Neutral Citation: [2024] UKFTT 952 (TC)

Case Number: TC09333

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House

Appeal reference: TC/2022/13357

Furnished offices – eligible for Business Property Relief for IHT – dismissed on the facts

Heard on: 10-12 June 2024
Additional submissions received 24 June 2024
Judgment date: 24 October 2024

Before

TRIBUNAL JUDGE SARAH ALLATT
MR MICHAEL BELL

Between

THE EXECUTORS OF KEITH DENIS LEWIS BERESFORD (DECEASED)
Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Mr James Rivett, KC

For the Respondents: Ms Rebecca Murray of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal by the Executors of the late Mr Beresford against a determination made by HMRC on 14th June 2022 under section 221 of the Inheritance Tax Act 1984 ("IHTA 1984") ("the Determination").

2. The Determination was made, in relation to the transfer of value for inheritance tax ("IHT") purposes made on the death of Mr Keith Denis Lewis Beresford on 18 September 2018. Mr Andrews, his executor, claimed relief from IHT under Chapter 1 of Part 5 IHTA 1984 on the basis that part of the value transferred by the transfer of value was attributable to the Mr Beresford's shares in a company called Fiveteam Limited ("Fiveteam") and that the shares were "relevant business property" within the meaning of section 105 IHTA 1984. In particular, he claims that Fiveteam's business consisted wholly or mainly of being the holding company of a company called Ninecourt Limited ("Ninecourt") whose business did not fall within section 105(3).

3. The Determination was made on the basis that the business of Ninecourt did fall within section 105(3), because it consisted mainly of holding investments, and in particular of holding the freehold of a property known as 16 High Holborn, London WC1V 6BX ("16 High Holborn") as an investment and therefore in HMRC's opinion the condition in section 105(4)(b) was not met.

BACKGROUND AND EVIDENCE

4. The Tribunal was presented with extensive bundles of evidence regarding the company and its business. The Tribunal heard from Mr Andrews, an executor of Mr Beresford, who had worked extensively with Mr Beresford and who had been a director of Ninecourt from June 2002 to October 2013, and from August 2018 to December 2021.

5. We found Mr Andrews to be a clear and credible witness.

6. We note below background information in relation to the matters at issue. Where a matter is controversial, or is critical to our decision, we make clear our view in the further section 'Findings of Fact'.

7. Fiveteam owns only the entire issued share capital of Ninecourt.

8. The main capital asset of Ninecourt is 16 High Holborn, which has 6 floors. The property was acquired some time ago and until 2008 had been occupied by another business operated by Mr Beresford, with some floors being let on commercial leases.

9. In January 2008, the tenant on the 5th floor of the Premises, Grant Spencer Caisley & Porteous, exercised the break clause in their lease and the floor became unoccupied. In November 2009, the Law Society's lease of the 1st floor came to an end and was not renewed.

10. Ninecourt decided to operate the empty floors as serviced offices rather than letting them out on commercial leases. We heard from Mr Andrews, the executor of Mr Beresford, who was himself a director of Ninecourt at the time, that he had run a detailed business model and concluded that this model had the potential to generate more income for Ninecourt than letting out the floors on commercial leases.

11. On 28th July 2010 Ninecourt entered into an agreement with Orega labelled a 'Serviced Office Management Agreement' ('the Orega Management Agreement' or 'OMA'). The terms of the OMA have been amended from time to time including pursuant to supplemental agreements dated (a) 16th February 2011; (b) 27th September 2011; (c) 12th February 2014; (iv) 24th April 2017. Further details of this are set out below.

12. Before entering into the OMA Mr. Andrews built a detailed spreadsheet which sought to identify areas of risk in the model. The directors of Ninecourt sought to negotiate terms which so far as possible reduced the exposure to risk by introducing (i) various break clauses in the OMA; and (ii) a catch-up provision which enabled 'Priority 1' and 'Priority 2'costs as defined under the OMA incurred by Ninecourt to be carried forward for a period (but no equivalent provision was agreed in relation to 'Priority 3' costs including the Owner's Base Return).

13. The total internal floor area of 16 High Holborn is approximately 32,000 square feet. Since circa 2010 four out of six floors (amounting to approximately 21,000 square feet) of the property have been used for the purposes of providing serviced office facilities through the agency of Orega. The remainder of the property consisting of part of the basement, most of the ground floor and (at an early stage, for a period of time) the third floor used by Ninecourt itself (together approximately 11,000 square feet) has been used for the purposes of commercial lettings, to tenants for shops and offices.

Orega Management Agreement

14. The Orega Management Agreement (OMA) was signed on 28 July 2010 and there have been various supplemental agreements since. It contains the following material clauses (summarised rather than written out verbatim):

(1) Ninecourt appoints Orega to operate and manage the serviced office business

(2) Fit out works are to be carried out as agreed, and these are to be paid for by Ninecourt and the agreement sets out a mechanism to repay these out of the revenue of the business.

(3) Certain costs to be incurred by Orega and the agreement sets out a mechanism to repay those out of the revenue of the business

(4) Management fees to be charged by Orega, being an 8% fee if gross income (the Orega First Management fee) and a 2% fee of gross income (the Orega Second Management Fee)

(5) There are certain situations where Ninecourt may trigger an early exit, but in the absence of those the agreement is for 10 years, but can be terminated on either side with notice.

(6) The duties of Orega are set out, including actively seeking and accepting bookings from users, collecting amounts due, providing the services to the users, managing the business, preparing management reports and employing individuals to provide the services.

(7) It is made clear Orega shall not be entitled to share possession of the premises.

(8) The duties of Ninecourt are set out including providing working capital, permitting access to the premises, and entering into contracts for the various fit out works.

15. Clause 11 is reproduced below as it contains critical details of the split of the revenue and profit.

> 11.1 All funds deposited in the operating account an interest earned there on shall (subject to the terms of this agreement) be the property of the Owner.
>
> 11.2 All interest earned on funds deposited in the Operating Account will be credited to the Operating Account.
>
> 11.3 Expenses which are to be paid by the Owner as set out in Schedule 4 shall be paid out of the Operating Account in accordance with this clause and expenses which are to be paid by Orega shall be paid from its own funds and reimbursed in accordance with this clause.

11.4 The parties agree that all Priority 1 Expenses (whenever incurred) shall be reimbursed to the parties before any Priority 2 Expenses shall be paid and all Priority 2 Expenses (whenever incurred) shall be reimbursed or payed (as appropriate) to the parties before any Priority 3 expenses are paid

11.5 Within three business days of the end of any calendar month gross income received in such months shall be distributed as follows:

11.5.1 If the gross income should be less than Priority 1expenses incurred in that month then each pound of the gross income should be split equally between the Owner and Orega until either Orega or the Owner have been reimbursed or paid (as appropriate) for all their priority 1 Expenses and any remaining should be used in payment of the remainder of the Priority 1 Expenses until exhausted.

11.5.2 If the gross income should be equal or more than all the Priority 1 expenses incurred in that month then the Owner and Orega should be reimbursed or paid (as appropriate) in full in respect of the Priority 1 expenses and any excess should be used to pay any Priority 1 Expenses in respect of any previous months that shall not have been reimbursed or paid in that month or all Priority 1 expenses (whenever occurred) have been paid.

11.5.3 If all the sums payable under clause 11.5.2 have been paid then the excess shall be used to pay Priority 2 expenses incurred in that month and if the gross income should be insufficient to pay all the Priority 2 expenses then each pound of the gross income should be split equally between the Owner and Orega until either Orega or the Owner have been reimbursed or paid as appropriate for all their Priority 2 Expenses incurred in that month and the remainder should be used in payment for Priority 2 expenses until exhausted or all Priority 2 Expenses (whenever incurred) have been paid.

11.5.4 If the sums payable under clothes 11.5.3 have been paid then the excess be used to pay Priority 3 Expenses incurred in that month and if the gross income shall be insufficient to pay all the Priority 3 Expenses that each pound of the excess should be split equally between the Owner and Orega until either Orega or the Owner have been reimbursed or paid (as appropriate) for all their Priority 3 Expenses incurred in that month and the remainder shall be used in payment of the Priority 3 Expenses until exhausted or all Priority 3 Expenses whenever incurred other than in respect of the Priority 3 Expenses payable to the owner and Orega during the Agreement Year commencing on the Operational Date have been paid.

11.5.5 Any Priority 1 Expenses or Priority 2 Expenses which are stated to be reimbursed to the owner should be credited to the operating account or remaining the operating account and Priority 3 Expenses due to the owner shall be paid from the operating account to the Owner.

11.6 Within five business days following the preparation of the accounts at the end of any agreement year in accordance with clause 13.4 any any Net Income should be paid to the Owner and Orega in equal shares.

16. Schedule 4 describes how expenses shall be paid

Priority One expenses

Payable to Orega - the Orega costs repayment

Payable to Ninecourt - the monthly capital repayment and the further capital repayment

Priority 2 Expenses

Payable to Orega - the first management fee

Payable to Ninecourt - the costs of insurance payable to the owner under clause 16, any costs and expenses attributable to the premises in connection with the repair and

maintenance and any service charge items for the building including any reasonable managing agent or other professional fees properly incurred in connection with the management of the building, any rates taxes outgoing and impositions of whatever kind payable in respect of the premises and where such sums appear payable in relation to the premises together with other property a fair and reasonable proportion of the total sum paid

Priority 3 Expenses

Payable to Orega - the Orega second management fee

Payable to Ninecourt - the Owner's Base Return

17. The Owner's Base Return is defined in the OMA as a fixed amount for each two separate parts of the property, and it is then reviewed after 5 years, to be 'the Open Market Rent' for the relevant parts at that date.

18. The effect of the OMA is that each party has certain costs paid as a priority (Priorities 1 and 2), and these carry forwards to the next accounting periods if they are not paid. These costs include the First Orega Management fee which will therefore include an element of profit for Orega. The Priority 3 Expenses do not carry over from one accounting period to the next. If there is any profit left after all 'costs' have been paid, it is shared equally between the parties.

19. The table below show how the operation of this clause worked over the period 2011 – 2018. In 2018, due to building works in the vicinity, a number of users did not renew their agreements and no profit was made.

20. Mr Beresford died in 2018. We therefore note in passing, but do not give it significant weight, that the COVID 19 pandemic meant that no profit was made in 2019 or 2020 either.

Financial period to 30 September	**Ninecourt Limited**			**Orega**		
	Base Return	Profit Share	Total	Management Fee	Profit Share	Total
2011	119,700		119,700	145,600		145,000
2012	600,400	47,000	647,400	206,600	47,000	253,600
2013	600,400	203,300	803,700	229,400	203,300	432,700
2014	600,400	62,000	662,400	218,800	62,000	280,800
2015	600,400	335,200	935,600	283,500	335,200	618,700
2016	983,400	304,400	1,287,800	340,700	304,400	645,100
2017	983,400	109,900	1,093,300	281,900	109,900	391,800
2018	25,700	0	25,700	189,200	0	189,200

21. The income from the end clients was in the form of two separate fees. The first was described either as a 'licence fee' or as a 'facility fee'. This was a fee for 'the workstations' and additional standard services. It was described on the face of the invoice as 'a 12 month office agreement with one break clause'. We also note the following extracts from the standard terms and conditions.

'The office centre remains the property and in the sole possession and control of Orega [see note below]. We are giving you the right to share the office centre with Orega and other users so that we can provide the services to you.....you accept that this agreement does not create any tenancy interest, leasehold estate or other property interest in your favour in the serviced offices.

> ...you may (by licence but not subletting) share occupation with another company in the same group of companies....
>
> If we are permanently unable to provide the serviced offices or services to you then we can end this agreement and you are not liable to pay any further fees for the period after the date we bring this agreement to an end. We will try to find you suitable alternative office space at another Orega office centre...
>
> When your agreement ends you are to vacate all of your serviced office immediately leaving it in the same condition as it was when you took it. We will charge a fee of £75 per workstation for cleaning and redecorating the service office and the common parts you had access to and reserve the right to charge additional reasonable fees for any repairs needed above normal wear and tear. Any works carried out to alter or adapt the existing layout and/or specification of your service office shall be fully reinstated by Orega at your cost prior to the end of the prevailing licence period. These works will be authorized and managed by Orega and you must provide vacant possession of your serviced Office early enough to allow these reinstatement works to be completed prior to the end of the prevailing license period. In order to transfer your mail and telephone calls from the office centre you will automatically be entered into a virtual office agreement with us at our prevailing rate plus associated costs....
>
> Standard Services Provided
>
> Furnished and Serviced Offices
>
> We will provide the number of serviced and furnished office rooms for which you have agreed to pay in the initial in the serviced office centre stated in your agreement. Your agreement contains details of the rooms initially allocated for your use. We may need to allocate different rooms from time to time but these will be of equivalent size and we will try to agree these with you in advance.
>
> We will provide the following office services during normal opening hours Monday to Friday; access to your serviced office, personalised telephone answering by our operators, reception of your visitors by our receptionist, heating and (where available) air conditioning, lighting and electrical power, cleaning, servicing, maintenance and repair of our equipment, use of kitchen, sanitary facilities and photocopying areas. We are happy to discuss special arrangements provision of these services outside on normal working hours.
>
> All of the available workstations the number of which are specified on page one of the agreement will be supplied with a telephone handset at the prevailing rate including the rental mainline DDI, personal answering services, voicemail and nightmail box
>
> IT connectivity services are provided at the prevailing rate. Orega provide Network Switch ports equal in number to the amount of telephone handsets. A dedicated private partition service will be mandatory at the prevailing rate if voice or video conferencing services email and/or web servers over the network are intended....
>
> You will be asked to sign an inventory of all the serviced offices, furniture and equipment you are allowed to use together with a note of its condition and details of the keys or entry cards issue to you. You may only use the service offices as offices which may not include office use of a retail or medical nature. You must not install any furniture or office equipment cabling, IT or telecoms connections without our consent which we may refuse at our absolute discretion....

22. This fee was determined at the start of the contract by reference to the number of workstations or, in rare cases where offices without workstations were provided at the client's request, by the number of workstations the office could hold.

23. The second fee was called the contract services fee and was charged by reference to specific additional services provided. The most significant of these services, by reference to fees charged, were for IT, telecoms, meeting rooms and maintenance or reinstatement of offices.

24. The table below shows the fees generated by these services for the years in question:

Financial Period to 30 September	2014 £	2015 £	2016 £	2017 £	2018 £
IT	74,652	97,671	184,706	166,372	164,858
Telecoms	156,917	178,970	120,603	94,300	28,245
Meeting Rooms	42,371	46,923	51,070	54,945	60,097
Postage	3,469	7,219	2,996	2,290	2,794
Couriers	5,015	2,974	1,852	585	818
Catering	2,160	3,475	3,114	4,467	6,162
Secretarial and Admin	10,236	2,883	11,172	23,152	17,011
Maintenance/reinstatement	103,366	50,087	216,065	161,107	34,227
Other income	3,674	6,257	44,452	8,796	1,782
Virtual Office fees	1,601	3,264	4,590	5,292	7,016
Insurance recharges	25,206	35,501	53,411	42,208	39,596
Ninecourt admin recharge	8,750	30,000	15,000	15,000	15,000
Total	437,417	465,224	709,031	578,514	377,606

25. The income from the rented floors and the income from the serviced office floors is show in the table below:

Year to September	Turnover – £ serviced offices		Turnover – £ rental activities	
	Facility fees	Contract services fees	Rent	Service charges
2014	1,878,156	437,417	412,393	101,320
2015	2,438,365	465,224	441,773	25,922
2016	2,770,886	709,031	441,772	6,967
2017	2,275,915	578,514	503,083	22,038
2018	1,575,829	377,606	465,991	18,618

26. There were various matters on which we were provided with evidence but we do not consider relevant. We note these briefly below.

27. We do not consider the reason for the original purchase of the building to be relevant. We do not consider the motivation for carrying on a particular business to be relevant, nor whether the people carrying it on considered it to be trading or otherwise.

28. We do not consider the circumstances in which Ninecourt started to look at providing serviced offices relevant.

29. We do not consider it relevant, in this case, to consider anything that happened after the date of death. We consider that the information we have been given, for the period covering the 5 years before death, is sufficient to allow us to make our decision.

MATTERS UNDER APPEAL

30. The question for this Tribunal to consider is 'was the business of Ninecourt wholly or mainly one of making or holding investments?'

31. Both parties agreed that the answer to this question was largely found by considering the activities performed by Ninecourt in relation to the 'facility fees'.

THE LAW

32. The statute is found in The provisions of Part V of the Inheritance Tax Act 1984 ('the IHTA 1984') provide among other matters relief at various rates from inheritance tax ('IHT') arising on the occasion of a transfer of value in circumstances where the value transferred is attributable to so-called 'business property'.

33. The relevant relief is known as 'Business Property Relief' ('BPR').

34. So far as presently relevant, as at the material time the provisions of s. 104(1) IHTA 1984 provided as follows: -

> '104(1) Where the whole or part of the value transferred by a transfer of value is attributable to the value of any relevant business property, the whole or that part of the value transferred shall be treated as reduced –
>
> (a) In the case of property falling within section 105(1)(a)(b) or (bb) below, by 100 per cent…'

35. For the purposes of Part V, 'relevant business property' is defined by s. 105 IHTA 1984 which so far as relevant provides as follows: -

> '(1) Subject to the following provisions of this section… in this Chapter 'relevant business property' means, in relation to any transfer of value –
>
> (a) Property consisting of a business or interest in a business,
>
> (b) Securities of a company which are unquoted and which either by themselves or together with other such securities owned by the transferor and any unquoted shares so owned gave the transferor control of the company immediately before the transfer;
>
> (bb) any unquoted shares in a company…

36. The effect of the legislative scheme is to restrict the availability of BPR to the value of shareholdings in companies which carry on certain categories of activity. So far as presently relevant s. 105(3) IHTA 1984 states as follows: -

> (3) A business or interest in a business, or shares in or securities of a company, are not relevant business property if the business or, as the case may be, the business carried on by the company consists wholly or mainly of one or more of the following, that is to say, dealing in securities, stocks or shares, land or buildings or making or holding investments.

37. Section 105(3) IHTA 1984 poses an 'all or nothing' test: in the event that a given business falls outside the provisions of s. 105(3) IHTA 1984 then BPR is, in principle, available against the entire value of the business.

38. The provisions of s. 105(4) IHTA 1984 adapt the operation of s. 105(3) IHTA 1984 in the context of groups of companies. The effect of the provisions, taken together, is that BPR will not be denied where the relevant shareholding is in a company which is the holding company of another company which itself does not fall within the provisions of s. 105(3) IHTA 1984. So far as relevant at the material time, s. 105(4) IHTA 1984 states as follows: -

> (4) Subsection (3) above –
>
> (a)…
>
> (b) does not apply to shares in or securities of a company if the business of the company consists wholly or mainly in being a holding company of one or more companies whose business does not fall within that subsection.'

39. It is common ground that Fiveteam was, at the material time, a 'holding company' for the purposes of s. 105(4)(b) IHTA 1984. In the event that the business carried on by Ninecourt were not such as to fall within the provisions of s. 105(3) IHTA 1984, then the provisions of s. 105(3) and (4) IHTA 1984 would not operate to prevent BPR for the value of the Shareholding.

40. It is common ground among the parties that there is not a statutory definition of the 'making or holding of investments' for this purpose.

41. Mr Rivett invited us to find that Ninecourt's business was, apart from the 2 floors of the building let on long term leases, a trading business. In the event we found that it was a trading business, it would self-evidently not be a business of 'the making or holding of investments'. In the event that we did not find that, he made further submissions that the business was not that of 'making or holding of investments'.

42. We were referred to a large number of cases, some on BPR, some not, but both parties were agreed that BPR cases turn largely on their facts (and sometimes on the way that the cases have been argued, for example, an agreed starting point from which to consider the law). For that reason it is necessary to treat 'fact matching' to other BPR cases with caution, and to start only from the language of the statute.

43. Both parties were agreed that one of the leading cases in this area is George v HMRC [2003] EWCA Civ 1763 (George). We quote (extensively) relevant passages from this judgement below:

> 12. Although it is common ground that the exploitation of a proprietary interest in land for profit is in principle an "investment" activity, I would agree respectfully with the Commissioner's comment as to the wide "spectrum" involved; and with his view that cases relating to different taxes and different subject matter are unlikely to be helpful. He said:
>
> "It is not in dispute that the Company carries on a business; the question is whether it is a business consisting mainly of holding or making investments. There is a spectrum at one end of which is the exploitation of land by granting a tenancy coupled with sufficient activity to make it a business, which may be activity in granting tenancies rather than activity in relation to the tenancy once granted. At the other end of the spectrum, while land is still being exploited, the element of services means that there is a trade, such as running a hotel, or a shop from premises owned by the trader. Normally for income tax, leaving aside services for which a separate charge is made, the income must be either income from land or trading profits. Here the concept of trade is irrelevant and one is required to determine whether the business of the

company consists mainly of making or holding investments or some other business. Although I was referred to a number of income tax cases, I do not find these helpful on this issue." (para 12)

13. I would also agree with the Commissioner's comment on the previous Special Commissioner decisions that they are generally distinguishable, either on the facts, or because the arguments were different. He said:

"The argument that the business of a residential caravan site is mainly the provision of services was not put forward in any of the previous cases before the Special Commissioners, and the attempt to put it forward on appeal in Weston did not succeed. In Powell [1997] STC (SCD) 181 a long-term caravan business was held to be the business of holding investments but the site was in a run-down state (p184b) and there was no evidence of any business activity beyond the receipt of income from caravan rents (p186j). In Hall v IRC [1997] STC (SCD) 126 there was a different type of caravan park with the caravans occupied only in the summer (p 128g). It was assumed that receiving rent from them was the business of holding investments and the decision was that commission on the sale of caravans was ancillary to the main business. In Furness v IRC [1999] STC (SCD) 232 (in relation to the long-term caravans), and Weston v IRC [2000] STC (SCD) 30 it was assumed that the residential caravan business was that of holding investments and the issue was whether this was the main business, which it was not in Furness and it was in Weston. Accordingly these cases do not help me in relation to the Appellant's argument in this case.

Farmer v IRC [1999] STC (SCD) 321 is helpful as it concerned a farm which also had let properties. In deciding that the business was mainly that of farming the business was considered in the round and the fact that the lettings were more profitable than the farm was one factor to be taken into account but not a decisive factor. " (para 13)

I agree that the last decision (of Dr Brice) is particularly helpful, not least in its emphasis on the need to look at the business "in the round".

14. The only one of these cases which came to the High Court (before the present case) was Weston v IRC [2000] STC 1064, in which the Commissioner's decision was upheld by Lawrence Collins J. With respect to the Judge, the basis of his decision (that the issue was one of fact for the Commissioner) was unremarkable. The present issue, as to the status of the services, had not been raised before the Commissioner, and was not permitted to be raised in the High Court.

...

Management and services

17. One Special Commissioner decision, Martin v IRC [1995] STC (SCD) 5 (Stephen Oliver QC), requires more detailed discussion. Apart from the respect due to the particular tribunal, this was seen as providing guidance for later cases before the Commissioners. It is also the main foundation for Mr McKay's arguments in this appeal as to the treatment of services provided by the owners, and the relevance of the terms of the lease or licence.

18. The case also concerned the availability of business property relief, but in relation to a business of letting industrial units on three-year leases. It was argued that the landlord's activity in managing and maintaining the properties was sufficient to take it out of the "investment" category, on the basis that it was "active" rather than purely "passive" property investment. Mr Oliver rejected that contention. That conclusion is unimpeachable. On any view, the business was at least "mainly" that of holding property for letting, and thus for investment.

19. The relevance of the case for present purposes is in relation to the treatment of the various activities of the owner. Mr Oliver divided them into three categories: i) Those directed at "making" the investment (finding tenants, negotiations over rent, granting leases, taking surrenders and the like); ii) "Compliance activities" which the owner had to carry out as landlord (such as keeping the exterior painted and in good repair); iii) "Management activities" (such as day-to-day maintenance of the exterior and the common areas, and "policing" the common areas to ensure that tenants complied with

the terms of their leases). He regarded the first two categories as "clearly activities of or attributable to the making or holding of investments".

20. As to the third he said:

"The purpose of these was to keep the property tidy, secure and in good repair and generally to keep up the standard of the whole investment property. But they were in no way productive of any income other than rent, nor were they designed to produce any separate income. This third category of activities covers, in my view, activities that were incidents of the business of holding investments." (para 22)

His reference to the lack of "any separate income" from those activities should be seen in the context of an earlier passage, where he had recorded, without dissent, the following comment on behalf of the Revenue:

- "Had there been activities of producing income distinct from the rents, such as fees for cleaning or security services provided quite separately from the landlord's obligations, those would not have been part of the investment holding activities and might have tipped the balance in determining whether the business in question consisted wholly or mainly of the making of holding of investments." (para 19)

21. He concluded:

"Thus, active though Mrs Moore's business was, none of the activities that had anything to do with the property were concerned with anything other than the making or holding of investments. The property is therefore excluded from ranking as qualifying business property by the words of exclusion in section 105(3)." (para 23)

22. In making that analysis, Mr Oliver QC relied (as does Mr McKay before us) on observations of Slesser LJ in the Court of Appeal in Fry v Salisbury House Estate Ltd [1930] 1KB 304, 372 331 (a case better known for the House of Lords decision, reported at [1930] AC 432). In Fry, the company managed a block of buildings, in which the rooms were let out as unfurnished offices. The statutory context was quite different, concerning the distinction under the income tax law as it then stood, between Schedule A (annual value of property) and Schedule D case 1 (trading profits). The question was to what extent the profits of the business were to be treated as covered by the assessment under Schedule A, or could be subject to separate assessment as profits of a trade under Schedule D.

23. The company had in fact admitted liability under Schedule D in respect of profits from services such as lighting, cleaning and care-taking; so no issue on those matters arose for decision. However, the following comments were made by Slesser LJ (p 331-2):- "…It is important to distinguish between those mere incidents of an ordinary tenancy, such as provisions as to the keys and porters, and those additions to the tenancy…whereby the landlord was able to, and did in fact, earn certain profits from the tenants with regard to charges for cleaning, lighting and heating. As regards these further matters, which are not normally incidental to a tenancy, they are clearly severable from it and in no sense alter the legal relation of landlord and tenant." Having noted that under the terms of the tenancies the additional services, such as lighting of fires and cleaning, were optional, he continued:- "Now it is argued by the Attorney-General…that because that limited purpose of carrying on a trade is in some way necessarily connected with a pre-existing tenancy, therefore the whole undertaking of the company is in the nature of a trade. I am unable to accept that view. In so far as there is a trade of lighting and heating, and cleaning, it is a separate matter; it need not be done at all. And we come back to the position that when the matter is properly examined in all its aspects, we have here the ordinary relationship of landlord and tenant…"

24. Commenting on that passage in the Martin case, Mr Oliver said:- "The income attributed to the rent was taxable as such: the income arising from the latter class of activities, eg cleaning, heating, and lighting provided for a separate fee came from a separate source and was potentially taxable as trading income. The distinction is I think equally applicable here. The activities which a landlord carries out *because he is obliged to under the lease* are incidents of the tenancy and *so fall on the 'holding investments' side of the equation.* The business activities, if any, carried out by the

landlord for gain and which are not required by the lease fall on the other side of the equation. The activities carried on by the landlord which are *not required under the lease and for which he receives no separate consideration* will fall on the 'holding investments' side of the equation *if they are connected with and incidental to the holding of the property as an investment*." (para 21, emphasis added)

25. I have underlined the passages most material to the argument in the present case. They were applied by another Special Commissioner, Mr Everett, when holding that a caravan park did not qualify for relief (Powell v IRC [1997] STC (SCD) 181). In that case the owner carried out the ordinary maintenance and security work of the caravan park, including such activities as grass cutting and painting and cleaning site vans, and helping when the electricity or gas supply broke down. The Commissioner, having cited the passage to which I have referred from Martin, said:

"Most of the activities which she carried out were either required under the terms of the lettings or pursuant to the terms of the caravan licence which governed the lettings…."

26. As I have said, I have no doubt as to the correctness of the Martin decision on its own facts. Similarly, as the present Commissioner said (see above), the actual decision in Powell is readily understandable on the facts, in view of the run-down condition of the park and the "low intensity" of the managers' activity (although that was not the basis of Mr Everett's decision: p 187c-d).

27. However, I would make two comments of relevance to the present case. First, I agree in general terms that property "management" is part of the business of "holding" property as an investment (cf Webb v Conelee Properties Ltd (1982) 56 TC 149, 157C-E). In the case of a building held for letting, management no doubt includes the activity of finding tenants and arranging leases or licences, and that of maintaining the property as an investment. But I would not extend that term to additional services or facilities provided to the occupants (such as those referred to by Slesser LJ), whether or not they are included in the lease and covered by the rent. In the case of a building for letting, it is unlikely to be material. They will not be enough to prevent the business remaining "mainly" that of holding the property as an investment.

28. Where it does matter, in my view, the characterisation of such services depends on the nature and purpose of the activity, not on the terms of the lease (or, where relevant, a site licence). It is true that, in Fry, Slesser LJ noted the fact that the particular services mentioned (cleaning, heating and lighting) were optional under the lease, and that a separate charge was made. That was treated as a reason for not regarding them as "mere incidents" of the tenancy. However, the converse does not follow. There is nothing in that judgment to support the view that, merely because services or facilities are required by the lease, and their cost is included in the rent, they lose their character as services, and become part of the "holding" of the investment.

....

58. For the reasons already given, I am unable to accept Mr McKay's reliance on the terms of the lease or licence as definitive in the case of a caravan park. On the other hand, I think, with respect to the Judge, that he placed too much reliance on the particular formulations used in Cook and Weston, instead of concentrating on the language of the statute. As I have said, the most important point about each of those decisions is that the Court was upholding the decision of the fact-finding tribunal.

59. In the present case the Judge was being asked by the Revenue to find some error of law in the approach of the Commissioner. The error identified by Mr McKay, as accepted by the Judge (para 15, cited above) was, in Mr McKay's words, that instead of following the sequence based on Weston, he "jumped straight to Cook v Medway". As I understand it, the Judge intended that as another way of putting his point that the first step was to decide what activities were in "the investment bag"; or, in Mr McKay's terms "recognising that the land was held as an investment", and then assessing which of the other activities were "incidental to the investment business".
60. For the reasons I have given, I think that was the wrong approach. The section does not require the opening of an investment "bag", into which are placed all the

activities linked to the caravan park, including even the supply of water, electricity, and gas, simply on the basis that they are "ancillary" to that investment business. Nor is it necessary to determine whether or not investment is "the very business" of the Company. The statutory language does not require such a definitive categorisation. In the present context, it gives insufficient weight to the hybrid nature of a caravan site business, as I have explained. The holding of property as investment was only one component of the business, and on the findings of the Commissioner it was not the main component. In my view, the Commissioner's overall approach was correct in law, and he reached a view which was open to him on the facts.

44. The other case which we found of significant assistance was *Vigne* [2018] UKUT 357 (TCC)

25. We agree that there are parts of the FTT Decision in which the FTT failed to include reference to the "wholly or mainly" part of section 105(3) IHTA 84 in its various repetitions of the statutory test. When the decision is read as a whole, however, it is clear that the FTT had fully in mind the "wholly or mainly" requirement, indeed in its final conclusions in paragraph [46] it explicitly addressed the point, concluding that it was "the provision of enhanced livery, albeit stopping short of part livery (as defined by Mr Vigne), but nonetheless providing a level of valuable services to the various horse owners, which prevents it being properly asserted that the business was mainly one of holding investments."

26. In a similar way, although the reference to the "properly informed observer" in paragraph [45] is perhaps unfortunate, it is clear that from the remainder of paragraph [45] and paragraph [46] that the FTT is applying the correct test by considering the business as a whole and all of the services provided to horse owners.

27. As to the FTT's apparent contradiction of Henderson J in Pawson, we do not consider there to be anything in the point. It must be remembered that Henderson J's comments were made in the context of his preliminary statement at [42] that

"I take as my starting point the proposition that the owning and holding of land in order to obtain an income from it is generally to be characterised as an investment activity. Further, it is clear from the authorities that such an investment may be actively managed without losing its essential character as an investment".

28. The FTT's statement at [44] of the FTT Decision to the effect that Henderson J's comments cited at [24(5)] above were a transposition of the statutory test, whilst somewhat unhappily expressed, does not in our view amount to an error of law which undermines the FTT Decision as a whole. It is clear that in effect the FTT was simply taking the view that the proposition expressed by Henderson J as being an appropriate "starting point" for a managed holiday let property business was not necessarily also appropriate for a livery business of the type under consideration in this appeal, which it considered to be fundamentally different. Accordingly, as the FTT did not consider the deceased to have been owning the land "in order to obtain an income from it", the "presumption of investment activity" referred to in the comments of Henderson J was quite simply inapplicable to the present case, and accordingly the statutory wording should be applied de novo and without any presumption of the type referred to by Henderson J in Pawson. Mr McNall's arguments appeared to be based on a submission that any business involving exploitation of land should, as a matter of law, be assumed to be wholly or mainly a business of investment unless the taxpayer could establish otherwise. This clearly overstates the position; Pawson makes it clear that such an assumption only applies to "owning and holding land in order to obtain an income from it", a much more restricted proposition. We also note that Briggs LJ in the Court of Appeal, in refusing permission to appeal in Pawson, said this:

"I accept Mr Gordon's submission… that there is no presumption that requires to be rebutted, that a business, which consists of the exploitation of land for profit, is an investment business. Of course it must be looked at in the round."

29. Accordingly we are satisfied that when the FTT Decision is read as a whole, the FTT applied the correct legal test.

45. We have also found the case of *Pawson* [2013] UT 050 (TCC) helpful, particularly the following paragraph:

> 42. In considering these rival submissions, I take as my starting point the proposition that the owning and holding of land in order to obtain an income from it is generally to be characterised as an investment activity. Further, it is clear from the authorities that such an investment may be actively managed without losing its essential character as an investment: see Martin, Weston at paragraphs 18 to 19 and George at paragraphs [18] and [27].

46. When considering the nature of a trade we were referred to a number of cases but the one we find most pertinent is *Ransom v Higgs* Ransom v Higgs [1974] 1 WLR 1594, where Lord Wilberforce said:

> " Trade " cannot be precisely defined, but certain characteristics can be identified which trade normally has. Equally some indicia can be found which prevent a profit from being regarded as the profit of a trade. Sometimes the question whether an activity is to be found to be a trade becomes a matter of degree, of frequency, of organisation, even of intention, and in such cases it is for the fact-finding body to decide on the evidence whether a line is passed.
>
> ....
>
> Trade involves, normally, the exchange of goods, or of services, for reward, not of all services, since some qualify as a profession, or employment, or vocation, but there must be something which the trade offers to provide by way of business. Trade, moreover, presupposes a customer (to this too there may be exceptions, but such is the norm), or, as it may be expressed, trade must be bilateral—you must trade with someone. The " mutuality " cases are based in part at least upon this principle, and it was the existence of it that made Sharkey V. Wernher [1956] A.C. 58 an interesting problem: could Lady Zia trade with herself?
>
> Then there are elements or characteristics which prevent a trade being found, even though a profit has been made—the realisation of a capital asset, the isolated transaction (which may yet be a trade). In recent years a transaction, even one of property dealing, which amounts to no more than a planned raid on the revenue (see Lupton v. F.A. & A.B. Ltd. [1972] A.C. 634), has been held not to be by way of trade—a sophistication which I do not reject, but which must be carefully watched for illegitimate extension. Although these are general characteristics which one cannot state in terms of essential prerequisites, they are useful benchmarks, so when one in faced with a novel set of facts, as we are here, the best one can do is to apply them as tests in order to see how near to, or far from, the norm these facts are.

47. Further on in the case, Lord Morris of Borth-y-Gest said

> 'In considering whether a person 'carried on' a trade it seems to me to be essential to discover and examine what it was that the person did.

48. We consider that *George* makes it clear that we should start from the statute and look at the situation in the round, and *Vigne* and *Pawson* give guidance on the starting point when there is a significant property based asset contained within the business.

49. Since the date of this hearing, a further case has been heard by this Tribunal, that of *Demetriou* [2024] UKFTT 00830 (TC) which we found gave a helpful summary of the cases above, and also considered what the starting point should be in making the decision.

DISCUSSION

50. HMRC's primary submission is that the business derives its income from the exploitation of land, and that the exploitation of land for a profit is 'the making or holding of investments'.

51. They categorise the facility fee as 'for the supply of a certain number of square feet in the office known as a workstation'.

52. Whilst HMRC acknowledge that other services were provided, they categorise these as 'the minimum requirements for the use of an office, and would be provided by any commercial landlord' (eg heating, lighting, air-conditioning, receptionist) or incidental to the use of the office space such as phone handsets.

53. HMRC reject the proposition that the Appellant is carrying on a trading business, and say that the serviced office business was licensing space in the building, which should be classified as investment.

54. Although obviously we have to consider the entirety of the business in the round, both parties agreed that we should start with the business that gave rise to the facility fee. The contract fees (being trading income) and the rental fees (being investment income) were relatively uncontroversial, and neither were significant enough on their own to sway the business to being 'wholly or mainly holding or making investments' or not being such.

55. We do not forget the fact that the existence of these other streams of fees may shed light on the nature of the facility fee itself.

56. Mr Rivett advanced the proposition that the business of Ninecourt was a trading business. He considered that there were two alternative ways that this could be found. The first was to look simply at the management agreement between Ninecourt and Orega.

57. As detailed above, this management agreement set out the obligations of each of the parties to each other, and the method by which the money in the 'Operating Account' was to be paid out, by reference to gross receipts.

58. Mr Rivett sets out that it is clear from the management agreement that Ninecourt was laying out working capital, and paying for alterations to the building to make it fit for the serviced office business, engaging an agency to perform the provision of services on its behalf, and assuming risk in order to generate a variable income from the provision of services.

59. Secondly, he says that in addition, it is clear that Ninecourt is trading because the terms of each of the User Service Agreements entered into with particular customers make it clear that what they were doing was providing services to customers in return for payment.

60. Ms Murray submits that investment businesses may also make significant capital outlay in order to generate future returns, and that the fact that the management agreement has a mechanism for dividing the profit such that Ninecourt took significant financial risk would not turn an otherwise investment transaction into a trade simply because of the level of risk involved.

61. We do not think that the fact that the OMA gives significant financial risk to Ninecourt is determinative in whether or not the business is either trading or making or holding investments, or neither of those things.

62. We agree with Ms Murray that we need to look at the nature of the (initial) income stream that flows from the customers. The nature of that income stream in this case is not altered by how the parties that work together to receive the revenue from this income have decided to carve it up.

63. Ms Murray contends that the fundamental business of the appellant is to generate income by licensing space in the building, and not by carrying on a business or trade on the premises.

64. The Appellant, in inviting us to consider what the nature of the business is, submits that we should remember that we should not start from the presumption that a business which consists of the exploitation of land for profit is an investment business (see the comments of Briggs LJ quoted in ***Vigne***). When looking at George he also cautioned that the statement at [12] *'Although it is common ground that the exploitation of a proprietary interest in land for profit is in principle an "investment" activity'* was a statement of the agreed position of both the parties, not an approval by the judge of that as a starting point.

65. In addition, although a number of cases consider a spectrum of activity in relation to land, with rental activities at one side and trading activities at the other, the Appellant contends that this is not an approach that is consistent with considering matters in the round. In particular, the Appellant made the point that Business Property Relief should not be seen as a spectrum of 'how busy people are' in providing services.

66. In considering the nature of the business in relation to the facility fee, we start by looking at a User Service agreement which was provided to us as an example. This was the agreement between the Barton Partnership and Orega as agent for Ninecourt.

67. The invoice in relation to the agreement makes it clear that the facility fee was charged on three offices, and the office numbers were detailed out, as were the number of actual workstations in each office.

68. Mr Andrews had explained to us in oral evidence that the floors were divided up so that each workstation was identical, and had an identical amount of space. The floors were then divided into offices, so that each party entering into a user services agreement would have an entry into specific offices that would be enabled by a secure fob. Initially the price calculated by Ninecourt/Orega would be based on the number of workstations in the particular office space agreed to be used by each user. Ninecourt reserved the right to move users into different offices if necessary, and this had indeed happened on a number of occasions. If a user was moved into a larger office, their price would remain the price based on the number of workstations they had originally requested.

69. It was however also possible to have an agreement for an office space for dedicated use that did not have workstations in it, and Ninecourt had entered into one such agreement that he could remember. In that case the price was based on the number of workstations the office could theoretically hold.

70. If a customer wished partitions to be moved around this could and did happen, and they were invoiced both for the initial work and for reinstatement work at the end of their tenure.

71. As set out in [21] above, the fee for the workstations and additional standard services was variously called a facility fee or a licence fee.

72. In addition to the standard services provided within the facility fee, to look at the business in the round we need to take note of the additional services that were also provided. These included IT services (eg the provision of dedicated server space), telecoms services, meeting rooms, postage services, couriers, catering, secretarial and admin services, in addition to maintenance and reinstatement fees when clients wanted alterations, and various recharges.

73. Other services (eg dry cleaning) were offered but either do not appear to have been actually used or were used only minimally.

74. Mr Rivett contends that the agreements show that the floors of the building that were used for serviced offices were used in the purpose of the trading nature of the business.

75. We consider that the primary element contained within the transaction between the client and Ninecourt was that of the use of an office room within a particular building. That particular room, named on the invoice, was for the exclusive use of the client until either the client gave notice, Ninecourt gave notice, or Ninecourt moved the client into another office in the same building. We note that moving offices did happen, but that this was not a common occurrence.

76. Mr Rivett contends that you can't unpick the facility fee and try to, for example, assign value to the various different elements of what was provided. He contends that 'the whole point is, people bought the package'.

77. We agree. We are aware that the service provided was different from renting a space in a building under ordinary rental terms, and arranging all the services separately. However, a fundamental part of what the clients acquired in this transaction was the right to use a specific room in the building, fitted out both in the room and in the communal areas with facilities that were desirable and formed part of the price they were willing to pay.

78. When we look at the income produced by the facility fee, compared to the rental income produced by the 2 floors that were let, it is clear that the facility fees were at a significant premium to the whole floor rentals. The floors were roughly the same size, and the rental income for 2 floors varied between £412,000 and £503,000 for the period, with the facility fee income for 4 floors varied between £1,576,000 to £2,771,000 over the period.

79. The Appellant contends this is due to the fact that the services provided to the serviced office tenants were significant and could not be said to be merely 'minimum requirements for use of an office'.

80. We also bear in mind that many other factors may also contribute to the premium for the serviced offices, such as smaller floor space let and short notice period.

DECISION

81. Each side invites us to take very different starting points in approaching this decision. HMRC's start and end point is that the nature of the business is the exploitation of land in return for a fee.

82. The Appellant disagrees with this not only as a proposition, but also as a starting point. We are invited to take as a starting point that the business is trading, and if we find that it is not, alternatively to find that it carries on a business other than the making or holding of investments.

83. We first set out our findings of fact in relation to this appeal.

FINDINGS OF FACT

84. Orega acted as agent for Ninecourt. This was an agreed fact at the hearing but we mention it here as in their original skeleton argument HMRC disputed this.

85. 2 Floors of the 16 High Holborn building were let out to tenants on commercial leases. This part of the business was holding of investments.

86. The remaining 4 floors of the building were occupied as serviced offices.

87. Ninecourt granted licences to occupy a specific area of the floorspace designated by an office. This specific area could be (and was) changed by Ninecourt with notice from time to time. This was done primarily to fit other tenants better in the remaining office space.

88. Although the method of charging was stated per 'workstation' it was up to the client whether workstations were actually required, and the price would not change whether they were or not, so the standard method of charging was actually per square foot.

89. This method was modified by individual negotiations with the tenants. They were not all charged the standard (list) price.

90. Orega as agent for Ninecourt actively marketed the property as serviced offices, and provided staff to undertake all the requisite services (answering phones, cleaning kitchens etc etc).

91. The serviced office tenants used a variety (but not all) of the services offered by Ninecourt under the contract fee provisions such as meeting rooms and catering.

STARTING POINT

92. When applying the law in this case, we are not going to attempt to fact match the facts in this case with the many other cases involving BPR. We agree that the concept of a 'spectrum of activities' in relation to land needs to be treated with caution, although it should be borne in mind as a method of viewing decisions made in the wide variety of previous cases.

93. We take as a starting point that the owning and holding of land in order to obtain an income from it is generally to be characterised as an investment activity. This is made clear in *Pawson.* We are not taking this as a rebuttable presumption, merely as a starting point in the decision making process.

94. After looking at the details of what the relevant company did, we need to look at the nature of the activities in the round.

95. Active management of an investment is possible without the essential character of investment being lost.

96. It is important to look not at the level of the activities, but the nature of the activities that are carried out.

97. It is not important, when looking at these activities, to look at whether they were performed under the terms of a lease or not. In the context of this case, this means that in relation to the serviced office business, we should look at the entire business relationship with a customer for which the customer paid both a facility fee and a contract fee, to determine the nature of that business.

WHAT DID NINECOURT (THROUGH OREGA AS AGENT) DO?

98. We note the following characteristics of the transactions between Ninecourt and its customers:

99. Ninecourt, through Orega, advertised the serviced offices, negotiated the terms with the customers, arranged the layout of the offices to be used by a particular customer (ie moved partitions etc as required), provided an on-site receptionist, provided a phone answering service, cleaned kitchen areas and kept them replenished, provided and maintained office equipment and heating, air conditioning and electricity.

100. It also provided the services charged for separately under the contract service charge such as meeting rooms, server space, postage, catering and photocopying.

101. Note that we bear in mind that not all of these services were used by all customers, but we are only taking notice of services that were actually used (and therefore what Ninecourt did) rather than services that were available but which did not appear to have been used.

102. There were around 42 separate offices, and at any given time these were occupied by around 7 – 20 separate firms.

103. Some customers had offices for a relatively short time (less than 6 months) and some for over 2 years.

104. As services provided under the facility fee are not itemised on the invoices, we do not have a detailed breakdown of the 'daily tasks' of Ninecourt, however we make the following observations:

105. Looking at the annual income for Ninecourt in 2018 in relation to meeting rooms (£60,000) and comparing this to the costs on the invoice for The Barton Partnership in 2018, given meeting rooms were a variable price, with some charged at £35 and some at £55, then our estimate is around 100 meeting rooms hours a month (circa 5 hours of meetings per day) were provided. However, it is noted that the meeting rooms income for the quarter was significantly lower for that quarter at £9,000 (equivalent to only 2 meeting room hours per day)

106. A similar analysis for postage costs leads to an estimate of around 300 items of post a month (ie circa 15 items per day) being posted.

107. The Management accounts for 2017 show that direct costs (that is, those costs for which no extra fee was charged) amounted to £767,000 in 2017. £415,000 of these were rates. The facility fee income in the period was £2,276,000.

108. When looking at these activities in the round (as set out in *George*), we consider that the nature of most of the activities were investment management activities. The advertising of the offices, negotiation of terms, maintenance of office equipment and provision of hearing, air conditioning and electricity were all activities which maintained the value of the investment, rather than provided services to any particular customer.

109. The provision of dedicated server space, meeting rooms, postage, catering and photocopying were clearly non-management activities (and were invoiced separately).

110. In addition, the cleaning of the kitchen areas and their replenishment, and the provision of a receptionist and telephone answering service were also non-management activities.

111. We consider that, contrary to the view advanced by the Appellant, it is possible to place activities in relation to obtaining a profit through the use of land on a spectrum. This should be done not by looking at 'how busy people are performing these activities' but 'to what extent these activities do something other than maintain the investment in the land'.

112. When we look at the overall range of the activities performed by Ninecourt in relation to the facility fee, which predominantly related to charging for the occupation of floor space, we consider that these fall on the 'managing investments' side of the spectrum.

113. We have considered whether the consideration of the other services performed, in relation to the contract fee, changes this analysis when looking at the serviced office business in the round, and we consider it does not.

114. The contract services by themselves are trading activities. The provision of server space is, while no doubt complementary to the serviced office, not so integral to the provision of the serviced offices as to alter the nature of the facility fee.

115. The other services provided mainly under the contract fee but some under the facility fee are relatively minor in nature, both in their actual usage and in relation to how they change or colour the fundamental nature of what is being provided to the customer as a whole.

116. Because HMRC and the Appellant disagree on the starting point for the making of the decision, we also consider as a starting point the proposition that Ninecourt might be trading.

117. Did the activity by Ninecourt, when combined with the physical space which the customer gained access to, amount to 'trading by the exchange of services for reward'?

118. We consider that it did not.

119. It is obvious that some of the basic requirements of a trade such as a customer, and the exchange of something for reward, are met.

120. However, when turning to what was provided, looking at the agreement, it was

> 'the number of serviced and furnished office rooms for which you have agreed to pay in the initial in the serviced office centre stated in your agreement. Your agreement contains details of the rooms initially allocated for your use. We may need to allocate different rooms from time to time but these will be of equivalent size and we will try to agree these with you in advance.
>
> We will provide the following office services during normal opening hours Monday to Friday; access to your serviced office, personalised telephone answering by our operators, reception of your visitors by our receptionist, heating and (where available) air conditioning, lighting and electrical power, cleaning, servicing, maintenance and repair of our equipment, use of kitchen, sanitary facilities and photocopying areas. We are happy to discuss special arrangements provision of these services outside on normal working hours.
>
> All of the available workstations the number of which are specified on page one of the agreement will be supplied with a telephone handset at the prevailing rate including the rental mainline DDI, personal answering services, voicemail and night mail box'

121. Fundamentally, we consider that what is being provided is physical space in a building with some desirable additional services, but not such a level of services as to mean that the principal transaction is 'the exchange of services for reward'.

122. This is not a clear cut case. We acknowledge that the considerable differential in income from the rental floors and serviced office floors shows that what was received was different to renting an empty floor. A significant premium was paid by the serviced office customers and this, would be to some degree down to the services provided. However, it would also be due to the fact that a smaller space than an entire floor was being rented, and that the notice period was considerably shorter and the flexibility that that offered; together with the fact that the office space was fitted out by Ninecourt to high specifications (in terms of partitioned and pre-decorated offices etc. The cost of which is included as freehold improvements within fixed assets in the accounts. Those higher charges reflect the investment that Ninecourt made in the 'appearance' on the serviced office floors

123. We were not presented with comparables for non-serviced offices rented on similar terms, and we do not think this is critical to our analysis due to the variety of other factors being considered.

124. We do not consider that the frequency of the transactions is enough to point to the activity being a trade. This is clearly not analogous to a hotel business, and the frequency of the contracts is not nearly sufficient enough to merit this being a determinative factor in a trading analysis.

125. We therefore consider that the facility fee was income derived from the 'making or holding of investments'.

126. Both sides agreed that if we decided that the income generated by the facility fee was from the 'making or holding of investments' then it followed that the business of Ninecourt was 'wholly or mainly making or holding of investments' and therefore BPR would be not be allowed on the transfer.

127. Accordingly, this appeal is DISMISSED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

128. 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.

SARAH ALLATT
TRIBUNAL JUDGE

Release date: 24th OCTOBER 2024