

**LONDON TRIBUNAL CENTRE**

**B E T W E E N:**

**TOWER HAMLETS HOUSING ACTION TRUST**

**Appellant**

**- and -**

**THE COMMISSIONERS OF CUSTOMS AND EXCISE**

**Respondents**

**Tribunal: Dr John F Avery Jones CBE(Chairman)**

**John G Robinson**

**Praful D Davda FCA**

**Nicola Shaw of Counsel, instructed by Field Fisher Waterhouse, for the Appellant**

**Kieron Beal of Counsel, instructed by the Solicitor for Customs and Excise, for the Respondents**

**Sitting in public in London on Thursday 7 June 2001**

**Decision: 4 July 2001**

### **DECISION**

1. Tower Hamlets Housing Association Trust appeals against a decision in a letter from the Commissioners of 26 January 2001, substituting its decision from that of a letter dated 16 October 2000 against which the Appellant had originally appealed. The Appellant was represented by Ms Nicola Shaw and the Commissioners by Mr Kieron Beal.
2. The issue in this appeal is first whether there should be an apportionment for the provision of services consisting of the supply of telephone equipment and photocopying services from the supply of office accommodation under a tenancy agreement. Originally the appeal related to fax facilities and certain other services but the Appellant conceded that these were part of the supply of the premises. If the supply is a separate supply of services, the issue arises whether it is supplied for consideration during the rent and service charge-free period under the tenancy agreement.

#### **Single or composite supply**

3. The Appellant is a statutory corporation established under Part III of the

Housing Act 1988. The Act provides that the Secretary of State may designate an area of land where he considers it expedient to establish a Housing Action Trust, which is then established by secondary legislation. Its purpose is to secure the repair and improvement of housing accommodation held by the trust. Its object is also to secure the proper and effective management and use of that housing accommodation, see sections 63 to 65 of the Housing Act 1988. The Housing Act 1996 provides that a non-profit making body is eligible for registration as a social landlord. Registered social landlords provide housing at rents substantially below market value for persons on low incomes. Such housing is provided by the private sector and not by local authorities. It is funded partly by central government grants and partly by private funding.

4. The Appellant's main activity is re-developing three council estates. It put a regeneration project out to tender and the successful tenderer was Circle Thirty Three Housing Trust Limited which established a non-profit making body as a registered social landlord, Old Ford Housing Association ("Old Ford").
5. The Appellant entered into a tenancy agreement with Old Ford of most of the ground and first floors of the Appellant's premises at 73 Usher Road, Bow, London E3. That lease was excluded from the business tenancies provisions of the Landlord and Tenant Act 1954 by order of the Mayor's and City of London County Court. We were shown a copy of the draft lease attached to that court application and were told that the tenancy agreement was entered into on 2 April 1998. The Appellant continued to occupy the whole of the second floor, the reception and public area on the ground floor, and a few rooms on the first floor. The parties could share the use of the board room on the first floor, the kitchens on the ground and first floors, and a kitchen and, between 12 noon and 2pm on weekdays, the staff room on the second floor. The tenancy was for a 9 year term and was free of rent and service charge until 1 April 2000, that is to say a two year period. Thereafter a market rent was payable determined in accordance with the tenancy agreement; we were told that it was £80,000 pa. In addition Old Ford agreed to pay two charges, both reserved as rent: a proportion of the cost of insurance of the building, and a service charge equal to the cost of the Appellant providing the services set out in the tenancy agreement and outlined below.
6. The services listed in the tenancy agreement consisted of the provision and support of telephone equipment comprising 50 telephones; 4 plain paper fax machines; a photocopying and binding service provided by collection and delivery twice a day with requests to be made on a form set out in the agreement including provision for bulk copying with up to 250 copies being returned within one working day and above that within two working days; security services, such as electronic access, security guards and closed circuit television; health and safety procedures, such as inspections of electrical equipment and fire alarms; first aid boxes; shared use of meeting rooms and staff rooms including the supply of tea and coffee and daily newspapers. The agreement also provided for the development of a business continuity plan covering alternative accommodation for Old Ford and the provision of an

alternative telecommunications system. The overall impression given to us by the tenancy agreement was one of close co-operation between landlord and tenant rather than a tenancy between unrelated parties.

7. We heard evidence from Ms Wilson, the Finance Officer of Old Ford, who had not been concerned in the negotiations for the tenancy agreement, that by the end of the rent and service charge-free period until 1 April 2000, Old Ford had installed its own telephone equipment and photocopiers as it was able to obtain them cheaper from other suppliers. She also told us that in practice Old Ford just used the photocopiers on the ground and first floors themselves and did not as the tenancy agreement provides, have copies made by the Appellant. The current annual cost to Old Ford of the new equipment was about £25,000 pa for the photocopying and £20,000 for the telephones (we were not told whether this includes the paper and other supplies for the former and the cost of calls for the latter, but we assume that it did). We conclude that, in accordance with the business continuity plan, effectively the tenancy agreement must have been varied to exclude the provision by the Appellant or these items since Old Ford must have agreed with the Appellant that the Appellant was no longer required to provide this service and there was accordingly no cost to the Appellant for Old Ford to reimburse under the service charge.

8. The issue in dispute is the VAT treatment of the telephone equipment and the photocopying service during the period before 1 April 2000 when it was supplied by the Appellant to Old Ford. The Appellant contends for an apportionment so that the provision of telephones and photocopying is taxable and the Commissioners for these to be included as part of the exempt supply of to premises. If there is a separate supply of the services a further question arises about whether they are supplied free of consideration.

9. Both sides relied on the European Court decision in *Card Protection Plan v. Customs and Excise Commissioners* (Case C-349/96) [1999] STC 270 at 293. The Court takes into account in paragraph 29 of the judgment that every supply of a service must normally be regarded as distinct and independent; that a supply which comprises a single service from an economic point of view should not be artificially split; and the essential features of a transaction must be ascertained in order to determine whether what is supplied are several distinct principal services or a single service. The court then says in paragraph 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 ....”

The court goes on in paragraph 31 to say that the fact a single price is charged is not decisive.

10. The supplies in *Card Protection Plan* were insurance against loss or theft of credit cards, including maintaining a computerized record of customers' credit cards, a 24-hour telephone line, assistance in obtaining replacement cards, change of address assistance in notifying card companies, printed key tabs enabling them to be found in case of loss, an annual printout for the customer to check, the supply of a medical card for the entry of personal medical information and car hire discounts. Most of these are such that the insurance would not be useful without them. The preliminary ruling was applied by the House of Lords which found there to be a principal supply of insurance services to which the other supplies were ancillary. Lord Slynn said that the national court's task was to have regard to the essential features of the transaction and that what from an economic point of view is in reality a single service should not be artificially split, see [2001] STC 174 at 183d.
11. Domestic cases subsequent to the ECJ decision in *Card Protection Plan* have approached the question by looking at all the circumstances and having regard to the commercial reality of the transaction, see *Customs & Excise Commissioners v. British Telecommunications plc* [1999] STC 758, 766e, 768f and *Co-operative Wholesale Society Ltd v. Customs & Excise Commissioners* [1999] STC 1096, 1101c. There have, of course, been many cases in this Tribunal on the question but since these were mostly decided before *Card Protection Plan* we shall not deal with them.
12. Ms Shaw for the Appellant contends that there is no single price following the rent-free period; the service charge is a separate component of the rent. The services are not essential or necessary or naturally accompany the supply of the land. Neither the supply of the land or the supply of services is a dominant feature. The photocopying is ordered and changed as and when required. The services are not a necessary ingredient of the relationship between the parties. The value of the services is substantial compared to the rent. Subsequent to the tenancy agreement the services in question have been obtained from alternative suppliers so that they are regarded by the parties as separate. The services are concerned with the facilitation of the administration of Old Ford's business, whereas the tenancy agreement is concerned with the provision of a place of business.
13. Mr Beal for the Commissioners contends that in substance and reality there is a lease of serviced office accommodation. The parties are pursuing a common purpose and Old Ford has taken over part of the Appellant's functions concerning the council estates. Each of the services are intimately connected with the supply of serviced office accommodation and were ancillary and incidental to the supply of business accommodation, enabling Old Ford better to enjoy the accommodation.
14. In reply, Ms Shaw criticised Mr Beal's categorisation of the tenancy as the provision of a serviced office as starting at the wrong end.
15. The matter is one of impression and we shall deal with the telephones and photocopying separately. So far as the telephones are concerned, after the service charge-free period of the arrangements in the tenancy agreement had

continued, the cost of providing the telephones would have been stated separately as the cost to the Appellant of renting the telephones in question as part of the service charge, but payment would not depend on the amount of use by Old Ford of the telephone equipment. We understand that the cost of calls could be allocated according to the extensions and so the cost of calls was recovered by the Appellant as a disbursement. In the circumstances of this case where two bodies are pursuing a common purpose and sharing a building in order to do so, we consider that the provision of telephone equipment is not an aim in itself but a means of better enjoying the principal service of the provision of the property. As a matter of commercial reality, one would expect to find telephone equipment in a serviced office just as one would expect to find furniture. It is an essential feature of a serviced office that telephones are provided. Obviously offices are let without telephones or furniture but the transaction with which we are concerned is a tenancy between parties pursuing a common purpose and sharing a building in order to do so which includes telephones for which the tenant is charged for the equipment regardless of the amount of use. We think that separating the telephones in these circumstances would be an artificial split. There is no appeal against the provision of the fax equipment which is similar in nature and therefore our decision means that there is no distinction between the telephone and fax equipment.

16. We consider that the photocopying service is different. After the service charge-free period of the supply had continued in accordance with the tenancy agreement the photocopying would have been paid for per copy and the fact that the payment is served as rent is merely to enable easier recovery. The service charge would include a separate element based on the number of copies. If Old Ford did not want any copies they would have been charged nothing. It is difficult to see how the supply of an unknown quantity of copies could be ancillary to the provision of the premises. We consider that the commercial reality is that the photocopying service to be paid for according to the number of copies made is an aim in itself which has no connection with the property. We think it would be artificial to say that a payment for however many copies were made is in the same category as rent from the end of the rent-free period. It is not an essential feature of a serviced office that the provision of the property should include a photocopying service as that of the rent. The service contracted for is not merely the ability to use photocopying equipments although it seems that this is what happened in practice but the provision by the Appellant of a collection and return service including carrying out the copying and binding. We agree with Ms Shaw's description of it as being concerned with the facilitation of the administration of Old Ford's business, whereas the tenancy agreement is concerned with the provision of a place of business. This is different in nature from the mere provision of telephone equipment to be paid for after the end of the service charge-free period regardless of the amount of use.

#### **Whether the supply was for consideration**

17. We turn to whether the photocopying was supplied for consideration during the rent and service charge-free period. We are short of evidence about this. The Appellant's letter of 10 December 1998 says that "The fact that [The

Appellant] provides services, free of charge, to Old Ford was not taken into account, at all, in setting the level of this fee [a fee under a separate housing management agreement] as due account had already been taken of these services, as stated above, in an adjustment to the Grant.” A letter of 23 September 1999 from the Appellants to the Commissioners says that “The total amount of reduction to cover costs for the two year period was £1,080,755 this appears as a figure in our accounts. This was taken into account when the grant was agreed in negotiations in 1997/98”. We understand that this figure relates to matters in addition to the rent and services for this property. Ms Shaw contends that there is merely a reduction in a grant for the development of the property which cannot be consideration. Mr Beal contends that there was a reduction in the grant to which Old Ford would have been entitled. In view of the exact figure of £1,080,755 by which the potential grant was reduced it seems to us to indicate that first that the amount of the grant to cover the development work was agreed and then it was reduced by the figure quoted above to reflect the expected cost of the services that the Appellant was to supply “free of charge.” We were not shown the Appellant’s accounts but from the quotation in its letter it seems that the full amount of the grant and the amount of the reduction on account of the provision of services are shown separately. In our view there was consideration for the services in the form of the reduction in the amount of the grant that would otherwise have been paid.

### **Whether article 3 VAT (Supply of Services) Order 1993 applies**

18. If we are wrong in saying that the photocopying is supplied for consideration, the result is the same if article 3 of the VAT (Supply of Services) Order 1993 deems the supply to be for consideration equal to the cost of providing it. Ms Shaw contends that article 3 applies. The article applies where the services are not used or made available for use, for a consideration (article 6). It provides:

“where a person carrying on a business puts services which have been supplied to him to any private use or uses them, or makes them available to any person for use, for a purpose other than a purpose of the business he shall be treated for the purposes of the Act as supplying those services in the course or furtherance of the business.”

Ms Shaw contends that the Appellant is the person carrying on a business. The subsequent references to “the business” are therefore to the Appellant’s business. This interpretation is made clear in article 6(2)(b) of the Sixth Directive: supplies of services carried out free of charge by the taxable ... for purposes other than those of *his* business”. Mr Beal contends that the services have not been made available to Old Ford for a non-business purpose; they were made available to enable Old Ford to carry out its functions as a registered social landlord, which is a business purpose, notwithstanding that it is a non-profit making business. On this point we agree with Ms Shaw. The business referred to is the Appellant’s business, not Old Ford’s. It is sufficient that the services were not used for the Appellant’s business. Even if therefore the service is supplied without consideration, Article 5 of the Order treats this as a supply for consideration equal to the cost to the Appellant of providing

the service.

19. Accordingly we dismiss the appeal in relation to the telephones, and allow it in relation to the photocopying. The taxable amount will need to be determined and the parties have liberty to apply if agreement cannot be reached.
20. As the Appellant has succeeded in part, we award them half the costs of and incidental to the appeal.