TC01842

Value Added Tax - whether work in replacing a damaged plasterboard ceiling with a lath and plaster ceiling in a Grade II listed building, the change of fabric resulting from insistence by the planning authority, qualified as an alteration to the fabric of a listed building, and thus to be zero-rated - Appeal allowed

FIRST-TIER TRIBUNAL **Reference no: TC/2010/05380**

TAX

E L FLOOD & SONS PARTNERSHIP

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: HOWARD M. NOWLAN (Tribunal Judge)
ANDREW PERRIN F.C.A.

Sitting in public at Vintry House in Bristol on 26 October 2011

Mr. A.C. Flood, partner in the Appellant, for part of the hearing, by telephone
Philip Rowe of HMRC's Local Compliance office on behalf of the Respondents

DECISION

Introduction

1. This case related to whether plastering services rendered by the Appellant firm on a sub-contract basis to a firm of builders undertaking work on a listed building, were zero-rated or standard-rated. This hinged on whether the supply was made "in the course of making an approved alteration to a listed building", and whether if it was, the work was excluded from the resultant zero-rated status by virtue of Note 6 to Group 6, Schedule 8 of the VAT Act 1994 by virtue of the fact that:

> *"approved alteration …… does not include any works of repair or maintenance, or include any incidental alteration to the fabric of a building which results from the carrying out of repairs, or maintenance work."*

The conduct of the hearing

2. At the beginning of the hearing, whilst there were four representatives of HMRC, we had ascertained that, although Mr. A.C. Flood (one of the partners in the Appellant) was too ill to attend the hearing, it was going to be possible to speak to him with the aid of a speakerphone. Since four people were attending on behalf of HMRC it seemed to us that it would have been very unfortunate to defer the hearing until another date, not least because we had also been told that Mr. A.C. Flood had been ill during earlier negotiations with HMRC, and his brother (presumably the only other partner following the recent death of their father) had been diagnosed with cancer. We accordingly decided to proceed with the hearing, ascertaining the background facts before seeking to speak to Mr. A.C. Flood, with a view then to hearing his contentions over the phone.

The facts

3. It was clear that the Appellant was not a conventional firm of plasterers. The firm had been founded a long time ago by the now deceased Mr. Flood, the father of the two men presumably referred to as "& sons" in the name of the partnership and was described on its letter head as "Ornamental Plasterers". Both the current partners were either in their late 60's or possibly even over 70. The firm specialised in cornice work and was one of the few firms in 2010 that could create a "lath and plaster" ceiling or wall covering for a timber-framed wall. During the phone call, Mr. Flood mentioned some of the mansions on which they had worked, including Windsor Castle.

4. The Appellant was engaged on a sub-contract basis by a building firm called Alisa Properties Limited, which firm was renovating a small Grade II listed building, comprising two flats, at Royal York Crescent, Bristol.

5. So far as we could ascertain, the work done by the Appellant firm consisted of two elements. The renovation of the flats involved creating bathrooms within what had previously been larger bedrooms, such that a new bathroom ceiling had to be constructed in the original bedroom of each flat, and the walls between the bathroom and the remainder of the bedrooms had to be plastered. There was no dispute in relation to any of that work. It was accepted that it constituted an approved alteration of a listed building, and that this work was zero-rated. The dispute related to the fact that the Appellant also had to re-plaster the ceiling of the bedrooms. We

were not told the age of the buildings but it was clear that at some time, many years after their construction, the bedroom ceilings had been covered with plasterboard. That was presumably done at some time in the last 40 years. We did not know whether, before the plasterboard was affixed, the ceilings had revealed the joists or whether the earlier ceiling had been plastered. Had it been plastered, the date of the building made it obvious that the fabric of the ceiling would have been lath and plaster. In other words, numerous thin strips of wood would have been affixed across the joists, and lime plaster would then have been applied beneath the laths, expanding in the small gaps between the laths so as to remain in place.

6. The building had been empty for some time before the renovation work commenced, and the ceilings had been damaged by water that had presumably leaked through the roof. This had led to some warping of the ceiling joists. There was no dispute that the ceilings needed repairing.

7. We were not entirely clear who did one element of the work required, but it appears most likely that the builders who were doing the bulk of the work would have removed the damaged plasterboard. We say that because Mr. Flood certainly said that the builders then undertook the second phase of the work in that it was the builders who affixed diagonal cross-braces between the joists to arrest any further lateral movement of the joists. The Appellant was then engaged to re-plaster the ceiling. Instead of the re-plastering involving the use of plasterboard and a skimming of plaster, the local authority required the original integrity of the listed building to be re-created, and insisted that the ceiling be created in its original form of laths and lime plaster. This was of course why the Appellant was engaged at all because this form of work required specialists and could, we assume, not have been undertaken by the main firm of builders.

The VAT implications of the work

8. There were a number of confused features to the VAT implications of the work.

9. The technical position can be described relatively simply. Firstly, the work would have been zero-rated, had it constituted an "approved" (in other words, approved or indeed required by the Planning Authority) alteration to a listed building. This resulted from Item 2, Group 6 of Schedule 8 of the VAT Act 1994, which provided that:

> *"The supply, in the course of an approved alteration of a protected building, of any services other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity"* … were zero-rated.

Note 6 provided, however, that:

> *"Approved alteration …… does not include any works of repair or maintenance, or include any incidental alteration to the fabric of a building which results from the carrying out of repairs, or maintenance work"*.

10. Were the work not to be zero-rated under the above two tests, the rate of VAT would, however, have been reduced to 5%, if it could be shown that the building had been empty for either two or three years (depending on when the work was undertaken) immediately prior to the works. The Appellant was unable to establish that this requirement was met, firstly because the developers had ceased business, and

secondly, and somewhat unfortunately because both the council and the Land Registry refused to provide the relevant information, both quoting the Data Protection Act.

11. Another slightly unfortunate feature was that Alisa Properties passed on to the Appellant some short, confused, and hardly helpful (even if not strictly wrong) information intended by their Accountants to be passed on to sub-contractors. It read as follows:

> *"Further to our telephone conversation, I am now enclosing a section of VAT Notice 708, Buildings and Construction.*
>
> *Work on approved alterations to Protected buildings is Standard Rate* [obviously this meant "zero-rated"] *and therefore suppliers will be able to zero rate their services to the property. All that you will have to do to meet the criteria is, refer all the contractors to the Public Notice in respect of the work and they should then zero rate their services.*
>
> *If you require any clarification, please do not hesitate to contact me."*

The parties' contentions

12. The parties' contentions, without the assistance of professional assistance to the Appellant, have rather confused this case. The Appellant essentially argued that in terms of the dictionary definition of an "alteration" there was an alteration, principally because the new ceiling was perhaps an inch lower than the previous one, and that that should conclude the matter. HMRC's officer argued that because the ceiling clearly needed "repairing", it ceased to rank as an approved alteration. As already indicated, however, she conceded that the creation of a new ceiling in the bathroom was a relevant alteration and that that element of the work (a fairly small proportion of the total) was rightly zero-rated. We might add that HMRC's officer should be commended for having sought to be so helpful to the Appellant, for instance in trying to pursue the eventually fruitless enquiries of whether the building had been empty for the required period.

Our decision

13. We accept that the old ceiling had been damaged, and that it needed repairing.

14. Addressing the first part of the relevant test to ascertain whether the Appellant's work on the ceiling was rightly zero-rated, we first conclude, in terms of the wording of Item 2, quoted in paragraph 9 above, that there was an "approved alteration" to the listed building. It was clear that the fabric of the ceiling was changed from plasterboard to lath and lime plaster, and also clear that this was positively required by the local authority. Without bothering about the detail of whether the new ceiling was an inch lower than the earlier one, that very material change of fabric to the building was an "approved alteration".

15 It was also clear that this alteration of the fabric was required by the local planning authority, not because it was the best or most economic way of effecting a repair. The requirement was obviously based on the purist desire to reinstate the original construction form of the first ceiling, and to stop the builders putting up a modern plasterboard ceiling, as had been done 40 or so years before. The fact that

did not emerge until the hearing was that Mr. Flood said, without particularly noting the significance of the remark, that re-creating the ceiling with lath and lime plaster cost "four to five times as much" as a plasterboard ceiling would have cost.

16. We turn now to Note 6, and the question of whether this alteration was simply a repair, so as to be disqualified from ranking as an "approved alteration".

17. Whilst we do not dispute that the ceiling in question needed repairing, when we address the relevant "alteration", namely the change in fabric from plasterboard to lath and lime plaster, that alteration did not result from the need to repair the ceiling, but solely and simply from the planning authority's insistence that, at four or five times the cost, the original integrity of the building should be reinstated.

18. Referring first to the second part of Note 6, also quoted in paragraph 9 above, it is clear that the "approved alteration", in other words the major change of fabric, was not an "incidental alteration to the fabric of a building which results from the carrying out of repairs, or maintenance work." It was a fundamental change to the fabric, resulting from a purist requirement of the local authority, having nothing to do with the best or most economic way of repairing the building. The ceiling may have needed repairing but that was not why the relevant alteration, the change from plasterboard to laths and plaster, was required and why it was undertaken.

19. Whilst it is the second part of Note 6 that specifically addresses the type of situation in this case, we even conclude that the first phrase is not satisfied either. The "approved alteration", namely the substitution of laths and lime plaster for plasterboard, which is what constitutes the material alteration in this case, was not itself required by any need for "repair or maintenance". A new plasterboard ceiling, being simply a repair, would have needed no listed building approval, and if the authority had not seen fit to require the change, the replacement of the plasterboard on a like for like basis would have been a repair. But that is not what happened.

20. The Respondents quoted three authorities, and their own guidance Notes in support of their original argument, and we conclude that all in fact support our decision.

22. The case of *Dr. NDF Browne* (VAT Decisions11388) dealt with a repair to an unstable two-stone-skinned wall (not quite a cavity wall in that the building was built in 1722), by somehow removing loose rubble from the gap between the skins, and inserting a breezeblock insert. The final paragraph was as follows:

> *"We are of the opinion that this appeal must fail. Alteration there may have been – it is difficult for repair and maintenance not to involve some element of alteration –* ***but it was not alteration for the sake of alteration or for any other reason apart from the more effective repair and maintenance of the building. If the most effective way to repair or maintain a building is by employing modern methods which involve the use of different materials, the alteration (the internal structure of the walls in this case) so involved does not prevent the work from being essentially a work of repair or maintenance and therefore not eligible for zero-rating."***
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> 23. In *SH and VS Kain* (VAT Decisions 12331), Mr. Cornwell-Kelly dealt with a case where a straw-thatched roof was replaced by a reed-thatched roof. The original roof clearly needed replacing. Straw would have cost £6.25 a

square foot, and reed cost £7 a square foot. Reed was likely to last for 30 to 40 years, as against 15 to 25 years for straw. There was no planning requirement to change to reed, and indeed the planners had sometimes objected to such a change. In the present case the reed was doubtless chosen because in the long term it was a much more economic way of effecting the repair.

24. Mr. Cornwell-Kelly quoted part of the passage from *Browne,* which we have just highlighted, with approval. He concluded by saying that *"In the present case, the evidence shows clearly that work of some sort and some extent was needed to the covering of the roof. That Mr. Kain chose to do it somewhat better or somewhat more extensively than was strictly necessary* ***does not alter its essential character as repair and maintenance work to put and keep the roof covering in satisfactory condition".***

25. In *CCE v. Windflower Housing Association* [1995] STC 860, Mr. Justice Ognall dealt with a case where an old, defective and complex lead roof was replaced with lead, though in a different construction form than the original which would have been prohibitively costly in the 1990s. The roof pitch was elevated to a very minor degree as a result of the changed roofing method, and the resultant need to provide for better drainage. The judge concluded:

> *"Apart from the elevated roof pitch, the remainder of the work done was, I believe, work of repair or maintenance and admitted of no other proper conclusion. I put it to Mr. Tallon, in the course of his helpful arguments, that the concept of "maintenance" reflects a task designed by the owner or occupier to minimise, for as long as possible, the need for, and future scale and cost of further attention to the fabric of the building, and he agreed with that definition. It seems to me that* ***that is precisely what was undertaken and achieved here. Insofar as there were any differences in the ultimate physical features of the roof, they were either de minimis, or dictated exclusively by the nature and use of modern building materials in the exercise of proper repair and maintenance."***

26. Very similar guidance to the common theme of these three decisions is given by paragraph of 9.3.1. of HMRC's Guidance Note on the subject, in the following terms:

> *"9.3.1. What are works of repair or maintenance?*
>
> *Works of repair or maintenance are those tasks designed to minimise, for as long as possible, the need for, and future scale and cost of, further attention to the fabric of the building. Changes to the physical features of the building are not zero-rated alterations if,* ***in the exercise of proper repair and maintenance of the building, they are either:***
>
> - ***Trifling or insignificant, or***
> - ***Dictated by the nature and use of modern building materials.***
>
> *Similarly, if the amount of work or cost is significant, that does not make the work a zero-rated alteration* ***if the inherent character of the work is repair and maintenance."***

27. We consider it self-evident that the spirit of the three decisions just considered, and the spirit of the Guidance Note all support the conclusion that we have reached in this case, recorded in paragraphs 17 to 19 above.

28. We gave some thought to the possibility that, since a like for like plasterboard repair would have cost, say, one fifth of the cost of the lath and limp plaster ceiling, the right approach in this case might have been to allow the appeal as to only four-fifths of the cost of the ceiling work. On reflection that approach would be wrong. Where Note 6 simply does not apply, as we consider the case to be here, then the approved alteration is simply zero-rated.

29. This appeal is accordingly allowed.

Right of Appeal

30. 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.

HOWARD M. NOWLAN (Tribunal Judge)

Released: 21 February 2012