TC01943

Appeal number TC/2011/00931

VALUE ADDED TAX — zero-rating — construction of building — VATA s 30(2), Sch 8 Group 5 — whether retention of party wall a condition of planning consent — yes — appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE TRUSTEES OF THE EATON MEWS TRUST **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

Tribunal: Judge Colin Bishopp
Henry Russell OBE FRICS

Sitting in public in London on 26 January 2012

Mr Julian Potts, VAT adviser, for the Appellants

Mr Bruce Robinson, presenting officer, for the Respondents

DECISION

1. The appellant trustees are the owners of what was originally a two-storey dwelling at 38 Eaton Mews North in central London. The property forms part of a terrace of houses. It has no garden to the rear, and its southern boundary serves both as the outside rear wall of the house and the boundary wall separating it from the garden of the adjacent property. There is no access from the property to the rear, save for a means of escape in case of fire. The property is in a conservation area.

2. In 2009 the property was in need of modernisation but the trustees decided instead upon major works which included demolition of the property, save for the side party walls and the rear wall, and the construction of what is essentially a new dwelling. Planning permission and conservation area consent for the works were obtained from the local planning authority, Westminster City Council. Both included the following sentence:

> "The City Council has considered your application and grants consent for the works referred to below subject to the conditions and in accordance with the plans submitted."

3. The plans, which were individually identified in the permission and consent, showed that the rear wall was to be retained. Two further conditions of the conservation area consent were that

> "You must only carry out the demolition and development according to the proposed arrangements."

and

> "You must carry out the demolition and development without interruption and according to the drawings we have approved."

4. The City Council confirmed its own view of the effect of those conditions in an email to the trustees' architects dated 25 November 2010:

> "You are advised that you cannot fully demolish the rear elevation of the mews house and must implement the permission in accordance with the drawings approved …"

5. The trustees add that the manner in which the work was undertaken was dictated not only by the planning permission and conservation area consent, but also by a party wall award made in March 2010, in accordance with the Party Wall Act 1996. The award provided that

> "The south elevation of the Building Owners' property is in the shared ownership of the Building Owners and Adjoining Owners and is deemed to be a party wall within the meaning of the Act".

6. The Building Owners are the trustees, and the Adjoining Owners are the owners of the house and garden on the other side of the rear wall. The Award was applied for in contemplation of the demolition and rebuilding, and went on to provide that the trustees could carry out various works including the demolition of the existing house with the express exception of the party wall, the excavation of a basement below its foundation level (though taking steps to safeguard its

stability), and adjustment of the existing window openings within the wall. The Award also provided

> "That no material deviation from the agreed works shall be made without prior consultation with and agreement by the Adjoining Owners' Surveyor."

7. The trustees contend that that these requirements have the effect that the works satisfy the conditions for zero-rating set out in s 30(2) of and Group 5 of Sch 8 to the Value Added Tax Act 1994. Section 30(2) provides that

> "A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified."

8. Item 2 of Group 5 brings within the scope of that subsection

> "The supply in the course of construction of—
>
> (a) A building designed as a dwelling …
>
> of any services related to the construction other than the services of an architect, surveyor or other person acting as a consultant or in a supervisory capacity."

9. Item 4 contains similar provisions relating to the supply of building materials. The two Items need, however, to be read with the Notes to the Group. Of those, only Notes (16) and (18) are relevant here. They provide that:

> "(16) For the purposes of this Group, the construction of a building does not include—
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> (a) the conversion, reconstruction or alteration of an existing building …
>
> (18) A building only ceases to be an existing building when:
>
> (a) demolished completely to ground level; or
>
> (b) the part remaining above ground level consists of no more than a single façade or where a corner site, a double façade, the retention of which is a condition or requirement of statutory planning consent or similar permission."

10. The respondents accept that the original building has been completely demolished, save for the retention of the party walls dividing it from its neighbours in the terrace, and for the rear wall. No issue is taken about the party walls to the side (the Commissioners' published guidance makes it clear that their retention may be ignored) but, the respondents say, the retention of the rear wall is not "a condition or requirement of statutory planning consent or similar permission" and the works do not qualify for zero-rating. The trustees argue the contrary.

11. Mr Julian Potts, the VAT adviser who represented the trustees before us, pointed to other decisions of this tribunal in which conditions similar to those imposed in this case had been considered. In *Kevin Almond v Revenue and Customs Commissioners* [2009] UKFTT 177 (TC) the appellant was in a similar position, having secured planning permission which required that the development in question be undertaken in accordance with plans which showed the retention of

a single façade. The tribunal declined to speculate whether the planning authority might have granted permission without retention of the façade; it was enough that the permission as granted required its retention. In *John Clark v Revenue and Customs Commissioners* [2010] UKFTT 258 (TC) the tribunal expressly agreed with the reasoning in *Almond*. In *Martin Samuel v Revenue and Customs Commissioners* [2010] UKFTT 633 (TC) the tribunal decided the appeal on other grounds, but went on to deal with the same point (though in relation to the retention of two façades), on which it had heard argument, and said this:

> "37. Counsel for HMRC placed great emphasis on the proposition that the planning consent needed to contain an 'explicit condition' that the relevant walls should be retained. We are not entirely clear whether this contention extended to the proposition that there would be no such explicit condition if the consent required the building to be constructed in accordance with the plans (as it did), and the plans indicated that the two walls should be retained. If, however, the contention was that extreme we reject it.
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> 38. There is no requirement that the condition be 'explicit'. There must simply be a condition or requirement that the walls be retained. In this context, we believe that the notion of a 'condition or requirement' is any term of the planning consent, compliance with which is required in order for the development to comply with the provisions of the planning consent, and to be lawful. In this case, if the indication of the Planning Officer in the 2009 letter is right to indicate that the plans did indicate that the North and East walls were to be retained, then since the consent required the development to be conducted in accordance with the plans, we decide without hesitation that the retention of the two walls was effected pursuant to a required condition.
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> 39. We actually believe that the Planning Officer was instrumental in indicating that it was the North and East walls that should be retained. Even however if it had been the Appellant who had reluctantly volunteered that these two walls should be retained prior to the giving of the planning consent, and if it was thus the Appellant who had indicated the retention of the walls on the plans submitted, when the Planning Consent required the works to be undertaken 'in accordance with the application and accompanying plans submitted by you', it thereby became a condition of the construction of the new house under the relevant planning consent that the walls be retained. As the planners said on more than one occasion, if the walls had not been retained, the consent would have been void, the construction of the proposed house would have been unlawful, and all this would have been because a condition of the planning consent had been breached."

12. There was, Mr Potts said, no difference of substance between those cases and this. Whatever the reason for the imposition of the requirement that the façade be retained, it was "a condition or requirement of statutory planning consent or similar permission" and that was enough. Moreover, it was also a condition of the party wall award, and that was sufficiently akin to statutory planning consent to amount to the "similar permission" to which the legislation referred.

13. HMRC do not accept that the wall is a party wall in the sense intended in their guidance, which relates to walls separating, and shared in common by, two buildings, such as the side walls in this case. Their retention is accepted as a matter of practicality, guiding HMRC policy, whereas a wall separating a

dwelling from a neighbour's garden, as here, is of a quite different character, notwithstanding the party wall award. Thus the only question to be decided is whether it is a façade retained as a condition of planning or similar consent.

14. The essence of HMRC's argument on that issue is that the retention of the wall became a feature of the planning permission and conservation area consent, not because the planning authority independently took the view that it must be retained, but because the application provided for it, and the requirement imposed on the trustees no more than an obligation to undertake the work in accordance with their own stated intentions. Put another way, the purpose of the condition was to ensure that the trustees did not deviate from the submitted plans. Thus it was not a requirement of the planning consent or the conservation area consent in the sense intended by the legislation, that is a requirement imposed for planning reasons by the planning authority. The tribunal decisions to the contrary were wrong, and should not be followed.

15. We are not persuaded that the party wall award adds anything to the trustees' case. It is in our view plain that the phrase "statutory planning consent or similar permission" means a consent or permission given by a body charged with administering and enforcing planning control. The phrase is intended to capture the different forms of consent granted by different bodies in different situations—there are, for example, added or different criteria in conservation areas (as here) and in national parks. A party wall award, by contrast, represents a determination of private law rights and has no effect on anyone other than the parties to it, and we do not think the draftsman had any such award in contemplation.

16. We are, however, satisfied that the trustees' case on the principal issue is right, and that HMRC's interpretation of the legislation is too restrictive. As the tribunal in *Martin Samuel* pointed out, the legislation demands no more than that "the retention of [the façade] is a condition or requirement of statutory planning consent or similar permission". While it is clear that there must be a positive requirement, and inference is not enough (see, for example, *J D & L B Halliwell v Revenue and Customs Commissioners* (2006) VAT Decision 19735), the reason for its imposition is not touched upon in the legislation, and we find no warrant for HMRC's argument that the condition is not met if the permission does no more than require compliance with plans submitted by the developer, showing the retention.

17. Had it been intended to confine zero-rating to cases in which the planning authority imposes such a condition contrary to the wishes of a developer, or in which the initiative for the condition lies with the planning authority, it would have been possible to say so. HMRC's argument, if it were right, would require the tribunal, in a case such as this, to embark on an enquiry into a developer's motives, as well as the planning authority's policy and its reasons for imposing the requirement in an individual case. We cannot believe that Parliament intended that zero-rating should depend on factors such as these. In our judgment the statutory condition is met if there is a positive requirement for retention of the relevant façade, whatever the reason for its imposition. The condition is met in this case and the appeal must be allowed.

18. 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 10 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.

Colin Bishopp
Tribunal Judge

Release Date: 5 April 2012