TC02465

Appeal number: TC/2012/04719

VATA 1994 section 30 and groups 5 and 6 of Schedule 8 – building services supplied to home owner - zero rating – HMRC view that should have been standard rated as building was an "annexe" to the main dwelling – appeal by home owner - decision in Cantrall (No 2) considered – on all facts the building is an annexe so should have been standard rated – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

STEPHEN COLCHESTER **Appellant**

- and -

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

TRIBUNAL: JUDGE ALISON MCKENNA
TYM MARSH MA MBA

Sitting in public at Bedford Square on 17 December 2012

Mark Phythian-Adams accompanied the Appellant and made representations on his behalf with the Tribunal's permission, pursuant to rule 11 (5) of The Tribunal Procedure (Tax Chamber) Rules 2009

Martin Priest of HM Revenue and Customs for the Respondents

DECISION

1. This appeal concerns HMRC's decision pursuant to under s. 83(b) of the Value Added Tax Act 1994 ("VATA"), that certain building works carried out at the Appellant's home are liable to VAT at the standard rate. The Appellant constructed a replacement garage with living accommodation in the grounds of his cottage and contends that this building is a "building designed as a dwelling" within the meaning of VATA so that the construction works qualified for zero rating. HMRC contends that the building does not meet the statutory definition of a "dwelling" because planning consent was given for an annexe to the existing dwelling only and, on the facts, the building falls within the ordinary definition of an annexe.

2. HMRC's decision, dated 5 January 2012, was addressed to the builders who had carried out the works for the Appellant and had applied a zero rating to them. HMRC's decision was then upheld in its review dated 16 March 2012.

3. The Appellant appealed by way of his Notice of Appeal dated 2 April 2012. HMRC accepted that he is an interested party in respect of its decision in view of his apparent liability to pay the builders the tax due.

4. The Appellant was assisted by his brother in law at the hearing. We are grateful to Mr Phythian-Adams and to Mr Priest, who represented HMRC, for their submissions in this case.

The Facts

5. The parties agreed a statement of facts in advance of the hearing and produced an agreed bundle of photographs, plans and relevant correspondence, for which the Tribunal was grateful. The relevant facts are as follows.

6. The Appellant is the owner and occupier of Yew Tree Cottage, near Shepton Mallet. The cottage is a listed building. Planning permission was sought and granted for the construction of a building described in the planning application as "*a replacement garage/guest annex*". The Tribunal heard that, in accordance with the planning consent granted, the old garage was raised to the ground and a replacement building constructed on its footprint. The new building is physically separate from the cottage. In addition to the replacement garage space, it contains a workshop, store room, studio, bathroom and utility room. In the justification document submitted to the planning authority, it is said that

> The house is Grade II listed ….
>
> At present the front door opens directly into the dining room with no appropriate space for coats, boots and dogs. This means that mud trails into the heart of the house and, as the stairs also open directly into the dining room. Both the ground and first floor suffer temperature loss when the front door is opened. The tented ceilings on the first floor and the general lack of space elsewhere means that there is no traditional

> storage in the house. There is also no practical utility room and no space for guest accommodation. The existing garage has impractical 2m wide doors, is unsightly and out of keeping with the character of the house.
>
> …
>
> The proposed works provide a practical solution to the house's current shortcomings in a sympathetic manner which will enhance the character of the house and its surroundings.

7. The builders had originally applied a VAT zero rating to the supply of construction works on the basis that the new building was in the garden of a listed building. By the time of the hearing, this justification for zero rating was no longer relied upon by the Appellant. It was agreed that works to the cottage porch, carried out at the same time as the new building on the site of the garage, were correctly treated as a zero rated supply and we are not concerned with that aspect of the works in this appeal.

8. It was agreed between the parties that the new building constituted self-contained living accommodation and that it had been constructed in accordance with the planning consent granted. It was further agreed that the planning consent did not impose any express conditions as to the use of the new building as a separate dwelling and that the Appellant's title to the land did not impose any express prohibition on the disposal or use of the new building as a separate dwelling.

9. The planning permission granted was stated to be for a "*new porch and replacement garage/annex*". HMRC relied upon the fact that the Appellant's planning application had specifically referred to the new building as providing a practical solution to the shortcomings of the cottage. HMRC had suggested to the Appellant that he produce a letter from the planning authority confirming its views about whether it had consented to the construction of a separate dwelling, but no letter was produced to the Tribunal and the correspondence in the bundle before us shows that the Appellant took the view that HMRC had "no right" to ask for such evidence.

The Law

10. Section 30 (1) and (2) of VATA provide as follows:

> Zero-rating.
>
> (1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section—
>
> (a) no VAT shall be charged on the supply; but
>
> (b) it shall in all other respects be treated as a taxable supply;
>
> and accordingly the rate at which VAT is treated as charged on the supply shall be nil.
>
> (2) 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.

11. The relevant part of Schedule 8 to VATA is group 5 item 2, which provides inter alia for zero rating of

> The supply in the course of the construction of—
>
> (a) a building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose or a relevant charitable purpose…

12. By virtue of s. 96 (9) of VATA the Schedule is to be interpreted in accordance with its notes.

13. Note (2) and note (16) provide as follows:

> (2) A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied—
>
> (a) the dwelling consists of self-contained living accommodation;
>
> (b) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;
>
> (c) the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision; and
>
> (d) statutory planning consent has been granted in respect of that dwelling and its construction or conversion has been carried out in accordance with that consent.

> (16) For the purpose of this Group, the construction of a building does not include—
>
> (a) the conversion, reconstruction or alteration of an existing building; or
>
> (b) any enlargement of, or extension to, an existing building except to the extent the enlargement or extension creates an additional dwelling or dwellings; or
>
> (c) subject to Note (17) below, the construction of an annexe to an existing building.

14. It can therefore be seen that even if a building falls within the definition of a dwelling by applying note (2) (a) to (d), it will nevertheless be excluded from zero rating by applying note (16) (c) if it is an annexe to an existing building, unless it falls under note (17). Note (17) concerns an annexe for charitable use, so is not relevant here. There is no statutory definition of "annexe" and the Tribunal finds that the ordinary meaning of that term should be applied. HMRC referred us to a dictionary definition of "annexe" meaning "*a building joined to or associated with a main building, providing additional space or accommodation,*" which we are happy to adopt.

15. The parties referred the Tribunal to a considerable number of first instance decisions which each turned on their own facts and have no precedent value. Accordingly, we are not bound to follow them. We were also referred to the two higher court authorities in the case of *Cantrell and Another v HMRC* which concerned the construction of an additional building at a care home. The first appeal in that matter was heard by Lightman J in the High Court (reported at [2000] STC 100), in which he quashed the first instance decision and remitted the matter for a fresh decision on the facts. In so doing, he commented at [3] that:

> The question of whether the works carried out constituted an enlargement, extension or annexe is a question of fact, not law…

And later at [12]:

> …regard must be had only to the physical character of the buildings in course of construction at the date of the relevant supply and that the subjective intentions on the part of Mr and Mrs Cantrell as to their future use, their subsequent use and the terms of the planning permission regulating their future use are irrelevant, save only in so far as they throw light on the potential use and functioning of the buildings.

16. Mr and Mrs Cantrell's case was accordingly re-heard by the VAT Tribunal but they were unsuccessful once again and the case was then the subject of a second appeal, heard by Sir Andrew Morritt (then Vice-Chancellor), reported at [2003] EWHC 404 (Ch). He commented at [16] that

> The reference to an "annexe" in note (16) when compared with the references to "enlargement" of or "extension" to the existing building introduces a different concept. Thus they may be physically separate so that the connection between the two is by way of some other association. But the Tribunal seems to have thought that any association is enough. In my view that cannot be right….
>
> [17] An annexe is an adjunct or accessory to something else, such as a document. When used in relation to a building it is referring to a supplementary structure, be it a room, a wing, or a separate building.

17. Later at [20], the Vice-Chancellor commented that

> The judgement of Lightman J was directed primarily to the conclusion of the Tribunal in their first decision that the Phase 1 works constituted the enlargement of the New Barn. In that context, and in the context of an extension, I understand and agree that the relevant considerations are those which arise from the comparison of physical features of the existing building before and after the works in question. But in the case of an alleged annexe the requirement that such a construction should be an adjunct or accessory to another may require some wider enquiry….

18. In allowing Mr and Mrs Cantrell's appeal, the Vice Chancellor took into account at [21] the fact that there was a requirement for certain types of medical care to be provided separately from each other and concluded that this negated the

argument that one facility was an adjunct or accessory of the other so as to constitute an annexe and so departed from the assessment of pure functionality adopted by Lightman J.

Submissions

19. The parties both made submissions as to whether there had been the construction of a building "*designed as a dwelling*" so as to fall within item 2 of group 5 in schedule 8 of VATA. In this regard, it was agreed by both parties that the criteria at (a) and (b) of note (2) were satisfied. However, compliance with both (c) and (d) of note (2) was disputed.

20. The Appellant argued that all the criteria at (c) and (d) were satisfied because there were no express prohibitions on the separate use or disposal of the new building and there were no planning conditions which prevented its use as a separate dwelling. The Appellant argued that it had been open to the planning authority to impose conditions which restricted the use of the building as a separate dwelling but that it had not done so.

21. HMRC submitted that note (2) (c) was not satisfied because it was implicit in the application and subsequent grant of planning consent that the building was an annexe to the cottage and therefore that its use as a separate dwelling was effectively prohibited. HMRC further submitted that note (2) (d) was not satisfied because planning permission had not been granted for a separate dwelling but only for an annexe to the cottage.

22. HMRC also argued that note (16) (c) precludes the zero rating of an annexe to an existing building, unless it falls under note (17), which refers to annexes for charitable use only. The Appellant argued that note (17) should be regarded as an aid to construction of the statutory scheme as a whole in that it made clear the intention of Parliament that an annexe is covered by the zero rating scheme if it can also function as a separate building. He argued that note (16) (c) should be construed accordingly because otherwise it would lead to an absurd result which could not have been intended by Parliament.

23. The Appellant argued, in reliance upon Lightman J's decision in the first *Cantrell* appeal, that the Tribunal must restrict its considerations to the physical conditions and functional capability of the new building and that if it were capable of functioning as a separate dwelling then it should be regarded as such for VAT purposes and the supply zero rated.

Conclusion

24. We were grateful for the careful submissions made to us and have considered all the evidence and arguments most carefully.

25. In relation to note (2) we find that all the conditions (a) to (d) were satisfied. It does not seem to us that it is permissible to imply restrictions which are not in fact

there as HMRC suggested we should. That said, we note that planning authorities consider the imposition of relevant planning conditions on the basis of what they are told at the time of the planning application, and there would appear to have been no reason to impose a condition in this case on the basis of what the planning authority was told by the Appellant. Nevertheless, we find against HMRC in relation to its submissions on those points.

26. However, in following the decision of the Vice-Chancellor in the second *Cantrell* appeal we note that, when looking at the case of an alleged annexe, we are entitled to look beyond the mere functionality of the new building. In making the "wider enquiry" contemplated by the Court in that case, we have considered the functional relationship between the existing dwelling and the new building and taken into account the justification for the new building provided to the planning authority as described at paragraph [6] above. We reject the Appellant's submission that, when considering the characteristics of an annexe, we are limited to assessing the functionality of the new building only.

27. This was a case in which the entire rationale for seeking planning consent was based upon the enumerated shortcomings of the existing dwelling and the need to provide additional facilities in a new building, to be in common ownership and use. The new building was specifically designed to be in keeping with the main dwelling and was said to enhance not only the amenities but also the character of the main dwelling. We find that, as a matter of fact, the new building is a supplementary structure, an adjunct or accessory to the main house. There is, in our view, a functional connection between the new building and the main house sufficient to render it an annexe. The new building is designed to meet the deficiencies of the main house and to operate in conjunction with it. We therefore find that the new building falls within the meaning of an annexe, using the ordinary meaning of that term, and so engages note (16) (c).

28. It follows that, in considering the requirements of Schedule 8 group 5 item 2 and the zero rating of "*the supply in the course of the construction of a building designed as a dwelling*" we conclude, in interpreting the Schedule in accordance with the notes, that although note (2) is applicable in that the new building meets its criteria for being a dwelling, note (16) (c) means we must find that there was no "construction", within the meaning of the Schedule, for the purposes of zero rating. We reject the Appellant's submissions as to the relevance of note (17) and conclude that note (17) specifically applies the zero rating to annexes for charitable purposes because any other annexe properly identified as such (including this one) is excluded from zero rating. It follows that we find that the supply in this case should be standard rated and accordingly we dismiss this appeal.

29. 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.

ALISON MCKENNA
TRIBUNAL JUDGE

RELEASE DATE: 4 January 2013