TC03384

Appeal number: TC/2013/02739

VAT – Zero-rating – group 6 schedule 8 VATA 1994 – listed building construction of a garage – whether eligible for zero-rating – yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR IAN OWEN **Appellant**

- and -

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

TRIBUNAL: JUDGE PETER KEMPSTER
MR WILLIAM HAARER

Sitting in public at Bedford Square, London on 6 December 2013

Mr Dave Brown (Dave Brown VAT Consultancy) for the Appellant

Mr William Brooke (HMRC Appeals Unit) for the Respondents

DECISION

1. This dispute concerns whether certain building works undertaken in constructing a garage attached to a listed property are standard rated or zero-rated for VAT purposes.

Facts

2. The Appellant ("Mr Owen") lives in a house which is a Grade II listed building ("the House"). He contracted with a local building contractor ("the Builder") to build a large garage abutting the house ("the Garage"). The Garage is substantial and designed to house Mr Owen's classic car collection. The Garage has folding doors, heating and lighting that make it suitable for conversion to additional living space; however, Mr Owen accepts that the Garage is a garage rather than any other description of building.

3. The works for building the Garage received a listed building consent from Cheltenham Borough Council, describing them as "Erection of garage".

4. In November 2012 the Respondents ("HMRC") issued a liability ruling to the Builder stating that the works for building the Garage were standard rated (rather than zero-rated) for VAT purposes. That view was upheld in a formal internal review decision issued on 22 February 2013. Mr Owen disputes that decision and his (third party) appeal comes before the Tribunal.

Law

5. All statutory references are to VAT Act 1994 and the law is cited as in force at the relevant date.

6. Section 30 (so far as relevant) provides:

> "**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.
>
> …"

7. Group 6 of schedule 8 (so far as relevant) provides:

> "**Protected buildings**
>
> Item No
>
> 1 ...
>
> 2 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 consultant or in a supervisory capacity.
>
> 3 The supply of building materials to a person to whom the supplier is supplying services within item 2 of this Group which include the incorporation of the materials into the building (or its site) in question.
>
> NOTES
>
> (1) "Protected building" means a building which is designed to remain as or become a dwelling or number of dwellings (as defined in Note (2) below) or is intended for use solely for a relevant residential purpose or a relevant charitable purpose after the reconstruction or alteration and which, in either case, is—
>
> (a) a listed building, within the meaning of—
>
> (i) the Planning (Listed Buildings and Conservation Areas) Act 1990; …
>
> (2) A building is designed to remain as or become a dwelling or 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 terms of any covenant, statutory planning consent or similar provision,
>
> and includes a garage (occupied together with a dwelling) either constructed at the same time as the building or where the building has been substantially reconstructed at the same time as that reconstruction.
>
> …"

Respondents' Case

8. Mr Brooke for HMRC submitted as follows.

9. It was common ground that the House was a dwelling and a listed building; that the disputed works consisted of the construction of a garage; that the Garage did not itself constitute a dwelling for the purposes of Group 6; and that there had been no substantial reconstruction of the House.

10. HMRC's policy on when the construction of a garage could be zero-rated was clearly published as detailed below, and that view had been followed in issuing both the liability ruling and the review decision.

11. HMRC's VAT guidance manual included:

> "**VCONST08240 - Zero-rating the 'approved alteration' of a 'protected building': is the work to a 'protected building': garages**
>
> A 'protected building' is a single building, with the single exception of a garage which can be in a separate building.
>
> The law allows a garage to form part of a building designed to remain as or become a dwelling when it is occupied together with the dwelling and is either:
>
> - constructed at the same time as the dwelling
>
> or
>
> - where the building has been substantially reconstructed, at the same time as that reconstruction.
>
> Where a garage qualifies as part of the dwelling, it can take the form of a separate building or be part of the same building as the dwelling.
>
> It is not necessary for the garage to have been constructed as a garage (that is as an enclosure for the storage of motor vehicles). It can also have been constructed as something different, for example a barn. Provided the enclosure is in use as a garage before the alteration (or reconstruction) and continues to be in use afterwards, and meets the remaining conditions stated above, it qualifies as part of the 'protected building'.
>
> …"

12. VAT Notice 708 (Buildings & Construction) included:

> "**9.3.3 Garages and other curtilage buildings**
>
> As noted above at 9.2.2, garages and other curtilage buildings can be treated for planning purposes as part of the listed building.
>
> For VAT purposes, however, any approved alteration carried out to such buildings can only be zero-rated if the building being altered falls within one of the descriptions in sub-paragraph 9.2.1. For example, the conversion of an outhouse in the curtilage of a dwelling to a swimming pool cannot be zero-rated as that building is not 'designed to remain as or become a dwelling' in its own right.
>
> Approved alterations to garages in the curtilage of a building 'designed to remain as or become a dwelling' can be zero-rated provided that the garage is occupied together with the dwelling; and was either constructed at the same time as the dwelling or, where the dwelling has been substantially reconstructed, at the same time as that reconstruction.

A garage need not be a building designed to store motor vehicles: the term can also apply to a building adapted to store motor vehicles such as a barn."

13. In the current case there had been no substantial reconstruction of the House and thus the construction of the Garage did not fall to be zero-rated under Group 6.

14. HMRC's view was supported by the decision of the VAT Tribunal in *Sherlock and Neal Limited v CCE* (VAT 18793 – Sept 2004). Although HMRC accepted that the case was not binding on the current Tribunal, as a decision of Dr Avery Jones it was persuasive authority. The facts and contentions in that case were described:

"2. We find the following facts.

(1) There are three buildings in a row: from left to right Chapel Cottage (a listed building built in about 1690), the Chapel (not joining the Cottage but built about 1 foot away, not listed and built in about 1896), and an agricultural shelter.

(2) The Appellant obtained listed building consent on 10 October 2002 to alter the Cottage by joining it to the Chapel and converting the Chapel into further residential accommodation, and demolishing the agricultural shelter and building a new garage sharing a wall with the Chapel. The work is accordingly an approved alteration of the Cottage.

(3) The building work was carried out by the Appellant.

(4) The Commissioners agree that all the works are zero-rated except for the construction of the garage.

3. We infer the following from these facts.

(5) The Cottage was and still is the only listed building.

(6) The Chapel and the new garage were not part of the curtilage of the Cottage before the alteration but may be now (although it is not necessary to decide this).

4. [The taxpayer] contends that the garage is an integral part of the alteration to the listed building for which listed building consent has been obtained and should accordingly be zero-rated.

5. [HMRC] contends that the building of the garage does not qualify for zero-rating within the legislation.

…

8. [HMRC] contends that the garage is not itself a dwelling and can be treated as a dwelling only if it satisfies the closing words of Note (2). It does not do so because it was not constructed at the same time as the protected building (the Cottage), being constructed as part of the current alteration, and nor, as is common ground, has the protected building (the Cottage) been substantially reconstructed. Accordingly although there has been an approved alteration of the Cottage, it is not an approved alteration of a protected building as defined to mean a building which is designed to become a dwelling."

The Tribunal concluded:

> "9. In our view [HMRC's] construction is correct. As Lord Walker said in *Customs and Excise Commissioners v Zielinski Baker & Partners Ltd* [2004] STC 456 at [41]:
>
> *"But the requirement that the subject matter of the "approved alteration" should be (1) a building and (2) designed to become a dwelling, indicate that Parliament intended to give the benefit of item 2 of Group 6, not to the whole set of listed buildings and scheduled monuments (and structures or sites deemed to form part of them) but only to a subset (that is those which are buildings to be used for residential purposes)."*
>
> In this case, even though the final structure is a single building resulting from the approved alteration of the Cottage, the garage fails to qualify because it is not a dwelling and is not treated as dwelling because the conditions for doing so are not satisfied."

15. The disputed works were not an alteration to an existing building within the curtilage but a brand new garage. The condition in Note (2) that a garage must be "either constructed at the same time as the building or where the building has been substantially reconstructed at the same time as that reconstruction" was not met here. Accordingly, the requirements of Item 2 are not satisfied and thus the works do not fall to be zero-rated.

Appellant's Case

16. Mr Brown for Mr Owen submitted as follows.

17. The House was a dwelling and was also a protected building. The House was altered by the addition of an extension, which in this case happened to be a garage. Group 6 looks at the building which is being altered, not the nature or use of the alteration. There was no requirement that the alteration works had to be a "protected building" (as defined). It was the House that was being altered, not the new Garage.

18. It was accepted that *Sherlock* was against the Appellant but it was not binding on this Tribunal.

Consideration and Conclusions

19. We have reached the conclusion that the disputed works do fall to be zero-rated pursuant to Group 6.

20. In *Zielinski Baker* the point at issue was described by Lord Walker:

> "[22] My Lords, this appeal raises a single issue of statutory construction on the legislation relating to zero-rating, for value added tax (VAT) purposes, of alterations to listed buildings. The issue is whether the expression 'protected building' in item 2 of Group 6 in Sch 8 to the Value Added Tax Act 1994 includes an outbuilding which is not itself listed under the Planning (Listed Buildings and Conservation Areas) Act 1990, but is protected under that Act because it is (and has

been since the inception of the modern system of planning control in 1948) a structure within the curtilage of a listed building."

21. As explained by Lord Brown:

"[49] To identify and resolve the issues now arising for decision it is necessary to refer to two buildings, one a listed building known as Mere Court (the house), the other, within the curtilage of the house but not fixed to it, an outbuilding (the outbuilding) which the taxpayers converted from a barn to a changing room and games room to be used in conjunction with an indoor swimming pool which they constructed alongside it.

[50] The Planning (Listed Buildings and Conservation Areas) Act 1990 provides by s 1(5):

'In this Act "listed building" means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and for the purposes of this Act—(a) any object or structure fixed to the building; (b) any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1st July 1948, shall be treated as part of the building.'

[51] The outbuilding had formed part of the land since before 1 July 1948 so that it was to be treated as part of the building and so that authorisation was required (by other provisions of the 1990 Act) and duly obtained for its conversion.

[52] Whether or not the supply of services here in question qualify for zero rating depends upon whether it falls within item 2 of Group 6 of Sch 8 to the 1994 Act, namely as: 'The supply [of the relevant services] in the course of an approved alteration of a protected building.'

[53] It is necessary at this stage to read the more directly relevant parts of note (1) to Group 6:

'(1) "Protected building" means a building which is designed to remain as or become a dwelling or number of dwellings … and which … is—(a) a listed building, within the meaning of—(i) [the 1990 Act] …'

[54] Put compendiously, therefore, the question now arising is whether this supply of services was 'in the course of an approved alteration of … a building which is designed to remain as or become a number of dwellings … and which … is … a listed building'.

[55] There is no dispute that the works constituted an approved alteration of a building. The critical question, however, is which building for the purposes of item 2 was being altered: was it the house or was it the outbuilding? If, as the taxpayers contend and the majority of the Court of Appeal held, it was the House, there can be no doubt that it was to remain as a single dwelling and was a listed building. If, however, it was the outbuilding, there can equally be no doubt that it was neither to remain as nor to become a dwelling and nor, indeed, was it 'a listed building'; rather it was at most under the 1990 Act definition 'part of' the building (itself a listed building) and, as this House decided

> in *Shimizu* (*UK*) *Ltd v Westminster City Council* [1997] 1 All ER 481, [1997] 1 WLR 168, although part of a building may be a listed building, a part of a listed building cannot itself be a listed building"

22. That is, we consider, a very different situation from the current case. In *Zielinski Baker* there was no alteration to the house (ie the dwelling); instead the works were performed on the outbuilding, which was not fixed to the house and was not itself a dwelling. Those works required permission under the relevant planning rules but did not (determined a majority of the House of Lords, reversing the Court of Appeal) meet the criteria in Group 6. It was in that context that Lord Walker stated his conclusion, cited by the VAT Tribunal in *Sherlock* (see [14] above):

> "But the requirement that the subject matter of the "approved alteration" should be (1) a building and (2) designed to become a dwelling, indicate that Parliament intended to give the benefit of item 2 of Group 6, not to the whole set of listed buildings and scheduled monuments (and structures or sites deemed to form part of them) but only to a subset (that is those which are buildings to be used for residential purposes)."

23. In the current case, by contrast, it *is* the House that is being altered. Item 2 of Group 6 requires the supply to be made "in the course of an approved alteration of a protected building". The building in question was the House. Note (1) sets two conditions for qualification as a "protected building", both of which are satisfied here: (a) the House was "designed to remain as … a dwelling … after the … alteration"; and (b) the House was "a listed building, within the meaning of [the relevant planning rules]". There is no dispute over the second condition. The first condition is satisfied because the House meets all the requirements set out in Note (2)(a) to (c) (see [7] above). The final words of Note (2) *extend* the meaning of "dwelling" ("… and *includes* a garage (occupied together with a dwelling) …" – emphasis added) to include a garage in certain circumstances and subject to certain requirements (which are not met in the current case). But in the current case it is not necessary to take advantage of those extra words; the House meets the test in Note (1) without them.

24. We accept and acknowledge that the disputed decision issued by HMRC (and upheld on internal review) was in accordance with HMRC's published internal guidance (see [11 & 12] above). That general guidance cannot cover all of the wide variety of factual situations that arise in practice and we also accept that there will be specific situations where that guidance leads to the correct answer. However, we consider that in the current case the wrong conclusion was reached by HMRC. We believe that because the final words of Note (2) to Group 6 specifically refer to garages, HMRC have erroneously concluded that any works involving a garage must meet the requirement in those words ("either constructed at the same time as the building or where the building has been substantially reconstructed at the same time as that reconstruction"). As the Garage does not satisfy that requirement, HMRC determined that zero-rating was not appropriate. In our view there was, in the current case, no need to read the final words of Note (2) or determine if the requirement stated therein was met; the relevant tests were satisfied by the House.

25. We are conscious that the above reasoning may be contrary to that adopted by the VAT Tribunal in *Sherlock* (which is not binding on us) but, if so, we consider the above analysis is to be preferred.

Decision

26. The appeal is ALLOWED.

27. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 5 March 2014