TC03951

Appeal number: TC/2014/00088

FIRST-TIER TRIBUNAL
TAX CHAMBER

VAT –zero- rating for construction of new building – planning permission for extension and alteration – building demolished in substance save for part of facade -whether supply was of construction of new building or alteration of existing building –whether retention of facade was condition of planning permission - HELD –retention of facade not explicit or implicit condition of planning permission – not supply of new building – appeal dismissed.

BOXMOOR CONSTRUCTION LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RACHEL SHORT

Sitting in public at 45 Bedford Square, London WC1B 3DN on 27 June 2014

Neil Owen of VAT Advisory Services Limited representing the Appellant

Mr Bernard Haley instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

1. This is an appeal against a decision by HMRC of 26 November 2013 to treat supplies of construction services made by Boxmoor Construction Limited ("Boxmoor") at 28 Cavendish Drive, Edgware as standard rated for VAT purposes.

Agreed Facts

2. 28 Cavendish Drive Edgware is a residential property owned and occupied by Mr and Mrs Mark Pearlman. A dwelling initially stood on the site. Planning permission was sought for major works to the property and was granted by Harrow Council's Planning Services Department in August 2010. The planning consent described the approved works as "single storey side, single and two storey side to rear extensions incorporating front dormer and roof alterations". The planning consent was given under Planning Application reference P/1502/10.

3. The works actually carried out pursuant to this planning consent involved the removal of the entirety of the previous dwelling with the exception of a small portion of the front facade referred to as the "projecting bay" and the construction, incorporating that facade, of a replacement dwelling.

4. The new dwelling consists of self-contained dwelling accommodation. The separate use and or disposal of the dwelling is not prohibited. There is no internal access to any other dwelling.

5. Boxmoor was appointed as contractor to carry out the works at 28 Cavendish Drive in autumn 2012. On the basis of their understanding that the project consisted of the construction of a new dwelling and the company's services were therefore eligible for zero-rating, Boxmoor applied no VAT to the invoices issued by the company for the works.

6. During the course of a VAT visit in mid-2013 HMRC took the view that the services supplied by Boxmoor did not qualify to be regarded as the supply in the course of the construction of a building designed as a dwelling as defined by the Value Added Tax Act 1994 ("VATA 1994") Schedule 8, Group 5. HMRC issued assessments for the 10/12, 01/13 periods and reduced the amounts of VAT already claimed for the 03/13 and 06/13 periods, considering the construction services to be chargeable to VAT at the standard rate. Boxmoor requested a review of these assessments which HMRC carried out. HMRC notified Boxmoor on 26 November 2013 that the original decisions would be upheld.

7. Boxmoor appealed against those assessments to this Tribunal on 24 December 2013.

Preliminary Matters

8. There is no dispute that the property constructed at 28 Cavendish drive is a building designed as a dwelling. It is not disputed that HMRC's assessments were made within time in respect of each of the periods under appeal.

9. HMRC have accepted the Appellant's hardship application and confirmed this to the Tribunal.

The Issue in Dispute

10. The issue in dispute between the parties is whether the construction services supplied by Boxmoor to Mr and Mrs Pearlman can be treated as zero-rated supplies of construction services under Schedule 8, Group 5, Item 2(a) VATA 1994 as the construction of a new dwelling house or whether they should be treated as standard rated supplies made in respect of an existing building.

11. Note 16(a) of Item 2 excludes from zero-rating the "conversion, reconstruction or alteration of an existing building". Notes 18(a) and (b) of Item 2 treat as a new building the demolition of an existing building save for the retention of a single facade which is retained as a condition of planning consent. The point in dispute is into which of these two categories the construction works at 28 Cavendish Drive fall.

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The Law

12. The relevant legislation concerning the treatment of the construction of new dwelling houses as zero-rated for VAT purposes is at Schedule 8, Group 5, Item 2(a) VATA 1994 and its related Notes:

13. Item 2(a) allows for the zero-rating of:

"*The supply in the course of construction of –*

(a) *A building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose; .....*

of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity".

14. Note 16(a) excludes from zero-rating work to an existing building:

"*For the purpose of the Group, **the construction of a building** does not include-*

(a) any conversion, reconstruction or alteration to 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.....

15. Note 18 (a) and (b) describes when a building **ceases to be an existing building**, being only if it is:

(a) *demolished completely to ground level; or*

(b) the part remaining above ground level consists of no more than a single facade or where a corner site, a double facade, the retention of which is a condition or requirement of statutory planning consent or similar permission.

The Evidence

16. The Tribunal was provided with oral evidence from Mr Paul Dewick, managing director of Boxmoor and Mr Mark Pearlman, on behalf of Boxmoor. HMRC did not provide any witness evidence. Mr Dewick was cross examined by HMRC.

The work at 28 Cavendish Drive.

17. The Tribunal was provided with photographic evidence and illustrations of the works which were undertaken at 28 Cavendish Drive and copies of the planning consent of 6 August 2010 and three earlier planning applications for the property which were refused in August 2003 (before Mr Pearlman owned the property), September 2009 and February 2010. The planning consent of 6 August 2010 from Harrow Council Planning Services referred to "*single storey side, single and two storey side to rear extensions incorporating front dormer and roof alterations"* and enclosed related drawings.

18. The Tribunal also saw the "Conditional Full Plans Approval Notice" from Harrow Council's Building Control Department, dated 3 December 2012 confirming that the plans for the work at 28 Cavendish Drive had been passed as complying with building regulations. The description of the work contained in that approval notice was "*Two storey side and rear part single storey front extension. Loft conversion and internal alterations including relocation of ground floor staircase. Removal of load bearing walls and formation of two first floor en-suites*".

19. The Tribunal was provided with a letter from Jeffrey Howard Associates, the architects engaged on the project at 28 Cavendish Drive dated 30 July 2013 and addressed to Mr Dewick which stated that:

> "*I can confirm that the small section of the facade was retained after discussion with the planning authorities who explained that if it was completely demolished it would nullify the planning permission already granted. The planners were very keen in ensuring that the building retained much of its original character, and considered it very important that we maintain what we have although it would structurally have been more sensible to demolish the whole property. The projecting bay was considered one of the characteristic features of the whole estate"*.

20. Neither Mr Dewick nor Mr Pearlman had any direct conversations with the planning authorities about the retention of the projecting bay and could not add any further details to this letter from the architect.

21. Mr Dewick and Mr Pearlman confirmed that no issues had been raised by Harrow Council either from the Planning Services Department or the Building Control Department to suggest that the works at the site did not comply with the planning consent of 6 August 2010.

22. The photographic evidence showed that at one stage of the building project all that remained at the site was a corner facade of the building being the projecting bay bow window section.

Mr Dewick's evidence

23. Mr Dewick explained that Boxmoor had been appointed to work at 28 Cavendish Drive in 2012. Their remit had been to demolish the existing building, which they had done, including removing all existing foundations. The only part of the existing building which had been retained was an L – shaped section of facade which was the projecting bay. This had entailed considerable additional work and the projecting bay had been supported by a temporary structure when the rest of the building had been demolished. It would have been much more convenient to demolish the whole building, but he had understood that this was not possible because it was contrary to the planning consent.

24. Boxmoor had liaised with Harrow Council's Building Control Department and no issues had been raised with the works done. Mr Dewick had had no direct contact with Harrow Planning Department.

25. On questioning from Mr Haley, Mr Dewick said that he viewed this as a new construction and when asked to explain the discrepancy between the work done and the planning consent description, he described the planning consent as "woolly". He confirmed that he had had no conversations with the architect to suggest that there had been a deviation from the plans submitted to the planning authorities. In his view the requirement to retain the projecting bay was implicit in the planning consent.

Mr Pearlman's evidence

26. Mr Pearlman is one of the owners of 28 Cavendish Drive. He said that he acquired the property in 2007 and had been living in it. He confirmed that he had no documentary evidence relating to the requirement to retain the projecting bay at the property. He had discussed the requirement with the architect and was happy to comply with the requirement because he was keen to get the house built. Retaining the projecting bay had made the whole project more expensive than it otherwise would have been, but he had had comments that his new property did now blend in with the rest of the street, as intended. Mr Pearlman said that he had had two planning applications refused for 28 Cavendish Drive before this one was accepted.

Taxpayer's Arguments.

27. Mr Owen representing the Appellant, started by explaining that although the planning consent for 28 Cavendish Drive referred to "extension and alteration", the building regulations consent (the Full Plans Approval Notice of 3 December 2012) did include the removal of load bearing walls, which suggested that the consent envisaged significant amounts of construction being carried out at the property. Although, by reference to the photographs provided as part of the evidence to the Tribunal, the works appeared to be more extensive than those envisaged by the planning consent, Mr Owen stated that the works were in conformity with that consent. In order to comply with the planning consent it had been necessary to virtually demolish the existing building.

28. Mr Owen said that the retention of the projecting bay was in order to ensure that the planning consent was not breached. He accepted that the actual works carried out amounted to the "virtual demolition" of the property, but the new building was equivalent to the existing building, plus the extensions referred to in the planning

consent. In order to achieve what was described in the planning consent, a radical re-build of the property had been required.

29. Mr Owen accepted that a different planning consent would have been required if the intention had been to demolish the existing building.

30. Mr Owen referred to the relevant legislation at Schedule 8 Group 5 VATA 1994 and Notes 2 and 18. The requirement in Note 18 was that the work was carried out with statutory planning consent and in accordance with that consent. There was no requirement as to what the specific terms of the planning consent were. Nor was it necessary in order to fulfil the conditions of Note 18 that the need to retain the facade at the property was explicitly stated in the planning consent, as supported by the decision in *Eaton Mews (The Trustees of the Eaton Mews Trust v HMRC [2012] UKFTT 249(TC))* and other earlier decisions.

31. Mr Owen stressed that HMRC were not arguing that the planning consent had not been adhered to. Harrow Council's Planning Department had not raised any concerns that the planning consent had not been adhered to. The Building Control Department were obliged to ensure that the building works were in compliance with the planning permission and they had also not raised concerns.

32. In Mr Owen's view it was necessary to look at the facts on the ground objectively; had a building been demolished? Had the facade been retained? Had this been a condition of the planning consent? Nothing had been left of the property at 28 Cavendish Drive other than a small section of facade and this complied with the conditions at Note 18 of Group 5. It was not relevant to the VAT treatment of the supplies of construction services how the planning consent had been obtained, only what happened once permission had been given. It was clear from the architect's letter that non-retention of the facade would have nullified the planning consent, therefore this must be treated as a condition of the consent.

HMRC's Arguments.

33. For HMRC Mr Haley started by setting out the history of the planning applications made for 28 Cavendish Drive and referred to HMRC's decision letter of 26 November 2013. Mr Haley accepted on the basis of the photographic evidence provided (which HMRC had not previously seen) that there had been substantial re-construction work at the property.

34. In Mr Haley's view, it was a condition of being able to rely on Note 18 of Group 5 that the requirement to retain a facade of the building was explicit in the relevant planning consent. The planning consent obtained here was specific and should be construed narrowly as permission for alteration and reconstruction not for the construction of a new building. Mr Haley accepted that there had been some deviation from that planning permission but the taxpayer's reliance on the confirmation from the Building Control Department (letter of 3 December 2012) was not relevant since that letter was issued after the construction work had already started.

35. The taxpayer had not provided any documentary evidence of a requirement in the planning consent that it was necessary to retain the projecting bay of the building. The only evidence produced was that it was the architect's view that the projecting bay should be retained in order not to nullify the planning approval. This did not comply with the requirements of Note 18 that retaining the projecting bay was a condition of planning consent, since it appeared to be merely a requirement of the

architect. In support of the need for an explicit condition in the planning consent Mr Haley referred to the decisions in *Roland Hall* (MAN/08/1037) and *Pollock & Heath* (MAN/06/0622). He distinguished the *Eaton Mews* decision because that was about the retention of the facade, rather than the existence of the permission to retain. The taxpayer had had ample time to provide specific evidence that the retention of the projecting bay was a condition of planning consent, but had not provided any such evidence.

Findings of Fact

36. On the basis of the evidence provided the Tribunal made the following findings of fact:

37. There was no specific reference to the need to retain any part of the projecting bay at 28 Cavendish Drive as part of the planning consent obtained from Harrow Council for the works to be done, either in the narrative description or in the drawings provided.

38. That planning consent was couched in terms of extensions and alterations rather than demolition and new build.

39. As a matter of fact, the property at 28 Cavendish Drive had been virtually demolished save for a small section of the facade, the projecting bay, before being substantially re-built.

40. 28 Cavendish Drive is not in a conservation area although the Canons Park conservation area is to the rear of the property.

Discussion

41. There is no dispute between the parties as to the construction works which were actually carried out at Mr Pearlman's property. The only question is whether, since in substance this amounted to the demolition of the existing building and the construction of a new building, the construction supplies made by Boxmoor should be zero-rated.

42. Before turning to the details of the VAT legislation it is worth noting the general principles of construction applied to the UK's VAT legislation on the basis of the EU law from which it is derived; that exemptions from the obligation to charge VAT should be construed narrowly. The UK's system of zero-rating is a specific exemption from the VAT legislation laid down by the Principal Directive and as such any question as to whether particular supplies fall within that special category should be narrowly construed.

43. The onus of proof in this instance is on Boxmoor to demonstrate that the supply of construction services can properly be treated as a zero–rated supply of a newly built dwelling house.

44. Turning to the terms of the relevant legislation, there is a clear distinction in the VAT legislation between the reconstruction of an existing building and the construction of a new building, with only the latter being within the favourable VAT zero-rating regime. We agree with the Appellant that the test in the VAT legislation is objective and the intention of the supplier is not the relevant test, the test is what has

actually occurred. The photographic evidence which was produced to the Tribunal made it clear that what had actually occurred, despite what was stated in the relevant planning permission, was the almost complete demolition of the existing building and the construction of a new building.

45. However, it is equally clear that a small part of the existing building was retained, as shown in the illustrations and the photographic evidence which the Tribunal saw. It is also clear that this was retained for a reason, as understood by Mr Pearlman and explained by his architect, to ensure that the new building blended in with existing buildings and to ensure that Mr Pearlman's planning consent was not nullified.

46. We have accepted that the definitions of construction and reconstruction in the VAT legislation are objective and we are treating the expansion of those definitions by the Notes to Group 5 in the same way. Note 18 makes it clear that if a facade is retained, it will not stop construction works being treated as the demolition of a building as long as the retention of the facade is a condition of planning consent. We were not provided with any evidence that this was the case for 28 Cavendish Drive; the planning consent made no reference to the retention of the facade. Nor did the plans of the works which we were shown. The only evidence that we have to suggest that the retention of the projecting bay was a condition of the planning consent is the architect's letter of 30 July 2013.

47. Taking a step back, it would be rather surprising if this planning consent had contained any conditions stipulating that some part of the building should be retained, since it was couched in terms not of demolition, but of alteration and extension. It would not have made sense, in that context, to be providing that a particular part of the building should be protected from demolition, since no mention was made in that planning consent of any planned demolition of the whole building.

48. Returning to the need to construe exemptions from VAT restrictively, taking account of the lack of any actual stipulation in the planning consent itself and the fact that any such stipulation would have been counter to the terms of the planning consent, the Tribunal cannot see any basis on which it can deem or infer as a condition of this planning permission that the projecting bay should be retained. At best, the retention of the facade was part of an understanding between the architect and the planning authorities about the limit to the acceptable degree of demolition which would be accepted at the property without contravening a planning consent which was for alterations and extensions not demolition.

49. The Tribunal has taken account of the decisions to which we were referred, in particular the *Eaton Mews* decision on which Mr Owen relied, but have concluded that this can be readily distinguished from the facts under consideration here. We take from that decision that the test to be applied is to establish as a question of fact whether or not there is a condition in the planning consent that the facade of the building should be retained. However, in that case the planning consent was for demolition and the plans attached to the relevant planning permission did refer to the need to retain the party wall despite the demolition of the remainder of the building. There was a positive statement as part of the planning application that the wall needed to be retained. We have not been provided with any evidence that this was the case for the projecting bay at 28 Cavendish Drive.

Conclusion

50. For these reasons the Tribunal has concluded that conditions of Note 18 of Group 5 of Schedule 8 VATA 1994 were not complied with in respect of the construction services supplied by Boxmoor at 28 Cavendish Drive and that while in substance the works might have amounted to the construction of a new dwelling, it was not a construction which fulfilled the conditions for zero-rating.

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.

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 21 August 2014