[2018] UKFTT 128 (TC)

TC06384

Appeal number: TC/2015/06492

VALUE ADDED TAX – whether or not construction costs of new building for sixth form college zero-rated – whether separate building – held yes – if not separate building whether or not qualifying annexe – held yes – appeal allowed – construction costs held to be zero-rated

FIRST-TIER TRIBUNAL
TAX CHAMBER

ST BRENDAN'S SIXTH FORM COLLEGE **Appellant**

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT
SHEILA CHEESMAN

Sitting in public at Taylor House, London on 30 January 2018

Leslie Allen, of Mishcon de Reya, for the Appellant

Jane Ashworth, Officer of HMRC, for the Respondents

DECISION

1. This was an appeal against a decision of HMRC that certain construction works carried out for the appellant ("St Brendan's") were liable for VAT at the standard rate and were not to be zero-rated, as contended by St Brendan's.

2. The original decision was contained in a letter from HMRC dated 15 June 2015. In response to this letter, St Brendan's requested a formal review by HMRC by a letter dated 8 July 2015 and the conclusion of this review, which upheld the original decision, was communicated to St Brendan's by a letter dated 1 October 2015.

3. The construction work in question was the construction of a new block, Building D, at the college, which provided additional teaching space, a café, a staff room and socialisation space for the students, and the question therefore was whether or not this new building qualified for zero-rating under Item 2, Group 5, Sch 8, Value Added Tax Act 1994.

Facts

4. We received a witness statement and oral evidence from Phillip Berry, Assistant Principal of St Brendan's. We found Mr Berry to be a very open, credible and reliable witness and we therefore accept his evidence as factually correct without reservation. Mr Berry also provided a number of photographs of the buildings, which were extremely helpful.

5. The basic facts however are not in dispute between the parties and we find the following as matters of fact:

(1) The new building, Building D, was built 7.1m away from the existing Building C. It was built some years after Building C and was noticeably different from it in terms of its design and materials.

(2) Its purpose was to replace old temporary accommodation and to provide for an expansion of the college to approximately 1,700 students. The teaching activities carried on there include some subjects that were previously taught in the temporary buildings and some that were previously taught in other parts of the college.

(3) The building consists of two floors and has its own entrance at ground level. It also has its own utility supplies in the form of separate gas, water, heating and electrical systems and in particular its own power distribution system.

(4) Mr Berry stated, and we accept, that the main entrance to Building D, ie, the entrance used by the majority of those entering Building D, is via its own ground floor entrance.

(5) The building has toilets, including disabled access toilets on both the ground floor and the first floor.

(6) It has a large flexible space on the ground floor, which contains a café area and sitting areas suitable for both socialising and working.

(7) There are normal generic classrooms on both floors and a specific IT room and a staff room on the first floor.

(8) The new building is linked to the existing Building C by a covered link bridge/walkway at first floor level. This bridge is fully enclosed but it is not heated and has double doors at both ends, into Building C and Building D respectively.

(9) Importantly, Building D does not have a lift for access to its first floor. There is a lift in Building C but this is not suitable for use by wheelchair users and is key operated, and is for the sole use of premises staff. It is not available for use by either students or teachers. The only access to the first floor of Building D for wheelchair users therefore is via a lift in the main college building, Building B, and then via a bridge/walkway which connects Building B to Building C, and then via the link bridge which connects Building C to Building D.

(10) Mr Berry said that the college had one student who used a wheelchair last year and two students this year. In order to cater for those students who use a wheelchair Mr Berry explained that the college organised the timetable such that all lessons in which wheelchair users participated took place on the ground floor of the building.

(11) There were some central college functions, such as the chapel and a Learning Resource Centre which were located in Building B and were not replicated in Building D, but access to library/reference type books was generally via e-books and these could therefore be accessed by computer from all parts of the college.

(12) The doors into classrooms and the doors at either end of the link walkway are not automatic and only open one-way. Wheelchair users therefore require assistance to use these doors. The entrance door on the ground floor of Building D however is automatic, and is therefore suitable for wheelchair users.

Legal Framework

6. The requirements for zero-rating of construction services are set out in the Value Added Tax Act 1994 in s30 and Group 5 of Schedule 8 to that act.

7. Section 30(1) and (2) of VATA state as follows:-

"30(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.

30(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."

8. Item 2 of Group 5 of Schedule 8 states as follows:-

"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; or

(b) any civil engineering work necessary for the development of a permanent park for residential caravans,

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."

9. Note 16 and 17 of Group 5 state:-

"(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.

(17) Note (16)(c) above shall not apply where the whole or a part of an annexe is intended for use solely for a relevant charitable purpose and–

(a) the annexe is capable of functioning independently from the existing building; and

(b) the only access or where there is more than one means of access, the main access to:

(i) the annexe is not via the existing building; and

(ii) the existing building is not via the annexe."

10. Further, Article 22A of the Further and Higher Education Act 1992 provides that:

"A further education corporation shall be a charity (and, in accordance with Schedule 3 to the Charities Act 2011, is an exempt charity for the purposes of that Act) and specifically, under Art 33M, "A sixth form college corporation is a charity … (and, as a result of its inclusion in Schedule 3 to the Charities Act 2011, it is an exempt charity for the purposes of that Act)."

11. We were also referred to a number of cases:

Chelmsford College v HMRC [2013] UKFTT 400 (TC)

Bryan Thomas Macnamara v HMRC [1999] (Decision number 16039)

East Norfolk Sixth Form College v HMRC [2008] (Decision number 20816)

Cantrell v Customs & Excise Commissioners [2000] STC 100

Leyton Sixth Form College v HMRC (TC03042)

12. *Chelmsford College, East Norfolk* and *Leyton*, are very fact specific, and therefore of limited value, but *Macnamara* and *Cantrell* set out broad statements as to how we should approach this appeal and we therefore think it of value to set out those statements at this stage of our judgement.

13. In *Macnamara* at [13] the Tribunal (Stephen Oliver, as he then was) concluded:

"The scheme of the 1994 code is to exclude from the expression "construction of a building" a series of building works. Note (16) deals with these in descending order of their degree of integration with the existing building. Conversions, reconstructions and alterations of existing buildings, the most closely integrated, are excluded. Enlargements of existing buildings are then excluded, the word "enlargement" connoting structural work producing an overall increase in size or capacity. The word "extension" in relation to an existing building refers, we think, to building work which provides an additional section or wing to that existing building; the degree of integration is one stage less than with enlargements. Then come "annexes" which, as a matter of principle, are also excluded. The term annexe connotes something that is adjoined but either not integrated with the existing building or of tenuous integration. Annexes intended for use solely for relevant charitable purposes are re-instated into the zero rated class by Note (17) only if they are capable of functioning independently from the existing building and if both the main access to the annexe is not via the existing building and the main access to the

existing building is not via the annexe. Otherwise all annexes are excluded from zero-rating."

14. 37. In *Cantrell* at [4] Lightman J said:

"The two-stage test for determining whether the works carried out constituted an enlargement, extension or annexe to an existing building is well established. It requires an examination and comparison of the building as it was or (if more than one) the buildings as they were before the works were carried out and the building or buildings as they will be after the works are completed; and the question then to be asked is whether the completed works amount to the enlargement of or the extension or the construction of an annexe to the original building. I must however add a few words regarding how the question is to be approached and answered, for this has been the subject of some lack of clarity (if not confusion) in a number of the authorities cited to me and it is the failure to approach and answer the question in this case in the correct way which flaws the decision. First the question is to be asked as at the date of the supply. It is necessary to examine the pre-existing building or buildings and the building or buildings in course of construction when the supply is made. What is in the course of construction at the date of supply is in any ordinary case (save for example in case of a dramatic change in the plans) the building subsequently constructed. Secondly the answer must be given after an objective examination of the physical characters of the building or buildings at the two points in time, having regard (inter alia) to similarities and differences in appearance, the layout, the uses for which they are physically capable of being put and the functions which they are physically capable of performing. The terms of planning permissions, the motives behind undertaking the works and the intended or subsequent actual uses are irrelevant, save possibly to illuminate the potential for use inherent in the building or buildings."

Submissions

15. For HMRC, Mrs Ashworth, argued that the new building was not a separate building because of the link bridge, which physically connected all the buildings on the site such that they could function as a single entity.

16. She said that the approach to be taken by the tribunal was set out in the cases of *Cantrell* and *Macnamara*, which required us to look at the building at the time of supply, ie, at the time it was built. She agreed however that the other cases referred to, *Chelmsford College*, *East Norfolk* and *Leyton*, although they had been decided in favour of HMRC, were of limited value because they were very fact specific.

17. Mrs Ashworth said that HMRC would not be asking the tribunal to consider whether or not the building was intended to be used solely for a relevant charitable purpose, although she said that there were still some questions to resolve on this point. We found this very unsatisfactory, and indicated to us that perhaps HMRC were

intending to reintroduce this argument at a higher level if necessary. Eventually however Mrs Ashworth accepted that HMRC were not contesting this point.

18. Mrs Ashworth submitted that the new building was not a separate building because of the link bridge. In addition, she argued that because the activities to be carried on in the new building were similar to those carried on elsewhere within the college, then the building was merely an extension of the existing buildings. We did not understand how this proposition fitted with the principles set out in *Cantrell*, to which Mrs Ashworth had referred us, whereby we were encouraged to consider the building at the time of supply, without reference to the subsequent use to which it was put. After further consideration, Mrs Ashworth agreed that she could not refer us to any legislation or case law which indicated that we should look at the subsequent use of the building to decide if it was in fact an extension of the existing buildings.

19. Mrs Ashworth made extensive reference to the Design and Access Statement which had accompanied the planning permission application. This made a number of references to the building being an "extension" of the existing college premises. It also referred to the link bridge and stated that one of its primary aims was to improve circulation around the buildings so that the first floor of all buildings could be accessed without the need to go outside. However, again we noted the words of Lightman J in *Cantrell* where he stated:

> "The terms of planning permissions, the motives behind undertaking the works and the intended or subsequent actual uses are irrelevant, save possibly to illuminate the potential for use inherent in the building or buildings."

20. Importantly, Mrs Ashworth encouraged us to look at all the buildings on the site as a whole, on which basis the new building could be seen as merely an extension or enlargement of the existing buildings. However, we found no basis for this approach either in the legislation or in the case law to which we were referred.

21. Mrs Ashworth then went on to consider whether or not the building would qualify for zero-rating under the provisions relating to annexes. In this context she referred to Note 17 to Group 5, as set out above, and argued that:

> (1) Given the various statements made in the Design and Access Statement, the main access was designed to be via the link bridge. It was also the only access to the first floor of the building for wheelchair users. However, following the evidence of Mr Berry set out above, she accepted that the ground floor access was in fact the main entrance to the building.
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> (2) The building was not capable of functioning independently because, when viewed as a separate building, it was not compliant with the Disability Discrimination legislation, because wheelchair users could not access the first floor of the building.

22. For St Brendan's, Mr Allen submitted that the new building was separate from Building C and totally self-contained, set at a distance of 7.1m from the next nearest

building, and having its own plant room, power supply, water supply, heating system, drainage, etc. He said that it also had its own kitchen facilities and toilets, including disabled access toilets, on both floors.

23. Mr Allen also said that the building was of a different type to its neighbours, in that its materials, design and function were not the same. Different academic subjects were taught in the new building, and it had a café and a social area. There was consequently very little movement between Buildings C and D.

24. He explained that the building had its own main access, on the ground floor, thus complying with the access requirements of Note 17.

25. As regards the issue as to whether or not the building was, on its own, compliant with the requirements of the Disability Discrimination legislation, he said that the main entrance to the building is accessible by a ramp and has automatic doors. In addition, he said that the college had taken great care to ensure that disabled students were appropriately accommodated, in that timetables were designed to ensure that all disabled students were taught exclusively on the ground floor of the building.

26. Importantly, Mr Allen said that to argue that the building could not function independently because, on its own, it did not provide access for wheelchair users to the first floor, as HMRC had done, was to take this point too far. The fact that one or two students per year would not be able to access the first floor of the building was not in his view sufficient to render it incapable of functioning independently.

Discussion

27. The first question we must answer is whether or not the new building falls within the words of Note 16 to Group 5 as being:

> "(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."

28. The only issue between the parties on this point is whether or not the existence of the link bridge between Buildings C and D means that the new building must be regarded as an extension or an enlargement of or an annexe to the existing Building C.

29. In *Macnamara*, a decision which is agreed by both parties as being very helpful, but which is not binding on us, the tribunal concluded:

> "The scheme of the 1994 code is to exclude from the expression "construction of a building" a series of building works. Note (16) deals with these in descending order of their degree of integration with the existing building.

Conversions, reconstructions and alterations of existing buildings, the most closely integrated, are excluded. Enlargements of existing buildings are then excluded, the word "enlargement" connoting structural work producing an overall increase in size or capacity. The word "extension" in relation to an existing building refers, we think, to building work which provides an additional section or wing to that existing building; the degree of integration is one stage less than with enlargements. Then come "annexes" which, as a matter of principle, are also excluded. The term annexe connotes something that is adjoined but either not integrated with the existing building or of tenuous integration. Annexes intended for use solely for relevant charitable purposes are re-instated into the zero rated class by Note (17) only if they are capable of functioning independently from the existing building and if both the main access to the annexe is not via the existing building and the main access to the existing building is not via the annexe. Otherwise all annexes are excluded from zero-rating."

30. It is common ground between the parties that Building D is not an enlargement or an extension of the existing buildings. The question as to whether or not it constitutes an annexe is however more difficult.

31. The tribunal in *Macnamara* suggests that the term annexe connotes something that is adjoined but either not integrated with the existing building or of tenuous integration. With due respect to the tribunal in that case, we are not sure that we share this analysis in all respects. In our view an annexe, in the conventional meaning of the word, means a building which is (usually, but not necessarily) physically connected to an existing building, and performs a specific subsidiary function to the main building. Looking at the new building as a whole, but in the context of the other buildings already on the site, we do not consider that the existence of this link bridge, on its own, is sufficient connection with the main building to mean that Building D is not a separate building. In our view it is a separate building.

32. If this interpretation is correct then the construction works in question fall to be treated as zero-rated under Item 2 of Group 5 of Schedule 8 without any further consideration. However, for completeness, we should also consider, if we are wrong on this point, whether or not the building still qualifies for zero-rating as an annexe, in accordance with Note 17 to Group 5.

33. Note 17 sets out two tests to be fulfilled:

"Note (16)(c) above shall not apply where the whole or a part of an annexe is intended for use solely for a relevant charitable purpose and–

(a) the annexe is capable of functioning independently from the existing building; and

(b) the only access or where there is more than one means of access, the main access to:

(i) the annexe is not via the existing building; and

(ii) the existing building is not via the annexe."

34. It is clear from the evidence presented to us, including photographs, that although there are two means of access to the building, the main access to Building D is via its own ground floor entrance doors. We believe that this is now accepted by HMRC. It is equally clear that this is not the main access to Building C. This therefore fulfils the two-part condition set out in (b) above.

35. Condition (a) is the condition being challenged by HMRC. They argue that because the building on its own does not provide access to the first floor for wheelchair users then Building D cannot function independently from the existing building. They say that in the absence of the link bridge Building D does not fulfil the requirements of the Disability Discrimination legislation.

36. We have two problems with this argument.

37. Firstly, to say that the building is not capable of functioning independently because it does not provide access to the first floor for the limited number of students who use a wheelchair seems to us to be taking this point way beyond any sensible approach. This lack of access for a very small number of students cannot we consider disqualify this building from being able to function independently.

38. The cases of *Chelmsford* and *East Norfolk*, whilst being very fact specific, and therefore of limited direct relevance, do provide a helpful guide as to what sort of issues might be considered sufficiently serious as to render a building incapable of functioning independently.

39. In *Chelmsford* the new building did not have its own independent heating system and the tribunal therefore considered that the building could not function independently. Interestingly, VAT Notice 708 suggests that, in spite of the decision in *Chelmsford*, "An annexe is capable of functioning independently when the activities in the annexe can be carried on without reliance on the existing building. **You can ignore the existence of building services (electricity and water supplies) that are shared with the existing building** (Our emphasis added)." It would seem therefore that HMRC themselves believe that reliance on the power systems of another building should not disqualify an annexe from being considered as able to function independently. This seems a somewhat more serious lack of independence than a lack of access to the first floor for wheelchair users, and is therefore in our view at odds with their arguments in the current case.

40. In *East Norfolk* the new building did not have any toilet facilities, and we agree with the tribunal in that case that this was a major impediment to its ability to function independently as an annexe to an education institute. Again we consider this to be on a very different scale to the lack of access to the first floor for wheelchair users.

41. We therefore need to look at the requirements of the Disability Discrimination legislation. Unfortunately, and somewhat surprisingly, at the hearing, in spite of the very obvious importance of this issue to our decision, neither party had prepared any submissions on the implications and effect of the Disability Discrimination legislation. We therefore requested subsequent written submissions from both parties.

42. The legislation in question was originally contained in the Disability Discrimination Act 1995. This was repealed and its provisions incorporated into the Equality Act 2010. Section 20 of that act introduces a duty on the person or organisation responsible for operating the premises in question to make 'reasonable adjustments' where a provision is putting a person at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled.

43. Section 20(1) to (5) provide as follows:

> "(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
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> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."

44. It is clear that the structure of the Equality Act 2010 is to impose a duty on the persons or organisation which operates the building in question. We note that the further submissions from HMRC indicate that they share this view of the structure of the Equality Act.

45. Importantly therefore, the Equality Act does not impose obligations on the building as such, as might be the case with Fire Regulations. It imposes obligations on the college, who have explained how they organise lessons to cater for the fact that the building does not have its own access to the first floor for wheelchair users. We do not therefore consider that the inability of wheelchair users to access the first floor

of Building D in the absence of the link bridge disqualifies it from being able to function independently.

46. We therefore find that if we are wrong as to whether or not the new building is a separate building, it still qualifies for zero-rating in accordance with Note 17 to Group 5 of Schedule 8 VATA 1994 as a qualifying annexe.

Decision

47. For the above reasons therefore we have decided that the appellant's appeal should be ALLOWED.

48. 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.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 8 MARCH 2018