Neutral Citation: [2022] UKFTT 201 (TC)

Case Number: TC08526

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/03157

VALUE ADDED TAX - Building work - Redevelopment of a large detached house in a conservation area - Whether redevelopment was lawful? - Yes - Substantial but not complete demolition of the existing dwelling and construction of a new dwelling on site - VATA Sch 8 Group 5 Note (18) - Whether the 'existing building' had continued to subsist for the purposes of zero-rating - Yes - Appeal in that regard dismissed - Whether HMRC had made an appealable decision about the chargeability to VAT? - Yes - Whether the conditions in Schedule 7A were met? - On the available evidence, yes - Appeal in that regard allowed.

Heard on: 23 June 2022
Judgment date: 27 June 2022

Before

TRIBUNAL JUDGE CHRISTOPHER MCNALL

Between

NORTHCHURCH HOMES LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Peter Gilmour, of counsel, instructed by Rradar Limited

For the Respondents: Ms Olivia Donovan, a litigator of HM Revenue and Customs' Solicitor's Office.

DECISION

SUMMARY

1. For the reasons set out more fully below, I have decided to dismiss the appeal in part and allow the appeal in part.

2. I have concluded that the works carried out do not amount to the "construction of a building" within the meaning of section 35(1)(a) of the Value Added Tax Act 1994 ('**VATA 1994**') because the original building did not cease to be an existing building within the proper meaning and effect of VATA 1994 Schedule 8 Group 5 Note 18(b). That is because the works did not involve complete demolition of the building. What was retained was, as a matter of fact, and for several reasons, more than 'a single facade'. Accordingly, the supply of the service to the Appellant was not zero-rated.

3. But I have allowed the appeal in relation to the Appellant's subsidiary argument, where it relies on the provisions of Group 7 of Schedule 7A to argue that the supply should have been reduced-rated. HMRC had made an appealable decision about the chargeability to tax, giving the Tribunal jurisdiction to consider the issue, and the works were, on the available evidence, subject to reduced-rate VAT.

INTRODUCTION

4. Petts Wood is an attractive so-called 'garden suburb' in the London Borough of Bromley. It was designed and built in the 1930s, in the so-called 'Tudorbethan' style, by Noel Rees, a follower of C F A Voysey. Many of the houses are typically 'Voysean' - white-rendered with gables, usually half-timbered, leaded bay-windows, sweeping (usually red-tiled) roofs, and distinctive semi-circular porch arches. Petts Wood Road and the surrounding roads, with their distinct character and appearance, were designated a conservation area by the Local Planning Authority.

5. The Appellant is a builder which contracted to implement a substantial programme of redevelopment works to one such house ('the Property') on Wood Ride, off Petts Wood Road. The Appellant builder engaged a sub-contractor, Sword Logistics Limited ('Sword'). Sword invoiced the Appellant for VAT on its services at standard-rate. The Appellant appeals on the basis that the supply to it was either zero-rated, or, if not zero-rated, reduced-rate.

6. The Property - a fine example of the Voysean style - was originally a detached two-storey house with a one-storey later extension.

7. After a protracted planning process, permission was given by the Local Planning Authority for extremely significant works to be done. Pursuant to permission, works were done. Those involved (in summary) demolition of the entire property as it then stood, except for the facade, the front slope of the roof, and certain other structural and decorative elements, the excavation of a large basement, and the construction of a new, significantly expanded, dwelling, tying into the preserved elements. The project was large and complex.

RELEVANT LEGISLATION - ZERO-RATING

8. Section 35 of VATA 1994 provides:

> "35 Refund of VAT to persons constructing certain buildings
>
> (1) Where –
> (a) a person carries out works to which this section applies,
> (b) his carrying out of the works is lawful and otherwise than in the course or furtherance of any business, and

(c) VAT is chargeable on the supply, acquisition or importation of any goods used by him for the purposes of the works,
the Commissioners shall, on a claim made in that behalf, refund to that person the amount of VAT so chargeable.

(1A) The works to which this section applies are –

(a) the construction of a building designed as a dwelling…"

9. By virtue of s96(9) VATA 1994, Schedule 8 of the VATA 1994 must be interpreted in accordance with its notes. Section 35(4) provides that the notes to Group 5 (Construction of buildings etc) of Schedule 8 apply for construing section 35 as they apply for construing that Group.

10. Notes 2, 16 and 18 to Group 5 of Schedule 8 are 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.

[…]

(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 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."

LATE APPLICATION

11. HMRC's review conclusion is dated 5 June 2020, and the Notice of Appeal is dated 20 August 2020. But the review is not directed to the taxpayer, but to Sword, which did not forward the same to the taxpayer until 29 June 2020. The Notice of Appeal, although late, was filed with reasonable expedition.

12. The appeal (in my view, sensibly) was conducted on the footing that the Notice of Appeal had been filed timeously. Insofar as any extension of time is called for, I extend time accordingly.

RELEVANT FACTS

13. I make the following findings of fact based on the evidence before me. Additional findings are contained in the Discussion.

14. Mr Rockall (and his wife) bought the Property on 1 July 2013. They wanted to turn it into a 'dream home'.

15. In pursuance of that ambition, there followed a lengthy planning history:

(1) On 4 February 2016, an application for planning permission for alterations and extension was made in relation to the Property ('the First Application'). The stated aim of the proposal was "to construct a part one/part two storey side and rear extensions to create additional living accommodation for the occupants and an updated and improved internal layout." Although the written application does not make this clear, the accompanying plans show that the proposal was to remove (ie, demolish) the vast majority of the Property as it then stood, retaining only a few of the original walls at ground and first floor levels. Amongst these were the ground floor bay, and the gable. But other walls and sections of walls were to be retained as well;

(2) On 4 April 2016, the Local Planning Authority (Bromley) gave full permission, on the basis (amongst other things), set out in Condition 3 ("Condition 3"), that the development was "not to be carried out otherwise than in complete accordance with the plans approved under this planning permission unless previously agreed in writing by the Local Planning Authority." ('the First Permission');

(3) Mr Rockall's planners themselves characterised the First Application, in my view correctly, as "wholesale extensions";

(4) In August 2016, a revised planning application was made. What were described as "serious concerns relating to the structural integrity of the elements originally proposed to be retained" had come to light (in essence, the need to support the retained parts during the demolition works before being tied back in to the new elements) and the revised application instead sought "to demolish the existing dwelling *in its entirety* and erect a replacement dwelling of the same design, scale and footprint to match the existing approval entirety" (emphasis added by me). The stated aim of the proposal was "to formalise planning consent for a replacement dwelling as opposed to wholesale extensions as approved" ('the Second Application');

(5) The Second Application, entailing complete demolition, was not pursued;

(6) On 31 May 2017, an application was made, under section 73 of the Town and Country Planning Act 1990, for what were described as 'minor material amendments' to the First Permission, and for permission to vary Condition 3 so as to build in accordance with revised plans: 'the Application to Vary'. The principal amendment was the proposed addition of a basement area below part of the ground floor, to contain a gym, games room, additional storage space and a shower room;

(7) The planning department asked for details as to how "the front elevation and part flank return walls together with a section of the front roof" were to be protected and retained during excavation. A Structural Assessment was provided in September 2017;

(8) On 31 October 2017, the Application to Vary was refused by the Local Planning Authority. Although the refusal stated that "the part demolition of the dwelling would

detract from the character of the Conservation Area", the principle of demolition had already been approved of by the First Permission. The refusal of the Application to Vary was appealed to the Planning Inspectorate (Inspector Mr Poole), which dismissed the appeal on 1 May 2018;

(9) In December 2017, a non-material amendment was approved. For present purposes, the only relevant feature was that the rear wall of the ground floor dining room was no longer to be retained. But other non-front walls remained as retained, including interior walls and sections of some other walls;

(10) In May 2018, a further non-material amendment was applied for, including for a basement ('the Second Application to Vary');

(11) On 15 June 2018, the local planner wrote, asked for, and received confirmation that 'the front facade and roof slope are to be retained as per [the First Permission]';

(12) On 16 July 2018, the Local Planning Authority refused the Second Application to Vary. The Second Application to Vary was appealed to the Planning Inspectorate, and, on 20 December 2018, the Inspector (Ms Pleasant) allowed the appeal, on pre-commencement conditions including a structural engineer's report as to securing and retaining the existing front facade and the roof slope during the construction phase.

16. The overall planning process took from February 2016 to December 2018.

17. Development could not commence until the second appeal was allowed and the pre-commencement conditions discharged.

18. Mr Rockall (through a company, Heniam Ltd) engaged the appellant, which in turn engaged Sword as a subcontractor to undertake works including underpinning, the excavation and construction of a basement and foundations.

19. Substantial works were carried out at the Property, including the demolition of most of the interior. Those are well shown on the photographs at pages 286-287 and 553-554 of the bundle.

20. In January 2020, Sword invoiced the appellant for VAT in the sum of £84,113.43 (latterly adjusted to £83,691.52).

21. At some date before 6 February 2020, Sword was in correspondence with HMRC and intimated that its services should attract VAT at the reduced rate of 5% because the Property had not been lived in for 2 years prior to the start of work. HMRC requested documentation to support this, but Sword then responded suggesting that the work should instead be zero-rated.

22. On 30 March 2020, HMRC wrote to Sword advising it that should have charged VAT at the standard-rate on its supply to the Appellant, and advising it that HMRC intended to make adjustments to Sword's 10/19 and 01/20 VAT returns.

23. By way of a review conclusion letter dated 5 June 2020, addressed to Sword, HMRC upheld its decision as to the rating of the VAT on Sword's supply.

24. Sword provided the taxpayer with a redacted copy of the review conclusion letter on or about 29 July 2020. The Notice of Appeal (supported with substantive Grounds of Appeal settled by Counsel and dated 18 August 2020) was filed on 20 August 2020.

DISCUSSION

Burden and standard of proof

25. The taxpayer bears the burden of showing the appropriate rating. The standard of proof is the usual civil standard, ie the balance of probabilities.

Standing to bring the appeal

26. I am satisfied (and it is not in dispute) that the Appellant, as the recipient of the supply, has standing to appeal against HMRC's ruling as to the appropriate rate of VAT.

Lawfulness

27. The first element of HMRC's argument was that the works were prima facie incapable of qualifying for zero-rating on the basis that the condition as to lawful development set out in VATA section 35(1)(b) was not met.

28. I reject this argument. For the purposes of this appeal (and without any of my findings intended to bind the planning authorities) I am satisfied that the works as carried out (i) were in accordance with the planning permission granted and (ii) did not represent any breach of planning control. The point was put to Mr Rockall in cross-examination. His denial was emphatic and, in my view, entirely genuine, and I accept it. But my conclusion need not repose simply on his denial. In my view, Mr Rockall was correct, as is apparent from a proper reading of the permissions, and a proper understanding of the (admittedly, convoluted) planning process which gave rise to the development.

29. HMRC's argument in part flowed from an assertion that there was no express condition permitting demolition. In my view, this flowed from a misunderstanding as to the planning documents. Demolition "to rear of building" was authorised (albeit to be done by hand "to minimise impact on retained element").

30. But, and even if there had been no express authorisation of demolition, I do not consider this to be a touchstone of lawfulness for the purposes of zero-rating. Ms Donovan was unable to direct me to any principle of planning law or recorded decision which requires such an express condition. Moreover, implementation of the permission - ie, the permitted development - in this instance would simply have been impossible without the demolition of most of the then-existing structure. The approved plans make this clear, showing the outline of 'ghosted out' walls (ie, the footprint of a large part of the original building) all of which are identified in the same way (eg with dots), and some of which are labelled as 'wall to be removed'. In my view, the permission and the plans, read in the usual common-sense way (see *Lambeth LBC v Secretary of State for Housing* [2019] UKSC 33; *Trump v Scottish Ministers* [2015] UKSC 74) authorised the works of demolition which were in fact undertaken. Once permission had been granted for the works, then the permission remained extant (subject to the pre-commencement conditions). In the planning history of this Property, the subsequent decisions (including on appeal) in relation to minor material amendments did not entail any need to reconsider the scope of the original permission.

31. Moreover, and even if the foregoing were entirely wrong, there is no simply evidence that the works were anything other than 'lawful' in circumstances where it is reasonable to suppose that objections would otherwise have emerged quickly and loudly. There had been significant opposition - both from local politicians and the owners and occupiers of neighbouring properties - to the development. Bromley had itself refused permission to build the basement.

32. Nothing was concealed. These were significant works, done to a prominent property, in a prominent location, in a Conservation Area. The local planning authority was aware of the works and I accept the evidence that its officers visited the site on several occasions when the works were underway. The permission and the accompanying plans were all matters of public record. I agree with Mr Gilmour that, if there had been no permission to demolish those parts of the Property which were demolished. it is inconceivable that local planning authority would have stayed silent and taken no action.

Facade

33. Note 18(a) refers to a building ceasing to be a building "when demolished completely to ground level." The Property was not demolished to ground level. Hence, it is not in dispute that the only part of Note 18 which is directly relevant is 18(b). As such, the existing building would have ceased to be an existing building when "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".

34. In *HMRC v J3 Building Solutions Ltd* [2017] UKUT 0253 (TCC) the Upper Tribunal (Mann J and Judge Colin Bishopp CP) gave helpful (and binding) guidance as to the correct approach to Note 18. I have considered that guidance.

35. Reading 18(a) and 18(b) as part of the same mini-scheme, the intent is clear. A building ceases to be an existing building if entirely demolished (the core case: 18(a)), or (an exception to the core case) where "no more than a single facade or where a corner site a double facade" remains: 18(b).

36. The first issue must be whether there is "no more than a single facade". If there is more than a single facade, then Note 18(b) cannot be met, regardless of any issue as to consent or lawfulness.

37. This is not a case in which it was argued (or realistically arguable) that there was a double facade. Although the property is on a curve in the road, this is not a corner site - ie, it is not a site on a corner. The curve in the road is not a corner.

38. Note 18(b) is an exemption. Mr Gilmour invites me to bear in mind the cautionary remarks of the Court of Appeal in *Expert Witness Institute v Customs and Excise Commissioners* [2001] EWCA Civ 1882; [2002] 1 WLR 1674 at Para [17] (Chadwick LJ, with whom Longmore LJ and Harrison J agreed) (subsequently approved by the Court of Appeal (Longmore, Etherton and Pitchford LJJ) in *HMRC v Insurancewide.com Services Ltd* [2010] EWCA Civ 422) at Para [83]) and the guidance (binding on me) that, even if an exemption has to be construed strictly, I do not have to give it the most restricted or narrow meaning it can, but should give it a meaning which it can fairly and properly bear in the context in which it is used. Here, the context is whether the preferential VAT treatment (zero-rating) applied to new-builds should be extended to cases where an existing property has been demolished, but not entirely.

39. According to the Oxford English Dictionary, the principal meaning of facade is "The face or front of a building towards a street or other open place, especially the principal front."

40. Although perhaps tempting, I do not need to consider hypotheticals or other buildings (such as the Sydney Opera House). I must simply go on the basis of what happened with this building, in this case. As with many statutory tests, the application of which ends up turning on the facts, there may well be difficult or borderline cases. But this is not one of them.

41. In my view, and even adopting the *Expert Witness Institute* approach, what remained of the Property as it stood on the eve of development could not fairly be said to be "no more than a single facade". Hence, the development was not within Note 18(b).

42. Although the front facade was retained, it was far from the only thing retained. The entire front slope of the roof (being the spars, rafters and battens, up to the ridge line) including both sides and the ridge above each of the large front gable and a smaller side gable, were all retained. This was not described in any of the planning documents as "the facade", but was described (correctly) as "the roof" - because that is what it was.

43. I do not consider that the facade of this Property included, whether as a matter of fact, or a matter of law, the roof slope. I accept Ms Donovan's submission that the facade and the roof are not the same. As a matter of ordinary language, they are two different structures; they have different names; they are made of different materials; they have different aspects (ie, the facade is perpendicular to the ground, the roof is not) - in that sense, the facade is the thing which *faces* the street but the roof does not *face* the street, despite being visible from the street. This is consistent with the description of the planning authority's planner treating 'the front facade' and the 'roof slope' separately (and, in my view, correctly) in her email of 15 June 2018. Something does not become a facade, or part of the facade, simply because it can be seen by passers-by or approaching visitors.

44. The above conclusion is sufficient, in and of itself, to dispose of the Appellant's argument that the development falls within Note 18(b) and should be zero-rated.

45. As a cross-check, I cannot accept Mr Gilmour's ambitious argument, albeit attractively put, that the roof, in this case, could properly be described as part of the facade, being (in effect) something which faces the viewer. The roof does not, in my view, face the viewer: it faces the sky. A line drawn perpendicular from the roof slope does not face the road.

46. Nor do I consider that the roof should be considered part and parcel of of the architectural composition of the building treated as a whole. This argument fails on the application of ordinary language. The reasonable man, looking from the front, would have said that what had been retained included two things - both the facade and the roof.

47. This was not a new-build. In the round, this was an extensive building project preserving significant structural aspects of the old house.

48. Even if my conclusion that the roof is not part of the facade were wrong, it is nonetheless the case that the facade (even if, and I were mistaken, including the roof) was not the only part of the existing building which was retained, so Note 18(b) could not be met for that reason either.

49. In order to be lawful, and compliant with conditions, the building had to be developed in accordance with the plans. There is a useful plan at page 550 of the bundle. It shows the walls which were to be removed ('ghosted out' on the plan) and the walls and other structural features which were to remain. Focussing on the latter, and moving from west to east, there were four internal walls, orientated north-south, which were to remain - in the drawing room; the internal porch; and the dining room.

50. The former of these is shown on the photograph at page 554. It was originally an external side/flank wall of the property. It was taken back, through its entire height, to a length of about 6 feet (to a spray-painted vertical line marked 'keep'). I accept Mr Rockall's evidence that, as the blockwork was built up at the front of the property, the side wall would then be taken back still further, to a line marked about 2 feet from the corner: see the photograph at page 288 of the bundle (taken later, and showing the blockwork built up to first floor level). The intention - consistently with the plans - was to remove most of the length of this flank wall once the external walls had reached roof plate level.

51. Had there been no roof (or, if the roof were properly part of the facade), and had the matter been simply the retention of this single flank wall, during building works, for the purposes of support and buttressing of the facade, with it being taken down to a short length once the adjacent blockwork was done, then this might have been an instance where a case could have been made that what had happened was within Note 18(b), read generously.

52. But this is not such a case. The other three walls were retained, throughout the entire two storey height of the building, and to a depth of (at least) several feet: see the plan at page 550.

53. In his oral evidence, Mr Rockall said that all these were later removed, but I reject that evidence. I do not consider that he was trying to mislead me. He was simply mistaken. Those walls cannot in fact have been retained, because then the development would not have been in accordance with the plans, and would have been unlawful, and there would have been no entitlement to zero rating at all.

54. In terms of the dining room, not only the entire front wall (which I accept is facade), but also about 2/3rds of each of the west and east walls (the retained portions being, at a best estimate scaled from the plans, each about 3 metres in length) remained.

55. Retention in the dining room also included the handsome period brick-built fireplace and chimney-breast (shown in the photograph at page 520). The photograph at page 554 shows this whole element in situ, boxed in, and supported, during the project. That is to say, it was not deconstructed and then reconstructed. That photograph also shows the first-floor chimney-breast (although the plans are not clear whether that was retained: but part of the permission to be implemented including reinstatement of the chimney stack above - presumably to make the fire operational again. A flue would have been needed).

56. In reality, almost the whole of the non-facade structure of the dining-room, as originally built, was retained and was not demolished. The interior walls and the fireplace and chimney breast are not part of the facade. They remained in situ after construction and now form an integral part of the property, as developed.

57. Retention of these, non-facade, parts of the old building is consistent with what I was told about the Local Planning Authority's unfavourable treatment of the Second Application, which contemplated the demolition of the entirety of the old house. The LPA had indicated that it was not prepared to approve such a scheme (which, if implemented, would then likely have engaged Note 18(a)) even on the basis that the facade to be demolished was to be reinstated with identical appearance afterwards. The local planning authority was clearly placing a high premium on retention of elements, as built, of the original structure, using the original materials.

THE TAILPIECE OF NOTE 18

58. I am satisfied that there was a condition stipulating for retention of the facade. This is Condition 4 of the LPA's delegated decision at page 271 of the bundle:

> "No development shall take place until an engineer's report has been submitted to and approved in writing by the local planning authority. The report shall provide suitable structural methods and designs to be undertaken to secure and retain the existing front facade and front roof slope of the building throughout the construction phase...."

59. Even if that were not so, HMRC's own guidance (see VAT Notice 708 Para 3.2.4) says that, in the absence of a condition for retention of a facade within the planning consent letter, "HMRC will also accept evidence that the planning authorities have seen an application with plans showing that a facade is to be retained and that approval has been granted for construction to proceed on that basis". On the facts, that is met in this case.

CONCLUSION ON ZERO-RATING

60. The works done were not within Note 18(b) and therefore were not zero-rated. The appeal in that regard must be dismissed.

THE SUBSIDIARY ARGUMENT: CHARGE AT REDUCED RATE - SCHEDULE 7A

61. The Appellant's subsidiary argument is that, even if Sword's supply were not zero-rated, the supply should nonetheless be treated as subject to the reduced rate of VAT (5%) regime provided for by Schedule 7A Group 7 (Renovations and alteration of dwellings), being (in

summary) the supply, in the course of the renovation or alteration of qualifying residential premises (a single household dwelling) of qualifying services (being the carrying out of works to the fabric of the premises) related to the renovation or alteration, where the premises meet the 'empty home' condition - that is, they had not been lived in for a period of 2 years ending with the commencement of the relevant works.

62. HMRC's sole argument in response is that no decision has been made in relation to reduced-rating and therefore, in the absence of an appealable decision in relation to "the VAT chargeable on the supply of any goods or services" (VATA section 83(1)(b)) then the Tribunal has no jurisdiction, and, if not exercising power to transfer to another tribunal (which it is not said is a course of action open to me here), the appeal in relation to Schedule 7A and reduced-rating would have to be struck out: Rule 8(2).

63. Mr Gilmour invites me to consider the decision of the Upper Tribunal (Judges Roger Berner and Timothy Herrington) in *HMRC v SDI (Brook EU) Limited and another* [2017] UKUT 0327 (TCC). There, the Upper Tribunal remarked (at Para [47]), in relation to section 83(1)(b):

> "It is clear that appeals are not confined to cases where HMRC have decided the precise amount of VAT to be charged. Cases may proceed on questions of principle which are related to the chargeability of VAT, such as questions as to the nature of a particular class of supply and whether those supplies are standard-rated, exempt or zero-rate. Section 83(1)(b) therefore cannot be construed narrowly; it must be construed broadly so as to encompass any issue between a taxpayer and HMRC, in respect of which HMRC has made a decision, which is material to the chargeability of the taxpayer to VAT".

64. At Paragraph [52], they added:

> "It is not necessary, in our judgment, that HMRC should have definitively determined that the place of supply is or is not in the UK before the FTT's jurisdiction can arise. Section 83 does not require that all questions relevant to chargeability should have been determined before an appeal will lie to the Tribunal. An appeal may be made against a decision on a substantive element which goes to chargeability that is capable of being determined without reference to other elements. That is particularly the case where the determination of an appeal of that particular element is capable, depending on the outcome, of being determinative of that whole question of chargeability"

65. HMRC directed a decision to its sub-contractor, Sword. I have not seen that decision. All I know is that it was made by an Officer Pletts, at some date before 5 June 2020. As to the review, all I have seen is a redacted review letter. But "the point at issue" is unredacted, and is "whether the sloping roof forms part of the facade and whether the supplies should be zero-rated or standard-rated". Here, 'standard-rated' refers to standard rate. The letter does not refer to the reduced rate, and the letter itself contains no discussion of Schedule 7A.

66. HMRC's letter to the present taxpayer, dated 30 March 2020, referred to in Paragraph 12 of HMRC's Statement of Case is described as 'advising [the taxpayer] that HMRC intended to make adjustments to [the taxpayer's] 10/19 and 01/20 VAT returns because supplies for construction services at Wood Ride had been incorrectly charged at a zero rate and should have been charged at a standard rate'.

67. In my view, on the evidence available to me, HMRC did make a decision about zero-rating - the works did not qualify - but did not make any decision as to reduced-rating.

68. Applying the above guidance (which is binding on me) HMRC has made a decision "which is material to the chargeability of the taxpayer to VAT". The Notice of Appeal identifies the dispute as being one about "the rate of VAT chargeable on the work of our subcontractor", and the secondary submission set out in the Grounds of Appeal was that the work should be reduced-rated. Indeed, that seems to have been the original basis upon which Sword was corresponding with HMRC, before its change of tack in early 2020 to argue for zero-rating.

69. The substance of HMRC's decision was that the supply was not zero-rated. The taxpayer is entitled to challenge that decision (as it has), but, having lost on the point, the issue does not remain in limbo. Given that the chargeability to VAT was in issue, the situation here is exactly the one described in SDI: it is a question "as to the nature of a particular class of supply and whether those supplies are standard-rated, exempt or zero-rate".

70. I am entitled to consider the correct rating if there is sufficient evidence before me to permit me to determine the issue. I am not bound to find that, if the rating was not zero-rating, then it should be standard-rating.

71. In this case, there is sufficient evidence before me. Principally, this is the written evidence of the homeowner, Mr Rockall, filed and served in support of the appeal, and supported with a Statement of Truth. He states that the Property had been unoccupied between 1 July 2013 (the date of Mr Rockall's purchase) and 27 May 2021 (when the works were finally signed off by the approved Building Inspector), except for a period 28 July 2015 to 20 February 2017 when it was occupied by Mr Rockall's brother-in-law, Mr Prendergast (who then moved out, and entered into a tenancy of another property, which I have seen). The redevelopment works commenced on 3 June 2019. Hence, the best evidence is that the building was unoccupied for over two years before 3 June 2019. Although I afforded Ms Donovan the opportunity to do so, that evidence was not challenged by way of cross-examination. I accept Mr Rockall's evidence. The empty house condition was satisfied.

72. Having chosen to pin its colours to the mast with the sole argument that there was no decision, HMRC did not advance any other argument, either in writing or orally, as to why (if its primary argument were to fail) Schedule 7A would not apply. On the face of it, the empty house condition being satisfied, it seems to me that the other conditions in Schedule 7A are also met.

73. The supply by Sword to the Appellant therefore qualified for reduced-rating.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

74. 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.

Dr Christopher McNall
TRIBUNAL JUDGE

Release date: 28 JUNE 2022