



TC01310

Appeal number TC/2009/16027

VAT – Repairs and renovations to a weir – whether a weir is a building for the purpose of zero rating of works carried out on a protected building - definition of building.

FIRST-TIER TRIBUNAL

TAX

CALVER WEIR RESTORATION PROJECT

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: WDF COVERDALE (TRIBUNAL JUDGE)
MR R FREESTON**

Sitting in public in Manchester on 29th October 2010

Mr GD Thornton (Project Manager) for the Appellant

Mr J Boddy of the Solicitor's office of HM Revenue and Customs for the Respondents

DECISION

1. Calver Weir was built on the River Derwent in the late eighteenth century as an intrinsic component of a cotton mill. The other principal elements are the mill and a “goyt” which transported water from the weir to the wheel house in the mill. The weir is constructed of locally quarried carboniferous gritstone.
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2. The mill and the weir are both listed (grade II) buildings of special architectural or historic interest under Section 54 of the Town and Country Planning Act 1971. Calver Weir itself is a scheduled monument (Number 35628) on the list of English Heritage.
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3. In the mid twentieth century a section of the weir stone work was removed and replaced with concrete. This occurred many years before the weir was listed in 1967.
4. The Appellant is a company limited by guarantee and is registered as a charity under Number 1108048. The company is the legal owner of Calver Weir. It does not trade, nor is it registered for VAT.
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5. The Appellant company is represented by and its case is presented by Mr G Thornton who was the Project Manager over the design and construction of the restoration of Calver Weir. Mr Thornton has attended the Tribunal on behalf of the appellant and indeed has prepared a considerable volume of documentation which has been done to a high standard and illustrates very clearly, and interestingly, the nature of this project and the work that has been done.
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6. In late 2009 the Appellant restored the weir from its deteriorating state. It had broken down very badly, the concrete was an ugly and inappropriate material and the general state of the weir was clearly a cause of great concern to the local community and those who have dedicated themselves to this restoration project.
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7. The work was completed in July 2010. The concrete was partly replaced with new carboniferous gritstone, thus returning the weir to its original construction. Also a reinforced concrete fish pass was constructed through the weir (this being a “new build”).
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8. The Appellant had contacted the respondents in March 2003 to seek guidance on approved alterations to a protected building and was referred to Section 9 of the Respondents Public Notice 708. In March 2004 the Appellant enquired as to whether repairs to the weir could be zero rated for VAT purposes and was informed that they would be standard rated.
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9. By letter dated 10th September 2007 the Appellant told the Respondents about the 1950s work replacing stonework with concrete and confirmed that it was proposed to remove the concrete and restore with gritstone. It was also proposed to install a fish pass. It was suggested that the works satisfied the criteria in Section 9 Notice 708 and that the works should be zero rated. By letter in
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response dated 20th September 2007 the Appellant was advised that the works would not qualify for VAT relief as “it is only buildings that are eligible for any VAT relief”.

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10. Thereafter the Appellant sought a review of the above decision and provided further information in support of the contention that the works should be zero rated. It was argued that a) Calver Weir was a building (and an intrinsic component of Calver Mill - a Grade II listed building), b) it qualified in its own right as a listed building and as a structure and c) Calver Weir did not need to be classed as a building to qualify.
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11. The Respondents reviewed the matter by letter dated 29.11.07 but did not change their view: they noted that the weir was originally built to control the flow of water to power the water wheels at Calver Mill and that the mill was no longer in operation. The Respondents considered that a weir could not be considered as a building. They considered that, even if a weir could be considered as a building, the works in question could not be zero rated as they would be classed as repair and maintenance rather than alterations. The Appellant began an appeal process in respect of the Respondent’s decision but the appeal was struck out on 2nd June 2008 for want of jurisdiction, the works not having commenced.
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12. By letter dated 25.10.2009 the Appellants informed the Respondents that the works had now commenced and, once again, sought a ruling so that they could appeal if necessary.
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13. On 3.11.2009 the Respondents informed the Appellants that the facts remained as stated previously, the earlier decision stood and the works and services were not eligible for zero rating.
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14. The Appellant’s appealed against this decision by Notice of Appeal received on 11.11.2009. The grounds of appeal were stated to be as follows:
- i. The case law quoted is inappropriate and the conclusion is flawed;
 - ii That the proposed works for which zero rating is requested are not prima facie works of repair;
 - iii That the proposed works fall within the basic conditions for zero rating in accordance with the provisions of Notice 708 February 2008.
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15. Section 30 of the VAT Act 1994 provides for items to be zero- rated as set out in Schedule 8. Schedule 8, Group 6 – Protected Buildings, includes the following, as relevant to this case, at item 2, as being zero rated:
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- 2. The supply, in the course of approved alteration of a protected building, of any services other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity.

16. Note (1) to the above provides:

(1) “Protected building” means a building which is designed to remain as or become a dwelling ... 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, or...

[similar provisions applicable to Scotland or Northern Ireland]

(b) a scheduled monument, within the meaning of –

(i) The Ancient Monuments and Archaeological Areas Act 1979; or..

[similar provision applicable in Northern Ireland].

17. Note (3) applies Note (6) of Group 5 as follows:

(6) Use for a relevant charitable purpose means use by a charity in either or both the following ways namely –

(a) otherwise than in the course of furtherance of a business;

(b) as a village hall or similarly in providing social or recreational facilities for a local community.

18. Note (6) - “Approved alteration” means –

[(a) and (b) not relevant to this case]

(c) In any other case, works of alteration which may not, [..not relevant to this case] be carried out, unless authorised under, or under any provision of -

(i) Part 1 of the Planning (Listed Buildings and Conservation Areas) Act 1990

[(ii) – (iii) similar provisions applicable to Scotland and Northern Ireland]

(iv) Part 1 of the Ancient Monuments and Archaeological Areas Act 1979 and for which, [... not relevant to this case] consent has been obtained under any provision of that Part, but does not include any works of repair or maintenance, or any incidental alteration to the fabric of a building which results from the carrying out of repairs, or maintenance work.

19. It has therefore been submitted to the Tribunal that the following issues are for determination today.

1) Is the weir a protected building within the definition at Note 1 for item 2?

- 2) If the weir is found to be a protected building, are the works (approved) alterations? If the works are found to be repair or maintenance, or incidental alterations resulting from the carrying out of repairs, or maintenance work, they are not alterations.
- 5 3) If the weir is found to be a protected building within the above definition, and the works approved alterations, does the Appellant intend to use it solely for a relevant charitable purpose after the alterations?
20. Firstly, therefore, the Tribunal concentrates its attention upon the issue of whether the weir is a “protected building”. As stated above it is certainly a listed building being of special Architectural or Historic Interest under the 10 Town & Country Planning Act 1971. It is also a Scheduled Monument as defined in the Ancient Monuments and Archaeological Areas Act 1979. The structure is, therefore, protected by listing but this in itself is not conclusive as to whether it is a building.
- 15 21. “Building” is not defined for the purposes of the VAT Act 1994 and it is therefore necessary to consider occasions on which the matter may have been considered previously by Tribunals and to look at dictionary definitions.
22. In Upper Don Walk Trust Tribunal Decision 19476 it was argued that a bridge was a building for the purposes of Schedule 8 Group 5. The Tribunal held that:-
- 20 *The dictionary definition is plainly too wide for our purposes. For example a ship is “built” but is clearly not a building. A multitude of things are structures, which is a very wide word but are not buildings...in our view the word “building” connotes an enclosure of sorts. It will enclose a volume of space or provide a place within which persons or things can be*
- 25 *accommodated a building will usually have walls and, although not invariably, a roof...it is our view that in the ordinary meaning of the word, a bridge is not a building.*
23. Calver Weir does not have walls or a roof. It is not an enclosure and despite 30 the fact that it is designed to retain a quantity of water the Tribunal considers that the confinement of a fluid passage of water is not enclosure in the context of a “building”. The weir does not enclose a volume of space or provide a place within which persons or things can be accommodated. The water is flowing. There are no (vertical) walls of enclosure and no roof.
- 35 24. The case of Dr John Parkinson 17257 concerned the VAT treatment of the conversion of a Thames Lighter into a houseboat. The Appellant contended that a houseboat was a building but the Tribunal said that:-
- 40 *“Dr_Parkinson’s houseboat does not seem to us what we would naturally refer to as a building... The shorter Oxford English dictionary defines “building” as “a thing which is built; a structure, an edifice, a permanent fixed thing built for occupation, as a house, school, factory, stable, church, etc ...” The New Oxford Dictionary of English definition of “building” contains the words “A structure with roof and walls such as a house, school or factory”. To call the*

houseboat a “house”... would, we think, be misleading. The appropriate, and in our view, the only proper word in the English language to describe Dr Parkinson’s houseboat is a “houseboat”.

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25. In that case reference was made to a building being something “built for occupation” which clearly the weir was not.
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26. In the case of Adath Yisroel Synagogue v Revenue and Customs [2008] UK VAT V 20809 the Appellant contended that the perimeter wall of a cemetery amounted to a building. The Tribunal held “the wall was undoubtedly built, the work constructing it was building work, but that does not mean that it is a building.
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27. In the Athal Yisroel Synagogue case reference was made to EC Commission v UK [1988 STC 456] in which there was a challenge to the width of zero rating provisions in the UK. Originally in group 8 all building and civil engineering construction (and their alteration and demolition) were zero rated [and under this the wall would have benefited]. However the breadth of zero rating was challenged and it was held by the European Court that applying zero rating to services relating to the construction of industrial and commercial buildings, and to community and civil engineering works, was not to the benefit of the final consumer. Accordingly, henceforth this group was to be restricted to buildings
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- constructed as dwellings or for a residential or charitable purpose. The Tribunal found that “*these factors point to an interpretation of a “building” that would include what ordinary people would regard as a building rather than as civil engineering work*”.
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28. The Tribunal therefore scrutinises Item 2 Group 8 - Construction of Dwellings etc of Schedule 5 VAT Act 1983 which is the group subject to the amendment necessary after the decision in EC Commission v UK. It provides:-
2. The supply in the course of the construction of:-
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- (a) a building designed as a dwelling or number of dwellings or intended for the use solely for a relevant residual purpose or relevant charitable purpose; or
- (b) any civil engineering work necessary for the development of a permanent park for residential caravans, of any service other than...
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29. When considering the legislation and decided cases mentioned above it is apparent that “civil engineering work” was provided for separately to “building”. It is submitted to today’s Tribunal by the Respondent that there can be no justification for claiming that “building” includes civil engineering works which are clearly not building (in the ordinary and normal meaning of the word). It is submitted that if the “weir” needs to be defined, in addition to
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- the word itself, it is as a civil engineering work but it is not as a building.
30. Customs and Excise Commissioners v Zielenski Baker & Partners [2004 STC 456] concerns Schedule 8 Group 6 item 2 and note 1. It related to works to an

5 outbuilding in the curtilage of a protected building and whether or not (as the House of Lords subsequently found) the outbuilding itself had to be a dwelling to qualify for zero rating. The taxpayer argued that because the outbuilding was defined as part of the listed building for the Planning (Listed Buildings and Conservation Areas) Act 1990 then it should be treated as part of the house for the definition of the expression “protected building”. Lord Hope of Craighead said, succinctly, that “*The definition in note (1) to the Group does not say that a building which is a listed building within the meaning of the 1990 Act is a protected building. What it says is that a protected building is a building which has certain characteristics and is a listed building within the meaning of the 1990 Act or a scheduled monument within the meaning of the Ancient Monuments and Archaeological areas Act 1979...*”

15 31. In this case Calver Mill itself is a listed building. The weir is, however, situated approximately 1 kilometre away. The mill has now been converted into dwellings and neither the mill nor the Weir are dependent upon each other for performing the function that they now perform. Because of the distance apart today’s Tribunal concludes that it cannot be argued that the weir is “in the curtilage” of a protected building.

20 32. Turning now to dictionary definitions the Tribunal has the benefit of a number of these being drawn to its attention today. Definitions of the words “built” and “building” have been submitted.

25 33. Oxford Dictionaries Online refers to the noun “building” as “a structure with a roof and walls, such as a house or factory”. Cambridge Dictionaries Online defines “building” as “a structure with walls and a roof such as a house or factory”.

30 34. The Appellant produces further definitions, the Compact English Dictionary defining building as “that which is built; a structure, edifice; now a structure of the nature of a house built where it is to stand”. The Appellant also produces definitions of “weir” but this is not in dispute and the Tribunal will not dwell on that.

35 35. It is submitted on behalf of the Respondents that a weir does not come within the ordinary meaning of the word building and accordingly the Appellant’s case falls at the first hurdle because the weir is not a building.

40 36. As noted above there is not a tenable argument that the weir qualifies as being within the curtilage of a listed building because of the Zielenski Baker case (the weir would still need to qualify as a “building” in its own right). Oxford English Dictionary Online defines curtilage as “a small court, yard, garth, or piece of ground attached to a dwellinghouse, and forming one enclosure with it, or so regarded by the law; the area attached to and containing a dwelling house and its outbuildings”. The Tribunal confirms that the weir does not fall within the curtilage of Calver Mill itself; they are completely separate structures, unconnected in form or function, in separate ownership and a considerable distance apart.

37. The decided cases, mentioned above, do not assist the Appellant in promoting the view that the weir is a building: it is civil engineering work; it is not a building; it is a weir.
- 5 38. The Tribunal relies, in reaching its conclusion today, upon item 2 Group 8 – Construction of Dwellings etc - of Schedule 5 VAT Act 1983 which is reproduced above. That refers to dwellings or buildings intended for use solely for a relevant residential purpose or for a relevant charitable purpose. Reference is made to civil engineering work but only in the context of a permanent park for residential caravans.
- 10 39. The Tribunal finds that the Appellants do indeed fall at the first hurdle because the weir is not a building and accordingly the weir’s use for a “relevant charitable purpose” does not fall to be considered by the Tribunal today.
- 15 40. Likewise it is not necessary to the Tribunal to consider whether or not the works are approved alterations. It can, however, be stated briefly that the Tribunal’s view is that while there may be a fair argument that the fish pass is eligible to be treated as an alteration, nevertheless the remainder of the works are properly regarded as repair or maintenance: the replacement of concrete by granite is clearly a commendable exercise but is simply returning the structure to its original form using traditional materials and rectifying some rather
20 unsightly repairs which were done some 60 years previously. The exercise was to rescue the weir from a bad state of repair and to put it back to its former state; indeed the name of the Appellant is the Calver Weir Restoration Project; reference is made in correspondence from the Appellants to “ a general face lifting of the weir”.
- 25 41. Likewise it is not necessary for the Tribunal to consider whether the “building” or structure is intended for use solely for relevant charitable purpose after the reconstruction or alteration.
- 30 42. It is clear that the Appellants have served their local community well. The work done on the weir has been carried out to a high specification and the end result, as shown in photographs, is clearly a great asset to the environment. This appeal has been pursued principally by Mr Thornton, the Project Manager, and his personal dedication is very apparent. He has devoted much time over a number of years to see the project through to completion. He has carried out lengthy researches and has endeavoured to present a legal
35 argument to the Tribunal today to the best of his ability. The Tribunal respects him for this but ultimately the decision over whether the weir is a building has had to be made based upon existing law and authorities and the Tribunal finds that it is not a building. The civil engineering works carried out on the weir are properly standard-rated for VAT. This appeal is dismissed.
- 40 43. 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.

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**WDF COVERDALE
TRIBUNAL JUDGE
RELEASE DATE: 8 July 2011**

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