



TC01350

Appeal reference: TC/2010/03883

VALUE ADDED TAX – zero rating – construction of new building adjoining original building – was it an enlargement of or an extension to the original building – yes – had the new building been an annexe was it capable of functioning independently – no – appeal dismissed.

TREETOPS HOSPICE TRUST

Appellant

- and -

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

Respondents

**Tribunal: Lady Mitting (Judge)
Miss Susan Stott (FCA)**

Sitting in Manchester on 7 June and 23 June 2011

Nigel Gibbon of Counsel, appeared for the Appellant.

**Mrs Kim Tilling of the Solicitor's Office of Her Majesty's Revenue and Customs
for the Respondents.**

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DECISION

1. The decision under appeal is that of the Commissioners, contained in a letter dated 3 December 2009, that a building development to the Treetops Hospice did not qualify for zero rating. The issue before the Tribunal is whether the building works have created an enlargement or extension to the existing building which would be standard rated, as contended by the Commissioners, or a qualifying annexe which would be zero rated as maintained by the Appellant. It was not in dispute that the building was intended for use solely for a relevant charitable purpose.

The legislation:

2. Section 30 – VAT Act 1994 provides that a supply of goods or services is zero rated if the goods or services are of a description for the time being specified in Schedule 8. Group 5 of Schedule 8 relates to the construction of buildings and the relevant legislation is as follows:

GROUP 5, SCHEDULE 8, VAT ACT 1994 ITEM 2

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.

NOTES TO GROUP 5

(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.

Caselaw:

3. We were referred by the parties to the following cases:

Cantrell (No. 1) v CCE [2000] STC 100

Colchester Sixth Form College v CCE [16252]

Abercych Village Association v HMRC [20746]

The Roman Catholic Diocese Of Shrewsbury v CCE [17900]

East Norfolk Sixth Form College v HMRC [20816]

Thomas Rotherham College v CCE [17814]

Bryn Thomas Macnamara v CCE [16039]

The Arcudiocese Of Southwark v CCE [18883]

4. There is no definition within the legislation of any of the terms, enlargement, extension or annexe but the President in *McNamara* saw them in the following terms:

“The scheme of the 1995 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 the alteration 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 or not integrated with the existing building or of tenuous integration”

The approach to be taken in determining the nature of the new building was set out by Lightman J in *Cantrell* as follows:

“First the question must be asked at the date of 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 where a dramatic change is later made in the plans) what is 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 use are irrelevant, save possibly to illuminate the potential for use inherent in the building or buildings.”

5. We heard oral evidence from the Chief Executive of the Treetops Hospice Trust, Mr George Cameron, whom we found to be a witness of truth and integrity. From Mr Cameron’s evidence and the documents, plans and photographs produced to us we find the facts to be as follows:

Background:

6. The Treetops Hospice Trust has as its principle function the provision of ‘Hospice at Home’ services. Ancillary services such as therapies; counselling; bereavement support and clinical consultations are also provided on site. Prior to the new development, a limited day care service was provided but was constrained by lack of space. The development was designed to create a substantive and expanded day care facility which could accommodate a greater number of guests (the terminology used by the Hospice to describe its patients and adopted by us throughout this decision) in a light modern purpose built unit designed with the needs of the guests in mind. Construction work started in December 2009 and was completed in September 2010.

The Existing Building:

7. The existing building was a 1960’s former prisoner pre-release accommodation unit. It was rectangular in shape and on two floors with a central corridor running down the centre of each floor with a number of smallish rooms off to either side. The upper floor was used in the main for administration and the ground floor for the guest related activities. The ground floor contained consultation and therapy rooms, bathroom, hairdressing and toilet facilities and a kitchen. It also contained a slightly larger room described as an ‘activity room’ which was the existing day care facility. The activity room had been enlarged by the addition of a conservatory which could be used at all times except the height of summer or the depth of winter. Entrance to the existing building was by a single door up a small flight of steps. Wheelchair access was round a rather circuitous slowly inclining pathway leading to a fire door on the far side of the building.

8. The existing unit could only accommodate ten day care guests at any given time and even then this could only be managed by shuffling furniture around into various storage areas. The area devoted to the day care unit was estimated by Mr Cameron to cover only some 15% of the building. Day care was offered only four days a week. Wednesdays’ were excluded as this was the day on which complimentary therapies were provided. As Mr Cameron explained, space was so confined that it was impossible to accommodate the therapies which should take place in a quiet and calm environment alongside the noise and bustle of day care – hence the need to have these activities carried out on separate days. These constraints were the driver for the creation of the new unit, the footprint of which was to be approximately the same as the entire existing building.

The New Building:

9. The new structure is single storey and is in no way designed to be in keeping visually with the existing building. It is modern in aspect and made of modern materials and glass and presents to the eye a completely contrasting construction. The new development is built onto the south east facade of the existing building. It runs at a 90 degree angle to the old building and the entire northwest aspect of the development shares a party wall with the existing building.

10. Access between the old and the new buildings is by means of two lockable doors, situated either side of a newly created semi-enclosed garden. One door leads out of the new reception area and gives into a short corridor which has been created between a changing room and bathroom in the original block. The second door leads into a corridor alongside a newly created seminar room. The seminar room has taken over the space previously occupied by the activity room and conservatory in the old building but extending far beyond the original outer wall into the new development. Access to the seminar room is by way of a door on the new side of the second locked door (outside the footprint of the original building) and a further entrance is off a newly created patio. Without accurate measurement it would appear from the plan that the Seminar room stands approximately one third into the original building and two thirds into the new.

11. The new building houses therefore part of the seminar room, the new reception area and a large open plan space which constitutes the new day care unit. This contains a lounge area, an activity and dining area and a kitchen area which to distinguish it from the existing kitchen in the old building, we will call the 'servery'. It also contains its own toilet and storage facilities. The new unit is accessed from outside by a sweeping ramped pathway under an awning which gives in to the new reception area. It is clearly signposted 'Reception' at the foot of the ramp. There are several car parks which in effect serve the entire hospice and a drop off area which runs for much of the length of the existing building up to the new entrance in the new building and is clearly intended to serve both. Staff access the hospice through the entrance which serves the part of the hospice in which they work.

How the Hospice Operates:

12. The new day care unit operates Monday to Friday and can accommodate thirty five guests. The activities carried on in the unit are much as they were in the original but in far greater space and comfort and within their own self-contained space. The existing range of complimentary therapies, counselling and clinical appointments continues as before but with greatly increased provision. They continue to be provided in the existing building which also continues to house the bathroom and hairdressing salon used by day care guests. Mr Cameron was pressed in cross examination by Mrs Tilling as to what precise difference there was between the services offered by day care in the old building and that currently offered. His answer was that what was now provided was, "a total community within the four walls". It was in effect, he accepted, the same service although he called it a "fuller service" for a greater number of people and on five days a week.

13. All appointments in the hospice, whether they be to therapeutic or clinical appointments or to book a slot in the day care unit or for other visitors to the hospice have to be pre-booked. There is no drop-in facility. As each appointment is booked, the guest or visitor is told which entrance they should use. Day care guests are directed to the new entrance in the new building and guests for the therapeutic and clinical appointments and administrative visitors, are directed to the old entrance. Wheelchair users visiting the old building still use the access described previously leading to the fire door. Any wheelchair users visiting day care would use the new ramped entrance. Mr Cameron readily accepted that in inclement weather such as that of last winter, wheelchair users would be allowed and expected to use the new entrance regardless of where they were heading for.

14. During the day, the two lockable doors which separate the existing building and the new are kept unlocked and they are used for access between the two. If a guest inadvertently uses the incorrect entrance, they are taken by a volunteer through one of the connecting doors into the correct area. There is no question of their being sent outside and round. Day care guests are offered bathing and hair washing facilities which sometimes cannot be managed at home. As these still take place in the existing building, the guest will be taken through from day care into the existing building via one of the linking doors, as indeed are day care guests who are booked into a clinical consultation or a therapy. Staff wishing to pass from one area to the other will also go internally through the linking doors.

15. The administration for the entire hospice, including day care, is carried out in the existing building although on a day to day basis the day care unit does administer itself. The receptionist will have computer access to the booked appointments and the patient files for the day which are housed in the existing building are brought down on a trolley into the day care unit so that they can be accessed and updated by the day care staff before being returned at the end of the day.

16. Catering for day care guests is provided from both the kitchen in the existing building and the servery in the new. Shortly after the completion of the new unit, the kitchen underwent a total refurbishment, advertising itself on the hospice website as “the catering team now has a ‘state of the art’ kitchen to prepare guest meals.” Guests are offered a freshly cooked main meal at lunchtime. This meal is prepared in the kitchen and wheeled through internally into the dining area of the new unit. All other refreshments – tea and toast on arrival, drinks and snacks throughout the day and afternoon tea, are prepared in and served from the servery. All staff can pre-order a sandwich or baked potato for lunch and those for day care staff are similarly wheeled through to the day care unit where staff will eat with the guests.

17. The new building can be isolated by the locking of the two interlocking doors which is done after hours and at weekends and it was a major part of the Hospice’s case that this could be done and still allow the day care unit to operate normally. In Summer 2010, during the kitchen refurbishment, Day care continued to function with light food being provided from the servery and main meals from outside caterers. The Trustees are currently considering opening the Day Care Unit at weekends when the existing building would be locked off. It was Mr Cameron’s expressed view that the new building would be more than capable of providing the full day care service

without needing access to the original. This view is something which we comment upon at greater length later in this decision.

The Respondents' Submissions

18. It was Mrs Tilling's submission that the new development was an extension to the existing building and that as such it was excluded from the legislative provisions which allowed for zero rating. In the alternative, if the tribunal were to find the development to be an annexe then it was not a qualifying annexe as it failed both the access and independent function tests. Mrs Tilling contended that the use of the original entrance to the old building had been compromised by the positioning, size, signage, attractiveness and accessibility of the new. Nor, in her view, was the new building capable of functioning independently of the old.

The Appellant's Submissions

19. It was Mr Gibbon's submission that the building was a qualifying annexe and as such qualified for zero rating. In terms of appearance and layout, Mr Gibbon saw the new building as having minimal association with the old and a high degree of independence from it. There was bound to be a measure of integration because the two were physically adjoined and the services provided within the old and the new were to similar categories of people. He contrasted the minimal through flow of people with the extensive migration backwards and forwards found in for example *Colchester Sixth Form College* and *Thomas Rotherham College*. He contrasted the different functions of the old and the new, the new being a dedicated day care centre and the old, with its small intimate rooms being for the provision of therapies and clinical appointments. He described the integration, at most, as tenuous consisting in effect of only two lockable doors.

20. Having submitted that the new build was an annexe rather than an extension or enlargement, he went on to submit that the two provisos to qualify it for zero rating were also met in that the two access points were distinct and the new was capable of operating independently of the old. He highlighted the fact that for the six week period during the kitchen refurbishment, the Day Care Unit had operated without the kitchen facility.

Conclusions:

21. The first question for our determination is whether the new building is an enlargement or extension to the existing building or is it an annexe. We have already set out the principles which we apply in making our determination (*Cantrell*) and we set out below our objective examination of the physical characters of the buildings, paying specific attention to their appearance, their layout, the uses for which they are physically capable of being put and the functions which they are physically capable of performing.

22. Looking first at appearance, we have already highlighted the complete contrast in styles. The old is a typical 1960's institutional building. The new is a striking and an attractive example of modern architecture. There was no attempt whatsoever to blend the new in with the old or to achieve any degree of visual integration. Mrs Tilling had

contended that consideration should be given to the internal refurbishment of the old so as to render it in keeping with the new. We do not accept that this is of any real relevance. The test, we believe, is aimed at what the observer sees at first glance as his eyes sweep over the exterior of the buildings.

23. Looking at layout, the two lockable doors providing double access routes between the old and the new give a clear integration. There is the question of the seminar room which Mr Gibbon described as a 'red herring'. His argument was, as we understand it, that because the seminar room can only be accessed from the 'new side' of one of the lockable doors and there was no access from the seminar room into the old building, then the seminar room does not add to the integration. There is some merit in Mr Gibbon's view but we do not accept that the seminar room can be completely disregarded. There is clearly *a* degree of physical integration in that the seminar room has been created out of part of the old and into the new. Its footprint is part in the old and part in the new. Whilst in terms of size, it is primarily in the new it bites into the old. However, the integration goes no further than that and in our view does not add significantly to the very clear integration which we see as being provided by the two doors.

24. Thirdly, we examine the usage and function of the buildings and this can only be done in context. The purpose of the new building is to provide an enhanced day care facility and we have to look at the service which that unit offers and how the services are delivered by reference to the layout of the buildings. We were referred to the Hospice's pre and post development websites and the day care services offered are very similar. They include several services which continue to utilise the facilities of the old building – bathing and hairdressing; main meals provided from the kitchen; complimentary therapies and clinics in palliative medicine. It is clear to us that functionally, what has been achieved with the erection of the new building is one integrated whole offering a comprehensive day care service. The old and new operate in conjunction with each other and in terms of delivery of the service, they are inter-dependent. During the working day, the lockable doors are unlocked and there is clear and actual access between the two buildings. They are equipped to function as one.

25. Notwithstanding the visual contrast between the two, we find that the latter two factors outweigh that one and that the new building is an extension of the old, the degree of integration being considerably greater than 'tenuous'.

26. We also here refer to the HMRC Notice 708 which in section 3.2.6 offers guidance on what HMRC believe constitutes an annexe. The third and fourth paragraphs read as follows:

“ An enlargement or extension would involve making the building bigger so as to provide extra space for the activities already carried out in the existing building. Examples of an enlargement or extension are a classroom or a sports hall added to an existing school building or an additional function room (or kitchen or toilet block) added to an existing village hall.

On the other hand, an annexe would provide extra space for activities distinct from but associated with the activities carried out in the existing building. The annexe and the existing building would form two separate parts of a single building that operate independently of each other. Examples of an annexe are a day hospice added to an existing residential hospice, a self-contained suite of rooms added to an existing village hall, a church hall added to an existing church or a nursery added to a school building. “

27. It was Mr Gibbon who took us to this publication, contending that what we have here is akin to the day hospice being added to an existing residential hospice. This is not the way we see it. The implication of the paragraph is that the day hospice is a totally new facility added to an already existing residential unit. The reality at Treetops is far closer in our view to the earlier paragraph in that “it provides extra space for the activities already carried out in the existing building”. Although Mr Gibbon described the original day care service as, “rudimentary”, in terms of what was offered it was far from rudimentary although severely hampered by lack of space. The Notice describes the annexe and the existing building as two separate parts of a single building operating independently of each other. That is not how Treetops operates. In our view in terms of the service which is offered, the two buildings are used in conjunction with each other and are interdependent upon each other.

28. We therefore hold that the new building is an extension to the original but if our conclusion is wrong, we go on to consider what would be the position if it were an annexe (an extension and an annexe being, in terms of the legislation, mutually exclusive). The issue for determination here is whether the annexe would be a “qualifying annexe”. To qualify, the new building must be capable of functioning independently from the old and the main accesses to each not via the other.

29. Looking at access first, Mr Gibbon is quite obviously right in his contention that each building has its own access to which its guests and other visitors are clearly directed. This is not compromised by the fact that odd people get the wrong entrance or that wheelchair users for the old building, in inclement weather, use the new access. The old and the new both have their own main means of access and neither is accessed via the other. Note 17(b) is therefore satisfied.

30. However, is the new building capable of functioning independently from the old? Mr Gibbon rightly stressed the key word here is “capable” and as he put it we are looking not at what actually happens sometimes but what is capable of happening *all the time* (our emphasis). We think this is the correct approach. The question has to be looked at in the context of what the function of the buildings is and here we go back to the analysis of the services which the day care facility offers. It offers a bathing facility – of utmost importance to those guests who are unable to be bathed at home. It offers a hairdressing facility, equally important for those who cannot get out. It offers access to clinical and therapeutical appointments, again of great importance. The main meal, clearly offered in all the advertising literature, comes from the main kitchen not the servery. Mr Gibbon maintains that in fact the main meal could be brought in from outside caterers as it had been during the time of the kitchen refurbishment. However, this would not actually meet Mr Gibbon’s own test that we are looking at what is capable of happening “*all of the time*”. The purpose of the state

of the art kitchen, firmly situated in the old building, is to provide a freshly cooked meal to the guests in the day care unit in the new building.

31. We accept that the hospice is considering opening its day care unit at weekends and in the evenings and that if it did so it would operate in its entirety from the new unit. However, what it would be providing would be a very limited service. That is the only service which, operating in isolation, the new building could offer. It would not be the 'all singing, all dancing' provision described by Mr Gibbon or the 'full' provision described by Mr Cameron. It would be a provision where there was no access to bathing or hairdressing and no access to the therapies and clinical appointments. The meals would either be light meals only, provided from the servery or, brought in by contracted caterers. In the context of what the Day Care Unit does and of the service it offers, the new building could not function or provide that service independently of the old. Note 17(a) is not therefore satisfied.

32. In summary therefore we hold that the new building is an extension to the old and as such falls to be standard rated but if we were to be found to be wrong and it were found to be an annexe, the qualifying provisions for zero rating are not met and it would still fall to be standard rated. The appeal is dismissed.

33. 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.

TRIBUNAL JUDGE:

RELEASE DATE: 25 July 2011