



**TC01375**

Appeal number LON/2009/0573

LON/2009/0647

*Appeal against decision by HMRC that construction work carried out should be standard rated for VAT purposes because the new structure was an extension or enlargement to an existing building – the new structure was a building joined to the original on both floors with internal access for staff throughout – appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**(1) TL SMITH PROPERTIES LTD  
(2) TREGWILYM LODGE LIMITED**

**Appellants**

**- and -**

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

**Respondents**

**TRIBUNAL: S.M.G.RADFORD (TRIBUNAL JUDGE)  
M.TEMPLEMAN**

**Sitting in public at 45 Bedford Square, London WC1 on 13 July 2011**

**Mr Richard Barlow for the Appellant**

**Mr David Bedenham, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. This is an appeal against a decision by HMRC dated 2 February 2009 that VAT at the standard rate was chargeable on certain construction work performed by TL Smith Properties (“TLSP”) for Tregwilym Lodge Ltd (“TLL”) (together “the Appellants”).
2. The Appellants appealed on 3 March 2009 on the basis that the decision was incorrect and the construction supplies qualified for zero rating.

### **Background and facts**

3. TLSP is a building contractor registered for VAT with effect from 1 February 1998.
4. TLL owns and operates a residential care home for the elderly and also a nursing home catering for elderly people with mental infirmity or dementia and is not registered for VAT.
5. In an email dated 16 December 2008 TLSP’s representative sought clearance from HMRC that construction work which they had performed for TLL was zero-rated for the purposes of VAT.
6. On 2 January 2009 HMRC wrote to TLSP requesting the plans relating to the construction work. These were provided by TLSP’s representative on 7 January 2009.
7. On 2 February 2009 HMRC replied to TLSP informing it that HMRC did not consider that the work undertaken satisfied the statutory test for zero rating and it was therefore liable for VAT at the standard rate.
8. TLSP and TLL each filed separate notices of appeal in respect of this decision on 3 March 2009.
9. On 7 April 2009 a clerk of the Tribunal directed that these appeals be consolidated.
10. Mr Brian Rosenberg, managing director of TLL gave evidence for the Appellants.
11. He confirmed that previously the care home had no nursing services. It provided board and lodging and the personal, social and healthcare needs of the residents were provided by the district nursing team and community psychiatric nurses via the general practitioner.
12. He stated that demand for residential care services had always been high in the Newport area. However as the residents became more frail it became clear that the district nursing team could not meet all their needs. As a result the residents had to be reassessed and transferred to homes with nursing services which was difficult for them.

13. It was therefore decided that following the grant of planning permission a new build nursing facility would be built alongside the existing residential care home.

14. Construction commenced in April 2008 and the two existing houses on the site were demolished. The development of the new nursing facility also involved the construction of new kitchen and laundry facilities.

15. Mr Rosenberg described the new structure in accordance with the plan provided and explained that because all the residents had a primary diagnosis of dementia and were moderately to extremely confused they were very vulnerable. Security and safety were therefore of the essence and there were swipe cards for access to the various areas which were provided only to the staff.

16. The old kitchen was replaced with new equipment and was developed on the edge of the newly built nursing facility and serviced both the needs of the nursing home and the residential care home. Entry and exit from the kitchens is by swipe cards.

17. He stated that the new laundry was between the nursing home and the residential home and also accessed by swipe card.

18. Mr Rosenberg confirmed that although the original plan was to have just one main entrance through the new structure because this was what the regulator wanted, in the event the old entrance to the residential home was kept and is used as an entrance and exit by visitors to this facility.

19. Mr Rosenberg stated that the residential service and the nursing service were run as two distinct and very separate businesses with different staff. The only common denominator to both were the kitchens, laundry and registered manager who had an office in the new building (with access to the residential home by swipe card) and who in regulatory terms had responsibility for both services.

### **The Legislation**

20. Section 30 of the Value Added Tax Act 1994 (“VATA”) provides as far as is relevant

(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.

(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

21. Group 5 of Schedule 8 of VATA which relates to zero rating provides as far as is relevant:

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...

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

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22. The notes to Group 5 of Schedule 8 of VATA provide as far as is relevant:

(4) Use for a relevant residential purpose means use as—

(a)....

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(b) a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder;

(c) a hospice;

(d)....

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(e)....

(f)....

(g) an institution which is the sole or main residence of at least 90 per cent. of its residents,

Except use as a hospital, prison or similar institution or an hotel, inn or similar establishment.

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(12)Where all or part of a building is intended for use solely for a relevant residential purpose or a relevant charitable purpose—

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(a) a supply relating to the building (or any part of it) shall not be taken for the purposes of items 2 and 4 as relating to a building intended for such use unless it is made to a person who intends to use the building (or part) for such a purpose; and

(b) a grant or other supply relating to the building (or any part of it) shall not be taken as relating to a building intended for such use unless before it is made the person to whom it is made has given to the person making it a certificate in such form as may be specified in a notice published by the Commissioners stating that the grant or other supply (or a specified part of it) so relates.

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(16)For the purpose of this Group, the construction of a building does not include—

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(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—

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(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.

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(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.

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## Appellant's Submissions

23. Mr Barlow submitted that TLL operated the residential care home separately from the nursing facility and the regulation of the two was quite different. This influenced the design of the new structure.

24. The new building was designed solely for a relevant residential purpose under paragraph 2 Group 5 of Schedule 8 of VATA.

25. The care home was the old building and the nursing home was new. Both fell within Note 4 of the notes to Group 5 Schedule 8 at 4(b) and (g) and 12 (a) and in his contention the new structure was not within Note 16(a) or 16(b). In the Appellants' contention the new structure was not an enlargement or extension of the old building as contended by HMRC.

26. Mr Barlow submitted that it was necessary to look at the building as a whole. He referred to the case of *Customs and Excise Commissioners v London Diocesan Fund* [1993] STC 369 in which Mc Culloch J held that whether the work constituted an enlargement of an existing building was to be determined by looking at that question as a matter of fact and degree considering the work as a whole and that the starting point was to look at the building before any work commenced.

27. He submitted that in the *London Diocesan Fund* case the judge referred to the three stage test derived from the Tribunal decision in the *St Andrew's Building Co Ltd* case. This is (i) was there an existing building prior to the commencement of any works; (ii) was there still an existing building once any projected demolition involved had been carried out; and (iii) was the completed building to be described as the conversion, construction, alteration or enlargement of the existing building.

28. He submitted that it was not the intention of the legislation that every new structure that abutted an old building should be treated as an extension.

29. He referred to the HMRC letter dated 2 February 2009 and said that their view was wrong. For security reasons there was no unimpeded link between the two buildings and although in the plans there was to be only one main entrance in fact the original entrance had remained albeit with a new front door.

30. He submitted that it was irrelevant that the new structure could not be disposed of separately because the law made no rule about that and in any event all that would be needed was to block the joining corridors.

31. He referred to the case of *Cantrell and another v Customs and Excise Commissioners* [2000] STC 100 and *Same (No 2)* STC in which the Vice Chancellor said that it was legitimate to look beyond the physical characteristics.

32. Mr Barlow submitted that in any event the physical characteristics showed that it was quite clearly a new structure.

33. On the facts it was quite clear that some connection between the buildings was not enough to dislodge the fact that it was a new structure.

34. In *Cantrell No 2* the Vice Chancellor agreed with Lightman J that at least where the physical characteristics of a building are relevant to the uses to which it can be put, those characteristics are relevant to deciding the question whether the new building is an annexe of the old. Mr Barlow contended that the same would apply to the question of whether the new structure was an extension or enlargement of the old building.

35. In summary the Appellants contended that the new structure was not substantially physically connected to the existing building; the new structure was considerably larger than the existing building; it was intended to be used as a separate nursing home distinct from the existing building which is a residential home; the new structure was self-contained and functioned independently from the existing residential home; the new structure employed its own more highly qualified staff and the new structure's distinct purpose as a separate nursing home was separately registered.

36. There was no free flowing between the buildings. As a result of the vulnerability of the residents the law did not allow it.

#### **HMRC's Submissions**

37. Mr Badenham submitted that the *London Diocesan Fund* case was a 1993 case and pre VATA. There were different provisions and demolition was not relevant.

38. He submitted that having regard to the physical nature of the relationship between the original building and the new structure there was a substantial link between the two.

39. They were linked by a corridor on the ground floor which provided a permanent access from the existing building to the new structure intended for routine use by staff. By virtue of this neither structure could be disposed of separately. Both buildings shared a common kitchen, laundry and plumbing facilities.

40. Mr Badenham contended that *Cantrell No 1* was the case on point. *Cantrell No 2* was an annexe case and so not relevant.

41. Mr Badenham submitted that the appropriate test was that enunciated by Lightman J in *Cantrell No 1*:

“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 ...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 construction of and extension or annexe to the original building (see *Customs and Excise Comrs v Marchday Holdings Ltd* [1997] STC 272. I must however add a few words regarding how the question is to be approached...First the question is to be asked

as at the date of supply. It is necessary to examine the pre-existing building or buildings in the course of construction when the supply is made. What is in the course of construction at the date of the supply is in any ordinary case (save for the 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 of which they are 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.”

42. Mr Badenham dealt with each of Lightman J’s tests in turn.

43. As to the appearance he submitted that the original building consisted of two floors and was constructed of red brick with white sash windows directly underneath each of which there was paintable brickwork. The roof was of black tiles.

44. The addition to the original building consisted of two floors and was constructed of red brick with white sash windows directly underneath each of which there was paintable brickwork. The roof was of black tiles. It was plain from the photographs supplied in evidence that the new structure and the original building, whilst constructed at different times, shared significant features.

45. As to the layout the main entrance to the building after the works were conducted was located in the new structure and this was where the office of the administrative manager to both facilities was located.

46. Having entered through the main entrance the original building was accessible on both floors albeit with the use of a swipe card only available to the staff. Apart from the necessity of a swipe card the access was unimpeded. Mr Badenham contended that the connection between the original building and the new structure was very different to the position in *Chacombe Park Development Services* where Mr Barlow found that

“the linking structure only serves the purpose of a back-up fire escape from either building to the other”.

47. As to the function test Mr Badenham submitted that there was a single kitchen and a single laundry for both buildings and it could not therefore be said that the addition could operate independently without recourse to the original building.

48. He submitted that there was also a single administrative office and reception area and again this was an indication that the two parts of the building could not operate independently of each other.

49. Further by virtue of the unimpeded access between the two buildings they could not have been disposed of separately.

50. He contended that as per Lightman J the use and the motive were unimportant. One had to consider what the reasonable man would say.

51. He submitted that putting aside motive, intention, subsequent actual use and the terms of the planning permission, the appearance, lay out and functionality of the building as at the date of supply were such that an educated layman would describe the new structure as a enlargement or extension of the original building. The educated  
5 layman would, as concluded in HMRC’s decision letter, view the resulting building “as a single establishment offering different levels of care rather than two distinct homes”.

52. One might say that the new structure was too big to be an extension but it was not enough just to look at the surface appearance.

### **Findings**

10 53. We found that the new structure was an extension or an enlargement of the existing building.

54. We found that the buildings were linked albeit by doors which could only be accessed by the swipe cards provided to the staff who had access to all parts of the buildings. This would include the kitchen staff who would need such access to serve  
15 meals. Presumably other domestic staff such as cleaners and those who operated the laundry would also need to go backwards and forwards.

55. Although Mr Barlow submitted that these links could be blocked off to create two entirely separate buildings there remained the fact that there was a single kitchen and a single laundry for both buildings and it could not therefore be said that the addition  
20 could operate independently without recourse to the original building.

56. Looking at the photographs we found that the new structure had the appearance of being an extension of the original building. It is physically joined to the original building, has the same appearance and even includes bay windows like the original house.

25 57. In making this finding we did not attach importance to the reproduction of the same colour of bricks, tiles etc in the new building as were in the original building as we found it quite usual that the appearance of houses is matched in certain areas. We found much of this is to be the requirements of the planners but they quite clearly believed that what they were sanctioning was an extension and specifically required  
30 the two buildings to be joined as the new construction would otherwise have been too close to the next houses.

58. There is also a single administrative office and reception area and we found this an indication that the two parts of the building could not operate independently of each other.

35 59. We considered the *London Diocesan Fund* case but did not find it helpful. The new structure did not just abut the original building. It was joined to it and when completed, having looked at the original building before work started, could best be described as an extension or enlargement.

60. We considered Mr Barlow's submission that the physical characteristics showed that the new structure was quite clearly a new building. He contended that the Vice Chancellor's agreement with Lightman J in the *Cantrell No 2* case, that where the physical characteristics of a building are relevant to the uses to which it can be put, those characteristics are relevant to deciding whether the new building is an annexe of the old, would apply to the question of whether the new structure was an extension or enlargement of the original building.

61. However, although the new structure was built for the purpose of accommodating those residents who needed nursing care, we found that it was a building joined to the original on both floors with internal access for staff throughout. In addition key services, kitchen and laundry were shared. We found this made it an extension or enlargement which was not self contained and nor could it function independently.

### **Decision**

62. The appeal is dismissed

63. 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: 4 August 2011**