



**TC02543**

**Appeal number: TC/2012/05630**

*VAT – appeal against HMRC’s decision that the appellant’s product Stormdry was not an energy saving material for the purpose of Note 1, Group 2 Schedule 7A VAT Act 1994 – appeal allowed- product found to be insulation for walls*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**SAFEGUARD EUROPE LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE SANDY RADFORD  
JO NEILL**

**Sitting in public at Bedford Square, London WC1 on 8 November 2012.**

**Mr C Ridgewell, finance director of the Appellant**

**Mr P Rowe, officer of HMRC, for the Respondents**

## DECISION

1. This is an appeal against HMRC's decision that the appellant's product Stormdry is not an energy saving material for the purposes of Note 1, Group 2 Schedule 7A VAT Act 1994 and therefore that the installation or supply and installation of Stormdry does not qualify for VAT to be charged at the reduced rate.

2. The legislation only deals with the installation or the supply and installation by the same person of energy saving materials. As the manufacturer and supplier of Stormdry rather than the installer the decision that is being appealed does not alter the rate at which the appellant has to charge VAT which is the standard rate.

### Background and facts

3. Mr Ridgwell explained that for the last six or seven years the appellant had decided to manufacture and sell new products withdrawing from its established market and customers in the damp proofing industry.

4. The appellant decided to go down the green route and to push its environmental credentials and make buildings drier as well as greener. At the same time by this change of course the appellant hoped to tap into the Government's incentives.

5. The appellant employed Dr Eric Hirsch to spearhead the development of new products.

6. Dr Hirsch explained to the Tribunal that the original concept of Stormdry was to insulate buildings. He stated that the name Stormdry was a bit of a misnomer but unfortunately the appellant was unable to find a name incorporating "Insu" or "Therma" and names like "Insubrick" were already owned.

7. Having spent over £80,000 developing the product the appellant made the decision to launch it initially as water repellent as this data was easy to obtain.

8. Once the heat saving/carbon reducing data was ready it followed the launch of the product and established its insulation properties.

9. Dr Hirsch stated that the appellant had always made and sold waterproofers under the trade name Raincheck so waterproofing was not the objective of the new product.

10. The objective of the new product was to produce an insulating material which was easy to apply and which did not alter the outside façade in any way.

11. Mr Ridgwell stated that Stormdry is a gel which penetrates half an inch into the brickwork creating a thick waterproof zone. It is breathable and so not only can no dampness get in but also any dampness inside the house can get out.

12. Mr Ridgwell said that the energy saving is from making the bricks drier and converting a half inch brick zone into an insulation barrier. By making the bricks drier there is a reduction in the amount of heat lost. All their tests had shown that there would be a significant energy saving.

5 13. The appellant produced a number of laboratory reports and studies which showed that an application of Stormdry improved thermal insulation and water repellence.

14. He stated that Stormdry differed from waterproof paints such as Weathershield because it actually penetrated half an inch whereas Weathershield sat on the surface.  
10 Weathershield was a paint which tended to develop micro cracks behind which the water could penetrate. This did not happen with Stormdry. Whilst moisture became trapped behind Weathershield, this did not happen with Stormdry because of its breathability.

### **Legislation**

15 15. Section 29A of the VAT Act 1994 (“VATA”) states:

Reduced rate

(1) VAT charged on—

(a) any supply that is of a description for the time being specified in Schedule 7A, or

(b) any equivalent acquisition or importation,

20 shall be charged at the rate of 5 per cent.

(2) The reference in subsection (1) above to an equivalent acquisition or importation, in relation to any supply that is of a description for the time being specified in Schedule 7A, is a reference (as the case may be) to—

(a) any acquisition from another member State of goods the supply of which would be such a supply;

25 or

(b) any importation from a place outside the member States of any such goods.

(3) The Treasury may by order vary Schedule 7A by adding to or deleting from it any description of supply or by varying any description of supply for the time being specified in it.

(4) The power to vary Schedule 7A conferred by subsection (3) above may be exercised so as to  
30 describe a supply of goods or services by reference to matters unrelated to the characteristics of the goods or services themselves. In the case of a supply of goods, those matters include, in particular, the use that has been made of the goods.

35 16. Schedule 7A of VATA Group 2 Installation of energy saving materials (“Group 2”) states:

Supplies of services of installing energy-saving materials in—

- (a) residential accommodation, or
- (b) a building intended for use solely for a relevant charitable purpose.

2 Supplies of energy-saving materials by a person who installs those materials in—

- (a) residential accommodation, or
- 5 (b) a building intended for use solely for a relevant charitable purpose.

NOTES:

*Meaning of “energy-saving materials”*

1 For the purposes of this Group “energy-saving materials” means any of the following—

- (a) insulation for walls, floors, ceilings, roofs or lofts or for water tanks, pipes or other plumbing
- 10 fittings;
- (b) draught stripping for windows and doors;
- (c) central heating system controls (including thermostatic radiator valves);
- (d) hot water system controls;
- (e) solar panels;
- 15 (f) wind turbines;
- (g) water turbines.

*Meaning of “residential accommodation”*

2(1) For the purposes of this Group “residential accommodation” means—

- (a) a building, or part of a building, that consists of a dwelling or a number of dwellings;
- 20 (b) a building, or part of a building, used for a relevant residential purpose;
- (c) a caravan used as a place of permanent habitation; or
- (d) a houseboat.

(2) For the purposes of this Group “use for residential purpose” has the same meaning as it has for the purposes of Group 1 (see paragraph 7(1) of the Notes to that Group).

- 25 (3) In sub-paragraph (1)(d) “houseboat” has the meaning given by paragraph 7(3) of the Notes to Group 1.

17. The legislation makes no further definition of what insulation for walls is but  
30 the dictionary definition of insulation is “material used to insulate something”. The  
word insulation derives from insulate which is defined as “to prevent the transmission  
of electricity, heat or sound to or from (a body or device) by surrounding with a  
nonconducting material.

**HMRC’s submissions**

18. Mr Rowe submitted that Stormdry is a waterproofing product for use on walls to  
35 prevent rain penetration. He submitted that any energy saving achieved by the use of  
Stormdry was secondary and that improvement to the thermal resistance of masonry  
by its use was similar to that which could be achieved by the application of many

other products such as the proprietary paint Weathershield which would also reduce rain penetration and thereby improve thermal resistance.

19. He submitted that the primary or dominant purpose of a customer having Stormdry applied to their property was to provide waterproofing. If a customer  
5 wanted to insulate their walls then they would in all probability consider cavity wall insulation or another alternative available for solid walls for which grants were available rather than improving the thermal resistance of the walls by waterproofing them.

20. Mr Rowe submitted that in the case of *Beco Products Limited*, a Tribunal case  
10 decided in 2004, the Tribunal had to consider what the dominant purpose of the contract and in this matter Mr Rowe submitted that the dominant purpose of using Stormdry was to achieve waterproofing.

21. He submitted that any reduction in heat loss from the walls of a house using Stormdry was mainly because it repelled water, not because of any inherent  
15 insulation property. He submitted that energy saving from a house which had been treated with Stormdry would be minimal if the house were dry. He submitted that this was borne out by test results on the appellant's website which stated:

Further testing carried out by the University of Portsmouth involved the comparative testing of a treated and an untreated model house placed in an environmental chamber. During the experiment the  
20 energy required to maintain a stable 20°C temperature within the model test house was measured. Energy savings of between 5% and 9% were demonstrated in a single brick width wall from the result of changing outside temperature and humidity alone, indicating that energy savings are possible even during periods of no rainfall. A 50% energy saving was demonstrated during a single "wet" rain event.

Mr Rowe submitted that in view of the above test it was most unlikely that a customer  
25 would choose Stormdry for its insulating properties alone.

22. Mr Rowe referred to the case of *Pinevale v HMRC* [2012] UKFTT 606 (TC) in which Sir Stephen Oliver QC concluded that in order to qualify for the reduced rate of VAT, the potential insulating supplies had to satisfy a single composite test that had  
30 two separate components. Sir Stephen Oliver QC decided that the failure of either test would disqualify the supply from the reduced rate.

23. Mr Rowe stated that the first test was whether the product could be classed as an energy saving material. He submitted that the appellant's evidence in the form of technical data suggested that the thermal conductivity of a wall was affected by the  
35 moisture content of the wall; the higher the moisture content the more conductive the wall and thereby the greater the heat loss. Therefore by waterproofing the wall with Stormdry the wall became less conductive and less heat would be lost hence energy would be saved.

24. He submitted that HMRC drew an analogy to Sir Stephen's words at paragraph  
40 25 of his decision in *Pinevale* where Sir Stephen accepted "that a second layer of glass (when installed to create a double glazed roof) may function as energy saving, but the glass itself is not energy saving material". He submitted that HMRC said that similarly Stormdry was not an energy saving material.

25. Mr Rowe explained that the second test related to the purpose or use for which the material was supplied. In this case the test was whether Stormdry was “insulation for walls”. He submitted that none of the appellant’s evidence or its marketing referred to Stormdry as insulation.

5 26. He submitted that in its application to the SBRI/Technology Strategy Board it referred to “significantly improving the insulation properties (of the brickwork)”. The appellant also referred to the cost of the cream Stormdry costing much less than applying external insulation. In the conclusion of its laboratory report as produced to the Tribunal the appellant stated that “the system (application of Stormdry) had the  
10 advantage over internally or externally applied insulation...” Earlier in the report Dr Rirsch stated that “This will have the ability to keep the outer wall of a house dry and thereby improve the insulation properties”.

15 27. Mr Rowe submitted that the appellant had therefore made no claim that Stormdry was insulation and thereby tacitly accepted that it was not. Mr Rowe submitted that the appellant’s claims were that Stormdry improved the existing insulation properties of the existing wall and therefore could not be said to be insulation in its own right. Just because the product saved energy it did not mean that it was an energy saving material.

20 28. He submitted that therefore Stormdry failed both parts of the composite test set out by the Judge in *Pinevale Ltd*.

25 29. Mr Rowe stated that Schedule 7A was inserted in VAT Act 1994 by Finance Act 2001 and was effective from 1 November 2001. It generally re-enacted Schedule A1 VATA 1994 which was repealed in the same Finance Act. Reference was made in the decision in the case of *Beco Products Ltd* to sub-paragraphs 1(1)(aa) and (ab),  
30 which have become Group2 Sch.7A. These sub-paragraphs were themselves inserted in the repealed Sch.A1 by Finance Act 2000, effective from 1 April 2000. Reference was made in the laboratory report to the work of Roedder and to the reports of BRE and Kunzl. The references in the report showed that all these reports that relate to the energy savings that could be made by the waterproofing of bricks, pre-dated the legislation.

35 30. Mr Rowe submitted that this evidence was available at the time Parliament enacted this legislation. If Parliament had meant for waterproofing materials such as Stormdry to be regarded as energy saving material it would have included that definition in the Legal Notes. Mr Rowe submitted that what Parliament took insulation for walls to mean was the usual understanding of the word insulation, i.e. a nonconductive material, such as cavity wall insulation.

31. Finally Mr Rowe submitted that HMRC did not dispute that Stormdry resulted in energy saving. However Group 2 only permitted a reduced rate of VAT for those products specifically listed under Note 1.

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### **Appellant's submissions**

32. Mr Ridgwell submitted that Stormdry fell within Note 1 as it was insulation for walls. Once inserted half an inch into the bricks it created an insulation barrier.

5 33. Mr Ridgwell submitted that the appellant had made a decision in 2007 to introduce products that would improve the energy efficiency of buildings and reduce the amount of carbon dioxide in the atmosphere.

34. He submitted that it would be unfair to turn down a product just because it had been launched early, before the heat saving and carbon reducing data was available, in order to recoup some of the initial costs.

10 35. He submitted that HMRC had been overly influenced by this early data and it was incorrect to compare Stormdry to Weathershield. As evidenced, Weathershield is a waterproof paint which is applied to the surface and does not penetrate as does Stormdry.

15 36. Alluding to Sir Stephen Oliver's first test Mr Ridgwell submitted that HMRC had accepted in its skeleton argument that an application of Stormdry resulted in energy saving.

20 37. As to the second test he submitted that if all that was required was waterproofing the appellant's customers would choose one of the appellant's waterproofers such as Raincheck. Stormdry was specifically developed to provide an insulation barrier and should therefore be regarded as insulation in its own right.

38. He submitted that contrary to Mr Rowe's submission the dominant purpose of applying Stormdry was to create an insulation barrier and it was most likely that a customer would buy Stormdry for its insulating properties.

25 39. One of the appellant's contractor customer's had decided to buy Stormdry under a private label as "Thermotek" and intended to market the product to homeowners as an insulating material.

### **Findings**

40. We found that Stormdry's purpose was not decorative as would be a paint but rather it converted an area half an inch into the bricks into an insulation barrier.

30 41. We found that Stormdry was a gel not a paint and unlike glass was an insulation in itself.

42. We found that it would only be used if an insulation barrier was required. We found that if all that was required was waterproofing then there were many waterproof paints available.

35 43. We found therefore that Stormdry fell within Note 1 (a) being insulation for walls.

**Decision**

44. The appeal is allowed.

45. 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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**SANDY RADFORD  
TRIBUNAL JUDGE**

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**RELEASE DATE: 13 February 2013**