



**TC02773**

**Appeal number: TC/2012/08901**

*VAT – zero rating – building work – construction of residential care home  
integrating existing church – whether taken out of zero rating by being  
works of enlargement, extension, or conversion – Value Added Tax Act 1994  
Schedule 5 Group 8 Item 2 – appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ASTRAL CONSTRUCTION LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE LADY JUDITH MITTING  
DEREK ROBERTSON**

**Sitting in Manchester on 11 June 2013**

**Tim Brown, counsel for the Appellant**

**John Nicholson, Officer, instructed by the General Counsel and Solicitor to HM  
Revenue and Customs, for the Respondents**

## DECISION

1. The dispute between the parties concerns the Appellant's development of a 72  
5 bedded nursing home on the site of a redundant church, which was itself retained as a  
part of the development. The Appellant contends its supply of the construction  
services should be zero rated pursuant to VAT Act 1994, Schedule 8, Group 5, Item 2.  
The Commissioners, however, view the development as a conversion of and/or an  
extension to an existing building, the church, thus taking the supply out of zero rating  
10 by virtue of Notes 16(a) and 16(b). The Commissioners consequently believe the  
correct rating is the reduced rate of 5% pursuant to Schedule 7A, Group 6, Item A.

### The legislation

2. The supply of goods and services is zero rated if the supply is of a description  
specified within VAT Act 1994, Schedule 8. Group 5 of Schedule 8 deals with the  
15 construction of buildings and includes at Item 2 (with relevant notes):

“The Supply in the course of construction of

- (a) a building designed ... intended for use solely for a relevant residential purpose

Notes

20 (4) use for a relevant residential purpose means use as

- (b) home or institution providing residential accommodation

(16) for the purpose of this group the construction of a building does not include

- 25 (a) the conversion, reconstruction or alteration of an existing building or
- (b) any enlargement of, or extension of an existing building.

(18) A building only ceases to be an existing building when demolished completely to ground level.”

### Case Law

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

- (1) *Cantrell (No.1) v CCE* [2000] STC 100
- (2) *Marchday Holdings v CCE* [1997] STC 272
- (3) *London Diocesan Fund v CCE* [1993] STC 369

- 5
- (4) *Great Shelford Free Church v CCE* [1987] STC 249
  - (5) *Victoria Gardens Nursing Home v CCE* MAN/91/1197 (VTD 10547)
  - (6) *Bryan Thomas MacNamara v CCE* LON/97/1584 (16039)
  - (7) *Cantrell (No.2) v CCE* [2003] STC 486

### Facts

4. We heard no oral evidence but did have in front of us an unchallenged witness statement from Khushdip Singh Nagra dated 18 April 2013. The facts were not in dispute and we find to be as follows.
- 10 5. On 24 June 2010, Molescroft Nursing Home (Holdings) Limited (“Molescroft”) received planning permission for the erection of a new 72 bed care home on the site of the Holy Name Church in and lying to the eastern side of Hall Road, Kingston Upon Hull. The site, as acquired by Molescroft, had an area of 0.7 hectares and contained the church; the presbytery to the north (on the left hand side when viewed from Hall Road) with an access into the church; to the south (the right hand side of the church) a substantially sized social club and at the rear of the site, and totally separate, some garages and outbuildings. The site had been vacant since November 2008 and the church was boarded up and of derelict appearance. The site was not in a conservation area and the buildings were not statutorily listed although the church itself was locally listed and the Council had made it clear to Molescroft that in any planning permission it granted it would expect to see the retention of the church. The planning proposal submitted to the Council therefore involved the demolition of the presbytery, the social club and the outbuildings but the retention of the church.
- 15 20
6. The planning permission was granted in the following terms:
- 25 (1) Erection of 72 Bed care home with associated car parking, bin store and landscaping following demolition of former vicarage, former social club, single storey extensions to church and garages.
- (2) Change of use of existing church to purposes ancillary to the use of the residential care home.
- 30 7. In April 2011, Molescroft contracted to the Appellant (“Astral”) the construction of the new residential home. In accordance with the terms of the planning permission, Astral demolished the Presbytery, the social club, the outbuildings and some single storey extensions which had been built on to the back of the church in earlier times. All that remained on the site was the church in its original unextended form. The remainder of the site was flattened.
- 35
8. The development carried out by Astral retained the church as its centrepiece. Two new 2-storey wings were built, one to the north and one to the south of the church. Each wing contained, on each of the two floors, en suite bedrooms situated opposite each other divided by a central corridor and at the end of each of the corridors on both floors, facing into Hall Road were large dayrooms. Each of the two
- 40

wings, at their rear, were connected into a further wing running at right angles to each of them. This further wing contained further bedrooms, bathrooms, dining rooms, dayroom and treatment rooms. There had therefore, in effect, been created three new sides of a square with the church and each of the ends of two of the wings making up a fourth side. To the rear of the connecting wing, and connected into it, at ground floor level were kitchen and staff facilities. The three new wings were all connected into the church by five brick and glass walkways, three at ground floor level and two at first floor level.

9. The church itself, while retaining its original exterior had been altered internally. A mezzanine floor had been created which was described on the plans as containing a dayroom and gallery storage. The ground floor consisted of an entrance/reception area at the front, an office to the right and a shop and activity room to the left and a small chapel at the rear. The remaining central large internal area was described on the plan as “dayroom, sitting area and function space”.

10. We stress that the above is taken from the description of the interior of the church from the plans because the reality as to the use of the church is in fact quite different. The home itself caters in the main for residents with dementia and the three bedroom wings are all designed to be self-contained in that they all contain everything which the residents need including their dayrooms. The areas can and normally are isolated and in fact we were told that the connecting doors into the church are normally kept locked (although nothing hangs on this). The aim is to reduce the risk of a resident wandering. The dayroom, function room and activity room described on the plan of the church are never used. The church was described to us as, in reality, “just one big entrance area”. It forms the main entrance and reception area into the home and a single office but not much more.

11. We were told that in terms of area footprint, the church in its original form (without its demolished rear additions) was 315 sq.m. This figure remained post-construction at ground floor level but with the new mezzanine adding 140 sq.m. The ground floor new build (i.e. the three new wings and the extended area at the back of the back wing) had an area of 1,590 sq.m. and the first floor of 1,320 sq.m. making a total new build area of 2,910 sq.m.

12. We were taken to two articles which had appeared in the local press dated 10 June 2011 and 27 March 2013. Both articles publicised the construction and opening of the new care home but neither of them had originated from either Molescroft or Astral and we were told that both contained factual inaccuracies. We therefore draw nothing either way from the wording of these articles and believe they take the matter before us no further.

**Submissions**

13. It was common ground that the care home was intended for use solely for a relevant residential purpose as it was a home or institution providing residential accommodation (Note 4(b)). It was also common ground that all buildings on the

original site, bar the church in its original form, had been demolished completely to ground level (Note 18).

14. Mr Brown, for Astral, contended that the building works fell squarely within Item 2. Notwithstanding the fact that the church remained intact, the scale of the works, the difference in building materials and the increase in footprint all pointed to a new build, not a conversion or enlargement. What had been a disused church now merely provided the administrative facility for the new development. The wording of the planning permission (especially paragraph 2) was not determinative.

15. Mr Nicholson, for the Commissioners, argued that Note 16 took the development out of zero rating. The works were in effect the conversion of the church to a relevant residential purpose (Note 16(a)) or an extension to the church (Note 16(b)) in that the wings merely extended the pre-existing church into which they had been fully integrated. He maintained that the church remained the focal point of the development and gave the appearance of dominance. A situation could never, in Mr Nicholson's submission, be reached where an increase in area could no longer be described as an enlargement because of the wording of the legislation. Note 16(b) refers to "any enlargement of or extension to an existing building". The Commissioners' view and their policy was that because the legislation placed no upper limit on the size of the enlargement, size is not a material factor. It is not a question of degree. That is immaterial. Further, the demolition of all the other buildings on the site was purely and simply to make room for the extension.

### Conclusions

16. We take from the decided cases to which we were referred the following principles:

- 25 (a) The test which we should apply to determine whether the works carried out constitute enlargement or extension involves two stages. It requires an examination and comparison of the building(s) as it or they were before the works were carried out and the building or buildings as they will be after the works are completed (*Cantrell (No.1)*).
- 30 (b) The answer to the two stage test 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 difference in appearance, layout and how they are equipped to Function (*Cantrell No.1*).
- 35 (c) The terms of the planning permissions are in the main irrelevant.
- 40 (d) The examination of the works involves a question of fact, degree and of impression. Whilst enlargement clearly involves some addition to the existing building and an increase in space, it will be a question of fact and degree whether something can properly be described as an enlargement of an existing building. The additional works may be so extensive in comparison with the original that that would be a misnomer (*Marchday Holdings*).

17. We look first at Note 16(b) and consider whether the works consist of an enlargement or extension. Before any work began the site consisted of a set of disused church buildings including the church itself. Post-demolition there remained the church in its original form. The question for us is therefore whether the final development, the care home in its finished form, should be seen as merely an extension or enlargement of the church. This is a question of fact and, contrary to Mr Nicholson's submission, we believe it to be a question of degree, as set out above in the extract from *Marchday Holdings Limited*. Viewing the final construction here, we believe that the point is certainly reached where it can only be a misnomer to describe the works as an extension. Viewed structurally and as a whole the church can only be described as being dwarfed by the new build. This is apparent from the front where the church is flanked by the two new wings each of roughly equivalent width to the church itself. It is more apparent from all other views where the church is all but unseen within and behind the three new wings. We accept that the church is a focal point looked at from Hall Road but even on this easterly aspect, in the most generous definition of the word, it does not "dominate" the façade as contended by Mr Nicholson. Looking at the final complete structure one sees a large fully functioning care home of modern design. In a very attractive way it has incorporated an old and disused church. No objective observer however could see the new build as an extension or enlargement to the church. There is just no impression of enlargement. The sheer scale of the works precludes this.

18. Mr Nicholson's alternative argument was that the new build was a conversion of the church. The external structure of the church remains unchanged but there has been a conversion of the church in the sense of its appearance, internal layout and use having been altered. In external appearance, it is no longer freestanding but to each side gives into glass and brickwork walkways. It is very obviously now a fully integrated part of another structure. Internally, it is structurally transformed from being of a single storey to having the mezzanine floor added. Additionally, further rooms have been made out of the open space in the form of a shop, activity room and office. In terms of use there is a clear conversion from that of a church or former church into a fully functioning reception and office area serving a care home. However, conversion there may have been but in no way can it be said that the church has been converted into the care home. Again it involves a question of degree. The church has been structurally integrated into the care home but forms a proportionately very small area of it in terms of size and a function.

19. Mr Nicholson contended very strongly that we should treat the supply as one single supply with one rating. He said that the Tribunal neither could nor should either find there had been separate supplies or that within a single supply separate ratings applied. For the purposes of this decision we therefore adopt this approach.

20. In summary, the structure which now exists is one single fully functioning nursing home. As a matter of impression, size, shape, function and character it is so vastly different from the existing church that it cannot be said to constitute the conversion of the church or an enlargement of or extension to the church. We therefore find that the works do fall to be zero rated within Item 2 and we reject the

Commissioners' contention that they are taken out of zero rating by Notes 16(a) or 16(b). The appeal is therefore allowed.

5 21. The mechanism by which the appeal came before us was that the Commissioners had raised an assessment against the Appellant applying a reduced rate to just three of the invoices which had been issued. We were told, and indeed it is clear from the amounts, that these invoices are by no means for the entirety of the building works and are specimen only. Our decision to allow the appeal is therefore not only in relation to these three invoices but as a matter of principle to be applied to the cost of the entire works.

10 22. 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  
15 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

20

**LADY JUDITH MITTING  
TRIBUNAL JUDGE**

**RELEASE DATE: 2 July 2013**

25