



TC02796

Appeal number: TC/2011/10183

Value added tax - construction of an annexe to an existing building – current use of the building – purpose for which it was designed – capacity for functioning independently - VATA 1994 Sch 8 Group 5 Item 2 - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CHELMSFORD COLLEGE

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY
MRS GILL HUNTER**

Sitting in public at Chelmsford College, Moulsham Street, Essex on 3 July 2013

Mr David Walters of Deloitte LLP for the appellant

Ms Alison McHugh of the Office of the Solicitor to HM Revenue and Customs for the respondents

© CROWN COPYRIGHT 2013

DECISION

Introduction

1. This appeal concerns whether supplies made to the taxpayer in the course of the construction of a new building at its Moulsham Street campus should or should not be zero-rated under Item 2, Group 5, Schedule 8 of the Value Added Tax Act 1994 ('the 1994 Act'). The new building in question is the college's Art & Design Block erected very close to the main college building and connected to it by an enclosed footbridge at the first floor level and an open pathway immediately under the bridge at ground floor level.

2. The commissioners contend that the Art & Design Block ('the A&D Block') is an extension to an existing building and therefore fails the test of Note 16(b) to Group 5 of Schedule 8 to the 1994 Act, while the taxpayer contends that the A&D Block is an annexe capable of functioning independently of any existing building. It is agreed that the building is within Item 2(a) as a building designed for a relevant charitable purpose.

Legislation – 1994 Act Schedule 8 (zero-rating)

3 Group 5 – Construction of Buildings

20 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
 - 25 (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 the Group

30 (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.

35

(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:
 - 40 (i) the annexe is not via the existing building; and

(ii) the existing building is not via the annexe.

Facts

4. We received sworn evidence from Mr Paul Bayliss, the Director of Finance and
5 Resources at Chelmsford College, and a bundle of documentary evidence; we also
inspected the A&D Block and the main building. From this we find that the following
facts are established, at least on the balance of probabilities.

5. Chelmsford College is an educational charity providing a range of teaching to
students predominantly aged between 16 and 18 in day classes, though there is some
10 evening teaching as well. It includes the study of conventional Advanced Level
subjects but it extends to topics such as child care, social and health care, forensic
science, various aspects of computer and information technology, travel and tourism,
and business administration. There is also a sports centre forming part of the college.

6. In the A&D Block, the first floor is used for teaching fine arts, painting,
15 photography, dress design and the like, and there are high windows on the north side
to let in the north light which is especially suitable for this kind of work; on the south
side, there are substantial grids (called '*brise-soleil*') extending from the tops of the
ground floor windows and a large roof overhang at first floor level to moderate the
sunlight for the same reason. There is a dark room for developing, from which all
20 light is excluded by means of a capsule entry mechanism similar to that sometimes
found in banks or jewellers' shops. The rooms for storage and teaching are large and
the ceilings high, which is again particularly suitable for the studies in question -
though it is conceded that the rooms could in principle be subdivided and used for
other types of teaching as well. The ground floor is given over principally to media
25 studies, though sculpture and pottery is taught there also and there is some very heavy
equipment such as kilns, cutting machines and so on which is bolted to the floor, and
there are recording studios.

7. In the A&D Block, there are toilets, student lockers, and vending machines selling
confectionery and drinks, and microwave ovens together with a water supply. The
30 microwaves are located in storerooms and the water supply is obtained from the
teaching rooms. There is no cafeteria or canteen as such, and no staff common room:
both are available in the main building and may be used by students and staff, but the
A&D staff often in practice hold their meetings in the block in one of the classrooms.
As a practical matter, there are in the A&D Block the facilities necessary for the
35 courses which are taught there, though the students may use the Learning Resource
Centre in the main building as well. No A&D studies are taught in the main building.

8. There is pedestrian and vehicular access to the college from Moulsham Street on
the west side and pedestrian access from Vicarage Road on its east side. The A&D
Block can be accessed from either side of the campus on foot and the principal
40 accesses to it and to the main building are independent of each other, the main A&D
access facing the Vicarage Road side and that for the main building facing Moulsham
Street.

9. The connections between the A&D Block and the main building are, as we have said, effected by means of an enclosed bridge at first floor level and a pathway immediately below it. The bridge is lit but not heated, and is partly open to the air in the form of gaps between its floor and its glass walls, and there are doors at each end of it; it is the only disabled access to the A&D Block, because that block has no lift and disabled persons need to use the lift in the main building and pass over the bridge in order to get to the A&D Block's first floor. Alterations to the main building had to be made to provide for this bridge connection. On the ground floor, the connection is via a short open air path underneath the bridge, by virtue of which users are partly sheltered from the weather.

10. The A&D Block was built on the site of two demolished buildings called the Horsa Block (on whose footprint it is) and the Workshop Block: the Horsa Block was used to teach electrical engineering, now taught at a different campus, and the Workshop Block was used for Art, Design and Media studies. The new block is visually similar to the main building, though its large windows, sloping roof and window overhangs mark it as distinct.

11. The main building and the A&D Block now share the same heating system, the boiler being in the main building. The pipes to supply the A&D Block with heat go under the walkway at ground floor level but the heating itself is thermostatically controlled separately in each building. If the system breaks down, there is a reserve of oil-filled radiators which can be used instead.

Submissions

12. We were referred to the following authorities:

Cantrell v CEC (No 1) [2000] STC 100

25 *Cantrell v CEC (No 2)*. [2003] STC 486

McNamara v CEC – VDT 16039

Grace Baptist Church v CEC – VDT 16093

Longparish C of E Primary School v RCC – VDT 20464

East Norfolk Sixth Form College v RCC – VDT 20816

30 *Treetops Hospice Trust v RCC* [2011] UKFTT 503 (TC)

13. For the taxpayer, it is argued that the cases show that the A&D Block satisfies the criteria for zero-rating. In so far as the legislation is concerned, it is common ground that the college is a charity, that the construction was for a relevant charitable purpose and that Note (17)(b) is satisfied.

14. It is argued that the A&D Block looks like a separate building, with its different height of windows and sloping roof and the overhang and window grids to restrict sunlight making it quite clearly distinct; and the first floor bridge and the walkway underneath even slope slightly. The A&D Block is, moreover, faculty-specific with

its larger than usual rooms and suitability for heavy equipment, so that the precise teaching features installed were envisaged in the block's design.

15. All the students and staff need for their work is to be found in the A&D Block, and the fact that they could use the main building facilities does not detract from their not in practice needing to do so. In particular, the absence of a formal eating place is irrelevant because the college is responsible only for teaching, and the eating facilities in the main building are optional.

16. The A&D Block is used for a discrete purpose which is distinct from the activities in the main building, which had never been used to teach art and design, and in the A&D Block the subjects taught in the main building could not be studied.

17. For the commissioners, it is submitted that we must focus on the situation before and after the construction noting that the Horsa Block, on whose footprint the A&D Block stands, had been used for teaching electrical engineering. Before the construction A&D was taught by the college and after the construction the same was the case, it is simply that it was not taught in exactly the same location as before. In essence, what was taking place was the provision of education which had many aspects and it was immaterial that the subjects taught in the A&D Block were not those taught in the main building. Effectively, what had happened was that the teaching in the Horsa Block previously on this site had moved to another campus and that in the Workshop Block on an adjacent site now took place in the new building – an instance of what was referred to in debate as the 'education is education is education' thesis, or the impossibility of making a valid distinction between different types of education.

18. Apart from that, however, it was also the case that the A&D Block was not capable of functioning independently from the existing building: the heating, an essential feature of any building in Britain, was interdependent; the disabled access could only be through the main building and the fact that it was likely to be little used was irrelevant; the main building housed the administration of the college, with the timetables for teaching and deployment of staff, without which the A&D Block could not function; realistically, the likely use by staff and students of the eating facilities in the main building, and by the staff of the common room there, were further markers of interdependence.

19. In summary, the commissioners argued that the A&D Block was in fact an extension of the main building; but, if they were wrong on that, and the A&D Block was held to be an annexe, then the new building failed the test of Note (17)(a) because it was not capable of functioning independently from the existing building. It was accepted that Note (17)(b) was satisfied.

Conclusions

20. Of the authorities cited, those immediately binding on the tribunal are the two *Cantrell* decisions in the High Court.

21. The tests to be applied by the tribunal are described by Lightman J in *Cantrell (No 1)* at [4] as follows:

5 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 or (if more than one) the buildings as they were before the Works were
carried out and the building or buildings as they will be after the Works are
10 completed; and the question then to be asked is whether the completed
Works amount to the enlargement of or the construction of an extension or
annexe to the original building: see *Marchday* [1997] STC 272 at 279. I
must however add a few words regarding how the question is to be
approached and answered. First the question is to be asked as at the date of
15 the supply. What was in the course of construction at the date of supply is in
any ordinary case (save for example in case of a dramatic change in the
plans) the building 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
20 similarities and differences in appearance, the layout and how the building or
buildings are equipped to function. 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 potentials for use inherent
in the building or buildings.

22. In remitting the case to the tribunal for further consideration, the learned judge emphasised, at [12]:

30 that regard must be only to the physical character of the buildings in course
of construction at the date of the relevant supply and that the subjective
intentions on the part of the appellants as to their future use, their subsequent
use and the terms of the planning permission regulating their future use are
irrelevant, save only in so far as they throw light upon the potential use and
functioning of the buildings

23. When the matter returned to the High Court as *Cantrell (No 2)*, the Vice-Chancellor added two further considerations which must be borne in mind. At [17], the Vice-Chancellor observed:

40 An annexe is an adjunct or accessory to something else, such as a document.
When used in relation to a building it is referring to a supplementary
structure, be it a room, a wing or a separate building.

and at [20]:

45 The judgment of Lightman J [in *Cantrell (No1)*] was directed primarily to
the conclusion of the Tribunal in their first decision that the Phase I works

constituted the enlargement of the New Barn. In that context, and in the context of an extension, I understand and agree that the relevant considerations are those which arise from the comparison of physical features of the existing building before and after the works in question. But
5 in the case of an alleged annexe the requirement that such a construction should be an adjunct or accessory to another may require some wider inquiry.

24. Apart from this, we are assisted by the observation Sir Stephen Oliver had made
10 in *McNamara* at [13] that:

The term annexe connotes something that is adjoined but either not integrated with the existing building or of tenuous integration.

15 25. The various other first instance decisions cited to us have turned very much on their facts, but we derived assistance also from Judge Demack’s formulation in *Grace Baptist Church* at [26]:

20 The Notes to Group 5 recognise that it would be in conflict with that purpose if the Group were to exclude from zero-rating services relating to the construction of a subsidiary building which, *had it been physically divorced from the existing building*, would itself have been a building within Item 2(a). If such a subsidiary building were to be excluded from zero-rating solely because it had some form of link (possibly a covered way or corridor)
25 to the existing building, it would fly in the face of logic and of the obvious intent of the legislation. Such a “subsidiary building” (an “annexe”), and the factors which define it, are covered by Note 17, modifying what would otherwise be the effect of Note 16(c).

30 26. Applying Lightman J’s two stage test, we note that the Horsa Block and the A&D Block share the same footprint and essentially the same relationship to the main building, that is to say that they both sit (or sat) alongside it for use for a purpose which was and is part and parcel of the college’s teaching vocation, yet in ways which are distinct in so far as the physical requirements of that teaching are concerned, since
35 both art and design and electrical engineering require facilities beyond those in a straightforward classroom.

27. From the point of view of appearance, the A&D Block is visually similar to the main building though with distinguishing features such as the sloping roof, the overhangs and the big, high windows. An observer looking at the two buildings
40 would see that they were connected but distinct, though connected perhaps slightly more than would have been apparent with the Horsa Block. The first floor bridge and the ground floor walkway seem to us to fit well with the concept of ‘tenuous integration’ between the two buildings, and to fit well into the analysis we have cited in *Grace Baptist Church*. Had there been no first floor bridge, it is difficult to see
45 how it could be argued that the A&D Block is not a new and free-standing separate construction, albeit very close by the main building.

28. We are warned to look at this matter, in principle, at the time the supply was made and not at the present position, or at the intentions of the taxpayer except in so far as they illuminate the potential for use inherent in the building. In many respects they do in fact do so: the size of the rooms, the north facing lights, the sun-shielding devices on the south side appropriate to the current usage, the presence of adequate toilets, all suggest a building to be used for a purpose distinct from the main building. For these reasons, we conclude that the A&D Block is not physically an enlargement or extension to the main building, but that it is in its appearance and in its design and construction an annexe to the main building.

29. The question then turns to whether the annexe is capable of functioning independently from the existing building. The building itself cannot be spoken of as 'functioning' unless reference is made to the use which was envisaged in its construction and to which is actually put pursuant to it. The actual use made of the A&D Block is distinct and many, or perhaps most, of the activities carried out in the A&D Block take place exclusively there. The use of the bridge is not necessary save in exceptional cases, and the availability of confectionery and drinks in vending machines, and the staff microwave ovens, all suggest that staff and students alike often seek refreshment in that block rather than in the main building. Much emphasis was put by the appellant on this aspect of the self-sufficiency of the A&D Block, with its student lockers and toilet facilities.

30. By contrast, the shared heating system and the administrative dependence of the A&D Block suggest otherwise. Emergencies apart when the oil-filled radiators would be used, the normal situation would be that the two buildings function in tandem and were designed to do so. That is how the block was built and that is what in practice happens. The activity conducted in the block, for all its separate and distinct character, is nonetheless education at the same level and of equivalent quality to that provided in the main building but simply in relation to a range of different subjects, which are themselves but loosely connected. The centre of administration, without which the A&D Block would not function, without which the teaching staff would not be employed, and without which the facilities which are available in the main building would not exist, is located in the main building.

31. The dicta of Lightman J in *Cantrell (No 1)* however incite us to concentrate on the building itself, and the time of the supply of the services at issue. The wording of the legislation points us likewise to what can be the case rather than what is the case: the question remains, is the new block *capable* of operating independently? Given the factors pointing one way and the other, we find that the crucial factor in this case is the heating supply. A building for occupation by people cannot operate at all without heating, and the large rooms with their tall ceilings and big windows in the A&D Block were not designed to get through the winter with emergency heating equipment such as has been described. As designed and built, the A&D Block was not capable of being operated independently.

32. The appeal does not therefore succeed.

Appeal rights

33. This document contains the 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 no 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.

10

**MALACHY CORNWELL-KELLY
TRIBUNAL JUDGE**

15

RELEASE DATE: 23 July 2013