



**TC03017**

**Appeal number: TC/2012/09940**

*Value Added Tax – zero-rate – construction of a dwelling – swimming pool  
– external but connected to dwelling – whether zero-rate applicable to  
construction of swimming pool – Value Added Tax Act 1994 s. 30,  
Schedule 8*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**TERRY McCANN**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE NICHOLAS PAINES QC  
                  KAMAL HOSSEIN FCA FCIB**

**Sitting in public at 45 Bedford Square London WC1 on 19 July 2013**

**Mr Timothy Brown, Counsel, instructed by Dave Brown VAT Consultancy, for  
the Appellant**

**Mr Martin Priest, of the Appeals and Reviews Unit, HM Revenue and Customs,  
for the Respondents**

## DECISION

1. This is an appeal by Mr Terry McCann in his capacity as recipient of the services of constructing a house together with an adjoining swimming pool. He appeals against a decision by HMRC that the services, and associated supplies of materials, are not zero-rated insofar as they relate to the swimming pool, changing rooms and a plant room. The zero-rating provisions of the Value Added Tax Act 1994 are notorious for drawing fine distinctions. In this case we were addressed in considerable detail about the lay-out of the house and swimming pool, and on the question of whether the pool was “part of”, “incorporated in” or “integral to” the house.

### **The legislation and Notice 708**

2. The legislative provisions in issue are brief. We set them out now and, because reliance was placed on the HMRC Notice that discusses them, summarise the relevant passages of the Notice. Section 30(2) of the 1994 Act provides that

“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.”

3. Items 2 and 4 of Group 5 in Schedule 8 to the Act are, so far as material:

“2. The supply in the course of the construction of—

(a) a building designed as a dwelling ....

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.”

“4. The supply of building materials to a person to whom the supplier is supplying services within item 2 ... of this Group which include the incorporation of the materials into the building (or its site) in question.”

4. Note 3 to the Group provides that “The construction of ... a building designed as a dwelling ... includes the construction of a garage, provided that (a) the dwelling and the garage are constructed ... at the same time; and (b) the garage is intended to be occupied with the dwelling....” For the purposes of item 4, Note 22 defines “building materials” in relation to any description of building as meaning “goods of a description ordinarily incorporated by builders in a building of that description (or its site)”, with certain exclusions. The exclusions were not relied on in this case, nor was it disputed that the materials of which the swimming pool is constructed are of the required type.

5. HMRC Notice 708, dealing with buildings and construction, paraphrases the wording of item 2 by saying that, in order to be zero-rated, work must be “closely connected” to the construction of the building. It goes on to say that work is “closely connected” if it allows the construction to take place (e.g. works of demolition or ground works) or produces “works that allow the building to be used”; it instances: water and power connections; paths or drives (specifically including a patio); means of security such as fencing and gates; and soft landscaping such as topsoil and grass. It adds that planting trees, shrubs or flowers would not normally pass the test unless carried out in accordance with a planning condition. By way of examples of work that is not “connected” to the construction of the building, the Notice instances the construction of outdoor leisure facilities such as tennis courts and swimming pools.

6. By way of explanation of Note 22 to Group 5, the Notice says that an article is “incorporated” in a building if its removal would require the use of tools or result either in a need for remedial work to the building or its site or in substantial damage to the article itself. Examples of articles accepted by HMRC to be “building materials” within the meaning of the legislation are given at section 13.8.1 of the Notice; they include “swimming pools inside the house, including water heaters and filters but not diving boards and other specialist equipment”.

### **The facts**

7. We were provided with copies of correspondence, architect’s drawings and a witness statement of the architect, Mr Christopher Cunningham, who was not cross-examined. The house is of an interesting and unusual design. It is built on a hillside overlooking the sea. It is of two storeys, with the lower floor being larger than the upper floor. Apart from the main entrance, the lower floor mainly contains bedrooms; at the rear of it are some rooms devoted to uses that do not require natural light or a view. They are windowless, apart from some skylights, since the lower floor is built against the hillside. Between those rooms and the hillside is an area referred to as a “service void”. It is in effect a corridor, one metre wide, running around the rear of the ground floor. Its outer wall – most of which is built against the hillside, which has been excavated so as to be vertical – serves as a retaining wall to hold back the ground and as a protection against damp; it is constructed of waterproof reinforced concrete.

8. Mr Cunningham told us in his witness statement that the service void has three functions. First, having two walls, separated by the void, between the rear ground floor rooms and the hillside provides greater protection against damp from the hillside reaching the rooms. Secondly, the void allows access to the damp proofing, as is required by the relevant British Standard; thirdly, it carries cabling and pipework.

9. The upper floor stands over the lower floor but covers a smaller area. Those parts of the lower floor that are not covered by upper floor rooms are covered by a terrace; some of the upper floor rooms give onto it. At the rear of the terrace is the swimming pool, which is set into the terrace and consequently occupies a space more or less level with the lower floor rooms. The service void runs between the lower floor and the swimming pool in such a way that part of the outer wall of the service

void is also part of the structure of the swimming pool. At the rear of it (at upper floor level and giving onto the terrace) are changing rooms and a plant room, occupying a separate building that we shall refer to as the “pool house”. The main house is heated by heat pumps which extract heat from the hillside, and one of these is situated in the pool house although it supplies heat to the dwelling.

10. It appears that the builders initially began accounting for VAT on the whole construction, wrongly thinking that it was wholly excluded from zero-rating. They asked HMRC for a repayment. HMRC examined the planning permission and came to the view that the construction of the house could be zero-rated, but not the “outside pool which is not considered to be closely connected to a new build dwelling”. E-mail and postal correspondence ensued between HMRC and Mr McCann’s quantity surveyor and subsequently his VAT consultant (technically acting, at that stage, for the builders who at Mr McCann’s request had given him authority to represent them). HMRC gave the view that the swimming pool “would not be classed as ‘integral’ to the dwelling”, referring to the mention of “swimming pools inside the house” in section 13.8.1 of the Notice.

11. The further debate centred mainly on terminology in item 4, in Note 22 and in parts of the Notice dealing with those. Points were made on Mr McCann’s behalf that the pool was integral to the retaining wall of the house and could not be removed without compromising the structural integrity of the dwelling; it was described as being integral to the house. It was said that, if the pool were removed, part of the house would fall down or be engulfed by the hillside; it was “incorporated within the house” and was analogous to a rooftop swimming pool which would necessarily be regarded as integral with the roof. Noting HMRC’s acceptance that a rooftop pool could be zero-rated, it was argued that the pool was indeed within the roof of the ground floor, i.e. the terrace. The property was one continuous structure and it would be artificial to segregate parts of it. Moreover, the plant room at the rear of the swimming pool housed one of the heat pumps providing heating to the house. Mention was made of HMRC’s reference to a “detached swimming pool” in the Notice on zero-rating of do-it-yourself supplies.

12. HMRC’s decision letter maintained their original stance, saying “The swimming pool and associated pool house buildings do not form part of the dwelling, being the other side of a “perimeter drained cavity/service void”. As such the pool, the plant/store, the WC, changing rooms and associated features do not form part of the new dwelling and cannot be zero-rated”. In response to a request for a reconsideration, which disputed that the house ended at the outer wall of the service void, HMRC maintained that the building of the pool was not in the course of the construction of the house, and cited the reference to outdoor leisure facilities such as a swimming pool in Notice 708.

13. Mr McCann appealed, his grounds of appeal reiterating that the swimming pool was incorporated in the house, sharing walls with the house (a reference to the service void), being bounded elsewhere by retaining walls which were also part of the house and being surrounded by the terrace which was effectively the roof of part of its ground floor. HMRC’s statement of case contended that the pool was separated from

the house by the service void and the terrace; the construction of the house would be unaffected by the removal of the pool: it was “some distance away”, not part of the dwelling, and could not benefit from zero-rating. The inclusion in the pool plant room of a heat pump serving the house was an incidental use of a room whose main purpose was to provide facilities for the use of the pool.

### **The parties’ submissions**

14. Mr Timothy Brown, for Mr McCann, submitted that the pool and pool house did physically form part of the dwelling: the pool was connected to the terrace which formed the roof of part of the lower floor and parts of two of its walls were also parts of the outer wall of the service void. The service void was part of the house; it contained the services such as electric wiring, so that Mr Priest’s argument that the service void was not part of the house produced the anomalous consequence that the wiring of the house was outside it. Also, the upper floor rooms extended over the service void, meaning that its inner wall could not define the limit of the house. The pool could not be removed without compromising the structural integrity of the dwelling. He relied on *Catchpole v HMRC* [2012] UKFTT 309 (TC) and *Fox v HMRC* [2012] UKFTT 264 (TC) as showing that a dwelling could consist of more than one building, pointing out that HMRC had themselves relied on the correctness of the *Catchpole* decision in *Barkas v HMRC* [2013] UKFTT 186 (TC). The pool house, he submitted, was likewise part of the dwelling, and housing the domestic heat pump could not be dismissed as merely an “incidental” use of the plant room.

15. Finally Mr Brown referred to the Tribunal’s acknowledgement in *Rialto Homes v CCE* (Decision no. 16340) of the social purpose underlying the zero-rating of housebuilding. Given HMRC’s acceptance in Notice 708 that an indoor swimming pool is zero-rated, his client should not, he submitted, be penalised because his swimming pool was outdoor, while nevertheless an integral part of the dwelling.

16. For HMRC, Mr Martin Priest submitted that there were two questions for us to answer: whether the swimming pool and pool house were part of a dwelling and whether the services of constructing them were services related to the construction of a dwelling. He pointed out that zero-rating was not confined to the construction of a dwelling but extended to services related to it; these included civil engineering works such as building a retaining wall. He accepted that a swimming pool would be part of a dwelling if it was contained within the dwelling, but HMRC’s policy was that an outdoor pool was not part of a dwelling and not zero-rated. In the present case, he submitted, the pool was not part of the dwelling. The outer wall of the dwelling was the inner wall of the service void. The outer wall of the service void was a work of civil engineering; it was related to the dwelling and thus itself zero-rated, but not part of the dwelling. Removal of the pool would not alter the fabric of the dwelling; it was only connected to the dwelling by the paving of the terrace. It was separate from and not part of the dwelling. Mr Priest referred us to *O’Reilly v HMRC* (Decision no. 20945) which concerned an outdoor swimming pool surrounded on three sides by bedrooms, a lounge, a plant room and a further room. The Tribunal there held that the pool was not part of the building.

17. As regards the pool house, Mr Priest accepted that a dwelling could be split between two buildings, but said that that was not the situation here: the rooms in the pool house were designed to serve the pool and were not rooms typical of a dwelling. Turning to his second question, he accepted that the construction of the retaining walls between the house and the hillside was related to the dwelling but said that the construction of the pool and pool house was not, as the dwelling would be the same without them.

### **Our decision**

18. We have concluded that the swimming pool and pool house are not eligible for zero-rating, save possibly to a minor extent on account of the heat pump.

19. The terms of the legislation are such that a supply is zero-rated under item 2 (provided that is not made by a member of any of the excluded professions, a matter that is not in issue in this case) if it is made “in the course of” the construction of a dwelling and if it is of “services related to the construction” of the dwelling. A supply is zero-rated under item 4 if it is of “building materials”, as defined, and is made by a person who is supplying services which “include the incorporation of the materials into the building (or its site)”. It has not been disputed that the materials used in the pool and pool house were building materials as defined; nor could it be disputed that they were incorporated into the site of the dwelling, whether or not they are on a correct analysis incorporated into the building itself. If the construction is zero-rated under item 2, the supply of the materials would be zero-rated under item 4.

20. The real issues in the case relate to item 2: was the construction of the pool and pool house done “in the course of” constructing the dwelling, and was the service of constructing them “related to” the construction of the dwelling? Neither expression is particularly precise. The expression “in the course of” indicates that the supply must be part of a process culminating in the completion of building the dwelling. The expression also connotes that the supply must have some relationship to the process of building the dwelling, a requirement that is reinforced by the requirement that the services in question must be “related to” the construction of the dwelling.

21. On a wide interpretation, the requirement could be satisfied in the case of any service that produced something to be used in conjunction with the dwelling: the construction of Mr McCann’s swimming pool and pool house could be said to be related to the construction of his house because the pool and pool house would be facilities available to be used by occupants of the house. On that approach it would not matter whether the pool and pool house were physically part of the dwelling or not. We are satisfied that that is not the intended meaning of the provision, and Mr Brown did not contend for it, accepting that construction of a swimming pool that was separate from a house would not be eligible for zero-rating.

22. In our view the key to the interpretation of item 2 is its requirement is that the service be related to the construction of “a dwelling”. The word “dwelling” is not defined save to the extent that, by virtue of Note 2, a building is designed as a dwelling if, among other things “the dwelling consists of self-contained living

accommodation”. In other words, a dwelling is a building for living in: services under item 2 must relate to providing a building for living in. (For brevity, we leave buildings designed as a number of dwellings out of account; the principles are the same.)

5 23. At the core of item 2 are services that produce kitchens, living rooms, bathrooms, bedrooms, etc. Conversely, a service does not normally fall within item 2 if it relates to something that is not a normal part of living in a house, such as providing facilities for swimming.

10 24. The wording of item 4 throws some light on the meaning of item 2, in that it is implicit in item 4 that a service falling within item 2 can include incorporating building materials into the site of the building as well as into the building itself. Our understanding of the general intention of item 2 leads us to the conclusion that the legislator again had in mind things that contribute to producing a building for living in. For example, a bathroom cannot function in the fashion that is nowadays normal  
15 unless it is connected to the water main and drains, which will necessarily involve construction works on the site of the house but outside it.

25. It is against that background that we return to the question of swimming pools. There are three possible situations. One is the case of a swimming pool within a house, which HMRC accept is eligible for zero-rating, and Mr Brown agrees.  
20 Another is the case of an outdoor swimming pool that is separate from a house. HMRC maintain that it is not eligible for zero-rating, and Mr Brown does not dissent from that. The third situation, which is probably rare but occurs in this case, is of a swimming pool that is situated outdoors but is part of a single structure together with a dwelling.

25 26. Swimming in a swimming pool is not a normal part of living in a house in the same way as cooking, eating, bathing or sleeping, and it is common knowledge that most houses do not contain one. But where a swimming pool is contained entirely within a house, constructing it is part of building the house; the service of building a house is within item 2 even if one of the rooms is designed for a use that is not  
30 intrinsic to living in a house. HMRC have accepted in the Notice that the materials of such a swimming pool are within item 4 and, by necessary implication, that its construction is within item 2. That conclusion could be said to be anomalous, and in the case of a luxury facility not within the social purpose of the zero-rate, but distinguishing between rooms on the basis of their intended use would lead to a  
35 proliferation of borderline cases such as fitness rooms, home cinemas and the like.

27. Outdoor swimming pools that are separate from a house are in our view rightly regarded as ineligible for zero-rating, for the reasons we have given. The question we have to decide is whether an outdoor swimming pool that is part of a single structure together with a dwelling falls to be treated in the same way as an indoor swimming  
40 pool that is within the structure of a dwelling or in the same way as an outdoor swimming pool that is not part of the structure of a dwelling.

28. As we have noted, arguing their respective cases led the parties into disagreement on fine points of semantics as to whether, for example, the service void was part of the dwelling on grounds such as that it contains what would normally be regarded as internal wiring, and whether its outer wall was a work of civil engineering rather than of housebuilding. On those matters we tend to agree with Mr Brown. It seems to us that the service void is, in ordinary language, part of Mr McCann's house. On the other hand, Mr Brown's argument relies on the existence of a length of shared walling that forms a small proportion of the walling of the swimming pool and a yet smaller proportion of the outer walling of the service void. Removal of the pool and pool house would, in the language of the Notice, require tools and involve damage to the outer wall of the service void and the terrace, as well as to the pool and pool house structures themselves; whether it would involve removal of part of the house (as was suggested in correspondence) depends not only on whether the service void outer wall is part of the house but also on whether the hypothetical removal of the pool would include removal of that part of the walling that performs double duty as part of the swimming pool.

29. This part of the debate between the parties in truth relates, however, not to the requirements of item 2 but to one of those of item 4 and its treatment in the Notice. Whether the supply of a piece of material is within item 4 depends on whether it is "incorporated", for which purpose the Notice puts forward a test of whether its removal would require tools and/or involve damage. But that part of item 4 is concerned with distinguishing between fixtures and loose contents; the fact that something is a fixture only becomes relevant if the service of incorporating it (in the house or its site) is a service related to the construction of a dwelling within the meaning of item 2.

30. In our view the guiding considerations here are, first, that providing a swimming pool is not related to providing a building for living in, in the sense contemplated by the legislation. Secondly, a swimming pool that is part of the same structure as a dwelling but nevertheless not contained within it cannot be said to fall within the zero-rate on the basis of the reasoning that we have discussed in paragraph 26 above. Building a swimming pool contained within a house must necessarily be regarded as part of building the dwelling. Building a swimming pool which is part of the same structure as, but not contained within, a house is not in our view part of building the dwelling. It is part of building the structure as a whole, but that is not the same thing. To hold otherwise would cast doubt over the position of other structures comprising conjoined but separate parts with different characters, such as a shop with a flat above.

31. Though we agree with Mr Brown that the service void is part of the house and its outer wall is not a separate structure, and that the materials of the swimming pool and pool house are "incorporated into the building (or its site)" within the meaning of item 4, for the reasons we have given we do not consider that that is the key to the correct application of item 2. Even if the materials of the pool and pool house are regarded as being incorporated into a single overall structure with the house, that does not answer the question whether the service of incorporating them was a service related to the construction of a dwelling within the meaning of the legislation as we

have construed it. In our view the overall structure here is one of which only some parts are a dwelling. By the same reasoning, in our example of a shop and flat, the incorporation of building materials into the shop is not a service related to the construction of the flat.

5 32. We respectfully agree with the Tribunals in the *Catchpole* and *Fox* cases that a dwelling can comprise two separate buildings. But in those cases the buildings contained ordinary domestic rooms which were intended to be used, in combination, as living accommodation; they were merely distributed between separate buildings situated close to each other. The pool house in this case is, we find, designed to  
10 provide facilities for use in connection with the swimming pool. The explicit extension of the zero-rate to garages in Note 3 to Group 5 indicates that the zero-rate does not otherwise extend to separate buildings not designed for living in.

15 33. The plant room also contains a heat pump which contributes to heating the house. A room containing a heating unit (such as a boiler room) is a normal feature of a house and the heat pump itself is (subject to its complying with the further requirements of Note 22), a piece of building material that is being incorporated into the site of the house. The rationale of its being sited in the pool plant room was not fully explained to us. It may be that if the pool house had not been built, it would  
20 have been necessary to build a structure separate from the house in order to accommodate the heat pump. If so, it may be appropriate to apportion some part of the cost of building the pool house to accommodating the heat pump. If the parties cannot agree as to the appropriateness and amount of any apportionment (whether relating to the heat pump or more generally), we shall hear further argument.

25 34. For the reasons we have given, we conclude that the disputed items are for the most part not eligible for zero-rating.

30 35. 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.

35

**NICHOLAS PAINES QC  
TRIBUNAL JUDGE**

40

**RELEASE DATE: 23 October 2013**