



TC03504

Appeal number: TC/2013/01516

TYPE OF TAX – VAT – Listed buildings – is ancillary accommodation zero rated – yes. Does the ancillary accommodation need to be ancillary to one building only to be part of that dwelling – no.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

M I M CONSTRUCTION (a firm)

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GERAIN T JONES Q C
MRS S SADEQUE.**

Sitting in public at Bedford Square, London on 29 October 2013

Mr. Brown for the Appellant

Mr. Bingham, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

5 1. By a Notice of Assessment dated 10 April 2013 the respondents assessed the
appellant, MIM Construction, to value added tax in the sum of £60,292 plus
£2,541.56 interest. The assessment was raised because the respondents contend that
the appellant, a building firm, had not been entitled to zero rate for VAT, work that if
undertook at Snapes Manor, Lower Baston, Devon for its client, the owner of the
property. The assessment was upheld on review. The outcome of the review was
10 advised by an undated letter (page 39 in the appeal bundle).

2. The appellant has appealed on the basis that the work was properly zero rated.

3. The outcome of this VAT appeal is fact sensitive. Indeed that applies to very
many VAT appeals. Fortunately the facts are not in dispute between the parties. It is
common ground that :

15 (1) Snapes Manor is a listed building.

(2) Snapes Manor is not physically attached to other buildings within what
might conveniently be called the curtilage of Snapes Manor. There are other
buildings which have been referred to as "the tithe barn", "the pool barn" and
"the cottage." These buildings, although carrying different names, comprise a
20 single building as can best be appreciated from photograph 2, 5, 7, 8 and 11 in
the photograph folder. Historically, these were the outbuildings to the main
house. For ease of reference we will refer to them as "the outbuildings".

(3) The outbuildings are also listed under a single listed building reference
number but under a different listed building reference number to Snapes Manor.

25 (4) The part of the outbuildings referred to as the cottage is used by the
owners of the property as residential accommodation, in particular, for visitors
(whether family or friends).

(5) The cottage is physically attached to the part of the outbuildings referred
to as the tithe barn and thus connected to pool barn. The building work must
30 provide a doorway connecting the tithe barn with the cottage, at first floor level,
as depicted on plan 1225 which is one of the plans that was submitted with a
planning application to the local planning authority, South Hams District
Council, and resulted in the grant of Planning Permission on 6 July 2010. On
the same date Listed Building Consent was issued by the same council.
35 Condition 2 of the planning permission provides that "*the development shall in
all respects accord strictly with drawing numbers 1225*". Thus it is
a condition of the planning permission that the connecting doorway at first-floor
level must be provided. It will then be possible to travel internally between the
cottage and the pool barn, via the tithe barn. (In our judgment the ascribing of
40 different names to the parts of this one building is a minor factor in this appeal).

(6) Access from the tithe barn to the pool barn is also at first floor level
through an eccentric doorway depicted in photographs 9, 13 and 16. One (or

more) steps need to be installed for the doorway to facilitate convenient use of the doorway.

5 (7) The tithe barn is used for recreational purposes by those using Snapes Manor and/or the cottage. The pool barn does not, as its name might suggest, contain a swimming pool. As depicted in photograph 6, those resident at the property enjoy the facility of an outdoor swimming pool. The pool barn houses changing rooms, a gym, shower and toilet facilities on the ground floor. Although the pool barn contains changing rooms there is no evidence that these are used exclusively in conjunction with using the outdoor swimming pool
10 (which in our climate is probably used but a few days in each year). Such facilities are equally likely (or perhaps more likely) to be used in conjunction with the gym.

(8) On its first floor it serves as study/office accommodation.

15 (9) The Listed Building Consent that was granted was granted further to a proposal described as "*Listed building consent to utilise swimming pool barn for ancillary accommodation*". The location of the property was given as Snapes Manor, Lower Batson, that being the postal address of the entire property. The Listed Building Consent was subject to a condition in precisely similar terms as condition 2 in the planning permission.

20 (10) On an unknown date the appellant provided a Schedule of Works to the owners of Snapes Manor, which referred to "Conversion of Existing Pool Barn to Ancillary Accommodation to Main House". (We place little weight upon the appellant's ascription of the property to which such user might be ancillary).

25 (11) On 30 November 2012 the respondents wrote to D. Brown VAT Consultancy and asserted that [para 10] : "*For the works of alteration to the pool barn to be zero rated as approved alterations, the pool barn must become an integral part of a listed dwelling. From the information available, the barn is for ancillary accommodation to the house and not the cottage. The works do not alter the cottage to which it is indirectly attached since the pool barn is ancillary to the house, not the cottage.*" In fact the pool barn is (part of) a listed
30 building in its own right.

(12) During the hearing before us Mr Bingham informed us that the respondents resile from that proposition. They resile from that proposition, he explained, because the respondents now contend that the pool barn is not used
35 as accommodation which is ancillary to either Snapes Manor or the outbuildings (including the cottage). The contention was that the pool barn must be seen as a stand alone building, with no ancillary connection to either Snapes Manor or the outbuildings, notwithstanding that it is physically part of the outbuildings.

40 (13) The appellant undertook works to the outbuildings, which are listed buildings in their own right, and charged the client VAT at 0%.

(14) The owner of the property, Mr Badale, gave a witness statement dated 13 November 2013 in which he describes the use presently made of the various buildings referred to above, as already summarised. His evidence is not challenged.

4. The appellant's case is that the work to the outbuildings, particularly the pool barn, was properly zero rated under group 6 of Schedule 8 Value Added Tax Act 1994, because it is common ground that the building is a "*protected building*" within the meaning of Note 1 under Group 6. It is then said that Note 2 is satisfied because the pool barn is "*a building designed to remain as or become a dwelling* ". It is then said that if the pool barn is used as dwelling accommodation ancillary to the cottage (which, we find, is undoubtedly a dwelling), that is sufficient to satisfy Note 2. The contrary case, for the respondent, is, as set out above, that the pool barn is not, and is not be regarded as, ancillary accommodation (and so part of a dwelling) by reference to either Snapes Manor or the outbuildings (in particular, the cottage).

5. Thus argues the appellant, the construction work fell to be zero rated given that it was work done and materials supplied in the course of an approved alteration to or of a protected building.

6. As we set out in more detail below we find as a fact that the use of the pool barn is ancillary to both the use made of Snapes Manor and the outbuildings generally, and in particular, the cottage. We are also satisfied that we must look at the physical situation as it is on the ground; the actual user made of the several buildings and the facts which are not in dispute (set out above). We are satisfied that the names ascribed to various parts of the building or buildings should be given little weight in determining the issues that we have to determine in this appeal, especially in circumstances where the "pool barn" does not contain any swimming pool.

7. The focus of our attention must be upon whether, in consequence of the works undertaken to the pool barn, it became a dwelling or part of a dwelling which was/is a protected building. It is clear from the speeches of their Lordships in the Zielinski Baker case that although Note 2 refers to a building "*designed to remain as or become a dwelling*", the use of the words "*a dwelling*" does not mean that a separate dwelling must come into existence. That much is clear from paragraphs 33 & 43 of the speech of Lord Walker in Zielinski Baker & Ptnrs Ltd v HMRC [2004] UKHL 2, [2004] 1 WLR 707, approving the distinctions drawn during the course of argument by counsel for HMRC (Mr. Lasok Q. C.)

8. The burden of the argument put forward by the respondents was that the pool barn is a stand-alone building and does not comprise ancillary accommodation for either the Snapes Manor or the outbuildings, in particular, the cottage.

9. We reject that submission because it appears to us that, as a matter of fact, the pool barn does not have any separate and distinct function or use. Physically it is not a stand alone building; it is part and parcel of the outbuildings and covered by a single Listed Building registration number along with all the other realty to which it is physically attached. We accept the evidence given by the owner the property concerning the use that is made of the various buildings.

10. We therefore have to ask whether it is ancillary accommodation for and used in connection with a dwelling so that, by reason of such ancillary user it becomes part of that dwelling itself rather than being a self contained separate (non-residential) building (as was held to be the factual situation in Zielinski Baker).

5 11. We find as a fact that the pool barn is used as ancillary accommodation of a type ordinarily found with larger or more commodious dwellings.

12. The respondents' submissions then proceeded on the basis that if it is not a stand-alone building, its use must be ancillary either to the main house or to the pool barn. The submission was predicated on the basis that such ancillary user must be exclusive to one or the other building/dwelling. We consider that to be a flawed approach. The use of building A might be ancillary to building B, or to two (or more) buildings, B and C. Especially where those other buildings are in common ownership there is no conceptual and/or practical difficulty in characterising the use made of a particular physical entity, in this case the pool barn, as ancillary to both Snapes Manor and to the outbuildings (which include the cottage).

13. The cottage is undoubtedly a dwelling. It is undoubtedly a protected dwelling. Even if, bearing in mind the fact that the cottage is used for the owner's visiting friends and relatives, we conclude, as a matter of common sense, that it serves as ancillary accommodation to a lesser extent than it serves Snapes Manor, that does not detract from the fact, as we find, that there is a significant and meaningful degree of ancillary domestic use made of the pool barn by a protected dwelling, that is, the cottage. It is difficult to assess the degree of disparity in user of Snapes Manor and the cottage given that the evidence, which we accept, is that the Snapes Manor is not lived in permanently but is used as a country retreat (in Devon) for the owner whose principal place of residence (in terms of use) is in London. We similarly so find in respect of the tithe barn, through which internal access to the pool barn can or will be obtained once the works are finished so as to comply with planning condition 2.

14. Mr Brown, for the appellant, argues that even if the pool barn was adjudged to be ancillary solely to the main house, the appellant's appeal would still succeed. He put it on the basis that for the pool barn to be part and parcel of the Snapes Manor by being accommodation ancillary to it, it was not necessary for the two buildings to be physically connected. He recognised that in so submitting it was open to the objection that the decision in Zielinski Ptnrs Ltd v HMRC [2004] UKHL 7 might tell against his submission, but he sought to distinguish it on the basis that in that case the building that housed a swimming pool was detached from the main house and was not, in itself, a protected building and was not found to be ancillary accommodation so that it was (or became) part and parcel of the protected building/dwelling. He referred to the fact that in Catchpole v HMRC [2012] UKFTT 309 (TC) the Tribunal had no difficulty concluding that two physically separate buildings were designed to, and did operate as, a single dwelling. A similar conclusion had been reached by this Tribunal in Fox v HMRC [2012] UKFTT 264. Each case is fact sensitive and Zelinski-Baker is a fact sensitive decision that does not establish, as a proposition of law, that to physically separate buildings cannot, in any circumstances, constitute a single dwelling. Such a proposition would be surprising and we cannot believe that

the House of Lords intended to lay down any such untenable principle. However, given the primary basis upon which this appeal must be allowed we do not need to go onto the specifically with this subsidiary submission.

5 15. Accordingly we find that each of the pre-requisites to zero rating applied to the works in respect of which the assessment under appeal was issued. It is set aside and the appeal is allowed.

10 16. 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.

15

20

**GERAINT JONES Q C
TRIBUNAL JUDGE**

RELEASE DATE: 10 April 2014

25