



TC03622

Appeal number: TC/2013/00218

Value Added Tax – zero rating – original buildings substantially demolished – front and side façades and party walls retained – whether retention of façades a requirement of planning consent – yes – - whether rear wall had been retained – no - conditions for zero rating satisfied – appeal allowed - Schedule 8 Group 5 VAT Act 1992

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BS DESIGN & MANAGEMENT LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE NICHOLAS ALEKSANDER

Sitting in public in London on 19 November 2013

Toby McLean for the Appellant

Bill Brooke, an officer of HM Revenue and Customs, for the Respondents

DECISION

1. This appeal relates to the construction of a building at 149 Southampton Way, on the corner of Bonsor Street in the London Borough of Southwark. The issue before the Tribunal is whether services relating to the construction of the Building are zero rated, which turns on the application of item (b) of Note 18 to Group 5 of Schedule 8 to the VAT Act 1994.
2. The Appellant (“BS”) is a building contractor, which was engaged to undertake the works that are the subject of the appeal. BS was represented at the hearing by their client (the owner of the building), Mr Maclean. HMRC were represented by Mr Brooke.
3. I heard evidence from Anna Mac, a director of BS. In addition a bundle of documentary evidence was produced. The bundle included extensive “before”, “during” and “after” photographs of the construction, copies of the planning application, the planning consent (including the commentary and recommendation of Southwark Council’s officers to the Planning Committee), and copies of relevant plans.
4. In February 2011, Southwark Council gave planning consent for the demolition of most of the late-Victorian building at 149 Southampton Way, located on the corner of Southampton Way and Bonsor Street, and for the construction of a building with a commercial unit at basement and ground floor, and a single residential unit on the first, second and third floors. The Appellant contends that the building works relating to or necessary for the residential element of the development are zero rated. HMRC contends that all of the building works are standard rated (although the works relating to the residential element qualify for the reduced VAT rate of 5%).

25 *The Law*

5. Section 30, VAT Act 1994 provides that services are zero rated if they are of a description specified in Schedule 8 of that Act.
6. Item 2 of Group 5 of Schedule 8, VAT Act 1994 is as follows:
- 2 The supply in the course of the construction of—
- 30 (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
- (b) any civil engineering work necessary for the development of a permanent park for residential caravans,
- 35 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.

7. The notes to Group 5, so far as are relevant to this appeal, are as follows:

[...]

(7) For the purposes of item 1(b), and for the purposes of these Notes so far as having effect for the purposes of item 1(b), a building or part of a building is “non-residential” if—

(a) it is neither designed, nor adapted, for use—

(i) as a dwelling or number of dwellings, or

(ii) for a relevant residential purpose; or

(b) it is designed, or adapted, for such use but—

(i) it was constructed more than 10 years before the grant of the major interest; and

(ii) no part of it has, in the period of 10 years immediately preceding the grant, been used as a dwelling or for a relevant residential purpose.

[...]

(11) Where, a service falling within the description in items 2 or 3 is supplied in part in relation to the construction or conversion of a building and in part for other purposes, an apportionment may be made to determine the extent to which the supply is to be treated as falling within items 2 or 3.

[...]

(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

I subject to Note (17) below, the construction of an annexe to an existing building.

[...]

(18) A building only ceases to be an existing building when:

(a) demolished completely to ground level; or

(b) the part remaining above ground level consists of no more than a single I or where a corner site, a double I, the retention of which is a condition or requirement of statutory planning consent or similar permission.

8. In considering whether a building has been demolished, the retention of party walls forming part of a neighbouring property are ignored.

9. At first glance, it seems that the building works undertaken by BS qualify for zero rating (or at least those parts relating to or necessary for the residential element). BS
5 constructed a building with a commercial unit on the ground floor and in the basement, but with residential accommodation on the first, second and third floors.

10. However, HMRC say that note 18 to Group 5 of Schedule 8, defeat BS's claim. In this case, the party wall and the facades facing on to Southampton Way and Bonsor Street were retained. HMRC dispute (a) whether the retention of the front and side facades
10 were an express requirement of the planning consent; and (b) whether all or part of the rear elevation had been retained.

11. If HMRC are correct, then the original building did not cease to be an "existing building". The works carried out by BS would therefore be in the course of the conversion, reconstruction or alteration of an existing building under Note 16. In
15 consequence, the works fall outside the terms of Item 2 of Group 5, and could not be zero rated.

12. The questions for the Tribunal are, therefore, whether:

- (1) Any part of the rear elevation had been retained; and
- (2) The retention of the front and side I was a condition or requirement of
20 statutory planning consent or similar permission.

Background facts

13. The background facts for the most part are not in dispute and I find them to be as follows:

14. Mr Maclean purchased 149 Southampton Way in August 2009. 149 Southampton
25 Way was a late Victorian end-of-terrace building on the corner of Bonsor Street. The building had been boarded-up and was derelict for at least 20 years, and its condition was "distressed".

15. Planning consent was granted by Southwark Council in 2011 for the development that is the subject of this appeal.

16. The terms of the consent specify that the development cannot be carried out otherwise
30 than in accordance with the approved plans "for the avoidance of doubt and in the interest of proper planning". Although there is no express condition requiring the retention of the front and side facades, it is clear on the face of the plans that the facades on Southampton Way and Bonsor Street must be retained. If there was any doubt about this, an e-mail
35 from Southwark Council's planning department to Mr Mclean dated 9 October 2012

confirms that the “planning permission granted does not allow for the demolition of the walls to the front and side elevations And as such the retention of these walls form part of the development”.

5 17. BS were engaged by Mr Maclean to undertake the building works that are the subject of this appeal in accordance with the planning consent.

18. HMRC do not dispute that front and side walls were retained. However Mr Brooke did question whether any part of the rear elevation had been retained. In the course of her evidence Ms Mac gave an extensive description of the building method used by BS, and how the front and side elevations were supported as the rest of the building was demolished, and how the original bricks were then re-used (together with reclaimed bricks that had to be purchased) in constructing the building.

19. Ms Mac was subjected to extensive cross examination by Mr Brooke, and we played the game of “spot the brick” in the “before” and “after” photographs of the rear wall. Mr Brooke sought to persuade me that because various dark bricks appeared in roughly the same place in both the “before” and “after” photographs, and that a window was also in roughly the same place, this must mean that the rear wall had been (at least in substantial part) retained.

20. However, I am satisfied (and find) that the rear wall must have been completely demolished, and that no part of it had been retained, in the light of the construction method employed by BS (which was amply evidenced in the photographs).

21. It is not possible to tell from the photographs whether the dark bricks highlighted by Mr Brooke were in precisely the same position in the “before” and “after” photographs. But even if they were, I am entirely satisfied that this must be a matter of coincidence.

22. In reaching the conclusion that the rear wall had been demolished to the ground, I have taken into account (and I find) that:

(1) there were dark bricks which were not in the same location in the “before” and “after” photographs,

(2) the original rear wall was about 70% of the width of the new wall, and had three openings at ground floor, and one at first floor, with a sloping roof line. There was also a side passage with a door. The new wall is wider – as the space occupied by the side passage has been incorporated into the building - has two openings at ground floor (neither in the same place as the old openings) and two openings at first floor, and a horizontal roof line.

(3) although one of the first floor openings is in a roughly similar position – by counting bricks in the arch above the new window (and comparing them to the number of bricks above the arch in the old window), you can tell that it has been rebuilt.

(4) it is possible to see from the photographs that the inner face of the rear wall is made from a different kind of brick (yellow London stock bricks) to those used on the inner face of the original wall.

23. I therefore find that the original building had been demolished completely to ground level, other than the party wall and the facades to Southampton Way and Bonsor Street.

Case for HMRC

24. Mr Brooke, representing HMRC, did not dispute that the implicit terms of the planning consent required the retention of the existing facades facing Southampton Way and Bonsor Street.

25. However it was his submission was that the effect of Note 18 was to ensure that the “construction of a building” includes only those developments where the retention of a wall or walls is a specific condition of the permission granted, one which is imposed by the person granting it. That this is so, needs to be made explicit in the terms in which the permission is granted, and generalities such as “in the interests of proper planning” do not suffice.

26. HMRC contend that the planning consent granted by Southwark Council merely consents to the applicant’s desire to retain the facades. They distinguish cases where the planning authority, of its own volition, makes it a requirement that the facades be retained.

27. I am aware that is a line that HMRC have taken in a number of cases, and has consistently been overturned by Tribunals. There is nothing in the statute which suggests that the motivation of the planning authority is remotely relevant to the application of Note 18, or that the requirement to retain a façade must be set out as an explicit condition of the consent. The legislation is drafted in objective terms, and the sole issue to be determined is whether the retention of the facades is a requirement of the planning consent. I find that the requirement to retain the front and side facades of 149 Southampton Way was a requirement of the planning consent.

28. Even if there was any merit in HMRC’s submission (which, in my opinion, there is not), the reality is that when framing an application for planning consent, applicants take account of the planning policies of the local authority and their likely reaction to an application. If an applicant expects that a local authority will want to see the retention of historic or architectural features, it is likely that the retention of those features will be incorporated into the application. We will never know (and have no way of knowing) whether the reason why a planning consent required that a façade be retained was because of the whim of the applicant, or in order to comply with the planning approach adopted by the council.

Conclusion

29. I find that the original building at 149 Southampton Way had been completely demolished to ground level, other than the party wall, and the front and side facades facing Southampton Way and Bonsor Street.

5 30. As the demolition of party walls is ignored, and as it was a condition or requirement of the statutory planning consent that the front and side facades be retained, I find that the original building ceased to be an “existing building” pursuant to note 18(b) of Group 5 to Schedule 8, VAT Act 1994.

10 31. Accordingly, I find that the supplies made by BS in respect of 149 Southampton Way were in relation to the construction of a building. I also find that part of the building was designed as a dwelling.

32. I leave it to the parties to agree the apportionment of the supplies between the zero rated and standard rated elements. In the event that the apportionment cannot be agreed between the parties, I give liberty to apply to this Tribunal to determine the amount.

15 33. 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
20 Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**NICHOLAS ALEXANDER
TRIBUNAL JUDGE**

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RELEASE DATE: 23 May 2014

30 *Cases cited in submissions but not referred to in this decision:*

Almond [2009] UKFTT 177 (TC)

Samuel [2010] UKFTT 633 (TC)