



TC03645

Appeal number: TC/2013/02103

VALUE ADDED TAX – reduced rate on supplies of energy-saving materials – weather stripping services supplied with other services generally related to renovation of windows – whether composite or separate supplies – held that where weather stripping services were invoiced for separate prices they were separate supplies, otherwise they were elements of composite supplies not attracting the reduced rate – penalty considered – held that in relation to all but one of the periods assessed the inaccuracy was not careless with two minor exceptions – mitigation reduction percentages also increased – decision in principle – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ITCHEN SASH WINDOW RENOVATION LTD Appellant

- and -

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

**TRIBUNAL: JUDGE JOHN WALTERS QC
MR MICHAEL SHARP**

Sitting in public at Bedford Square, London on 21 March 2014

Vincent Wick, Director, for the Appellant

John Nicholson, Presenting Officer, HM Revenue and Customs, for the Respondents

DECISION

1. The appellant in this appeal, Itchen Sash Window Renovation Limited (“Itchen”) appeals against an assessment issued on 13 February 2013 by Officer Adrian Starks of the Local Compliance office of the Respondents (“HMRC”). The assessment charges VAT of £12,018. Also under appeal before us is an associated inaccuracy penalty charged under Schedule 24, Finance Act 2007 of £2,884.32. The assessment is a global amount charging VAT for the periods 10/09, 01/10, 07/10, 10/10, 01/11, 03/11, 06/11 and 10/11.

2. The assessment was calculated by Officer Starks as follows:

Period	Invoice No.	VAT due	VAT assumed already accounted for	Amount assessed
10/09	257	£291.21	£106.32	£184.89
	262	£134.43	£49.08	£85.35
				£270
01/10	264	£85.76	£31.31	£54.45
				£54
07/10	269	£83.60	£26.73	£56.87
				£56
10/10	271	£2,203.81	£704.62	£1499.19
	276	£47.49	£15.18	£32.31
	279	£187.24	£59.86	£127.38
				£1,658
01/11	278	£141.95	£45.39	£96.56
	282	£1,493.99	£338.03	£1,155.96
	285	£331.14	£94.61	£236.53
				£1,489
03/11	287	£603.75	£172.50	£431.25
				£431
06/11	288	£1,382.01	£394.86	£987.15
	294	£234.61	£67.05	£167.56
	294/1	£7305.65	£2,087.33	£5,218.32
				£6,373
10/11	298	£1,579.08	£451.17	£1,127.91
	296	£103.83	£29.67	£74.16
	302	£41.52	£16.63	£24.89
	297b	£644.70	£184.20	£460.50
				£1,687
TOTAL AMOUNT ASSESSED				£12,018

3. We heard oral evidence from Mr Wick, the director of Itchen who presented Itchen’s case, and Officer Starks. Each of these witnesses had also lodged a witness

statement, which was before us. Also before us were witness statements from, respectively, Stephen John Taylor, managing director of Kis Accounting Limited, who states that he has acted for Mr Wick both as a sole trader and following the incorporation of Itchen in 2011, and Suzanne Claire Ranger, who works as the bookkeeper for Itchen. Neither of these two latter named witnesses gave oral evidence at the hearing, although Ms Ranger was present, assisting Mr Wick.

4. We also had before us a bundle of documents.

5. From the evidence we find facts as follows.

The facts

6. Itchen provides services to both commercial and domestic customers connected, speaking generally, with the renovation of sash windows. Itchen is beginning to provide also renovation services for casement windows. Most of the sash windows with which this appeal is concerned, are old windows. Itchen's website, with the slogan 'Protecting our heritage' emphasises this. Under the heading 'About us' the website states:

'We are dedicated to preserving the historic value of original sash windows. We are committed to renovation over replacement.'

7. One of the services offered by Itchen to customers is 'Weather stripping'. Weather stripping is a process designed to 'significantly reduce heat loss, noise, dust ingress and sash rattle' (according to Itchen's website). This is achieved by the installation of compression strips or brushes, which are attached to the stop bead or parting bead (or perhaps both) in order to make sash windows airtight.

8. When applying weather stripping to old windows it is necessary to scrape back the paint, and it is often necessary to realign the windows to ensure that the mid rails meet in the middle and are completely aligned. Further remedial work to the sashes may be necessary, such as the replacement of rotten parts of the frame or the sash.

9. Once the weather stripping and any remedial work has been completed, Itchen may paint the window if the client requests this (to primer, undercoat or full paint finish) and will make good the surrounds of the window if necessary. This will include making good pre-existing damage but Itchen try to limit their work to making good damage they create. Itchen's work is entirely focussed on windows. They do not normally, for example, carry out work on internal shutters.

10. The language on the invoices in issue describing the services provided was as follows:

Invoice No.	Language
257	"General overhaul to 3 windows: £1,226.33 Installation of full weather stripping to all windows including landing: £900"

VAT was charged at 5% on the total amount invoiced – i.e. 5% of £2,216.33 = £106.32.

262	“Overhaul and remedial work to 2 sash windows: £657.30
	Installation of full weather stripping: £200.25
5	Prime and paint to undercoat level only: £124.00”
	VAT was charged at 5% on the total amount invoiced – i.e. 5% of £981.55 = £49.08.
264	“Bedroom window
10	General overhaul to 1 sash window: £113.32
	Installation of full weather stripping: £91.66
	Kitchen window
15	General overhaul and remedial work to 1 sash window: £348.00
	Installation of full weather stripping: £73.25”
	VAT was charged at 5% on the total amount invoiced – i.e. 5% of £626.23 = £31.31.
269	“General overhaul to 1 sash window
20	Dismantle window
	Make good defective putty work
	Realign and rebalance
	Reassemble windows
25	Install full weather stripping
	Replacement softwood external sill: £319.66
	General overhaul to 1 casement window
	Dismantle window
30	Make good defective putty work
	Realign and rebalance
	Reassemble windows
	Install full weather stripping: £214.99”
35	VAT was charged at 5% on the total amount invoiced – i.e. 5% of £534.65 = £26.73
271	“General overhaul to 33 sash windows: £6,773.36
	Full weather stripping to 33 windows: £4,294.46
40	Complete painting programme to 14 windows: £3,174.62
	Deduction: (£150.00)”
	VAT was charged at 5% on the total amount invoiced – i.e. 5% of £14,092.44 = £704.62.
45	276 “General Maintenance to main bedroom window: £124.56
	Replace 4 pulleys: £82.54
	Installation of full weather stripping to single window: £96.59”
50	VAT was charged at 5% on the total amount invoiced – i.e. 5% of £303.69 = £15.18.
279	“Renovation of 5 sash windows: £863.80

Installation of full weather stripping: £333.57”

VAT was charged at 5% on the total amount invoiced – i.e. 5% of £1,197.37 = £59.86.

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278 “General overhaul to 2 sash windows (bay windows): £218.72
Installation of full weather stripping: £178.08
General overhaul to 2 sash windows (living room – springs): £134.40
Spring adjustment to two sash windows: £64.00
10 Installation of full weather stripping: £177.60
Replacement of 6 panes: £135.00”

VAT was charged at 5% on the total amount invoiced – i.e. 5% of £907.80 = £45.39.

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282 “Overhaul of 15 sash windows (only opening sash to bay window):
£3,801.65
Additional remedial work to rot in 3 windows: £626.94
20 Installation of full weather stripping to 15 sash windows: £2,331.96
Painting to final finish to 15 windows: £2,700.00
Additional painting to two fixed lights in bay window: £232.58”

VAT was charged at 5% on the first three amounts invoiced – i.e. 5% on £6,760.54 = £338.03. No VAT was charged by the invoice on the final two amounts invoiced – on the basis, according to Mr Wick, that these painting services were provided by a subcontractor who was not registered for VAT. Nevertheless, the assessment is calculated on the basis that the whole amount invoiced in subject to VAT at the then-standard rate of 17.5%, giving a total VAT liability of £1,493.99.

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285 “Overhaul to 8 sash windows: £1,096.71
Installation of full weather stripping: £707.55
Additional 4nr: replacement panes: £88.00”

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VAT was charged at 5% on the total amount invoiced – i.e. 5% of £1,892.26 = £94.61.

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287 “Replacement of softwood sashes to five sash windows: £3,004.92
Additional
Replacement sashes to bathroom window with privacy glass: £445.08”

VAT was charged at 5% on the total amount invoiced – i.e. 5% of £3,450.00 = £172.50. There was also with our papers a copy of a letter to Itchen’s customer in respect of this invoice (287) explaining that “[b]ecause the work included the installation of weather stripping the VAT is charged at a reduced rate of 5%”.

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288 “General overhaul of 8 sash windows including remedial work to frame and sills and the installation of full weather stripping: £4318.22
Replacement of softwood sashes to six sash windows including full weather stripping: £3,579.01”

VAT was charged at 5% on the total amount invoiced – i.e. 5% of £7,897.23 = £394.86.

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294 “Installation of double glazed units into existing sashes – bay window with working centre sash and two side fixed lights: £1,340.91”

5 VAT was charged at 5% on the total amount invoiced – i.e. 5% of £1,340.91 = £67.05. At the hearing, Mr Wick accepted that, although the job was one which contained a supply of weather stripping, the charge of 5% VAT on this invoice was made in error and that the supply should have carried VAT at 20% (the then-prevailing standard rate).

10 294/1 “Refurbish sash windows: £19,247.91
Installation of weather stripping: £6,956.17
Cost to replace missing weights and damaged spiral balances: £5,685.69
Overhaul of window shutters: £2,593.24
General overhaul to external doors: £3,721.40
General overhaul and replacement sills to state room sham windows: £1,776.80
Supply and fit sash casement: £756.82
Replace brass pulleys to bathroom windows in F31: £97.00
Replace hardwood midrail to window in F22: £253.37
Replace textured glazing to first floor toilets: £294.72
Replace Glass to window in G35 (vent removed): £25.94
Install new glazing bar to window in G35: £104.06
Replace textured glass top bay window in G51: £129.70
Replace textured glass to courtyard external doors: £103.76”

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25 VAT was charged at 5% on the total amount invoiced – i.e. 5% of £41,746.58 = £2,087.33.

30 298 “Renovation works to casement sashes including the installation of full weather stripping and remedial work: £7,295.25
Erect Scaffold to rear of property to access first and second floor windows and soffits and fascias: £724.32
Painting of external woodwork: £1,003.74”

35 VAT was charged at 5% on the total amount invoiced – i.e. 5% of £9,023.31 = £451.17.

40 296 “Overhaul to 1 bay sash window including the installation of full weather stripping sash windows. Replacement of 1 nr: pane of 4mm clear glass: £593.34”

45 VAT was charged at 5% on the total amount invoiced – i.e. 5% of £593.34 = £29.67.

50 302 “Overhaul to first floor window: £234.32
Installation of full weather stripping: £98.20”

55 VAT was charged at 5% on the total amount invoiced – i.e. 5% of £332.52 = £16.63.

297b The document in evidence was not an invoice, but an “Application submission”. However it contained information as follows:

“windows refurbish sash windows 17 No. £2,255.68
Installation of full weather stripping 17 No. £1,428.32”

VAT was proposed to be charged at 5% on the total amount – i.e. 5% on £3684.00 = 184.20.

11. We have set out the details of the language on the various invoices in issue because there was very little other evidence as to what Itchen agreed with its various customers to do for them.

5 12. Mr Wick said (and we accept) that most customers called Itchen in when the draughts caused by their old sash windows needed attention. When they are called in to give a quotation, it will be apparent that the client wishes full weather stripping to be installed, but it will be very difficult, if not impossible, for Itchen to know how much work needs to be done to the windows to prepare them for effective weather stripping. Itchen sees lots of windows in differing states of repair and it takes time,
10 until they begin to dismantle them, before they begin to realise the extent of any repair work required. Itchen needs to be able to give a quotation in the certain knowledge of the rate of VAT which will apply.

15 13. Itchen's website emphasises that customers "pay only 5% VAT on all weather stripping installation" but also makes clear that the services provided by Itchen include "Full Renovation" of windows (which includes a general overhaul and remedial work to deal with any rot found), installation of double glazed units (which Mr Wick accepted attracted VAT at the standard rate), "Security Upgrades" (fitting of security locks to windows), as well as installation of weather stripping.

The law

20 14. The domestic statutory law on this point can be shortly stated. Section 29A VAT Act 1994 ("VATA") was enacted in 2001. It relevantly provides as follows:

'(1) VAT charged on-

(a) any supply that is of a description for the time being specified in Schedule 7A ... shall be charged at the rate of 5 per cent.'

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15. Schedule 7A to VATA (as applicable in the present case – it was amended in relation to supplies made on or after 1 August 2013) relevantly provides as follows:

'Group 2 – Installation of energy-saving materials

Item No.

30 1 Supplies of services of installing energy-saving materials in-

(a) residential accommodation, or

(b) a building intended for use solely for a relevant charitable purpose.

2 Supplies of energy-saving materials by a person who installs those materials in-

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(a) residential accommodation, or

(b) a building intended for use solely for a relevant charitable purpose.'

Notes to Group 2, Schedule 7A, VATA make it plain that draught stripping for windows and doors (which we find includes the weather stripping in this case) comes

within the meaning of ‘energy saving materials’ and also include definitions of ‘residential accommodation’ and ‘use for a relevant charitable purpose’ (which we find cover the premises in which Itchen has installed the weather stripping in this case).

5 **Notice 708/6**

16. HMRC have issued a Public Notice (Notice 708/6) on the subject of ‘Energy-saving materials’. A version of this Notice was published in August 2006, and another version was published in November 2011. Although it is not suggested that the applicable law had changed in this period, the text of the Notice was materially
10 different in the two versions. It is to be noted that the invoices in issue in this case gave rise to supplies which (except for the four invoices in respect of which the assessment relates to the period 10/11) took place in the period when the August 2006 version of Public Notice 708.6 was current.

17. Both versions of the Notice explain (at paragraph 1.2) under the heading “Who
15 should read this notice?” that a contractor or subcontractor installing energy-saving materials should read the notice – i.e. that it is intended to be read by such traders, which include Itchen.

18. Both versions of the Notice explain that draught stripping products within the
20 ambit of the reduced rate are ‘strips that are fixed around windows, interior and exterior doors, and loft hatches to reduce draughts’.

19. Both versions of the Notice also explain that the reduced rate applies to the installation of the energy-saving materials concerned and that ‘[t]his involves some process by which materials are permanently fixed in place, although loft insulation may simply need to be unrolled and positioned in place to be installed’.

25 20. The August 2006 version of the Notice included the following paragraph (2.3) under the heading “Incidental Work”:

‘Any work that you undertake as part of the installation process is eligible for the reduced rate.

This includes minor building works, such as planing doors or windows, enlarging loft hatches, and painting or plastering to make good.

30 But if the installation of energy-saving materials is incidental to another supply you are making – such as the building of an extension or the replacement of a roof – you are making a single supply of construction services (see Notice 708 Buildings and construction.’

21. Mr Wick’s evidence was that it was this wording which he considered provided
35 the basis for applying the reduced rate to Itchen’s work as recorded in the invoices in issue – that is, that all the work other than the installation of the weather stripping itself, was incidental work covered by this language. He said that some of the invoices, for example No. 285, had been worded incorrectly. That invoice should have simply said: ‘installation of full weather stripping’ rather than referring to the overhaul of 8 sash windows, because no new sashes had been installed. (He accepted
40 that where a single glazed sash window was replaced with a double glazed sash window fitted with weather stripping, that would not be a “like for like replacement”

and VAT should be charged at the standard rate. His evidence was that Itchen had charged VAT on such jobs at the standard rate.) He also said that invoice No. 296 had been incorrectly worded. It should have separated out the replacement of the pane of glass and charged that at £30 or £40 attracting VAT at the standard rate. The rest of the job, he contended, was properly chargeable at the reduced rate as the installation of weather stripping, including incidental work.

22. The November 2011 version of Notice 708/6 considerably enlarged the guidance in the area of 'incidental work'. Instead of a paragraph with that heading the November 2011 version included a paragraph (2.3) with the heading: "Energy-saving materials installed with other works". The text of that paragraph is as follows:

'Although the installation of energy saving materials is reduced rated, it is normal for other goods and services to be provided at the same time. The following gives general guidance with examples of the VAT liability of these works which should help identify the correct VAT treatment. Please note that these examples may not apply if the contractual position between you and your customer is different or if there are other supplies or activities taking place at the same time.

2.3.1 Installation of energy-saving materials only

The installation of just energy-saving materials is reduced rated, for example, visiting a home owner solely to install cavity wall insulation or to draught strip all the windows and doors.

2.3.2 Installation of energy-saving materials with ancillary supplies

The installation of just energy-saving materials with ancillary supplies is reduced rated. An ancillary supply is a supply of goods or services that is a better means of enjoying the principal supply, for example, installing loft insulation but having to cut a new loft hatch in the ceiling and making good to access the loft. Clearly, the cutting of the loft hatch and making good is, in itself, a simple construction supply, but as the services have been carried out solely in support of the loft insulation, they become ancillary.

However, if you replace your existing roof with a new insulated one, the insulation clearly is a better way of enjoying the new roof and so the insulation is ancillary to the new roof. As the roof is standard rated, this applies to the whole job including the insulation.

2.3.3 Installation of energy-saving materials with other goods and services

Sometimes when individual goods and services are provided together, there is not a single dominant supply and so the individual goods and services supplied together have equal importance, often taking the form of something else. For example, a central heating system may consist of a conventional boiler, radiators, copper pipe, radiator valves, heating controls etc. Supplied together, they form a single supply of a central heating system.

While some components of the central heating system may be reduced rated if supplied on their own, here they are part of a wider supply of a central heating system and since a whole central heating system is not included in the list of energy-saving materials eligible for reduced rate (see paragraph 2.5) the whole supply is standard-rated.

A further example would be the construction of an extension of a house. While the walls and roof space would be insulated, this is just one part of the construction of the whole extension and since there is no reduced rate for the construction of an extension, the supply is standard-rated.

However, the installation of central heating systems may still be subject to the reduced rate if grant-funded – see paragraph 3.3 below [which is not relevant in this appeal].

2.3.4 Mixed Supplies

5 Where you are undertaking more than one job at the same premises, the VAT liability will depend upon the circumstances. For example, if you are contracted to build an extension and, as part of the same contract, required to fit thermostatic valves to all the radiators in the house, then this is a single standard rated supply of construction service.

10 However, if you have a contract to building [sic] an extension and some time after the work has commenced, the homeowner separately asks you to install thermostatic valves, this is then a separate supply and reduced rated.'

23. Itchen made repeated complaints that HMRC had relied on the arguments set out in the November 2011 version of Notice 708/6 to refuse reduced rate treatment to its supplies which, for the most part, had been made before that version was published.

15 24. This reflects the fact that most of the argument in this case, both in correspondence before the appeal reached the Tribunal and at the hearing itself was focussed on the wording of Notice 708/6.

25. That Notice (whether in the August 2006 version or the November 2011 version) sets out HMRC's view of the underlying law. However, this Tribunal must apply the law itself, rather than interpret versions of the Notice in order to reach its decision.

20 **Single and multiple supplies**

26. The November 2011 version of Public Notice 708/6, in the passages set out above, plainly takes account of the law as interpreted by the Court of Justice of the European Communities (the ECJ) in *Card Protection Plan Ltd v Customs and Excise Commissioners* (C-349/96) [1999] STC 270 (and other cases) and by the House of Lords in *College of Estate Management v Customs and Excise Commissioners* [2006] UKHL 62; [2005] STC 1597 (and other cases). The judgments in these cases give guidance on how connected supplies should be characterised for VAT purposes.

30 27. This jurisprudence emphasises the need to take an overall view, without 'over-zealous' dissection, and to look for the essential purpose (objectively assessed) of a transaction. The commercial reality of a transaction must be ascertained and a supply which comprises a single service from an economic point of view should not be artificially split. Regard must be had to the 'essential features of the transaction'. (See: paragraph [29] of Lord Walker's speech in *College of Estate Management*.)

35 28. The ECJ in *Card Protection Plan* ruled that there is a single supply where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service (ibid. [30]), The ECJ went on to say in the same paragraph that a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied.

29. This highlights the importance of viewing the matter from the (typical) customer's perspective.

30. In the recent decision of the Upper Tribunal in *Honourable Society of Middle Temple v Revenue and Customs Commissioners* [2013] UKUT 250 (TCC); [2013] STC 1998, a useful summary of the key principles for determining whether a particular transaction should be regarded as a single composite supply or several independent supplies was set out (*ibid.* paragraph [60]). We rehearse those principles as so set out as follows:

10 ‘(1) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.

(2) The essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.

15 (3) There is no absolute rule and all the circumstances must be considered in every transaction.

(4) Formally distinct services, which could be considered separately, must be considered to be a single transaction if they are not independent.

(5) There is a single supply where two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split.

20 (6) In order for different elements to form a single economic supply which it would be artificial to split, they must, from the point of view of a typical consumer, be equally inseparable and indispensable.

(7) The fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant.

25 (8) There is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element.

(9) A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied.

30 (10) The ability of a customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.

35 (11) Separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive.

(12) A single supply consisting of several elements is not automatically similar to the supply of those elements separately and so different tax treatment does not necessarily offend the principle of fiscal neutrality.’

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Analysis

31. The main difficulty for the Tribunal arises from the fact that we have had no direct evidence of what Itchen's customers in the supplies evidenced by the invoices in issue actually asked Itchen to do – whether it was to install full weather stripping, and do
5 everything else necessary to the windows to achieve efficient weather stripping, or whether it was to overhaul the windows and install weather stripping in the process, or whether it was simply to install weather stripping and overhaul the windows.

32. Mr Wick, as we have said, in evidence which we accept, emphasised that what caused the typical customer to call Itchen in was the desire to deal with draughty
10 windows.

33. We consider that we must give considerable weight to the wording of the invoices in issue as, being almost contemporaneous with the supplies, they are probably the best evidence of what, from the customer's point of view, was the essential purpose, objectively assessed, of the respective transactions.

15 34. It is notable from the invoices that a separate sum is usually (but not always) stated in respect of the installation of full weather stripping. This sum is (of course) additional to the sums stated in respect of general overhaul, painting, etc. The ECJ in *Card Protection Plan* stated (at paragraph [31]) that in a case where there may be a principal and ancillary services, the fact that a single price is charged is not decisive in
20 determining whether there is one service or more than one service, although it may be suggestive of a single service. In *Levob Verzekeringen BV and another v Staatssecretaris van Financiën* (Case C-41/04) [200] STC 766, the ECJ stated that the fact that separate prices were contractually stipulated for the supply of the two elements in issue in that case was not 'of itself decisive'. The Court went on: '[s]uch
25 a fact cannot affect the objective close link which has just been shown with regard to that supply [of basic software] and that customisation [of the software] nor the fact that they form part of a single economic transaction' (*ibid.* paragraph [25]).

35. The objective close link shown in *Levob* was that it would be artificial to take the view that Levob, as customer, had purchased, from the same supplier, first, software,
30 which, as it stood, was useless to Levob's economic activity, and only subsequently the customisation, which alone made the software useful to it (*ibid.* paragraph [24]).

36. The fact that (usually) separate charges have been made by Itchen for the installation of weather stripping and other work done on the windows (or doors) concerned is, therefore, a factor pointing towards the conclusion that a separate supply
35 of weather stripping is made, provided that the view should be taken that it was not artificial to suggest that a customer had required, first, weather stripping and only subsequently a general overhaul of the windows concerned (*or vice versa*). That is, to adopt the language of the Upper Tribunal in *Middle Temple*, provided the separate pricing reflects the interests of the parties.

40 37. HMRC themselves, at paragraph 2.3.4 of the November 2011 version of Notice 708/6 accept that a supply of construction services (the building of an extension) is a

separate supply from a subsequent supply, by the same contractor, of the installation of thermostatic valves (a type of energy-saving materials).

5 38. There is, in our view, no doubt that if the supplies of general overhaul services and the installation of weather stripping had been made by Itchen to the same customer at separate times, then they would be treated as separate supplies. Although it is no doubt often convenient for weather stripping installation and general overhaul of a window to be provided at the same time, we find that there is no such 'objective close link' between those supplies as the ECJ found to be the case in *Levob*. We conclude that it is open to us to find that weather stripping services and general
10 overhaul services supplied at the same time by the same supplier to the same customer can be the subject of separate supplies.

15 39. Further, we do not accept that weather stripping is an ancillary service (in the *Card Protection Plan* sense) to, for example, the general overhaul of the window to which it is applied. Nor do we accept that the general overhaul of a window can be an ancillary service to the installation of weather stripping. In the context of old windows, we find that the general overhaul to achieve 'full renovation' of the window (to adopt the language of Itchen's website) is not "better enjoyed" by the installation of weather stripping. Nor is weather stripping "better enjoyed" by the general
20 overhaul of the window, because it would be objectively disproportionate to regard costly works of overhaul as ancillary to the relatively inexpensive installation of weather stripping. Weather stripping is a separate element which could, in our judgment, only be combined with the service of general overhaul to produce a single supply on the (*College of Estate Management*) basis that the commercial reality of the transaction between Itchen and the customer objectively assessed was the provision of
25 services of general overhaul of an old window *plus* the service of the installation of weather stripping to the window.

30 40. On consideration of all the evidence before us so far as it relates to the circumstances surrounding the transactions, we find that where an invoice shows a separate price for the installation of weather stripping from the price shown for other services, that is indicative of the transaction having been for a separate supply of weather stripping. In such cases we find that the supplies of the installation of weather stripping and the other supplies made at the same time to the customer were, from the point of view of those (typical) customers, neither inseparable nor indispensable. Where, however, a separate price is not shown for the installation of weather
35 stripping, we conclude that the transaction between the customer and Itchen was for the provision of a single composite service of overhaul of the window(s) plus the installation of weather stripping. In such cases, the evidence of the language of the invoices persuades us that for those (typical) customers, the services were inseparable and indispensable.

40 41. Turning to the specific invoices, invoices numbered 257, 262, 264, 271, 276, 279, 278, 282, 285, 294/1, 302, and 297b show separate supplies of services of the installation of weather stripping, whereas invoices numbered 269, 287, 288, 298, and 296 do not. As stated above, Mr Wick accepted that invoice 294 was in respect of the installation of double glazed units into existing sashes and so could not qualify for the

reduced rate of VAT. Invoices numbered 269, 287, 288, 298 and 296 were, we find, in respect of transactions for composite supplies of overhaul, repair or renovation which do not qualify to have the reduced rate of VAT applied to them.

5 42. On this basis we decide that the supplies of weather stripping installation services referred to in invoices numbered 257, 262, 264, 271, 276, 279, 278, 282, 285, 294/1, 302 and 297b were single supplies of such services made for the consideration respectively allocated to them on those invoices and were supplies properly chargeable to VAT at the reduced rate of 5%.

43. This will give rise to a substantial reduction in the amount assessed.

10 44. From the format of the invoices it appears that Itchen has already effectively accounted for VAT at 5% on the consideration (stated as exclusive of VAT) charged specifically for the installation of weather stripping. Therefore the reduction in the assessment which is called for by our decision is to be calculated as follows – taking invoice 257 as an example.

15 45. In that invoice Itchen charged £1,226.33 before VAT at 5% for the general overhaul of 3 windows and £900 before VAT at 5% for the installation of weather stripping. The VAT at 5% which was accounted for came to £106.32. The assessment takes the gross invoice charge inclusive of VAT at 5% (£2,232.65) applies the fraction 3/23 to that figure to reach the element of VAT at 15% (the then standard
20 rate) which HMRC have argued ought to be included in that gross invoice charge. This element is £291.21, and the VAT accounted for of £106.32 is then subtracted to give an amount requiring to be assessed in respect of that invoice of £184.89.

46. Our decision calls for the charge of £900 net of VAT at 5% for the installation of weather stripping to be separated out from the net amount charged. This leaves
25 £1,226.33 in respect of the general overhaul of 3 windows. Itchen have accounted for VAT at 5% on that amount, that is, they have recognised a gross cum-VAT receipt of £1,287.65 in respect of the general overhaul of 3 windows. In accordance with our decision, that supply attracts VAT at 15%. The fraction of 3/23 must be applied to the figure of £1,287.65. This produces a liability for VAT at 15% of £167.95. The VAT
30 at 5% in respect of the charge of £900 net for the installation of weather stripping (£45) has already been accounted for. What remains to be accounted for is VAT of £167.95 less the amount of VAT over and above £45 which has already been accounted for (i.e. £106.32 - £45 = £61.32). Thus the assessment in respect of this invoice requires to be reduced from £184.89 to (£167.95 - £61.32 = £106.63), a
35 reduction of £78.26.

47. We leave it to the parties to work out the reduction in the assessment required in respect of the other invoices identified. The appeal is allowed to the extent of the reduction indicated – otherwise we uphold the assessment.

The penalty

40 48. The penalty of £2,884.32 will, of course, be reduced in consequence of our decision above on the substantive issue of the application of the reduced rate of VAT.

49. HMRC have imposed the penalty under Schedule 24, Finance Act 2007 on the basis that Itchen's VAT returns were "careless" within the meaning of paragraph 3 of that Schedule, in that Itchen 'incorrectly determined liability of supply on renovation of sash windows and as a result invoices were raised showing incorrect rate of output tax' (see: the Penalty explanation issued by HRC to Itchen and with our papers).

50. The threshold requirement for the penalty to be upheld is that Itchen was "careless" in the manner described. An inaccuracy is "careless" for these purposes if it is due to failure by P (here, Itchen) to take reasonable care (paragraph 3(1)(a), Schedule 24, Finance Act 2007).

51. We consider that by consulting the wording of Public Notice 708/6 in the August 2006 version, which assured the reader that any work undertaken as part of the process of installing energy-saving materials was eligible for the reduced rate, and by telephoning the National Advice Centre, Itchen in the person of Mr Wick took reasonable care in completing Itchen's VAT returns for the periods 10/09, 01/10, 07/10, 10/10, 01/11, 03/11 and 06/11. We find that Mr Wick honestly believed, in reliance on the wording of the August 2006 version of the Public Notice, that the invoices relating to the installation of weather stripping and associated works were prepared correctly. No penalty ought therefore to arise in respect of those periods, except in relation to invoices 282 (assessed in the VAT period 01/11) and invoice 294 (assessed in the VAT period 06/11). Both these invoices contained different errors, which we regard as "careless" – see the comments we have made in our recitation of the language of the invoices in issue above.

52. Itchen's VAT return for the period 10/11 was (presumably) made after HMRC had published the November 2011 version of Public Notice 708/6. A person taking reasonable care in making a VAT return at the end of November 2011 would, we consider, have taken account of the wording of this version of the Public Notice, in particular paragraph 2.3.3 set out above, and would have taken steps to ensure that the practice previously adopted in *bona fide* reliance on the wording of the August 2006 version of the Public Notice could still properly be adopted. Itchen, through Mr Wick, took no such steps and for this reason we must regard the inaccuracy in Itchen's VAT return for the VAT period 10/11 as "careless".

53. A penalty of a much reduced amount is therefore upheld. As to the percentage mitigation discounts pursuant to paragraph 10, Schedule 24, Finance Act 2007, we note that Mr Wick by letter to HMRC dated 8 February 2012 suggested a meeting and this suggestion was not taken up. In these circumstances we consider the discounts allowed for "Helping us to understand it" and for "Giving us access to records" (both of 5%) are too low, and should have been 15% in each case. This will increase the "total reduction" to 60% and the "percentage reduction" to 9%, giving a "penalty percentage" of 21%, instead of 24%.

54. Besides leaving the parties to calculate the reduction in the assessment called for by our decision, we also leave them to calculate the reduction in the penalty also called for by our decision.

Disposal of the appeal

55. This decision is therefore a decision in principle. The appeal is allowed in part. The parties must use their best endeavours to agree the figures for the disposal of the appeal. In the event that agreement cannot be reached both parties have leave to
5 apply to reinstate the appeal for a further hearing to lead to a final determination of the appeal.

56. 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
10 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.

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**JOHN WALTERS QC
TRIBUNAL JUDGE**

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RELEASE DATE: 30 May 2014