



**TC03807**

**Appeal number: TC/2013/03222**

*VAT – zero rating – Item 2 Group 5 Schedule 8 VAT Act 1994 – construction works on an existing building – whether an extension or annexe – Notes (16) and (17) – if an annexe, whether conditions in Note (17) satisfied – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**GATESHEAD JEWISH NURSERY**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JONATHAN CANNAN  
MRS SHAMEEM AKHTAR**

**Sitting in public at Bedford Square, London on 19 May 2014**

**Dr Alan Sinyor and Mr James Fairburn both of Berwin Leighton Paisner LLP  
appeared for the Appellant**

**Mrs Erika Carroll of HM Revenue & Customs appeared for the Respondents**

## DECISION

### *Background*

5 1. The appellant is a charity providing childcare facilities from two sites in  
Gateshead. It provides a nursery facility for 3-5 year old pre-school children at  
Alexandra Road, Gateshead and a crèche facility for babies from birth to the age of  
approximately 2 at Carlisle House, 2-4 Cambridge Terrace, Gateshead (“Cambridge  
Terrace”). This appeal is concerned with the treatment for VAT purposes of  
10 construction work at Cambridge Terrace.

2. In 2011 the appellant decided to embark on a project to build additional  
accommodation at Cambridge Terrace. It intended to use the additional  
accommodation as a facility for the care of children between approximately 2 and 3  
years old. Effectively this was to bridge a gap for children too old for the existing  
15 crèche facility and too young to move to the main nursery. To adopt a neutral term we  
shall refer to this as the new structure.

3. By letter dated 11 December 2012 the appellant sought a ruling as to whether  
the construction services were zero rated. In a letter dated 3 January 2013 an officer  
wrote to the appellant stating that the construction work was standard rated. That  
20 decision was confirmed on a reconsideration dated 5 February 2013. The VAT in  
dispute is approximately £8,000.

4. The issue on this appeal is whether or not the construction work which was  
carried out by a VAT registered builder was zero rated for VAT purposes. If the  
construction work produced an enlargement, extension or annexe to the existing  
25 building then prima facie it would be standard rated. There is an exception to this in  
the case of annexes where the annexe is capable of functioning independently from  
the existing building and where the main access to the annexe is not via the existing  
building and vice versa.

5. We set out first the relevant statutory provisions from the Value Added Tax Act  
30 1994 (“VAT Act 1994”) and how those provisions have been construed. We also deal  
in that section with submissions made by the parties on the law. We then make  
relevant findings of fact based on the evidence before us. Finally we apply the law to  
the facts in reaching our decision.

### *Statutory Provisions and Summary of Issues*

35 6. Group 5 Schedule 8 VAT Act 1994 deals with the zero rating of supplies in  
connection with the construction of buildings. For present purposes we are concerned  
with Item 2 which provides as follows:

“ *The supply in the course of the construction of –*

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

(b) ...

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.”

5

7. The present appeal is concerned with a supply of services related to the construction of a building intended for use solely for a relevant charitable purpose. It was not disputed that the new structure was intended for use solely for a relevant charitable purpose.

10

8. There is no definition in the VAT Act 1994 of what is a building for these purposes, but Notes (16) and (17) to Group 5 provide as follows:

“ (16) For the purpose of this Group, the construction of a building does not include –

15

(a) the conversion, reconstruction or alteration of an existing building; or

(b) any enlargement of, or extension to, an existing building except to the extent the enlargement or extension creates an additional dwelling or dwellings; or

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

20

(17) Note 16(c) above shall not apply where the whole or a part of an annexe is intended for use solely for a relevant charitable purpose and—

25

(a) the annexe is capable of functioning independently from the existing building; and

(b) the only access or where there is more than one means of access, the main access to:

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

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

30

9. Note (17) is effectively an exception to the exclusion of annexes from zero rating.

10. In the present appeal the appellant contends that the work at Cambridge Terrace involved construction of an annexe and not an enlargement or extension to the existing building. The respondents contend that it involved construction of an extension to the existing building.

35

11. In the event that the work did involve construction of an annexe, the appellant contends that the exception to exclusion applies. The new structure was capable of functioning independently from the existing building and the main access to the annexe was not via the existing building. The respondents contend otherwise.

5 12. Both parties accept that the descriptions “enlargement”, “extension” and “annexe” are mutually exclusive and that the work did not involve an enlargement of the existing building. Further, it was not suggested that the main access to the existing building was via the annexe.

13. The issues which we must resolve on this appeal are therefore as follows:

10 (1) Did the work done involve construction of an extension or an annexe to the existing building?

(2) If it was an annexe:

(a) Was the annexe capable of functioning independently from the existing building?

15 (b) Was the main access to the annexe via the existing building?

14. The provisions of Notes (16) and (17) have been considered on a number of previous occasions.

20 15. In *Cantrell v Commissioners of Customs & Excise [2000] STC 100* Lightman J described the test for zero rating as follows:

25 “4. The two stage test for determining whether the works carried out constituted an enlargement, extension or annexe to an existing building is well established. It requires an examination and comparison of the building as it was or (if more than one) the buildings as they were before the Works were carried out and the building or buildings as they will be after the Works are completed; and the question then to be asked is whether the completed Works amount to the enlargement of or the construction of an extension or annexe to the original building: see *Marchday [1997] STC 272* at 279. I must however add a few words regarding how the question is to be approached and answered. First the question is to be asked as at the date of the supply. What was in the course of construction at the date of supply is in any ordinary case (save for example in case of a dramatic change in the plans) the building subsequently constructed. Secondly the answer must be given after an objective examination of the physical characters of the building or buildings at the two points in time, having regard (inter alia) to similarities and differences in appearance, the layout, **the uses for which they are physically capable of being put and the functions which they are physically capable of performing**. The terms of planning permissions, the motives behind undertaking the Works and the intended or subsequent actual use are irrelevant, save possibly to illuminate the potentials for use inherent in the building or buildings.”

30

35

40

16. The words in bold are the words used by Lightman J in his signed version of the judgment (See *Cantrell (No 2) v Commissioners of Customs & Excise [2003] EWHC 404 (Ch)* at [18]).

5 17. In Cantrell the taxpayer appealed against a finding that the building was an enlargement and possibly an extension but not an annexe. The High Court allowed the taxpayer's appeal against that decision on two grounds. Firstly that the VAT Tribunal wrongly found that there was an internal access to the new structure and the existence of such an access would have been a material factor. Secondly, the VAT Tribunal did  
10 not confine itself to the objective physical character of the building but took into account the effect on the enterprise as a whole being carried on at the premises.

18. It is not surprising that the existence of an internal access would affect the description to be applied to the new structure. The High Court did not say so in terms, but the extent to which the new structure is integrated will be a relevant factor. The  
15 looser the integration, the more likely it is that the structure will be viewed as an annexe rather than an extension. The taxpayer's appeal was allowed and remitted back to the VAT Tribunal.

19. In Cantrell (No 2) the Vice-Chancellor (Sir Andrew Morritt) was concerned with whether the building was an annexe. Following a further hearing the VAT  
20 Tribunal had found that it was an annexe. HMRC did not appeal a finding of the VAT Tribunal that the building was not an extension to the existing building. The taxpayer contended that it was not an annexe to an existing building. In relation to annexes the Vice-Chancellor said this:

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

20. The Vice-Chancellor allowed the appeal on the basis that no tribunal properly directed could have concluded on the basis of the findings of fact that the building was an annexe. He went on to hold on the facts that the building was not an annexe.

30 21. The Vice-Chancellor left open a question as to whether or not it is legitimate to engage in an enquiry wider than a comparison of the physical features of the buildings before and after the work. In particular whether account should be taken of the requirements of the enterprise in separating the buildings (see [20] and [21] of his judgment).

35 22. The authorities do not really go beyond this. Hence there is no further guidance as to what differentiates in particular an extension and an annexe. This is because in Cantrell it was not necessary to give further guidance and in Cantrell (No 2) the issue was whether the structure was an annexe or a completely separate building.

23. What guidance there is appears in decisions of the VAT Tribunal and the FTT and we were referred to various decisions. We recognise that these decisions are not binding on us.

24. In *Macnamara v Commissioners of Customs & Excise (Decision 16039)* the VAT Tribunal was concerned with building works at a school. The Chairman, Stephen Oliver as he then was, said:

10 “13. *The scheme of the 1995 code is to exclude from the expression 'construction of a building' a series of building works. Note (16) deals with these in descending order of their degree of integration with the existing building. Conversions, reconstructions and the alterations of existing building, the most closely integrated, are excluded. Enlargements of existing buildings are then excluded, the word 'enlargement' connoting structural work producing an overall increase in size or capacity. The word 'extension' in relation to an existing building refers, we think, to building work which provides an additional section or wing to that existing building; the degree of integration is one stage less than with enlargements. Then come 'annexes' which, as a matter of principle, are also excluded. The term annexe connotes something that is adjoined but either not integrated with the existing building or of tenuous integration...*

20 *17. The scheme of Note (16) implies that the construction works falling within paragraphs (a), (b) and (c) are mutually exclusive. Moving down the degrees of integration, if the construction works are found on the facts to produce alterations to the existing building, they will not be works of enlargement or extension; and if they produce an extension, the structure will not be an annexe.”*

25 25. Dr Sinyor who appeared for the appellant questioned whether the observations in *Macnamara* were correct, or at least whether they had survived *Cantrell*. We are satisfied that what Stephen Oliver said in *Macnamara* as a statement of principle is correct and is in no way inconsistent with either of the judgments in *Cantrell*.  
30 *Macnamara* has been referred to by numerous tribunals since 1999 and as far as we are aware it has never been criticised (See for example *Colchester Sixth Form College – Decision 16252*, *The Roman Catholic Diocese of Shrewsbury – Decision 17900*, *The Archdiocese of Southwark – Decision 18883*, *East Norfolk Sixth Form College – Decision 20816*, *Treetops Hospice Trust [2011] UKFTT 503(TC)* and *Chelmsford College [2013] UKFTT 400 (TC)*).

40 26. Both parties accepted that enlargements, extensions and annexes were mutually exclusive. There was however a slightly different approach to the issue. The respondents approached the issue on the basis that it is first necessary to consider whether the structure is an enlargement or an extension and only if it is not to then consider whether it is an annexe. This may derive from [17] in *Macnamara*. The appellant criticised this ‘serial approach’ and submitted that the proper approach was simply to consider whether the structure was an enlargement, an extension or an annexe.

27. The concern of the appellant seems to be that HMRC's approach would somehow pre-dispose a tribunal to decide the issue in favour of the new structure being an extension. However in our judgment the difference in approach is one of form rather than substance. We must consider all the facts and consider how the new structure is to be characterised, in particular whether it is an extension or an annexe.

28. Mrs Carroll who appeared for the respondents relied on Macnamara and submitted that Note (16) dealt with various forms of construction by reference to the degree of integration with the existing building. Conversions, reconstructions and alterations relate directly to an existing building. Enlargements and extensions one way or another increase the size of the existing building. Finally an annexe is a supplementary structure which would be less integrated than an enlargement or an extension.

29. Mrs Carroll also submitted that an extension would provide extra space for activities already carried on in the existing building. In the same way an annexe would provide extra space for activities distinct from but associated with the activities carried out in the existing building.

30. We do not consider it is appropriate to focus on the activities actually carried on in the existing building and a new structure in ascertaining whether the new structure is an extension or an annexe. Lightman J in Cantrell emphasised that what is relevant is the function of the buildings and structures, whilst accepting that the activities carried on could shed light on the uses to which the building and the new structure might be put.

31. Dr Sinyor accepted that categorisation for the purposes of Note 16 is an objective exercise.

32. The objective approach certainly applies in distinguishing an extension from an annexe. The relevance of actual use is limited to indicating what potential uses there might be. Such an approach is consistent with legal certainty and assessing the position at the date of the supply.

33. In our judgment a similarly objective approach applies to Note (17). It is necessary to consider whether the annexe is capable of functioning independently from the existing building. That must be in the form in which the annexe has been constructed and without any alteration. The way in which a building does in fact function might guide the answer to that question but it is not determinative.

34. It is also necessary to consider which is the main access to the annexe. Again, we consider this is an objective test. Actual or intended use is only illustrative and not determinative.

35. We derive the following principles from the authorities and previous tribunal decisions referred to above:

- (1) In determining whether works amount to an enlargement, extension or annexe it is necessary to compare the building before the works were carried out to the building afterwards. The question is to be answered by reference to a comparison at the time of the supply.
- 5 (2) The comparison involves an objective examination of the physical character of the building before and after the supply. This includes comparison by reference to appearance, layout, the use to which the building is physically capable of being put and the function it is physically capable of performing.
- 10 (3) Planning permissions, intended use and actual subsequent use are irrelevant, save that they may illuminate the potential for use inherent in the building and the functions it is capable of performing.
- (4) An annexe is a supplementary structure, but less integrated with the existing building than an extension. It may be a room, a wing or a separate building.
- 15 (5) An extension may also comprise a room or a wing which is more integrated than an annexe.
- (6) The degree of integration should be judged as part of the comparative exercise described above.
- 20 (7) If the new structure is an annexe it is necessary to ask, having regard to the character of the building and of the annexe, whether objectively the annexe is capable of functioning independently of the existing building.
- (8) If the new structure is an annexe it is necessary to ask, having regard to the character of the building and of the annexe, what objectively should be considered to be the main access to each.
- 25 (9) In considering the conditions in Note (17) relating to annexes, the actual use of the building and of the annexe is not relevant save in so far as it might illustrate the potential capabilities of the annexe and the location of the main access.

30 *Findings of Fact*

36. We heard oral evidence from Mrs Sarah Emanuel who is the crèche administrator for the appellant, and from Mr Paul Davies an officer of HM Revenue & Customs. We were also provided with documentary evidence relevant to the issues. There were no real factual issues. The area of dispute arises in relation to the inferences we should draw from the evidence.

35

37. We were taken to the plans and photographs of Cambridge Terrace which showed the existing building and the new structure.

38. Cambridge Terrace forms part of a row of terraced houses in a residential area of Gateshead. It comprises two houses which have been altered internally to form one building. The original building is constructed of double leaf redbrick with wooden,

40

sliding sash windows which are white and square. There is a Welsh slate pitched roof. No 2 is the end of the terrace.

39. The existing building retains two front doors. The door on the left looking from the road is No 4. It leads to a narrow hallway with stairs up to the first floor. There is also a ground floor toilet and a small room off the end of the hallway. An exterior door leads from the rear of the hallway to the back yard. The hallway also has internal doors to two larger rooms.

40. The door on the right looking from the road is No 2 which also leads to a narrow hallway with stairs to the first floor. There is another downstairs toilet off the hallway and internal doors to three larger rooms. One of those rooms at the back of the house originally had an exterior door leading to the back yard. Prior to construction of the new structure this was a fire door.

41. The back yard is enclosed and contains a gate into an alleyway which runs the length of Cambridge Terrace.

42. Upstairs there are nine further rooms and two toilets. There is a corridor which runs the length of No 2 and No 4 giving access to the rooms. There is also a second floor which is a conversion of the loft space and gives 2 further rooms.

43. The upstairs rooms are mainly let out for use by a third party although there is an administrative office used by the appellant. The appellant does not have any staff room as such.

44. The crèche facility as it existed before construction of the new structure was on the ground floor and comprised the five ground floor rooms, with one of the rooms at the rear of No 2 being described as a “baby sleeping room”. This room contained the fire door leading to the back yard. That is now an internal door which leads to the new structure. The crèche continued to use the same rooms after the new structure was built.

45. The new structure comprises essentially another room at the rear of No 2. It occupies approximately half the floor area of the original yard. It has been built on to the rear of No 2 and what was the fire door from No 2 to the yard now leads directly into the new structure.

46. The new structure occupies an area approximately equivalent in size to two of the existing ground floor rooms. It is therefore a large room and at the far wall it has two toilets and a sink and drainer with hot and cold running water. The left hand wall has two double doors which lead to what remains of the yard which is now an outdoor play area.

47. The new structure comprises a single storey constructed of beam and block with a flat epdm rubber roof and white Upvc windows. It is redbrick on the exterior walls but it plainly gives the appearance of a modern addition to the original building. The square windows do match and complement the windows in the existing building, although they are larger.

48. There are radiators in the new structure connected to the central heating system of the existing building. Electricity is supplied from the mains supply in the existing building.

5 49. Prior to the new structure being built, the entrance to the crèche was through the front door of No 2 and that remains the position. The entrance to the offices on the first floor used by third parties was through the front door of No 4 and again that remains the position.

10 50. The new structure houses what is described as an Early Years Play Centre (“the Play Centre”). Approximately 16 children attend the Play Centre on a daily basis. Currently it is only open in the mornings. There are 4 members of staff. In comparison, the crèche can take up to 30 babies and toddlers with 10 members of staff.

15 51. Since the Play Centre has been operational, the first staff member to arrive each morning opens the front door to No 2 and enters the building. He or she will go through the internal door to the new structure and gain entry to the yard through the double doors in order to unbolt the yard gate. It may be that this will change in future and it is possible that the appellant will put a coded security lock on the yard gate. This would mean that the new structure could be accessed at all times through the yard and the double doors.

20 52. The Play Centre officially opens at 9am but most parents drop their children off between 8.45am and 9.15am.

25 53. The staff and children using the Play Centre will generally gain access through the yard gate and the double doors. A sign on the front door of No 2 directs people wishing to gain access to the Play Centre to “Entrance from rear lane”. This refers to the alley and the yard gate. Approximately 10% of parents dropping off or picking up children at the Play Centre will gain access via the front door of No 2. This is because they are also dropping off or picking up babies in the crèche and they tend to do that first.

30 54. The yard gate is locked at 9.30am for security reasons. It is opened again at 12.10pm. Parents pick up their children from the Play Centre between 12.10pm and 12.30pm. The gate is locked again at 12.30pm.

35 55. Children in the Play Centre do not enter the existing building. The four staff members remain in the Play Centre for most of the working day, although they might enter the existing building to use hot water drinking facilities, to communicate with staff in the existing building or to use an oven in the existing building for baking activities.

56. Older children in the crèche, that is those nearing two years old, also use the outdoor play area. They gain access from the existing building through the new structure.

57. The evidence before us included a “Design and Access Statement” prepared for planning purposes. This stated that “*access to the property will remain as existing*” and “*the nursery will be accessed from the front and will maintain an active frontage on Cambridge Terrace*”.

5

*Reasons and Decision*

58. We have set out above the issues we have to determine and we deal with each of those issues in turn.

*Extension or Annexe?*

10 59. Dr Sinyor contended that the new structure was only tenuously integrated with  
the existing building. In particular he pointed out that the method of construction was  
very different and gave a very different appearance. He submitted that the new  
structure provided a separate area for a distinct use and purpose. The facilities in the  
new room included toilet facilities and a sink which he said were for use by children  
15 aged 2-3 years rather than babies and toddlers up to 2 years old. Self evidently the  
needs of a 2-3 year old would be different to the needs of a 0-2 year old. The new  
facility complemented the existing crèche but it did not replicate it.

20 60. Dr Sinyor also submitted that the layout indicated that the room was separate  
and isolated from the existing building. It was supplementary to the existing building  
and amounted to an annexe rather than an extension.

61. Mrs Carroll submitted that there was a significant degree of physical  
integration. The difference in appearance and materials used were not a significant  
factor.

25 62. Mrs Carroll also submitted that the new structure enabled the appellant’s overall  
objective to be achieved by allowing older children to be cared for separately. The  
property as a whole following construction was used generally to provide childcare  
facilities which it had been before. Essentially the building had the same function  
before and after the works. The two parts were not independent but interdependent.

30 63. It seems to us that the most obvious example of an annexe is an entirely separate  
structure, perhaps linked to an existing building by a walkway. On the other hand, an  
extension will be physically attached to the existing building in some way. It is  
difficult to conceive of an extension which is not physically attached to the existing  
building. However simply because the new structure is physically attached with an  
internal doorway does not necessarily mean that it is an extension. There may be  
35 circumstances where the internal connection is more remote, perhaps involving a  
corridor or steps between the existing building and the new structure. That may be a  
factor suggesting the new structure is an annexe.

64. We do not accept that the physical appearance of the new structure suggests an  
annexe rather than an extension. There is no reason why a modern addition to a new

building should not be an extension. It is a question of degree. The appearance of the new structure in the present case plainly indicates an addition. It is redbrick and whilst the windows are Upvc they do to some extent complement the windows in the existing building. We do not consider that the appearance is such as to mark it out as being of only tenuous integration.

65. The internal layout indicates a high degree of integration. Internally there is simply a doorway which leads from one room in No 2 to what has become, in effect, another room in No 2 albeit larger than the existing rooms.

66. Objectively, the new structure is capable of being put to any use that the existing building could be put to. It is simply an additional room in the existing house. Similarly, it is capable of performing any function that the existing building could perform. That is not to say that it is capable of functioning independently, which is a separate point considered below. For the reasons given below we consider that the new structure is capable of functioning independently. It is also much larger than the existing rooms which suggests that in terms of use it is more flexible than rooms in the existing building. It also has additional flexibility arising from the fact that it has double doors.

67. On balance we do not regard the new structure as a supplementary structure. In our judgment it is integrated into the existing building so as to form an extension rather than an annexe.

68. That is sufficient to dispose of this appeal. However we go on to consider what the position would have been if the new structure had been an annexe.

*Independent Function*

69. The question here is whether the new structure is capable of functioning independently from the existing building? As a matter of law we must answer that question by reference to the objective character of the existing building and the new structure.

70. Dr Sinyor contended that the new structure was capable of functioning independently from the existing building. He submitted that it was not necessary for the annexe to be capable of functioning completely independently

71. The question must be asked in the context of how the annexe is designed to function, which is different to how it might have been intended for use. For example, in the present appeal the new structure was intended for use as a Play Centre. No doubt it was designed to the specifications of the appellant. However it does not seem to us that there is anything in the design of the new structure that marks it out as specifically constructed to function as such. Similarly, the existing building is used as a crèche. It was not designed to function as such, although no doubt it will have had certain alterations to facilitate such use. There is no reason why it should not function as, for example offices which is what the first floor rooms are used for.

72. In order to function independently we consider that the new structure on the present facts would have to have certain characteristics. It would need its own independent access, heating and lighting, hot and cold running water and toilet facilities. It could then function independently of the existing building.

5 73. In considering those factors it is necessary to look at the new structure as at the date when the construction work is complete. We can accept that if in certain minor aspects an annexe relies upon an existing building in order to function then that can be ignored. That is an aspect of the de minimis principle, the law is not concerned with trivial things. To this extent we accept Dr Sinyor's submission that it need not  
10 function completely independently of the existing building.

74. Dr Sinyor submitted that whilst staff might occasionally use kitchen and other facilities in the existing building, it could function independently as an early years play centre. The only facilities necessary to function as such were a learning space, toilet and sanitary facilities. Whilst the room was heated using the central heating  
15 system of the existing building it could function without central heating, by simply using electric radiators. A kettle could be placed in the room which would mean that it would not be necessary for staff to go to the existing building for hot drinks. It was not necessary to use kitchen facilities as an activity for the children or for staff members to go into the existing building to communicate with other staff members.

20 75. For the reasons given above we consider that this is an objective test, focussing on how the new structure is capable of functioning. We are not concerned with whether it could function as a play centre. That was certainly the appellant's intention, but there was no evidence that the new structure was specifically designed to function as such.

25 76. The new structure does have an independent access and its own hot and cold running water. We did not have evidence as to how the water was heated, in particular whether it shared a hot water system with the existing building. We shall assume for present purposes that it shared the hot water system in the existing building as with the central heating system. It also shared the mains electricity supply with the existing  
30 building.

77. The building could function using electric room heaters and if a separate water heating system were installed. We consider that Note 17(a) refers to capability in the sense of being able to function without any alteration to the way in which the annexe was constructed. Use of electric heaters and for example a wall mounted electric  
35 water heater would not involve any alteration to the way in which the new structure was constructed. We are satisfied therefore that the new structure could function without the central heating and hot water system.

78. We agree with Dr Sinyor that other factors raised by Mrs Carroll are not relevant to the functioning of the new structure. Hence the fact staff go into the  
40 existing building for hot drinks is a matter of choice. They could have their own kettle. The availability of hot drinks, kitchen facilities for children's activities, office facilities and the need for staff to communicate during the day are not relevant

objectively to how the new structure functions. They arise from the fact that the new structure is actually used as a Play Centre in conjunction with the existing crèche facilities.

5 79. Having said that, the new structure still obtains its electricity supply from the existing building. On the facts of the present case we consider that the absence of a separate electricity supply would be de minimis (Cp *The Roman Catholic Diocese of Shrewsbury – Decision 17900 t [34]*).

10 80. In the circumstances if the new structure were an annexe, contrary to our conclusions above, then it would be capable of functioning independently of the existing building.

#### *Main Access*

81. Dr Sinyor contended that the main entrance to the annexe was through the double doors. The fact that some visitors might enter from the existing building did not affect that conclusion.

15 82. The actual use of the yard gate and the double doors rather than the front door on Cambridge Terrace seems to us to be referable to the nature of the activities actually carried on at the property rather than the buildings themselves.

20 83. In relation to the main access, we do not consider that this test is answered by what happens in practice. Rather, it is an objective test directed towards what might reasonably be expected to be the main access having regard to the characteristics of the annexe and the existing building. It is necessary therefore to have regard to the layout and physical position of the new structure and the existing building.

25 84. We do not attach any weight to the Design and Access Statement. Where it speaks of access, it is not clear whether it is referring to access to the existing crèche facilities rather than the new structure.

85. Objectively, the double doors amount to a back door entered from the alley gate through the yard. If it were not for the fact that the new structure houses the Play Centre there would be no reason at all to think that the main entrance to the new structure would be through the double doors.

30 86. The actual use of the new structure illustrates that in certain circumstances the main entrance could be through the double doors. However as a matter of law we consider that actual use is simply illustrative of the possibilities. Looking at the layout and characteristics of the existing building and the new structure we consider that the main access to the new structure at the time of supply is through the front door of No  
35 2.

#### *Conclusion*

87. For the reasons given above the new structure was an extension and therefore the services supplied in the course of construction were not zero rated. Further, even if

the new structure was an annexe, it did not satisfy the condition in Note (17)(b)(i) and the services would still not be zero rated.

88. In those circumstances we must dismiss the appeal.

5 89. 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  
10 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

15

**JONATHAN CANNAN  
TRIBUNAL JUDGE**

**RELEASE DATE: 16 July 2014**