



TC04151

Appeal number: TC/2013/03168

VALUE ADDED TAX – building construction services – redevelopment of a college campus in stages – whether each stage should be considered separately in applying item 2 of Group 5, Schedule 9 VATA (zero-rating) – or whether a global view comprising all the buildings erected in all the stages should be considered – the final stage delayed by funding problems – held the stages were stand alone projects which should be considered separately – on such consideration held that zero-rating did not apply by reason of the exclusions from zero-rating of enlargements and extensions to existing buildings in Note (16) of items 2 – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CENTRAL SUSSEX COLLEGE

Appellant

- and -

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

**TRIBUNAL: JUDGE JOHN WALTERS QC
MR JULIAN STAFFORD**

Sitting in public at Bedford Square, London on 14 and 15 July 2014

Richard Vallat, Counsel, instructed by Baker Tilly, for the Appellant

**Jonathan Davey, Counsel, instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents**

DECISION

1. This appeal concerns the application to the facts of this case of item 2 of Group 5, Schedule 8, VAT Act 1994 (“VATA”) which (so far as is relevant) defines construction services which are zero-rated pursuant to section 30(2) VATA as follows:

‘(2) The supply in the course of construction of-

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

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.’

2. The Appellant, Central Sussex College (“the College”), was formed in 2005 on the merger of the Haywards Heath Sixth Form College and Crawley College. The campus at Haywards Heath was unsatisfactory and the College has redeveloped the campus. The issue for our decision arises out of the redevelopment.

3. The Respondents (“HMRC”) contend that zero-rating is not due for two reasons: first, that the construction services concerned were not supplied ‘in the course of construction of a building’ within the meaning of item 2, Group 5, Schedule 8, VATA, and secondly that even if they were, they do not accept that the ‘building’ was ‘intended for use solely for a relevant charitable purpose’. However, both parties asked us only to consider and adjudicate on the first of these issues and the hearing of the appeal (and the evidence led) dealt with the first of these issues only.

4. The appeal is against the refusal of HMRC to allow the College to issue a retrospective zero-rating certificate in respect of the construction work at the Haywards Heath campus. A condition for zero-rating of construction services relating to a building intended for use solely for a relevant charitable purpose is that a certificate ‘in such form as may be specified in a notice published by [HMRC] stating that the ... supply ... so relates’ is given by the recipient of the construction services to the person supplying them (see: Note (12), Group 5, Schedule 8, VATA). The Note states that the certificate is to be given before the supply of services is made but we understand that HMRC will in some circumstances allow a certificate to be given retrospectively. HMRC’s refusal to allow the College to issue a retrospective zero-rating certificate was based on their view that the construction services did not, in any event, qualify for zero-rating.

5. There are other Notes to Group 5, Schedule 8, VATA which are relevant to the issue we have to determine and to which we were referred. They are (so far as relevant):

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

Note (17)

5 '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-

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

10 (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.'

Note (18)

'A building only ceases to be an existing building when:

15 (a) demolished completely to ground level; or

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

20 6. We heard evidence given on behalf of the College by Paul Harding, a member of the College's Corporation (its board) from around January 2005 to July 2012, Robin Martin, Facilities and Compliance Manager at the College, and previously (since 1989) Premises Manager at the Haywards Heath campus, and Giles Taylor, an architect and equity partner in the Lee Evans Partnership, and evidence given on behalf of HMRC by Michael McRae, a Senior Officer of HMRC. All the witnesses
25 except Mr Martin had also made witness statements.

The facts

7. From this evidence and the other documents before us, we find the following facts.

30 8. When the College was formed on the merger of the two pre-existing colleges, the Haywards Heath campus was acknowledged to be unsatisfactory and the Corporation (board) of the College decided to try to rebuild the campus. In 2005 Lee Evans were invited by the College to submit a proposal for an English and Performing Arts block on the site where Phase 1 of the redevelopment was subsequently built.

35 9. At an early stage, in 2005, Lee Evans met the Learning and Skills Council ("LSC") to discuss funding for the English and Performing Arts block and the LSC at that meeting suggested that an application for funding a complete new-build of the College's campus should be made rather than a plan for extending existing buildings. A presentation was made to the College in 2005 by Lee Evans and McComb (quantity

surveyors and project managers), after that meeting with the LSC, in which the option of phased complete redevelopment was put forward (adumbrating the Masterplan described in the next paragraph). In that presentation it was stated that that option could be “phased as stand alone projects”.

5 10. In March 2006 a “Detailed Masterplan for Haywards Heath Campus” was
produced by the College, in which four options were suggested (these had been
formulated by Lee Evans). The first was to do nothing but maintain the existing
campus site and facilities and to carry out ‘essential alterations’. The second was a
10 new-build (of a performing arts and education building) together with refurbishment
of the existing buildings. The third was to replace the whole of the campus in three
phases. The fourth option was to relocate and rebuild on another site. The
Masterplan stated that the College’s preferred option was to seek redevelopment of
the whole campus in phases. Outline planning permission for the phased replacement
of the existing buildings to form a complete new campus was granted by Mid Sussex
15 District Council on 9 February 2006. Detailed planning permission for Phase 1 (a new
English Performing Arts Centre including auditorium, rehearsal and dance studios,
music department, classrooms and ancillary accommodation) was also granted on 9
February 2006. The Phase 1 buildings were designed so that they could be used with
the existing original buildings (pending completion of the entire project). They were
20 aligned to the existing buildings for this reason. Reserved matters permission was
granted in relation to Phases 2 and 3 on 24 October 2006. Phase 2 is described in the
reserved matters permission as an ‘extension [to the scope of the works within the
planning permission for Phase 1] of the previously approved English and Performing
Arts block, to provide a new Art and Media Department at lower ground floor, central
25 kitchens on the ground floor and two storeys of classrooms above for business and
humanities’. Phase 3 is described in the permission as a building comprising ‘at
ground floor the new principal college entrance hall, central canteen and reception
area with admin, adult education and health and leisure classrooms. The first and
second floor will provide new classrooms for maths and science with a new learning
30 resources department centrally located above the entrance hall’. It was also stated in
the permission that ‘these two phases will enable the main section of the existing
college to be removed ...’.

11. It was hoped to start Phase 1 in July 2006 and complete it in August 2007, to
start Phase 2 in December 2006 and complete it in September 2007 and to start Phase
35 3 in November 2007 and complete it in July 2009. It was recognised in the
Masterplan that the scheme of redevelopment was ‘dependent on a high level of Grant
support being available’, but it was justified by representing the best value in the long
term.

12. (On 23 September 2008 a further reserved matters permission for Phase 3, ‘to
40 provide a new science facility and sports hall together with the demolition of the
remaining existing buildings and the construction of a new car park and associated
soft and hard landscaping works’ was granted.)

13. It was envisaged (and is noted in the planning permission) that the College would keep functioning throughout the building process, using the original buildings, which eventually would be demolished.

5 14. The Masterplan was approved at a meeting of the Corporation on 13 March 2006. It was agreed at that meeting to bid to the LSC for capital support at 75% of the total costs of Phase 1. It was envisaged that a secured loan to develop Phase 1 would be taken out from Barclays bank. The LSC had been supportive in preparatory meetings.

10 15. Mr Harding presented a report to the meeting of the Corporation on 10 July 2006. He explained that when the bid was put forward to the LSC, that had been on the basis of seeking outline approval from them for all three Phases of the project, with detailed approval for the first Phase. However, the LSC had responded that it would only consider Phase 1, on the grounds that there was only an outline bid for Phases 2 and 3. Mr Harding acknowledged to the meeting that this involved ‘a slight
15 increase in risk to the success of the overall project’. However the College at that time expected that funding for Phases 2 and 3 would be forthcoming in due course. Mr Harding accepted, as was obvious, that there was no guaranteed funding for the entire project.

20 16. The LSC in fact accelerated funding for Phase 2 which enabled that phase to be built largely at the same time as Phase 1. Building of Phase 1 and Phase 2 was completed on 11 January 2008.

25 17. As Phase 1 and Phase 2 neared completion, but before work had started on Phase 3, what Mr Taylor described as “the relevant people at the College” realised that during the construction of Phase 3 students would have to walk the long way round between the Phase 1 and 2 building and the original buildings, and that this was undesirable. In August 2007 therefore Lee Evans drew up a plan to provide a covered walkway between the original and the new buildings. This had not been in the original plans and was intended to be only temporary to enable students to move
30 across between the buildings during the construction of Phase 3. Officer McRae, the witness for HMRC, visited the site on 15 January 2013 and observed the covered walkway at that time. His evidence was that the walkway was a structure which physically connected two otherwise separate buildings, effectively allowing those buildings to be used as though they were one building.

35 18. A delay in fact occurred between the construction of Phase 1 and Phase 2 on the one hand and Phase 3 on the other hand. This was caused by the LSC not being forthcoming with funding for Phase 3, as we explain below. The College had to find alternative funding and this took some years to do. Phase 1 and Phase 2 had been constructed with the clear intention of connecting with Phase 3. There were indeed a number of doors suspended on the first and second floors of Phases 1 and 2 which led
40 nowhere until Phase 3 was eventually constructed – and now they do connect with the central entrance area built in Phase 3.

19. In early 2009 the LSC realised that it was over-committed to the funding of capital projects and, as a result, in June 2009 the LSC informed the College that it had decided not to approve funding for Phase 3. In 2010 the College decided that it should fund the construction of Phase 3 through borrowings of its own, as it realised that it had to see the campus redevelopment project through to completion. Approval for the borrowing still had to be obtained from the relevant government body, by then the Skills Funding Agency, and this was only received in May 2011. The Phase 3 works started almost immediately after that and were finished in May 2013. Mr Martin's evidence was that in March 2013 the old building was 'decanted' and ceased to be used to the educational purposes of the College, and the Phase 3 buildings came into use at that time.

20. At the time of the hearing (July 2014) the original buildings had not been entirely demolished and the temporary covered walkway link was still in place, although locked off.

15 **The submissions**

21. Mr Vallat, for the College, submitted that the works in this appeal involved the construction of a single, new, building in three phases. It was throughout the College's intention to construct a new building and demolish the original existing building. The College had to operate during the lengthy period of construction and there is nothing significant in the fact that the original existing building remained in place, and was used, during the period of construction. Likewise no importance should be attached to the construction of the temporary walkway, necessitated by the College's use of the site during the period of construction.

22. In particular, he submitted that there is nothing on the face of the legislation, or to be implied into the legislation, or in any of the authorities, to suggest that simply because a site is used during the course of construction, the building works cannot amount to the construction of a single building. Nor should it matter, he suggested, that temporary adjustments are required to allow the site to be used while works are completed.

23. He submitted that the College's intention (at all relevant times) to achieve the completion of the works in all the phases (Phase 1 and 2 and 3) was much stronger than being an 'aspiration' as suggested by HMRC. It was a definite plan at all times, although its achievement was delayed.

24. He cited the First-tier Tribunal's decision in *Hoylelake Cottage Hospital Charitable Trust v R&C Commissioners* [2011] UKFTT 48(TC), a decision which, as far as we are aware, remains unappealed. In that case the Tribunal viewed the building of a new kitchen and laundry block some 18 months after the completion of the main body of the hospital (which was in use in the interim) as part of a single project.

25. He also cited *Cantrell and another (trading as Foxearth Lodge Nursing Home) v Customs and Excise Commissioners* [200] STC 100. In particular he referred us to paragraph 4 of Lightman J's decision in that case, where the judge discusses the

legislation now found in Note (16) to Group 5, Schedule 8, VATA. Paragraph 4 is as follows:

5 ‘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 extension or the construction of an annexe to the original building (see *Customs and Excise Commissioners v Marchday Holdings Ltd.* [1997] STC 272 at 279). I must
10 however add a few words regarding how the question is to be approached and answered, for this has been the subject of some lack of clarity (if not confusion) in a number of the authorities cited to me and it is the failure to approach and answer the question in this case in the correct way which flaws the decision. First the question is to be asked as at the date of the supply. It is necessary to examine the pre-existing building or buildings and the building or buildings in
15 course of construction when the supply is made. What is 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 and how
20 the building or buildings are equipped to function. The terms of the 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.’

26. Mr Vallat also referred us to *Customs and Excise Commissioners v St Mary’s RC High School* [1996] STC 1091. In that appeal, Jowitt J had considered the
25 hallmarks of the connection and relationship between the services other than those actually involved in the construction of a building and the construction of the building itself, holding that such services must facilitate the construction or produce in their finished result one whole with the building. He also held that there had to be a temporal connection between the construction of the building and the provision of the
30 other services, if those services could be said to have been provided in the course of construction of the building.

27. He also cited the VAT and Duties Tribunal’s decision in *The Trustee of the Sir Robert Geffery’s School Charity v Commissioners of Customs and Excise* (Decision No. 17667, release date: 17 May 2002), which concerned the addition of an extra
35 storey to a school after a gap of 11 years which was caused by shortage of funds.

28. Mr Davy, for HMRC, also referred us to paragraph 4 of the *Cantrell* judgment. He submitted that the presence or absence of an appropriate temporal connection was relevant both in relation to works not of a pure construction character (as in the *St Mary’s RC School* case) and in relation to construction work (as in the *Trustee of the*
40 *Sir Robert Geffery’s School Charity* case).

29. His case was that it was not appropriate to regard the entirety of the works (Phases 1, 2 and 3) as one building project. He submitted that the *Cantrell* judgment showed that the motives behind the works and the terms of planning permission are generally irrelevant.

45 30. He submitted that the evidence showed that prior to the commencement of the Phase 1 works in January 2006, the College comprised a main building and ancillary

buildings. After the Phase 1 works (and the Phase 2 works, which related to the Phase 1 works) were completed in January 2008, the original main building remained extant, as did all or most of the original ancillary buildings. What had been created in the meantime was a new academic wing immediately adjacent to, and physically connected (via the enclosed walkway) with, the original main College building. The comparison required by *Cantrell* showed, in his submission, that the Phases 1 and 2 works had produced an extension or annexe to the original main College building, which meant that the construction services were outside the scope of the zero-rating provision by virtue of Note (16) of Group 5, Schedule 8, VATA.

31. Mr Davy made the point that neither the functioning of the original main College building, nor the functioning of the new academic wing was contingent on the Phase 3 works being carried out. The College remained functioning at all times.

32. At the time when the Phases 1 and 2 works were completed it could not be said with certainty that the Phase 3 works would go ahead as there was at that time no funding for them in place. Therefore the Phase 3 works should be seen as a separate project. In so far as those works involved the erection of another structure (the creation of a science facility connected to the English and Performing Arts block, a new entrance for the College, a sports hall with a car park and landscaping), they should be regarded as having created an enlargement or extension or annexe to what was already there and ineligible for zero-rating on that basis.

33. He referred us to the VAT and Duties Tribunal's decision in *Abercych Village Association v Commissioners for R&C* (2008 WL 2872510) and *Charles Gray (Builders) Ltd v Customs and Excise Commissioners* [1990] STC 650.

Discussion and Decision

34. We start by considering the legal provisions which we must apply. They were set out at the beginning of this decision. The first point is that zero-rating is applied to a supply of services related to the construction of a building which is made in the course of construction of the building (item 2, Group 5, Schedule 8, VATA).

35. Therefore it is necessary to focus on the building in relation to which a supply of services (here, construction services) is related.

36. The second point is that a zero-rating certificate is normally to be given before the related supply of services is made (Note (12), Group 5, Schedule 8, VATA).

37. This is not surprising as liability to VAT arises at the time a supply takes place. Therefore whether or not a supply is zero-rated ought to be ascertainable as at that time. The principle of legal certainty requires this, and Lightman J alluded to this point when he said, at paragraph 4 of his judgment in *Cantrell*, that the question whether works carried out constituted an enlargement, extension or annexe to an existing building has to be asked, and answered as at the date of the supply of construction services.

38. We must take each supply in turn and ask ourselves whether it was a supply in the course of construction of a building and, if so, of what building. We must then

decide if the building is one in relation to which the legislation provides that services in the course of its construction are inside or, alternatively, outside the zero-rating provision.

5 39. We were not shown the contract(s) under which the construction services for which zero-rating is claimed were supplied, but from the evidence it is clear that the services supplied in the course of construction of Phase 1 and Phase 2 were supplied under different supplies from the services supplied in the course of construction of Phase 3. For one thing, the delay between the completion of Phases 1 and 2 and the beginning of the construction of Phase 3 was caused by funding difficulties and therefore we cannot imagine that the College committed to receiving supplies of services in the course of construction of Phase 3 until the requisite funding was assured. Further, we note that from an early stage (in 2005) the College was aware that the redevelopment of the campus was to be phased and ‘phased as stand alone projects’.

15 40. In these circumstances it seems plain to us that the services supplied in the course of construction of Phases 1 and 2 were supplied in the course of construction of the building(s) erected in those Phases. Those buildings were a new English Performing Arts Centre, including auditorium, rehearsal and dance studios, music department, classrooms and ancillary accommodation, together with a new Art and Media Department at lower ground floor and two storeys of classrooms above for business and humanities.

25 41. These buildings were to be used together with the original main building of the College for the indeterminate period from completion of Phases 1 and 2 (11 January 2008) until the completion of Phase 3 (which in fact occurred in 2013). During that period a covered walkway was in place connecting the Phase 1 and 2 construction with the original main building of the College to assist in the functioning of both of them as one building.

30 42. We accept that the Phase 3 project was always planned (including the construction of doors suspended on the first and second floors of the Phases 1 and 2 construction which led nowhere until Phase 3 was constructed), and that it might be unfair to refer to the College’s intention that it should be completed as only an “aspiration”. Nevertheless, Mr Davy is, in our judgment, correct to stress that at the time when the Phases 1 and 2 works were completed it could not be said with certainty that the Phase 3 works would go ahead and that neither the functioning of the original main College building, nor the function of the new buildings constructed in Phases 1 and 2 was contingent on the Phase 3 works being carried out.

40 43. For the reasons given above, we find that the Phases 1 and 2 works were works in the course of construction of an enlargement of or extension to the original main College building and the services related to their construction were not eligible for zero-rating.

44. We turn to the Phase 3 works. They were the construction of a building comprising, at ground floor level, the new principal college entrance hall, central

canteen and reception area with admin, adult education and health and leisure classrooms, and at first and second floor levels new classrooms for maths and science with a new learning resources department centrally located above the entrance hall, and also with a new science facility and sports hall. Some, but not by any means all, of the original College buildings were demolished to make way for the construction of the Phase 3 building. The Phase 3 building abuts the Phases 1 and 2 construction, as has been indicated by mention of the fact that there were doors suspended on the first and second floors of Phases 1 and 2, which were planned to (and ultimately did) connect with Phase 3.

45. The supply (supplies) of services related to the construction of the Phase 3 building were supplies in the course of construction of a building which was, in our view, clearly an enlargement of or extension to the building erected by the Phases 1 and 2 construction works and therefore those services were not eligible for zero-rating by reason of the express terms of Note (16)(b) to item 2, Group 5, Schedule 8, VATA.

46. We add that no argument was addressed to us on the question of whether the building erected by the Phases 1 and 2 construction works was an annexe to the original College building and, if so, whether it was excluded from Note (16) by Note (17). We add for completeness that even if, which we doubt, that building could properly be described as such an annexe, it appears from Mr Taylor's evidence that the main access to that building was via the existing original College building, and so services in the course of construction of that building would be excluded from zero-rating by failure to fulfil the condition in Note (17)(b)(i). The Phase 3 building was even less likely to be properly described as an annexe to the building erected by the Phases 1 and 2 construction works. But even if it could properly be so described, it is clear, again from Mr Taylor's evidence, that the main access to the building erected by the Phases 1 and 2 construction works is via the Phase 3 building and therefore the Phase 3 building is not excluded from Note (16), because the condition in Note (17)(b)(ii) is not fulfilled.

47. The decision in the *Hoylake* appeal, on which Mr Vallat, for the College, placed considerable reliance, concerned the question whether the services of construction of a new kitchen and laundry block for a hospital complex should qualify for zero-rating, it being accepted that the services of construction of the main body of the hospital did so qualify.

48. There are certain similarities between the facts in the *Hoylake* appeal and those in the present appeal. The construction of the main body of the hospital was completed over two years before commencement of work on construction of the new kitchen and laundry block. The delay had been caused by the need to find funds to construct the new kitchen and laundry block. The Tribunal found that the delay was not unreasonable in all the circumstances and that there was a sufficient temporal connection between the construction of the main body of the hospital and the services of construction of the new kitchen and laundry block to permit the services to be zero-rated in accordance with the reasoning of Jowitt J in *Customs and Excise Commissioners v St Mary's RC High School* [1996] STC 1091.

49. The Tribunal's reasons for holding that the services of construction of the new kitchen and laundry block would attract zero-rating were that it was a continuation of the original development. The new kitchen and laundry block were connected to the use of the building and when constructed would form an integral part of the hospital's operation.

50. While the decision in the *Hoylake* appeal may be correct on the facts of that case, the Tribunal's reasoning outlined in the previous paragraph does not convince us that we should hold that any of the services under consideration in this appeal should attract zero-rating. We prefer to follow the approach of Lightman J in *Cantrell*, strictly considering the nature of the supplies of services at the time(s) they were made and basing our judgment on an objective examination of the physical characteristics of the buildings before and after those particular services were supplied. That, in our view, is the safest way to achieve consistent decisions on the application of these provisions to different sets of facts.

51. It follows that the appeal is dismissed and there is no need for further consideration of the second issue raised by the College, namely whether or not the new College buildings were intended for use solely for a relevant charitable purpose.

52. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**JOHN WALTERS QC
TRIBUNAL JUDGE**

RELEASE DATE: 27 November 2014