



TC04417

Appeal number: TC/2014/00368

VAT — Construction of a building at a university in two phases — Whether second phase of construction a continuation of the first phase of construction and therefore zero-rated — Whether second phase of construction an enlargement of or extension to the first phase of construction and therefore standard rated — VATA, Sch 8, Group 5, item 2 and note 16 — Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**YORK UNIVERSITY PROPERTY COMPANY LTD Appellant
(FORMERLY KNOWN AS YORK SCIENCE PARK
(INNOVATION CENTRE) LIMITED)**

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
 MR ROGER FREESTON FRICS**

Sitting in public in Leeds on 16 January 2015

Mr Graham Gilbert, manager of the Appellant, for the Appellant

Mr Philip Shepherd, HMRC Senior Officer, for the Respondents

DECISION

Introduction

1. The Appellant appeals against a decision of HMRC dated 3 May 2013, confirmed in a review decision of HMRC dated 5 December 2013, that construction services provided by the Appellant in relation to the second phase of construction of a building at the University of York were standard rated supplies.

Background

2. The Appellant is a subsidiary company of the University of York (the “University”) and has at all material times been registered for VAT.

3. In 2003, the University obtained planning permission for the construction in two phases of a research building to be used by the University’s Chemistry Department. That building is known as the Dorothy Hodgkin Building Chemistry Block (the “Hodgkin Building”).

4. The phase 1 works were completed in August 2004, and the building was occupied and used by the Chemistry Department from September 2004. The wall on one side of this building was designed to be easily removable when the time came to undertake the phase 2 works (referred to by the Appellant as a “sacrificial wall”).

5. In 2011, after additional funds had become available, the University commissioned the Appellant to undertake the works for phase 2 of the construction. The sacrificial wall was removed and phase 2 connected to phase 1 where the sacrificial wall had previously been located. The phase 2 works, which were completed in 2013, essentially doubled the size of the building.

6. From September 2011, there were exchanges of correspondence between HMRC and the Appellant in relation to the VAT treatment of the supply of the phase 2 constructions services by the Appellant. The Appellant contended that the supply should be zero-rated.

7. In its decision dated 3 May 2013, HMRC ultimately concluded as follows. Phase 1 had produced a complete building, which was used as a fully functioning stand-alone facility for some 7 years before the phase 2 works were undertaken. Therefore, the phase 2 works were an extension to an existing building which fell to be standard rated by virtue of note 16 to Group 5 of Schedule 8 to the Value Added Tax Act 1994 (“VATA”).

8. The Appellant requested a review of this decision. In its review decision dated 5 December 2013, HMRC upheld the 3 May 2013 decision, for the same reasons. The Appellant now appeals to this Tribunal.

Applicable law

9. Section 30(2) VATA provides that a supply of goods or services is zero-rated if the goods or services are of a description for the time being specified in Schedule 8 VATA.

5 10. Item 2 in Group 5 of Schedule 8 VATA specifies:

The supply in the course of the construction of—

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

10 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.

11. There is no dispute between the parties that both the phase 1 and phase 2 works related to “a building ... intended for use solely for ... a relevant charitable purpose” within the meaning of this provision, and HMRC accepts that the phase 1 works fell to be zero-rated on this basis.

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12. Note 16 to Group 5 provides as follows:

For the purpose of this Group, the construction of a building does not include—

...

20 (b) any enlargement of, or extension to, an existing building ...

HMRC Guidance

13. The HMRC VAT Manual, at paragraph VCONST02530, relevantly provides as follows:

25

VCONST02530 - Zero-rating the construction of buildings: are my services supplied ‘in the course of the construction’ of the building: completion - fact and degree.

26 There is no one factor that will always dictate whether building works are “complete” as circumstances will vary from project to project. As a general rule, a building is regarded as being in the course of construction until all main elements for it to function for its intended purpose are in place.

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31 The comments and observations below serve to reinforce the fact that the point at which a building is “complete” is a matter of fact and degree. They also provide an indication of the weighting that can be attached to different factors. ...

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Planning consent describes the scope of a project. It will show the extent and nature of the works to be carried out.

36 Generally, a building is complete when it has been finished according to the approved plans. However, the other factors described below must always be borne in mind. ...

40

Planning authorities may issue a Certificate of Completion when a building satisfies building regulation requirements. The issuing of a certificate is generally a good guide that a building has been completed

but, as has been recognised in *Carrophil Ltd (VTD 10190)*, they cannot always be relied upon ...

5 In *S A Whiteley (VTD 11292)*, the Tribunal ... observed [that] ... [a]lthough ... first occupation may well be a relevant factor in determining when the construction of a building ceases, it is not the only factor. ...

In general, the intentions or wishes of the parties to the construction contract carry little weight when determining when “completion” takes place [referring to case law].

10 14. HMRC Notice 708, at paragraph 3.3.2, relevantly provides as follows:

3.3.2 When is construction “complete”?

“Completion” takes place at a given moment in time. That point in time is determined by weighing up the relevant factors of the project, such as:

- 15
- when a Certificate of Completion is issued
 - the accordance to approved plans and specifications
 - the scope of the planning consent and variations to it
 - whether the building is habitable or fit for purpose

20 Once construction is “complete”, any further supplies of construction services (other than those mentioned at 3.3.6) are no longer “in the course of construction” and are thus ineligible for the zero rate.

Examples:

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- a developer is in the process of constructing a house for sale. The house buyer, however, would like the house to include an attached conservatory and so contracts with a conservatory specialist to supply and install the conservatory prior to him moving in. The developer refuses the conservatory supplier access to the site until after he has finished his work and the house has been conveyed to the house-buyer. In such circumstances, the supply by the conservatory supplier is not work “in the course of the construction” of the house but work to an existing building and cannot be zero-rated

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- a developer constructs and sells “shell” loft apartments for fitting out by the homebuyer. When the developer sells the lofts, their construction would not be “complete”. Future work to fit them out can be zero-rated until such time as they are habitable

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- a non-fee paying school obtains planning permission to construct a building that will be used solely for a relevant charitable purpose. However, due to limited funds, the extent of the work is scaled down and a smaller building is constructed instead. Funds are later obtained to extend and enlarge the building to produce a building of the same capacity as originally planned

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In such circumstances, the building would be “complete” at the end of the first set of works and the later works are standard-rated.

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You may also need to bear in mind, the length of the interval between construction phases, the reason for the interval and the nature of the construction works in the second phase.

The witness evidence

Professor Walton

15 15. Professor Walton is professor of chemistry at the University and was head of the academic department from 2004 to 2010. His witness statement states amongst other matters as follows.

10 16. Given the context of an academic department, the timescale for long term infrastructure planning can be very long term, often extending to the lifetime of an academic career of some 40 years. In about 2000, the University's Chemistry Department developed a master plan for the development of its building infrastructure. This saw the sequential replacement of the Department's four major buildings. The strategy aimed towards building new research efforts in interdisciplinary areas that break down the boundaries between traditional areas of chemical research. This "interdisciplinarity" deeply informed the infrastructure planning. It called for open, shared laboratory spaces in which researchers from different sub-disciplines can mix together. This vision was the basis of the Hodgkin Building.

20 17. The ability of universities to access large capital funds is limited, and universities are therefore accustomed to developing large scale infrastructure projects on a piecemeal basis. Due to funding limitations, originally only one half of the Hodgkin Building was constructed, with a false wall at the Western end. Funds for the second half of the building did not become available until 2010, and were the result of a donation. Building of phase 2 began in 2010 and was completed in 2013.

25 18. In examination in chief, Professor Walton added amongst other matters as follows. Until phase 2 was completed, different groups of experts were located in different buildings, which hindered their creative capacity and was akin to having different sections of an orchestra located in different buildings.

30 19. In cross-examination, Professor Walton added amongst other matters as follows. In the period between phase 1 and phase 2, the University had a list of capital projects, and phase 2 of the Hodgkin Building had been moving up the list. If funding had not been provided for phase 2 when it was, it probably would have got to the top of the list within a further 2 or 3 years in any event. Prior to the construction of phase 2, phase 1 was fully operational in terms of day to day work, but not in terms of the vision that the completed building was intended to achieve.

The evidence of HMRC Officer Waters

35 20. The witness statement of HMRC Officer Waters states amongst other matters as follows. On 19 February 2013 he visited the University and walked around the Hodgkin Building with Professor Walton and Professor Slade. There was free movement across all three floors of the completed building between phase 1 and phase 2, and nothing remained of the sacrificial wall. Outside, the building has the appearance of one complete building, and there is nothing obvious to distinguish the two phases. Phase 2 does not appear from the outside to be a stand alone construction.

The Appellant's submissions

21. The important consideration in this case is that from the outset it was planned to construct the building in two phases, and that the building that was ultimately constructed in two phases was built according to that original plan. The sacrificial wall was specifically incorporated into the first phase for that purpose.

22. HMRC have not challenged the general principle that “phasing” provides a prima facie basis for treating each element of a phased development in the same way for VAT purposes. The concept of phasing implies that successive physical completion and occupation of elements must be allowable in principle. The completion status of individual elements is not sufficient or relevant for determining the VAT treatment of a building where both phasing and zero-rating are involved. Completion of a phased development cannot be deemed to occur until all the planned elements are capable of being occupied and used.

23. The Appellant does not dispute that HMRC has a discretion to weed out cases where the notion of phasing is abused, for instance where there is no evidence of an initial intention to phase. However, HMRC should not proceed from a presumption against the applicability of phasing and then judge cases by a disaggregated, tick-box approach without effective and holistic consideration of each case. There are good prudential reasons why phasing is used for large construction projects, and it is prejudicial to the public interest and arbitrary and contrary to natural justice for HMRC to operate the principle in a way that produces uncertainty at the time of construction.

24. There is no obvious commercial reason for constructing a building in phases without being able to use each element as it becomes available, which implies that completion of a building can only occur when all planned elements have been completed. An argument that the first completed phase of a phased building is a complete building and that subsequent phases are extensions to the previous phases is a negation of the concept of phasing. That would defeat the purpose of phasing where it occurs due to lack of funds to construct the entire building at once. It is accepted that phased buildings cannot remain indefinitely incomplete, but in the present case the original design had a definite end point, and the ultimate purpose of the building could not be fully realised until both phases were in place. In the present case, the completed building is greater than the sum of its parts, and the planning and timing of the two phases were embedded in a context that predetermined the final extent and purpose of the building. The context included the place of the redevelopment of the chemistry complex in the development of the university as a whole, and the contingent nature of the capital funding available.

25. The importance of a temporal link is accepted, but previous cases are distinguishable on the ground that the reasons for the temporal gap were insufficient.

26. In the present case, phase 2 was part of a construction project that was designed from the outset to be undertaken in two phases, and had planning permission from the outset on that basis. The building was incomplete until phase 2 was finished. Further, the planned use of the building could not be fulfilled until both phases were in place, and the reasons that drove the decision to phase remained valid throughout the entire period of the building's construction.

The HMRC submissions

27. The Appellant bears the onus of proof. The standard of proof is a balance of probabilities. The issue is whether a development separated by a period of 7 years can be considered to be a single supply of construction services. There is binding case law that to characterise two phases of construction as a single building there must be a temporal link between the original works and the later works. If there is a gap in time between the two phases, it is necessary to look at the length of the gap and the reasons for the gap. In this case, phase 1 functioned independently as a fully operational research facility for 7 years before the phase 2 works commenced, and a temporal connection between phase 1 and phase 2 is not present. At the time of completion of phase 1, the Appellant and the University had no idea when phase 2 would be started or completed. Phase 2 contained more of the same kinds of facilities as phase 1. Phase 2 was therefore an enlargement to an existing structure.

The Tribunal's findings of fact

28. The burden is on the Appellant to establish the facts upon which the appeal is based, on a balance of probability. On the evidence before it, the Tribunal finds the facts at paragraphs 2-8 above to be established, and makes the following further findings of fact.

29. Phase 1 was a three-storey building in the shape of a rectangle, with the sacrificial wall on one of its short sides. Phase 2 was in the same style and was of similar size and shape to phase 1, and was joined to phase 1 where the sacrificial wall formerly stood. Following completion of the phase 2 works, there is now one single three-storey rectangular building that is twice the length of the phase 1 construction. A casual observer looking at the building today would be unable to tell that two parts of the building were constructed at different times. On each floor there are now corridors running the entire length of the building, and a casual observer looking at the corridors at the half-way point would be unable to tell that there was previously a sacrificial wall cutting across the path of the corridor. The Hodgkin Building was at the outset designed to be the single building that it now is, and the building has been completed in accordance with the original design. It was also intended at the outset to be built in two phases, and planning approval was obtained for this.

30. The reason why it was decided to build in two phases was a lack of funds at the outset to complete the entire building. At the time of completion of phase 1, it was not known when phase 2 would be completed. It was always intended that it would be completed when funding became available, since the complete Hodgkin Building was part of a master plan formulated in about 2000 for the development of the Chemistry Department's building infrastructure. It was due to a donation being made to the University in 2010 that phase 2 was able to be completed when it was. Had that donation not been made, phase 2 would probably not have been completed until 2 or 3 years later, or possibly longer.

31. On completion of phase 1, the phase 1 structure was occupied and used by the University for the purpose for which the building was designed, which was research in the field of chemistry. It contained all necessary facilities and complied with all applicable legal requirements for use as such. There is no evidence (or even any suggestion) that the sacrificial wall had a lifespan limited to any particular length of time. The Tribunal finds that there is therefore no reason why phase 1 could not have continued to be used in the way that it was indefinitely, had phase 2 never been built.

32. The original intention was to use the Hodgkin Building to accommodate various research teams with different specialisations who were collaborating in interdisciplinary work. This has now been achieved following the completion of phase 2. Phase 1 was not large enough to accommodate all of the specialist research teams engaged in this interdisciplinary work. The Chemistry Department considered that housing these various specialist teams in a single building would facilitate formal and informal interaction between them, thereby enhancing the quality and efficiency of their interdisciplinary work.

33. The Tribunal accepts that it may have been less convenient to have different specialist teams in different buildings, which was the situation prior to the completion of phase 2. It is possible that there was a less collegiate atmosphere between the different teams before they were all in the same building. However, the Tribunal is not persuaded that sufficient evidence has been presented to establish that accommodating different teams in different buildings had any significant impact on the actual quality of the interdisciplinary research being undertaken by the Chemistry Department. Even if it could be shown, for instance, that the academic rankings of the Chemistry Department have risen since phase 2 was completed, the Tribunal is not satisfied that this of itself would establish on a balance of probability that having all research teams in a single building materially contributed to this rise.

20 **The Tribunal's findings**

34. The Appellant's case emphasised what it referred to as the "concept of 'phasing'", which it argued was accepted in HMRC guidance. The Tribunal is not persuaded that there is any legally recognised concept of "phasing", as such, either in the legislation or in the HMRC guidance. However, the HMRC guidance, and various previous cases, have dealt with situations where there have been two successive sets of construction works in relation to a building site. In such cases it has been necessary to determine whether the first works resulted in a complete building, such that the second works were the "enlargement of, or extension to, an existing building", or whether the first works were merely the incomplete construction of a building that was completed by the second works.

35. In *Brahma Kumaris World Spiritual University* [1996] BVC 2136 ("*Brahma Kumaris*"), the appellant applied for and was refused planning permission to develop a site it had acquired into a three storey building. It subsequently obtained planning permission to redevelop the existing building and develop a single storey kitchen block. About a year after these works were completed, the appellant obtained further planning permission to build a two storey extension above the kitchen block.

36. The Tribunal found on the facts of that case that there was an interval of about two years between the completion of the first works and the commencement of the second works (at [8.11]), and that by the time that the second works began, the first works had become an existing building to which the second works were an extension (at [8.13]). The Tribunal added that the ordinary person, with knowledge of the facts, and looking at the plans and photographs, "would conclude that the later building was an extension of the older building" (at [8.14]).

37. The Tribunal held that it was not crucial to the determination of the issue whether there was only a single planning consent (at [8.2]), that the terms of the planning consent itself "may be helpful but not conclusive" (at [8.3]), that the time of

first occupation “may well be a relevant factor” but was not the only factor (at [8.4]), and that “the mere intention of a taxpayer at the outset cannot mean that all subsequent activity on a building, whenever undertaken, so long as it is in accord with the original intention, must be in the course of construction of it” (at [8.7]). The
5 Tribunal said (at [8.6]) that it is “a question of fact and of degree as to when the original building can be said to come into existence so that additions thereafter become standard-rated”.

38. In *Customs & Excise Commissioners v St Mary’s RC School* [1996] BVC 373 (“*St Mary’s*”), a school when planned had been intended to contain two playgrounds.
10 The buildings were completed in 1983, and had been open to pupils in 1981. At the time of construction of the buildings, funding would have extended to construction of both playgrounds, but construction of the playgrounds was delayed due to the fact that issues concerning a right of way over the land first needed to be resolved, and that funding was no longer available once these had been resolved. The playgrounds were
15 eventually constructed in 1993.

39. The Tribunal in that case rejected the school’s argument that the construction of the playgrounds should be zero-rated on the basis that they were part of the construction of the school. The Tribunal found that there was an insufficient temporal link between the two. The Tribunal said that in considering whether there was a
20 sufficient temporal connection, it was necessary to look at “both the reason for and the length of delay”, and that the reasons for delay in that case did not justify the length of the period of delay.

40. In *Cantrell (t/a Foxearth Lodge Nursing Home) v Customs and Excise Commissioners* [2000] STC 100 (“*Cantrell*”), the appellant was a nursing home with
25 two separate units caring for different types of patient (referred to respectively as the “EM unit” and “EMSI unit”). In the building works concerned, the building containing the EM unit was extended. Two other buildings were connected to form a much larger building that contained the EMSI unit, and this building was joined on to the extended building containing the EM unit. The EM unit and EMSI unit operated
30 independently of each other. It was a local licensing requirement that the patients of each unit be kept separate from each other. There was internal access between the EM unit and EMSI unit for fire safety reasons only, and this was not needed for “ordinary operational purposes”.

41. In that case, the Tribunal had found that the new structure was an enlargement
35 of the nursing home, and thus fell to be standard rated. At paragraph 22 of its decision, the Tribunal had stated that:

It is clear to us that there has been some addition to the buildings which formed Foxearth before the new building was begun. That new
40 building cannot, in our view, be described as being independent in every way from the existing buildings. We accept that the internal access is essentially a fire escape, though the evidence does suggest that it is sometimes used for ordinary ingress and egress, and we do not consider this point to be paramount. The function of the new structure is, in one way, different from that of the existing buildings, in that it
45 houses a separate category of patient who are intentionally prevented from mixing with the others. It is, however, entirely clear that those patients are patients of the nursing home, of which the new EMSI unit is undoubtedly part. Looking at the 1998 ground plan, it is clear that

5 the nursing home is now a single building complex, of which, again,
the new ESMI unit is clearly a part. The fact that one part of this
building is single storey and another two storey, and that there are
differences in style and architecture, does not seem to us to be
conclusive, though they are points to be taken into consideration. It
also appears to us that the condition to the planning permission makes
it plain that the new structure is to be used only as part of the nursing
home. From the above points, it is clear to us that the new structure is
an enlargement of the nursing home, and thus falls within Note 16 to
10 Group 5.

42. An appeal against the Tribunal’s decision was allowed by the High Court,
where Lightman J quashed the Tribunal’s decision and remitted the case to the
Tribunal for redetermination. Lightman J said (at [4]), in relation to the law, that:

15 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
20 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
25 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
30 similarities and differences in appearance, the layout and how the
building or buildings are equipped to function. 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.

35 43. Lightman J allowed the appeal on two grounds. The first ground was that there
was an erroneous finding of fact by the Tribunal on a particular matter. The second
ground was dealt with in the following terms (at [10] and [12]):

40 The second ground of challenge relates to the question whether the
Tribunal though having correctly posed for itself the two stage test, did
not confine itself to considering the objective physical character of the
buildings before and after the works were carried out, but took into
account extraneous and irrelevant considerations. It is I think clear that
it did so. In particular it took into account the effect of the Works on
the appellants’ nursing home enterprise as a whole. This is apparent
45 from the reference in paragraph 21 to the nursing home as a single
organisation and the references to the nursing home in paragraph 22. It
lent weight to the “function” of the new structure in the sense of how
the appellants use parts of the nursing home for accommodating
different patients. It lent weight in paragraph 22 to the condition in the
50 planning permission. In my view, in reasoning in this way the tribunal
has misdirected itself and the misdirection may have affected its
ultimate decision. The decision must accordingly be set aside for this
reason. ...

5 In my view the Decision must be quashed and I should remit to the
Tribunal the issue whether the Works constituted an enlargement,
extension or annexe within Note 16 of Group 5 of Schedule 8 of the
Act in the light of the guidance provided in this judgment, namely ...
10 that regard must be only to the physical character of the buildings in
course of construction at the date of the relevant supply and that the
subjective intentions on the part of the appellants as to their future use,
their subsequent use and the terms of the planning permission
regulating their future use are irrelevant, save only in so far as they
throw light upon the potential use and functioning of the buildings.

15 44. In *The Trustee of the Sir Robert Geffery's School Charity v Commissioners of
Customs and Excise* (Decision No. 17667, 17 May 2002) ("*Robert Geffery's*"), due to
lack of funds part of a new school building was constructed with one storey instead of
two. When funds became available, the second storey was added. It was not disputed
20 that the former works were zero-rated, but the Tribunal rejected the appellant's
argument that the latter works should also be zero-rated. The Tribunal noted that *St
Mary's* was concerned with "additional services" rather than with further construction
works to a building, but considered that in the latter situation there was also "the
necessity of a temporal link between the former works and the latter works" (at [38]-
25 [39]). The Tribunal found that the delay in this case of some 6 years between the
completion of the former works and commencement of the latter works "was too long
and there was not a sufficient temporal link between the two". The Tribunal
considered that a further consideration was whether "a reasonable person apprised of
all the facts" would conclude that the latter works were an enlargement of an existing
30 building, and considered that this was so in that case (at [43]-[44]). The Tribunal then
referred to *Cantrell*, and summarised the principles from that case at [46] as follows:

35 ... first, that it is necessary to examine and compare the building as it
was before the works were carried out and the building as it was after
the works were completed and then ask the question whether the
completed works amounted to the enlargement of the original building;
secondly, that this question has to be asked at the date of supply;
thirdly, that the answer has to be given after an examination of the
physical character of the building at the two points in time having
regard, among other things, to similarities and differences in
40 appearance, the layout, and how the building or buildings were
equipped to function; and, fourthly, that the terms of the planning
permissions, the motives behind the works, and the intended or
subsequent actual use are irrelevant, save possibly to illuminate the
potentials for use inherent in the buildings.

45 45. Applying those principles to the facts, the Tribunal in *Robert Geffery's*
concluded as follows:

49. After the works in 1998 the only visible alteration was that the east
wing had two storeys rather than one. Otherwise the building retained
exactly the same appearance, exactly the same layout, and functioned
45 in exactly the same way.

50. We therefore conclude that the 1998 works were the enlargement of
an existing building and not the continuation of the construction of a
building.

51. We accept that the foundations and steel beams built in to the east
wing during the 1989 works were beyond the requirements for a single
storey building and were intended to support a first floor (second
50

storey) as and when that was built. ... When the first floor (second storey) was built in 1998 no alteration was required to the foundations or the walls of the ground floor (the first storey). However, in *Cantrell Lightman J* said that the motives behind the works, and the intended or subsequent actual use, were irrelevant. In any event we would not regard these extra-strength works as determinative in this appeal. When the extra strength was included in the 1989-1992 building there was an intention to enlarge the school at some later indeterminate date. However, we adopt the reasoning of the tribunal at paragraph 8.7 of *Brahma Kumaris* that a mere intention at the outset cannot mean that all subsequent activity on a building, whenever undertaken, must be in the course of construction of it. That could lead to the conclusion that additions to a building made many years after its completion should be zero-rated so long as it could be shown that there was an intention at the outset to incorporate such additions; the legislation cannot be interpreted in that way.

46. In *Hoyle Cottage Hospital Charitable Trust v Revenue & Customs* [2011] UKFTT 48 (TC) (“*Hoyle*”), the Tribunal allowed the appellant’s appeal against a decision of HMRC that the construction of a kitchen and laundry block in a nursing home development did not qualify for zero-rating under item 2 of Group 5. In this case, a hospital obtained planning permission for the construction of a new nursing home, including the construction of a kitchen and laundry block. The residential part of the nursing home was completed in 2008 and beds in it were occupied that year. However, construction of the kitchen and laundry block commenced only in October 2010 when the hospital had sufficient funds. The Tribunal found:

10. We ... have decided that the construction of the kitchen and laundry block are a continuation of the original development and should be zero rated. When the first phase was being constructed HMRC conceded that the Hospital could continue to use the kitchen and laundry facilities until such time as the new kitchen and laundry facilities were built. Whilst it is suggested that the 60 bed nursing home could operate without the kitchen and laundry in the old building, by importing caterers and outsourcing the laundry function, the fact of the matter is that they did not do so. The Hospital has chosen to continue to use the kitchen even though there was the inconvenience of transporting food in trolleys across the site. We are satisfied that the kitchen and laundry are connected to the use of the building. When constructed they will form an integral part of the Hospital’s operation. ...

11. [*St Mary’s*] indicated that there has to be a temporal connection between the construction of the building and the provision of other services, if those services can be said to have been provided in the course of the construction of the building. Usually those services will be contemporaneous or nearly so, but this is not always the case. When it is not the case it will be necessary to consider both the reasons and the length of the delay. ... All of the cases that we have been referred to indicate that the decisions depend on the facts of each case. The hospital could not function without the kitchen and laundry. That development was the second phase of the original construction work and is an integral part of the Hospital’s activities. It is accepted that the fund raising in itself would not be a grounds for allowing the time to run indefinitely. The activity is contemporaneous because a period of 18 months between the developments, coupled with the fact that the Commission for Social Care Inspection thought it was reasonable to

allow the hospital to operate on a temporary bases until July 2010 is not an unreasonable delay in all the circumstances. We therefore find that group 5 of Schedule 8 of the Act applies and the construction of the kitchen and laundry block is to be zero rated.

5 47. In *Central Sussex College v Revenue & Customs* [2014] UKFTT 1058 (TC), a college decided to undertake a redevelopment of a whole campus in phases, which envisaged that the original buildings would eventually be demolished. The works in the first two phases were ultimately completed at the same time, and the phase 3 works were undertaken after the other phases had been completed. A covered walkway was constructed to connect phase 1 and phase 2 with the original main building, assisting them to be used as though they were one building. At the time of the hearing before the Tribunal the original buildings had not been entirely demolished and the temporary covered walkway link was still in place, although locked off. Phase 1 and phase 2 had been constructed with the clear intention of connecting with phase 3. There were a number of doors suspended on the first and second floors of phases 1 and 2 which led nowhere until phase 3 was eventually constructed, after which these doors connected with the central entrance area in phase 3.

20 48. The Tribunal found (at [37]) that liability to VAT arises at the time a supply takes place; that the principle of legal certainty requires that the question whether or not a supply is zero-rated therefore ought to be ascertainable as at that time, and that the question whether works carried out constituted an enlargement, extension or annexe to an existing building thus has to be asked and answered as at the date of the supply of construction services.

25 49. On the facts of that case, the Tribunal found (at [41]-[45]) as follows. In relation to the phase 1 and 2 works, the Tribunal found these were to be used together with the original main building for an 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 which time they were connected by a covered walkway and functioned as one building. Phases 1 and 2 were therefore an enlargement of or extension to the original main building. As to phase 3, it abutted phases 1 and 2, and doors had been suspended on floors 1 and 2 of phases 1 and 2 which were planned to (and ultimately did) connect with phase 3. Phase 3 was therefore an enlargement of or extension to phases 1 and 2.

35 50. Drawing together the principles that can be derived from these cases, the Tribunal makes the following findings of law:

- 40 (1) It is “a question of fact and of degree as to when the original building can be said to come into existence so that additions thereafter become standard-rated” (paragraph 37 above).
- 45 (2) That question must be answered as at the date of supply, based on an examination and comparison of the physical character of the building as it was before the works were carried out and the building as it would be after the works were completed, having regard (inter alia) to similarities and differences in appearance, the layout and how the building or buildings are equipped to function (paragraphs 42, 43, 44 and 48 above). If, after the later works are completed, the building retained exactly the same appearance, exactly the same layout, and functioned in exactly the

same way, the later works are likely to be an enlargement or extension (paragraph 45 above).

- 5 (3) A relevant question is whether the ordinary reasonable person, with knowledge of the facts, would conclude that the later building was an enlargement or extension of an existing building (paragraphs 36 and 44 above).
- 10 (4) The fact that the later works were intended from the outset, and were included in the original planning permission, does not conclusively mean that the later works were in the course of construction of the original building (paragraphs 37 and 45 above). However, this may nonetheless be a relevant factor. In *Brahma Kumaris* at [8.2], it was said that “A single planning consent may well indicate that parts of a building built in phases are ‘in the course of the construction of a building’ rather than enlargements of, or annexations or extensions to, the building but other factors also may be relevant”.
- 15 (5) The time of first occupation may be a relevant factor but is not the only factor (paragraph 37 above).
- 20 (6) The subjective intentions of the appellant as to the building’s future use, and its actual subsequent use, are irrelevant (paragraphs 42-45 above), as is the effect of the later works on the appellant’s activities as a whole (paragraph 43 above).
- 25 (7) The terms of the planning permission regulating the future use of the building are also irrelevant, “save only in so far as they throw light upon the potential use and functioning of the buildings” (paragraphs 43, 44 above).
- 30 (8) There must be a sufficient temporal link between the earlier works and the later works. In simple terms, the two must be sufficiently linked in time. In determining whether there is a sufficient link, it is necessary to look at “both the reason for and the length of delay” (paragraphs 39 and 46 above), and to consider whether the reasons for the delay justify the length of the delay.

51. Applying these principles to the facts of the present case, the Tribunal draws the following conclusions:

- 35 (1) In the present case, the completed building following phase 2 was twice the size of the construction at the end of phase 1.
- (2) Apart from this, at the time that the phase 2 works were undertaken, it was clear that the building, following completion of the phase 2 works, would look almost exactly the same in appearance (apart from the fact that it would be twice the size), would have a similar layout and would function in much the same way.
- 40 (3) However, the Tribunal accepts that the ordinary reasonable person, with knowledge of all the facts, might conclude that the phase 2 works completed the Hodgkin Building, rather than enlarged or extended the phase 1 building. The Tribunal does not doubt the genuineness of Mr Gilbert’s and Professor Walton’s subjective view that this is the case.
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- 5 (4) It is of limited relevance that the phase 2 works were constructed in accordance with the intentions, design and planning permission that existed at the outset. In cases where a second phase of building is part of the original construction a building, rather than an extension to an already existing building, it will almost inevitably be the case that the second phase of building will be part of the original design and planning permission. The fact that the second phase of building was *not* part of the original planning permission may therefore be a significant factor militating in favour of the conclusion that it is an extension to an existing building (unless, for instance, planning permission was obtained for the second phase before the first phase was even constructed: see *Brahma Kumaris* at [8.2]). However, the fact that the two phases *were* included in the same original design and planning permission does not necessarily point with the same strength to the opposite conclusion. As was said in *Brahma Kumaris* at [8.7], “the mere intention of a taxpayer at the outset cannot mean that all subsequent activity on a building, whenever undertaken, so long as it is in accord with the original intention, must be in the course of construction of it”.
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- 20 (5) It is of relevance, but not conclusive, that the phase 1 works were occupied upon their completion, and continued to be occupied and used for years before the phase 2 works were undertaken. To the extent that it is relevant, it is a factor adverse to the Appellant.
- 25 (6) As the subjective intentions of the Appellant as to the building’s future use, and its actual subsequent use, are irrelevant, the Tribunal does not take these into account. As the effect of the later works on the Appellant’s activities as a whole is also irrelevant, the Tribunal does not take into account the evidence of Professor Walton that the phase 2 works enhanced the efficiency and quality of the research of the Chemistry Department and gave effect to the Department’s strategy of intercollegiality.
- 30 (7) No particular significance is attached to any terms of the planning permission.
- 35 (8) Phase 1 was completed and the phase 1 construction was occupied in August-September 2004. Work on phase 2 commenced in 2011. The length of the delay was thus some 7 years. The reason for the delay was simply lack of funds. Funding for phase 2 became possible due to a significant donation being made to the University in 2010. Had this donation not been made, construction of phase 2 would have been delayed by a further 2 or 3 years, or possibly even longer. The case law indicates that fund raising in itself would not be a grounds for allowing the time to run indefinitely (*Hoylake* at [11]; see also *St Mary’s* and *Robert Geffery’s* in which delay was caused in significant part due to lack of funds).
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52. Of the cases referred to above, the only one where a second phase of works was substantively found to be a continuation of the original development rather than an extension to a completed building was *Hoylake*. The conclusion in that case rested on the finding that the kitchen and laundry block built in the second phase, which had been included in the planning consent, was integral to the development, in that the hospital could not function without it. There was only an 18 month gap between completion of the first phase and the commencement of the second phase.

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50 Furthermore, in that case the Commission for Social Care Inspection had required that

the kitchen and laundry facilities be built, and had granted an extension of time for this to be done.

53. The facts in *Hoylake* are significantly different from those in the present case. While it may be the case that the Chemistry Department's vision of interdisciplinarity could not be achieved until phase 2 was completed (a matter not of direct relevance: see paragraph 51(6) above), there is no suggestion that the phase 1 construction could not function and be used for chemistry research until phase 2 was completed. Phase 1 did so function, as did the Chemistry Department as a whole, for some 9 years until phase 2 was completed in 2013. The Tribunal has found that there is no reason why phase 1 could not have continued to so function indefinitely, without phase 2. There is no suggestion that any public authority required phase 2 to be completed within any stipulated timeframe, or at all.

54. The fact that the phase 1 construction contained a sacrificial wall in anticipation of the phase 2 works is of marginal relevance. In *Robert Geffery's* the first phase single storey wing included foundations and steel beams of sufficient strength to support the additional storey to be added in phase 2, but this did not affect the Tribunal's conclusion.

55. Weighing the relevant factors in the present case, the Tribunal finds that phase 2 of the Hodgkin Building was, for purposes of Item 2 in Group 5 of Schedule 8 VATA, an enlargement of or extension to phase 1, rather than a continuation of the original development of the Hodgkin Building.

Conclusion

56. For the reasons above, the appeal is dismissed.

57. 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.

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**DR CHRISTOPHER STAKER
TRIBUNAL JUDGE**

RELEASE DATE: 29 May 2015

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