



TC04488

Appeal number: TC/2014/05267

VAT – construction – zero-rating – retention of half of front façade of dwelling to preserve party wall - whether property “demolished completely to ground level” - no – relevance of VAT Notice 708 – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

M LENNON & CO LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN RICHARDS
 JULIAN STAFFORD**

Sitting in public at Fox Court, Brooke Street, London on 9 June 2015

Julian Dagnall of Summers Morgan, Chartered Accountants for the Appellant

Anne Sinclair, Officer HM Revenue & Customs, for the Respondents

DECISION

1. In this appeal, the appellant company appeals against HMRC’s determination that a sale of residential property in Islington (the “Property”) was an exempt supply for VAT purposes with the result that input tax attributable to that supply could not be recovered.

Agreed facts

2. There was no dispute as to the facts. We heard evidence from Mr Kevin Lynskey, who was a contractor supervising the development of the Property and from Mr Barry Lennon, who works for the appellant company and was closely involved in the project. We found both of them to be honest and truthful witnesses and, since there was no dispute as to the evidence they gave, we have simply recorded relevant aspects of their evidence in the agreed facts set out at [3] to [12] below.

3. The appellant carries on a business as a general builder involved in the construction and sale of residential property and as a landlord receiving property rental income.

4. The Property is an end of terrace Victorian house. In 2007, the then owner of the Property obtained planning permission to convert it into three self-contained flats and started the works necessary to effect this conversion.

5. The appellant purchased the Property with the benefit of that planning permission. However, the appellant decided that it would make more commercial sense to rebuild the Property, substantially redesign its interior and, having done so, sell the Property as a single dwelling.

6. The project was overseen by Kevin Lynskey who had over 40 years’ experience in the construction industry. Mr Lynskey advised that, owing to structural problems at the Property, the only practical method of doing the necessary works would be to demolish the Property to ground level, introduce a new steel frame and then build a new house around that steel frame. However, it became clear that, because of the way the Property was constructed, and the fact that it was leaning slightly to one side, a complete demolition of the whole Property could result in the party wall between the Property and the house next door falling down. Therefore, Mr Lynskey advised that half of the front façade of the Property (which was not itself a party wall, but which was intrinsically linked to the party wall) could not be demolished and would need to be retained in order to provide support to the party wall.

7. There was no other practical method of supporting the party wall during the works other than the retention of the half front façade. If Mr Lynskey’s advice had not been followed, the party wall would almost certainly have collapsed.

8. The parties were agreed that, to the extent that the demolition and reconstruction of the Property involved building the new house within the “footprint” of the original Property, no statutory planning consent was required for the works and that,

5 accordingly, the retention of half of the front façade was not a condition of statutory planning consent. The parties were also agreed that, while other permissions similar to planning consent might have been required for the works (for example Building Regulations approval), it was not a condition of any such similar permission that the front half façade of the Property be retained and not demolished.

9. Planning consent was required, and obtained, for an extension that was built that expanded the “footprint” of the Property. That extension did not involve the creation of a separate dwelling.

10 10. The appellant incurred input VAT in connection with the works. In its VAT returns relating to periods from, and including, 03/09 to, and including, 12/10, the appellant claimed credit for that input tax on the basis that it was attributable to a proposed zero-rated supply, namely the sale of the Property that was to take place following completion of the works.

11. Eventually the works were completed and the Property sold.

15 12. Following a visit to the appellant’s premises in February 2013, HMRC were concerned that the sale of the Property could be an exempt, and not a zero-rated, supply for VAT purposes and that the appellant could not recover any input tax associated with that supply. In order to ensure that time limits for making assessments were not exceeded, on 27 March 2013 HMRC issued an assessment for £45,295 plus
20 interest to counteract the claims for input tax that had been made. Discussions between HMRC and the appellants continued for a period. On 28 August 2014, following a review, HMRC upheld the decision to issue that assessment.

The law

25 13. It is common ground that the effect of s26 of the Value Added Tax Act 1994 (“VATA 1994”) in the circumstances of this appeal is that the appellant is entitled to credit for the input tax in dispute only if that input tax is attributable to “taxable supplies”.

30 14. Section 30 of VATA 1994 provides that no VAT is chargeable on a zero-rated supply but that, in all other respects, a zero-rated supply is to be treated as a taxable supply.

15. Zero-rated supplies are those of a description set out in Schedule 8 of VATA 1994. Group 5 of Schedule 8 VATA 1994 (“Group 5”) sets out certain heads of zero-rating that are applicable to the construction of buildings.

16. Paragraph 1 of Group 5 covers:

35 “The first grant by a person--

(a) constructing a building--

(i) designed as a dwelling or number of dwellings

... of a major interest in, or in any part of, the building, dwelling or its site.”

17. The provisions of Group 5 are supplemented and explained by the accompanying Notes. So far as relevant to this appeal, the Notes provide as follows:

- 5 (1) "Grant" includes an assignment or surrender.
- (2) A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied-
- 10 (a) the dwelling consists of self-contained living accommodation;
- (b) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;
- (c) the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision; and
- 15 (d) statutory planning consent has been granted in respect of that dwelling and its construction or conversion has been carried out in accordance with that consent.

...

20 (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

...

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

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

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18. HMRC's VAT Notice 708 ("Notice 708") deals with VAT issues relevant to construction. Paragraph 3.2.3 of Notice 708, which does not have the force of law, contains the following section:

35 "In determining whether a building has been demolished completely to ground level, you can ignore the retention of party walls that separate one building from another building that is not being demolished."

The contentions of the parties

19. The parties were agreed that, if the sale of the property was a zero-rated supply, the appeal must succeed as the input tax claimed would be attributable to a taxable supply (which, by virtue of s30 VATA 1994, includes a zero-rated supply). It was also agreed that, if the sale of the Property was not a zero-rated supply, it was an

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exempt supply falling within Group 1 of Schedule 9 of VATA 1994. In that case, it was common ground that the entirety of the input tax that the appellant claimed in the relevant VAT returns would relate to the making of an exempt supply and the appeal should be dismissed. Therefore, the essential question in this appeal is whether the sale of the Property was a zero-rated supply falling within Group 5.

20. The parties are also agreed that, unless the demolition of the Property satisfied the requirements of Note 18 to Group 5, the project involved the “conversion, reconstruction or alteration of an existing building”. In those circumstances, Note 16 would prevent the works from involving the “construction” of a building. That in turn would prevent the appellant from being regarded as a “person constructing” a building for the purposes of paragraph 1 of Group 5 so preventing the sale of the Property from being a zero-rated supply.

The Note 18(a) issue

21. Therefore, the parties agree that a central question is whether the requirements of Note 18 are satisfied. Given the agreed facts at [8], it was common ground that the requirements of Note 18(b) cannot be satisfied. Therefore the appellant relied on an argument that Note 18(a) was satisfied.

22. Mr Dagnall supported the appellant’s contention by reference to Notice 708. He argued that, since the sole reason for retaining half of the front façade was to preserve the party wall with which it was physically connected, logic dictates that Notice 708 should permit the retention of the front façade to be disregarded in just the same way that it permits the retention of party walls themselves to be disregarded. He made it clear that he was not arguing that the retention of the front façade was *de minimis*. Nor was he arguing that zero-rating was appropriate on the basis that the appellant had “in substance” built a new property as he accepted that the question does not involve the substance of the matter but rather the question of whether Note 18(a) is satisfied. He did submit, however, that since the appellant had essentially built a new property, a conclusion that the requirements of Note 18(a) were met in this case would be entirely consistent with the purpose of the legislation.

23. Mrs Sinclair disputed this. She argued that provisions relating to zero-rating should be construed narrowly. She said that, since the front half façade had been retained, the Property had not been “completely demolished”. Moreover, since the half façade was not itself a “party wall”, the demolition had involved the retention of more than party walls with the result that the practice in Notice 708 was not satisfied. Finally, she submitted that Notice 708 represented HMRC’s interpretation of the law and was not itself law. Therefore, she argued that the appellant could not rely on Notice 708 as disclosing any principle that the retention of the half façade for safety reasons should satisfy Note 18(a) when the statutory words used made it clear that Note 18(a) was not satisfied.

The Note 2(d) issue

24. At the hearing, Mrs Sinclair also submitted that the requirements of Note 2(d) to Group 5 were not satisfied owing to the absence of any requirement for planning consent. HMRC had not put this argument to the appellant in correspondence previously. Although HMRC's review decision of 28 August 2014 had alluded to the question of whether Note 2(d) could be satisfied where no planning consent was required, the reviewing officer had been prepared to proceed on the basis that Note 2(d) was satisfied.

25. Mr Dagnall made no observations as to HMRC's lateness in introducing this argument. He submitted that it was a surprising argument and that Parliament could not have intended Note 2(d) to impose a requirement to obtain planning consent when it was not needed.

Discussion

The Note 18(a) issue

26. We accept that there were compelling safety reasons for not demolishing the front half façade of the Property. However, these safety reasons cannot alter the plain fact that the Property was not "demolished completely to ground level" within the meaning of Note 18(a). As Judge Bishopp has noted in *Mr JD & Mrs LB Halliwell v Revenue & Customs* [2006] UKVAT V19735, "the phrase 'demolished completely to ground level' has to be taken to mean what it says". Therefore, the statutory requirements of Note 18(a) are not satisfied.

27. The front half façade was retained to protect a party wall, but Mr Dagnall accepted that this half façade was not itself a party wall. Therefore, even though there were excellent reasons for retaining that façade, the guidance set out in Notice 708 does not, on its terms, apply. Mr Dagnall referred us to the First-Tier Tax Tribunal's decision in *Kevin Almond* [2009] UKFTT 177 (TC) and the references at [11] of that decision to the effect that "If the eastern wall of his house was demolished completely, then Mr Almond believed that the neighbouring property would collapse". We do not consider, however, that this decision can assist the appellant. It is clear from [13] that the Tribunal based its conclusion on a finding of fact that what was retained was part of a party wall, whereas Mr Dagnall accepted that the front half façade that was retained in the circumstances of this appeal was not a party wall.

28. Therefore, it is clear that the statutory requirements of Note 18(a) were not satisfied. In addition, since the appellant's situation was outside the terms of HMRC's published guidance set out in Notice 708, it cannot be argued that HMRC are restrained, as a matter of law, from applying the letter of Note 18(a). (In making this observation, we express no view as to whether, even if the appellant's situation had been within the scope of Notice 708, the principle of "legitimate expectation" would have precluded HMRC from applying the letter of Note 18(a). Nor are we concluding that this Tribunal would necessarily have had jurisdiction to consider questions of "legitimate expectation". We are simply noting that no such argument is available in this appeal given that the appellant's situation is not within HMRC's guidance.)

29. It follows that this appeal is based on an argument that HMRC should have exercised discretion to treat Note 18(a) as satisfied, even though it was not satisfied as a matter of law. We invited Mr Dagnall to cite authorities to support the proposition that this Tribunal has the power to decide the appeal on those grounds. He did not cite any authorities to us and Mrs Sinclair did not do so either in her submissions. We have, therefore, performed our own review of the authorities without the benefit of submissions from the parties.

30. We have concluded that the proper venue for the appellant to make arguments such as those that Mr Dagnall is advancing would be in a claim for judicial review. We have reached that conclusion based on the dicta of Nicholls LJ in *Aspin v Estill* [1987] STC 723 who said, at 727c:

“The taxpayer is saying that an assessment ought not to have been made. But in saying that, he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review.”

31. Since it is clear that the First-Tier Tax Tribunal has no judicial review jurisdiction (as confirmed in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1981] AC 22), we have concluded that we are not able to decide the appeal in favour of the appellant on the basis that Mr Dagnall is requesting.

The Note 2(d) issue

32. The question is whether the requirements of Note 2(d) are satisfied in circumstances where no planning consent is required.

33. During the hearing, no authorities were cited that were relevant to this issue. However, we have ourselves determined that the VAT Tribunal has previously considered a similar question in *Sally Cottam v Revenue & Customs* [2007] UKVAT V20036. In that case the Tribunal Chairman, Stephen Oliver QC, said:

“Reverting to the words of Note (2)(d) to Group 5 of Schedule 8, we note that there is no suggestion that the present conversion was carried out in an unauthorized manner. This leaves only the question of whether planning permission was granted in respect of Greengage Cottage. The words of Note (2)(d) do not, as we read them, require the works of conversion to have been the subject of a formal planning application resulting in the issue of a consent notice. Properly understood, those words mean that so long as, by virtue of the statutory planning regime, consent has been granted, the condition is satisfied. The nature of the consent is left to the circumstances of the conversion. Where, as here, the conversion is carried out in pursuance of the relevant Planning Act or a general consent and the Act and/or on the strength of an assurance by the planning authority that the statutory

regime allows conversion without further formality, then we think that the condition in Note (2)(d) will have been satisfied.”

34. We respectfully agree with those statements. It is not enough to satisfy Note 2(d) that the works have not been carried out in an “unauthorized manner”. Rather, the requirement is that “statutory planning consent has been granted”, although as recognized in the extract quoted above, that consent could be granted in a variety of ways.

35. We have therefore concluded that, in order to reach a conclusion on whether Note 2(d) is satisfied, it would be necessary to understand precisely why the parties have reached their agreed position that no planning consent was required for the construction of the Property. For example if the construction of the Property was within the scope of a general planning consent, or was covered by the planning consent that had been granted previously referred to at [4], the requirement of Note 2(d) would appear to be satisfied. By contrast, if the construction of the Property was completely outside the scope of planning legislation altogether (which appears intuitively unlikely), the requirement may not be met.

36. As noted at [24], HMRC raised the Note 2(d) issue as a new point at the hearing. Therefore, neither the appellant nor the respondent had, in advance of the hearing, collected evidence as to the precise position under planning legislation. Had we reached a different conclusion on the Note 18(a) issue, we would have invited the parties to provide further evidence on the planning position and to make submissions on that evidence. However, given the conclusion we have reached on Note 18(a), we have decided not to put the parties to the trouble and expense of doing this as it could not change our overall decision that the appeal must be dismissed. We have therefore decided not to express a conclusion on the Note 2(d) issue.

Conclusion

37. The appeal is dismissed.

38. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 23 June 2015