[2016] UKFTT 0318 (TC)

TCO5087

Appeal number: TC/2015/03218

VALUE ADDED TAX – zero-rating – construction of dwelling Group 5 Schedule 8 VATA – whether building was within Note 16 – no, Astral followed – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

J3 BUILDING SOLUTIONS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
IAN MALCOLM

Sitting in public at Kings Court, North Shields on 2 February 2016

Mr Graham Jamieson for the Appellant

Mr John Nicholson, presenting officer, for the Respondent

DECISION

1. This was an appeal against a refusal by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") to allow construction work carried on by the appellant at 82, Moor Lane North, Gosforth, Newcastle-upon-Tyne ("the site") to be zero-rated. The VAT in issue was £40,069.00.

Evidence

2. We had two bundles of documents, one from each party, containing among other things photographs and plans of the building and construction work carried on by the appellant at the site. We had some oral evidence from Mr. Bryan Watson, the owner of the appellant and we were supplied by the appellant with a number of documents relating to the appellant's applications for planning permission etc to carry out the works at the site, though not the planning consent itself.

3. In view of this rather strange omission we informed the appellant that we might have taken the view that the appeal failed for lack of evidence on what might turn out to be a crucial point: however as neither the appellant's owner nor Mr Jamieson was apparently a tax specialist we decided to issue directions after the hearing ("post-hearing directions") with a strict time limit to enable the appellant to provide the planning permission and building plans which were discussed at the hearing and to enable any comments to be made on these documents that either party wished to make.

4. We add that, from reading the papers again after the hearing, we noted that the appellant had in fact supplied a copy of the planning consent to HMRC because they referred to having seen it when making their decision. It is possible then that the appellant expected HMRC to include the consent in the bundle it prepared and it seems then somewhat odd to us that HMRC did not include it, especially as in their Statement of Case they refer to it in support of their case.

5. In the event, in accordance with the directions, the appellant supplied the planning consent, a number of plans and its comments on the documents. HMRC did not comment on them.

Facts

6. From the bundles, the evidence and the documents provided in accordance with the post-hearing directions and from oral evidence from Mr Watson we make the following findings of fact.

7. The site consisted, before the works, of a coach house of, we assume, at least pre-war origin together with modern flat roofed extensions. There was no suggestion that this building had not been a residential dwelling in the period before the works with which we are concerned were begun (and we find that it had been).

8. The boundary of the site is roughly square, with the entrance to the road on the west side. The site is bounded by a stone wall about a metre high, except on the centre of the west side where there was an entrance from the road. But in the northwest corner of the site a side gable wall and rear wall of the coach house form the boundary so that the north and west boundary walls abut without a gap and are "knitted" into the two walls of the coach house, which are one storey high and so substantially higher than the main boundary wall. The entrance to the coach house is on the south side.

9. The boundary wall was not a party wall at any point as it went "hard up" against the boundary line of the site.

10. The appellant sought permission from Newcastle City Council on 19 December 2012 to demolish *part* of the original coach house and *all* the extensions on the site and to replace them with a building on the footprint of the coach house and with a more extensive footprint and higher to replace the previous extensions, all to become a single dwelling. The development was to be carried out in accordance with approved plans listed in the permission which was given on 11 March 2013. From those plans supplied by the appellant pursuant to the post-hearing directions we can see that the original proposal was to retain the north and west walls of the coach house and a small part of the south wall that adjoined the west wall. It is also clear from the plans that the passage proposed between the coach house and the further extension is much wider than the previous passage. From this we find that the new works consisted of a building that was more obviously fully integrated as a single dwelling than the previous arrangement.

11. We were told in evidence by Mr Watson that in making the application he and his advisers had in mind the Gosforth Area Conservation Document which said of "demolition":

> "There is a general presumption against the demolition of buildings within conservation areas. The demolition of unlisted buildings which contribute to the character and/or appearance of the Conservation Area will not be considered acceptable."

12. Mr Watson's evidence was that he was told, and believed, that the Council would not approve a total demolition. He had accepted that the works as proposed would not qualify for zero-rating as some of the original coach house would be retained.

13. We were told that it turned out that, mainly for Health & Safety reasons, the proposed demolition of those parts of the coach house for which consent had been given would not be acceptable. Plans were rethought and the idea of demolishing everything bar the north and west walls of the coach house were approved (though not it seems in any formal variation of the planning consent).

14. In the event what actually happened was that the boundary wall was retained including the north and west walls of the coachhouse. The coach house walls (which were not cavity or double skinned walls) were stripped of their plaster on the inside.

New walls were erected inside the old north wall with a membrane between them to prevent the ingress of water etc. The membrane was attached to the inside of the existing wall, and lead flashing was carried from the exterior of the new wall over the top of the old wall. A fillet was inserted at the east end of the north wall between the old wall and the new. The new exterior walls at the east side of the coach house's footprint was joined to the existing exterior wall on the north side. A window in the west wall was blocked up with stone, and a chimney breast built behind it.

15. In an email of 14 April 2014 the Building Control Surveyor of the City Council told Mr Watson that:

> "I can confirm that your attached drawings showing the extent of demolition and new build is accurate with our own records under this Building Regulations full plans application. Only the original coach house had had part of its original stone wall retained, simply as an external skin but with substantial overhaul and rebuilding.
>
> We regard the whole scheme as a demolition of existing and re-build of a new dwelling with dormer loft and attached large gable annex with internal gallery."

16. As well as these findings on the undisputed and background facts, we make further findings of fact in the "Discussion" section of this decision at §§55 to 62.

Law

17. The only law with which we were concerned was in Group 5 of Schedule 8 to the Value Added Tax Act 1994 ("VATA") which sets out what supplies are zero-rated. The only part of that Schedule that was relevant to this appeal is as follows:

> "Item No
>
> 2 The supply in the course of the construction of—
>
> (a) a building designed as a dwelling …
>
> …
>
> 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.
>
> …
>
> Notes
>
> (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 except to the extent the enlargement or extension creates an additional dwelling or dwellings; …
>
> …

(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."

18. In this decision reference to a "Note" without more is a reference to that numbered Note to Group 5, and a reference to the "Group" is to that Group in Schedule 8 VATA. We also refer to the construction of a building which is not excluded from zero-rating by Note 16 as a "new build" and when it is appropriate to refer to all the operations listed in Note 16 we call them "reconstruction etc". In this context we note that the operations so listed are not mutually exclusive and there can be overlap (see Woolf LJ in *Wimpey Group Services Ltd v Commissioners of Customs and Excise* [1988] STC 625 (Court of Appeal) ("*Wimpey CA*").

The contentions

19. The appellant's contention was that the construction was a new build and not the reconstruction etc of an existing building. If necessary the appellant would say that if there was a reconstruction it was not of an existing building (within the meaning of the Group). The two walls of the coachhouse were not façades but became part of the boundary separate from the new north and west walls of the coach house, but if they were façades they were on a corner site and were required as part of the planning permissions.

20. For HMRC Mr Nicholson contended the opposite. In his Statement of Case it had been said that what was done was an extension of an existing building (from which we understand that he meant an extension which did not create an additional dwelling). In his submission to us though he argued that what was done was the reconstruction or alteration of an existing building, and so was not a new build. The building had not ceased to be an existing building because it was not demolished to ground level, and what was retained were not façades, but if they were there were two of them and they were not on a corner site, and in any case the walls were not retained because of any requirement in the planning permission.

21. The only law cited by either party was Group 5 in Schedule 8 VATA. Neither party had referred to any case law in the bundle nor in their oral submissions.

Discussion (including further findings of fact)

The case law

22. We need to say something about the lack of case law citation. We found it difficult to believe that there were no cases binding on the Tribunal or while not binding might be of assistance to us in dealing with an area which is notorious for its difficult drafting. We therefore spent some time researching the case law going back to the 1980s only to find that on 20 January 2015 the Upper Tribunal ("UT") had

issued a decision on the very issue that we were called on to decide. We do not blame the appellant for not referring to this case: although they were represented we understand that Mr Jamieson, though a solicitor, is retired and may not be a tax expert. But we were surprised that Mr Nicholson had not disclosed this case given that before this Tribunal he was the presenting officer.

23. We can therefore thankfully spare the readers of this decision a lengthy disquisition on the case law because in the case we refer to, *HMRC v Astral Construction Ltd* [2015] UKUT 21 (TCC) ("*Astral*"), the UT (Judges Greg Sinfield and Judith Powell) has done the job for us. But before we consider what *Astral* is binding authority for we need to consider a prior issue.

The approach to be taken

24. Mr Nicholson referred to the policy behind Group 5 of Schedule 8, although we are not entirely sure what arguments he was making in relation to that policy. The policy behind Group 5 was recently referred to in a decision of this tribunal, *TGH (Commercial) Ltd v HMRC* [2016] UKFTT 052 (TC) ("*TGH*") (Judge Amanda Brown and Helen Myerscough) where the tribunal said:

> "60. The provisions of what is now Group 5 to Schedule 8 VATA were introduced by paragraph 1 to Schedule 3 of the Finance Act 1989 and in consequence of infraction proceedings successfully bought by the European Commission and the subject of the ECJ judgment in 1988 (*Commission v United Kingdom [1988] STC 251*). Prior to 1989 the UK had permitted all construction to qualify for zero-rating.
>
> 61. By its judgment the ECJ evaluated:
>
> '35. The Commission challenges the zero-rating of all the items in Group 8 [*as Group 5 was in the Value Added Tax Act 1983*] with the exception of housing constructed by local authorities. With regard to the housing sector, the Commission argues that the indiscriminate application of a zero-rate to the whole sector, regardless of the nature of the dwellings concerned, is contrary to the first criterion laid down in the last indent of art 17 inasmuch as it is disproportionate in relation to the objectives of the United Kingdom's social policy in housing matters. With regard to commercial and industrial buildings and to community and civil engineering works the Commission considers that any benefit to the final consumer is too remote to meet the second criterion laid down in the last indent of art I7.
>
> 36. With regard to buildings intended for housing, the Commission's arguments cannot be upheld. The measures adopted by the United Kingdom in order to implement its social policy in housing matters, that is to say facilitating home ownership for the whole population, fall within the purview of 'social reasons' for the purposes of the last indent of art 17 of the Second Directive.
>
> 37. By applying a zero-rate to the activities comprised in Group 8 with regard to housing constructed both by local authorities and by

> the private sector, the United Kingdom has not, therefore, contravened the last indent of art 17 of the Second Directive.
>
> 38. However, activities included in Group 8 in relation to the construction of industrial and commercial buildings and to community and civil engineering works cannot be considered to be for the benefit of the final consumer.
>
> 39. It follows that the United Kingdom has failed to fulfil its obligations, as alleged by the Commission, in so far as it applies a zero-rate to services in relation to the construction of industrial and commercial buildings and to community and civil engineering works.'
>
> 62. There are no explanatory notes to the 1989 Finance Act however, the rationale for the changes must be assumed to have been to ensure European compliance of the zero-rating provisions, i.e. to limit the construction zero-rating to activities with a defined social reason. The provisions implemented in 1989, which include what is now Group 5 limited zero-rating for construction to buildings designed as a dwelling or number of dwellings (determined by reference to design) and buildings used for a relevant residential purpose or relevant charitable purpose (determined by reference to use and thereby requiring a certificate of use)."

In setting out the extract from the decision we have corrected minor typos[1] and used single quotation marks for the ECJ judgment. We also remark that while there are no publicly available Notes on Clauses (as they were called in 1989) for the Finance Act 1989, a Standard Note from the House of Common Library on "VAT on construction" confirms the Tribunal's assumption in [62][2].

25. The policy behind Item 2(a) of the Group is therefore one of facilitating home ownership for the whole population. It does that by making the supply of dwellings etc that facilitate the policy cheaper than they would be if VAT was chargeable on them. At [90] of its decision the tribunal in *TGH* revisits the policy as a cross check against its conclusion on zero-rating based on the wording of the legislation and the relevant case law.

26. Considerations of the policy behind the Group raise questions about how the Group, and indeed all the groups in Schedule 8 covering zero-rating, should be interpreted. It is trite law that while European Directives should be given a purposive (or teleological, as it is often called in civil law jurisdictions) interpretation, but that exemptions from the normal scheme of VAT should be interpreted "strictly", though not so restrictively as to thwart the purposes of the exemption. So much is said in *Commission v United Kingdom* ("*EC v UK*"), the case quoted from in *TGH* at [61] (see §24). *EC v UK* makes the point that zero-rating is equivalent to what the VAT

[1] We haven't been able to work out what was intended instead of "evaluated" in the opening line of paragraph 61 of the *TGH* decision but it doesn't matter.

[2] It is also confirmed in an article by John Walters QC, a judge of this and the Upper Tribunal, "VAT and alterations to listed buildings – the *Zielinski Baker* appeal" GITC Review April 2004 at p 52 as well as in the Chancellor of the Exchequer's Budget Statement.

Directive in issue then (the 6th Directive) calls "exemption with deduction", and that the strict approach applies to that as well as to exemptions *tout court*.

27. But that leaves open the question whether a strict approach is applicable only to the actual provisions of directives (in *EC v UK* it was applied to Article 28 of the 6th Directive on VAT which provided the so-called transitional rules permitting member states to retain zero-rating and its equivalents, but only where the exemptions were in place for "defined social reasons") or also to the UK domestic law which provides the detail of the particular activities which qualify for the UK's zero-rating provisions.

28. Interpretation was a point that was addressed in *Astral* at [37]:

> "It was common ground that, like provisions for exemption (see Case C-348/87 *Stichting Uitvoering Financiele Actiës v Staatssecretaris van Financiën* [1989] ECR 1737 at [13]), provisions for zero-rating, such as those at issue in this appeal, must be interpreted strictly. It was also agreed that the requirement of strict interpretation does not mean that the provisions must be interpreted restrictively (see *Expert Witness Institute v Customs and Excise Commissioners* [2001] EWCA Civ 1882, [2002] STC 42 at [17] and *HM Revenue and Customs v Insurancewide.com Services Ltd* [2010] EWCA Civ 422, [2010] STC 1572 at [83])."

29. By contrast in *Harrier LLC v HMRC* [2011] UKFTT 725 (TC) ("*Harrier*") (Judge Roger Berner and Mike Templeman (now sadly deceased)) said:

> "42. In *Talacre Beach* the taxpayer was relying on the terms of the principles, those regarding single supplies, of the Sixth Directive. In this case we are not concerned with the construction of the terms of what is now the Principal VAT Directive, but with the meaning of the domestic legislation which is permitted under the terms of the derogation. It is right that exemptions (including, in this context, zero-rating) in the Directive fall to be construed strictly (but not, it should be observed, restrictively; see *Commissioners for Customs and Excise v Axa UK plc* (Case C-175/09) [2010] STC 10 2825, at [25]), but what we are concerned with here is the construction of the UK domestic provision, which will fall to be construed in accordance with ordinary principles of statutory construction. Nor is this case concerned with any items that are specifically excluded from the zero-rating treatment.
>
> 43. If, applying a strict construction of the derogation provisions of the Directive, we were to conclude that the UK domestic legislation went too far, that would not assist HMRC. It is a well-established principle that, whereas an affected person can rely upon the Directive if the domestic legislation does not properly implement it, such reliance is not available to the Member State (see, for example, *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* [1986] 20 QB 401, judgment para 48). If therefore the zero-rating provisions go further than the derogation would allow, the taxpayer is entitled to rely on the domestic provisions."

30. Although *Astral* is binding on us, it is only binding on us for what it decides on the point of law in it, and we do not think that by referring to common ground between the parties as to how Schedule 8 should be interpreted the UT in *Astral* was laying down any proposition of law that we are bound to follow. *Harrier* is not binding on us, but is a decision of a very experienced judge who is also a judge of the UT and in relation to the question of interpretation the FTT's view is a considered view and not an acceptance of a common ground between the parties. We therefore prefer to follow *Harrier*. But we do not think that there is much if any difference now between the teleological approach of the ECJ and the purposive construction that is required of any court or tribunal in the United Kingdom.

31. The "ordinary principles of statutory construction" do require us to consider the purpose of legislation and we cannot ignore that the European Directives relating to VAT do have a part to play in identifying that purpose, especially where it is not explicitly articulated in VATA 1994. Thus the provisions of Group 5 in Schedule 8 that are in issue here need to be interpreted in the light of the social purpose that *EC v UK* identified. That gives us some difficulties. A new build of a dwelling on a green- (or brown-) field site is clearly something that facilitates home ownership for the whole population. So does the creation by conversion of a building that was not a dwelling into one that is, eg the classic barn conversion (providing that the conversion is not an annexe or otherwise connected to an existing dwelling, as that would not create new accommodation, at least not accommodation that was freely available to any purchaser).

32. Somewhat more difficult issues about the purpose or policy arise where there is an existing dwelling all of which is completely removed so as to leave nothing but the land and on the site of which a new building is erected and used as a dwelling. How, it may be asked, does that facilitate home ownership for the whole population if one dwelling goes and another takes its place, especially if the same people occupy the dwelling both before and after the works? Whatever the answer to the question is, it seems clear that such work is likely to be zero-rated.

33. The position becomes even more cloudy when *EC v UK* is examined further. The European Commission objected to the zero-rating of the construction of dwellings by private developers, as it considered that only council housing could meet the agreed social reason referred to in the Sixth Directive. The UK's answer was that social housing was also, in the UK at least, being provided by private developers, and on that particular issue the ECJ found for the UK. But there is nothing in Group 8 that restricts the zero-rating to construction of buildings designed as dwellings as part of what might be regarded as social housing. Dwellings intended or designed for use for a "relevant residential purpose" or "relevant charitable purpose" would seem to fit the bill as a form of social housing, but that is not what we are concerned with here. Group 8 seems then to go beyond what the ECJ considered to be the social reason for upholding the zero-rating.

34. Note 18, read with HMRC "concessions", also makes it clear that in fact quite a substantial amount of an existing building may be retained, for example a basement (which may now notoriously be several storeys deep), one (and sometimes two)

façades and also party walls[3]. Exactly the same question about the policy of facilitating home ownership may be asked in these cases as is asked above in relation to total clearance cases. And since the policy reason for facilitating one-for-one construction at all is less than clear, at least to this tribunal, and the social reason behind zero-rating of the construction of single occupied large houses in conservation areas even less clear, the rules in Notes 16 and 18 begin to look somewhat arbitrary. It seems to us very difficult to judge whether any particular one-for-one construction fulfils the purpose or policy of Group 8. We are then driven back to the statement in *Harrier* that we simply apply the normal domestic rules of interpreting statutes to Group 5, and we end up carrying out a possibly more traditional exercise of considering the words of Notes 16 and 18 to the Group, but in the context of the Group as a whole, the Schedule and VATA 1994.

The case law on Note 16

35. With these considerations in mind we turn to the Group and in particular Notes 16 and 18 and their potential application to this case.

36. We have interpreted HMRC's stance on this case to be that if the works here did not amount to a demolition of either all parts above ground level or one or two façades the retention of which was required by the planning consent, then the works could not be a new build.

37. For the appellant to succeed it must show that what it did ("the works") does not fall within the operations listed in Note 16, reconstruction etc of an existing building. HMRC did not suggest that the works were a conversion, and nor has the appellant ever sought to argue that they were. Nor did either party suggest there was an enlargement of an existing building, although it seems to us that both the footprint and volume of the new building was bigger than those of the old. And as we pointed out at §20, HMRC did not argue at the hearing for there having been an extension. So we do not consider these three operations any further.

38. As to the meaning of "reconstruction" which was HMRC's main point no case law was cited to us. Our researches led us to discover that there had been three cases where there are decisions on the meaning of that term that are binding on us, and which are mentioned in *Astral*.

39. We have not sought the comments of the parties on the cases we have considered as we think that the primary proposition of law which they lay down is that the question whether particular works are within Note 16 or not is a question of fact.

40. We now turn to *Astral*. The works in *Astral* involved demolishing ancillary buildings that surrounded a disused church, retaining the whole of the church and adding two new wings to the church to create a nursing home. The church was

[3] This party wall "concession" may be found currently in "VAT Notice 708: buildings and construction" at paragraph 3.2.3.

altered to become the reception area, and a mezzanine was built but which was not used for its intended purpose and which remained simply part of the reception area.

41. The First-tier Tribunal (Judge Lady Mitting and Derek Robinson) held, in [2013] UKFTT 00374 (TC), contrary to HMRC's submissions, that the works were neither a conversion, nor an enlargement or alteration to the existing building. Before the UT HMRC sought to argue that Item 2 in the Group requires that, even if there is not an enlargement or extension of an existing building (the church), there must be a completely new building (which it said there was not as the church itself was retained).

42. The UT dismissed HMRC's appeal. It held at [36] that:

> "… the first issue that we must consider is whether the building work carried out by Astral to create the nursing home was the construction of a building for the purposes of Item 2 of Group 5 without regard to Note 16. If the work was not the construction of a building then the exclusions provided by Note 16 are irrelevant. If Astral's supplies were made in the course of construction of a building then we must consider whether the development was excluded from being regarded as the construction of a building by Note 16(b) as an enlargement of or an extension to an existing building, namely the church."

43. At [44] it said:

> "We consider that, without the gloss provided by Note 16, the phrase construction of a building is not restricted to the construction of a wholly new structure."

As to the application of Note 16, it must be remembered that it was Note 16(b) that was in issue (enlargement or extension). The UT decided at [59] that:

> "… the FTT were entitled to conclude that the building work carried out by Astral to create the nursing home was the construction of a building for the purposes of Item 2 of Group 5 of Schedule 8 to the VATA and that the development was not an enlargement of or extension to an existing building, namely the church, excluded from Item 2 by Note 16. Accordingly, HMRC's appeal is dismissed."

44. The proposition established in *Astral* which is binding on us is that a "new build" (ie construction within Item 2 of the Group that does not come within any of the operations in Note 16) does not need to be a wholly new structure, ie one on a greenfield or brownfield site that falls clearly within the policy of the Group as envisaged by the ECJ. The identically constituted UT reiterated this proposition in *Boxmoor Construction Ltd v HMRC* [2016] UKUT 0091 (TCC) ("*Boxmoor*"), a case published after the date of this hearing and which is relevant to another issue we consider below.

45. *Astral* itself was a case involving a purported "enlargement or extension". The UT held that the FTT was entitled to find that the works in the case were not such

operations. *Astral* does not consider the meaning of the term "reconstruction". For that we need to consider earlier binding case law some of which is discussed in *Astral*.

46. In *Wimpey Group Services Ltd v Commissioners of Customs and Excise* [1988] STC 1 (High Court (QBD)) ("Wimpey HC"), Mann J held that "reconstruction of an existing building" involves constructing the previous building anew, but that it does not require exact replication and is a matter of fact and degree.

47. The circumstances were set out in the decision of the VAT Tribunal:

> "The work involved the total demolition of all buildings in the old complex on the site except the 10 sack factory unit, a block on the northern end of the site to which we refer as 'the ancillary services block' and the office or administration block, a relatively small block on the western side of the site ...
>
> ... an entirely new building was constructed alongside the 10 sack factory building, to replace the one which had been demolished ...
>
> The new buildings erected were closely adjacent to the ancillary services block and the 10 sack factory building. The new buildings were completely different in construction: the old buildings had a steel frame with a pitch roof, whereas the new buildings were of precast concrete with a flat roof. None of the old materials were used in the construction of the new building. We find that these new buildings had new foundations and were structurally independent. … The gaps between them were infilled and the roofs were joined by weather proof plastic.
>
> On the facts which we have found, this redevelopment involved the construction of an entirely new building covering at least three quarters of the site."

48. Mann J held that there was no reconstruction and that there was no affinity in terms of function or appearance between the old buildings and the new, and his decision was upheld in *Wimpey CA*. There Lord Donaldson MR said:

> "The question is: Was the work undertaken a reconstruction of the pre-existing building, or was it a case of an entirely new building, a separate building, a distinct and independent building, being erected on the site made available by the demolition of part of the pre-existing building? For my part, on the findings of fact of the tribunal, I would agree with the judge that this was a new building and not the reconstruction of an old building."

And Woolf LJ (as he then was) said:

> "… in this case it appears clear to me that the learned judge was absolutely right in saying that what is there now is not a replication or a construction anew of what was there before, and on that basis, considering the word 'reconstruction' alone, which was the only matter which the judge was required to consider, I regard his decision as absolutely right."

It should be noted that in the period with which this case was concerned (before 1989), zero-rating was available for all construction, not just residential, which is why the case concerned a bakery.

49. The second case, *Commissioners of Customs and Excise v Marchday Holdings Ltd* [1997] STC 272 was also considered in the Court of Appeal. In the judgment of Stuart-Smith LJ the description of the operations undertaken was taken from the Tribunal decision:

> "The parts of the existing structure which were retained were as follows: (1) The reinforced concrete columns and beams forming the frame of the structure; (2) the concrete slabs forming the floor of the ground floor, first floor and second floor and the roof of the second floor with gaps where the old stairs, lift and loading bays had been and with holes cut out for the new lifts, stairs and the ramp to the basement; (3) the entire brick party wall on the east which was at ground level some 90 feet and 36 feet at first floor level and above; (4) the brick party wall on the west side of about 30 feet deep, the six feet return where the flats were set back from the road being demolished; (5) the brick wall at ground floor level only on the west side extending back by a little more than a further 90 feet; and (6) the foundations.
>
> Photographs taken during demolition and examination of the plans show that with the exception of the party walls and the retained ground floor wall on the east and west sides a person standing in the street could have seen right through the remaining structure and a person standing inside would have seen the sky through the substantial gaps in the floor and ceiling where the old lifts and stairs had been removed and the new ones were to be inserted. It might fairly be described as an incomplete skeleton albeit of substantial construction."

50. Stuart-Smith LJ continued:

> "The tribunal described the building as it was at the end of all the works. The basement floor was raised, new concrete slabs being laid over crushed brick hardcore which had been left by the demolition contractor. There is a new lift. An LEB transformer chamber has been retained, but there is a new electrical switch room and fire exit stairs have been modified because of the raised floor level at the basement. The dimensions of the building have been changed, for instance by a reduction of the floor space at ground floor level to allow for new patios. Raised steel floors have been superimposed on the existing concrete bases and false ceilings installed. The concrete columns have been encased and painted. The ground, first and second floors are all open plan save for the lift and lavatory areas. The third floor mansard is, of course, entirely new. Its gross area is a little more than three-quarters of the two floors below, and above it is a plant room and air-conditioning plant.
>
> After the building work had been completed the tribunal said (at 263):
>
> > 'Leaving aside the basement, some 15 per cent. of the concrete slabs were new. The basement floor was in effect new. One third of the

> structural frame was new; some of the outermost columns and beams were found to be out of alignment and had to be replaced.'

Thus a substantial part, but not the whole, of the 'incomplete skeleton albeit of substantial construction' which was left after the demolition contract still remained after all the works were completed.

As the tribunal says, and as is plain from the photographs, the appearance of the Banner Street façade is wholly different from what it was before any works were started. The tribunal describes the difference as follows (at 263):

> 'There is substantially more brick than before and of a much better quality, namely Red Leicester Ibstock, with black mortar. Instead of the long window effect there are rectangular windows at regular intervals, ten each on the first and second floors and eight on the ground and third floor. There is a new front entrance and a circular window above and central at third floor level.'

The important part of the tribunal's conclusion is to be found in three paragraphs (at 269-270):

> 'The question which we must ask ourselves is whether the work done by [the company] at No. 44/52 Banner Street amounted to the conversion, reconstruction, alteration or enlargement of the existing building, in the sense in which these words are commonly used or whether the end result is a new building. We must compare the end result with the building as it was. We accept Mr Pleming's submission that the question whether the end result is the original existing building or a new building must be considered in the context of Note (1A). It is clear however that the words 'existing building' must be given due weight. If what might otherwise be described as conversion, reconstruction, alteration or enlargement is so extensive that the building is essentially a new building, then Note (1A) does not apply. Having seen the plans, photographs, specifications and correspondence, visited the site and considered the evidence of the witnesses, it is our unanimous impression, viewed from our differing professional experience, that considered as a totality the work was so extensive that the building was essentially new. In our opinion to describe the work as the conversion, reconstruction, alteration or enlargement of an existing building is unrealistic.'" [emphases added by Stuart-Smith LJ]

51. Stuart-Smith LJ added:

> "Each of the words in note (1A)(a) are important, although there may often be overlap between them. The word reconstruction is somewhat different from the others. It involves a replication or construction anew of what was there before. The appearance and function of the building will be substantially the same as what previously existed. There may be minor differences and the use of more modern techniques to achieve what is essentially a replication of the old building (see *Wimpey Group Services Ltd v Customs and Excise Comrs* [1988] STC 625)."

And in relation to "alteration" he said:

> "… Somewhere along that line it is possible to say, the original building has ceased to exist, what is being done cannot be sensibly or realistically described as an alteration of it. …"

52. In the first of three appeals considered together in the third case, *Commissioners of Customs and Excise v London Diocesan Fund; Commissioners of Customs and Excise v Elliott and another; Commissioners of Customs and Excise v Penwith Property Co Ltd* [1993] STC 369[4], McCullough J said:

> "'Reconstruction' connotes replication (see *Wimpey Group Services Ltd v Customs and Excise Comrs* [1988] STC 625). That must mean replication of what was once, but is no longer, there."

53. In relation to *Penwith* he quoted from the decision of the tribunal to show what remained of the building after demolition:

> "After demolition works the site consisted of a front wall with the top three feet removed, the south gable end reduced by about three feet overall, the north gable end also reduced similarly and demolished on the north west corner of a length of about four feet, the rear wall reduced to chest or head height, and all walls outside the main body of the ruin totally demolished. All windows, frames and doors were removed, and the walls connecting the chimney to the corner of the outer walls were removed, as were substantial parts of the flanks of the chimney. I estimate that the ground area of the new house was approximately double the ground area of the main body [of] the ruin."
>
> …
>
> The tribunal appears to have paid due regard to Wimpey. There were certainly elements of the new which replicated the old — particularly in external appearance — but there was much that differed. The structures outside the central core were completely different. Mr Lomas, who appeared before the tribunal, says that so were the internal arrangements, as would have been apparent from the oral evidence. It was, in my judgment, well within the bounds of reasonableness to conclude that, considering the changes as a whole, the new was not a reconstruction of the old."

54. It should further be noted that all of these appeals related to periods before Note 18 was added to the Group (in 1995). They were therefore construing "reconstruction" of an "existing building" without any legislative gloss on the latter term.

Further findings of fact relating to what was done at 82 Moor Lane North

[4] The three cases taken together are described in the main text as "*LDF etc*", the first case as *"LDF"* and the third case is described as "*Penwith*".

55. There is no doubt that before any works started there was an existing building in the ordinary sense of the words (ie disregarding the effect of Note 18). Every part of the building was demolished to ground level except those walls of the coach house which formed part of the boundary wall of the site. At least we would have said that had we not examined the plans which formed part of the planning consent *and* the photographs of the works put in evidence by the appellant. From those we find that although it was said in evidence that following inspection plans to demolish all but the north and west walls were approved, the part of the south wall that was intended originally to remain was not in fact demolished. The photographs show that when the steel structure for the rebuilding of the south wall was in place there was still a substantial part of the original south wall in being between the end of the west wall and the west end of the steel structure.

56. There is no doubt, and we find as a fact, that a substantial new building designed as a single dwelling was erected on the site and that the new building physically touched the retained walls only at each end of the wall and on the top of the walls, and that new internal walls were built in front of but not attaching or tied to one of the retained walls. We say "one" because it is clear both from Mr Watson's evidence, the photos we had and the plans supplied after the hearing that our description applied to the north wall of the coach house. We do not think it applies to the west wall. This is because in one of the photos of the west wall we can see the course of brick or stone forming, we were told, the rear of a new chimney breast and flue, and because it appears that at the place where the south and west walls of the coach house meet there is no gap of any sort between the stone work. In the end though we do not think it matters whether one or both walls were treated as mentioned by the appellant.

57. More importantly what the photographs also show is that in fact the part of the south wall that abutted or tied into the west wall was not demolished before the creation of the new south side of the coach house. We so find and discuss the implications of that finding below.

58. We find that there is an affinity of function between the old building and the new, as both what was there before the works and what was there when they were complete were dwellings.

59. As to differences in style, appearance and size we are hampered to some extent by not having photographs of the building as it was before the demolition works. But we can see from the plans, and find as facts, that before demolition the main extension facing west was a single storey flat roofed building with a conservatory to the front, and that after the works there was what was described in the planning consent as a 2½ storey building (in essence a three storey building using the roof space) on a larger footprint. There are two dormer windows in the roof and the top of a large window whose sill is at floor level of the first floor. The conservatory had disappeared.

60. As to the coach house, before the works there was a row of dormer windows in the roof, a window to the west end of the front and patio doors at the east end, but no entrance. Afterwards there was a long row of aluminium windows to ground level

and only one a window in the roof, flush with the roof slope. There was before the works a window in the west gable end, and afterwards this was stopped up in stone.

61. Before the works the small extension between the coach house and the main extension was single storey: after, it is two storeys high with a glass roof at the first floor level.

62. The plans in the proposal included in the planning consent application show that the existing building's footprint was 193m^2 and total internal floor area 210m^2. Afterwards the footprint was 222m^2 (15% more) and the internal floor area 368m^2 (90% more).

Our conclusion on Note 16

63. Mindful that we are told that the question we have to decide is one of fact and degree, a jury question as was said in *Marchday*, we find, on the basis of our findings of fact as to what the old building consisted of and what was done after demolition, and the differences between them, that the works here were the construction of a building designed as a dwelling which was not the reconstruction of an existing building.

64. We do not see anything in *Wimpey*, *Marchday*, *Penwith* or *Astral* that would suggest that this is not a finding that we can properly make. Very substantially more was left in place in *Marchday*, but we note that Stuart-Smith LJ in the Court of Appeal quoted with approval, and added his own emphases to, the VAT Tribunal's view that:

> "If what might otherwise be described as conversion, reconstruction, alteration or enlargement *is so extensive that the building is essentially a new building, then Note* (*1A*) *does not apply.*"

and

> "it is our unanimous impression, viewed from our differing professional experience, that considered as a totality the work was so extensive that *the building was essentially new.* In our opinion to describe the work as the conversion, reconstruction, alteration or enlargement of an existing building is unrealistic."

65. It is true that unlike in *Marchday* there is no difference in function between the old and new buildings. Affinity in terms of function was mentioned by Mann J in *Wimpey HC* but the notion of affinity of function was not commented on in *Wimpey CA*. But Mann J's decision suggests that the affinity of function in that case was irrelevant to the question he had to decide:

> "It had no affinity in terms of structure or, as can be discerned from photographs, appearance with its predecessors. The only affinity was function as part of a large bakery. In my judgment the tribunal erred in that they did not focus upon that which was demolished and that which appeared in place. Rather do they seem to have focused upon the functional concept of 'the bakery'. It may be that the man in the street

> confronted with all the works (including those of undoubted new construction) would describe the operation as 'the reconstruction of the bakery at Greenford'. Such a confrontation is not, however, in my view material and I believe the question has to be refined in the manner I have endeavoured to suggest."

66. Nor do we think that what was done can possibly be described as an alteration of an existing building. Demolition is not alteration, and the only parts not demolished were not altered. We repeat Stuart-Smith LJ's remark in *Marchday* on alteration:

> "… Somewhere along that line it is possible to say, the original building has ceased to exist, what is being done cannot be sensibly or realistically described as an alteration of it. …"

In our view we can say that what was done here cannot realistically or even sensibly described as alteration of the old building.

67. As a result the appellant succeeds. We do not strictly need to consider whether Note 18 can affect our conclusion. But in deference to the submissions of both parties and in case it is found that we were wrong to come to the conclusion we did as to the meaning of "reconstruction" and "alteration" and their application to the facts of this case, we have considered Note 18. We have found ourselves in an uncomfortable position in relation to Note 18, so it may be as well that consideration of it is not vital to our decision.

Note 18: what does it do?

68. Unlike the position with Finance Act 1989 (where the Tribunal in *TGH* pointed out that there were no Explanatory Notes available to help the tribunal) the insertion into Group 5 of Note 18 was done by statutory instrument and all statutory instruments have a Explanatory Note ("EN"). That to the Value Added Tax (Construction of Buildings) Order 1995 (SI 1995/280) ("CBO"), the instrument in question, says (relevantly):

> "The major changes are that:
>
> …
>
> -- a stricter definition of an existing building is introduced.
>
> …
>
> Note (18) introduces a new definition of what amounts to an existing building for the purpose of the Group."

69. Note (A)6 to the Budget News Release 5/94 ("BNR") issued on 29 November 1994 says:

> "The distinction for VAT between new and existing buildings is to be clarified. This has been the source of extensive litigation by developers, who have sometimes successfully argued that the retention of a substantial part of an existing building does not prevent zero-rating as a new dwelling. Up to now there has been no satisfactory legal

> definition. A new building will be defined as one not incorporating any part of an existing structure other than foundations or a basement, and one or two façades retained as a condition of planning consent."

70. We note here that the EN to Note 18 says that what it does is give a new definition of "existing building", while the BNR says the legislation will define a new building by reference to what remains of the (pre-)existing building.

71. The mischief for which Note 18 is a remedy is, it seems from the BNR, the finding by some VAT Tribunals (upheld by the High Court and Court of Appeal in some cases) that the existence of substantial parts of buildings remaining above ground level does not prevent there being the construction of a new dwelling which is zero-rated. As of 29 November 1994 (when the BNR was issued and, we assume, the CBO was in draft, since it was laid on 8 February 1995) decisions had been given in a number of cases heard by the VAT Tribunal which allowed an appeal against a refusal by the Commissioners of Customs and Excise to zero-rate a work of construction. In two of these cases the decisions of the Tribunal were upheld by the High Court in 1993. We have already quoted from some, and from those and certain others which seem to us to be of some importance we can see that what was left of the original building was as follows (the "Notes" are ours):

Case	Remaining above ground	Notes
P S Thakkar (VAT Tribunal Decision 6127) 1991 ("*Thakkar*")	Front wall and two adjoining walls, part of rear wall	Fact that not a total demolition held not conclusive. Agreed retention of existing building in vast new complex would not be enlargement etc (*St Andrew's*) New building did not result from conversion etc.
A J Penn (VAT Tribunal Decision 10312) 1993 ("*Penn*")	Part of roof (tiles, battens underfelt) of barn.	3 part *St Andrew's* test applied. "No existing building". Works were a construction of new dwelling
London Diocesan Fund 1991	Church tower and 10% of rest	3 part *St Andrew's* test applied. Upheld by High Ct 1993 (*LDF etc*) disapproving that test.
Penwith 1991	Front wall with the top three feet removed, both	3 part *St Andrew's* test applied. Upheld by High

	gable ends similarly removed, and the rear wall reduced to head height	Ct 1993 (*LDF etc*) disapproving that test.
Marchday Holdings Ltd 1994	(1) reinforced concrete columns and beams forming the frame of the structure; (2) concrete slab floors and roof of 2nd floor with gaps (3) E party wall (4) W party wall & 6' return (5) brick wall at ground floor level.	Upheld High Ct 1995, Court of Appeal 1996 (*Marchday*).

72. The remedy in Note 18 for the mischief as identified in the BNR was to say simply that "[a] building only ceases to be an existing building … when demolished completely to ground level". This seems to presuppose that in deciding whether to allow zero-rating on the basis that Note 16 does not apply, it is necessary to decide whether the existing building referred to in that note has ceased to exist as such. It seeks to prevent the Tribunal from finding that an existing building has ceased to exist even if the only things that remain above ground level are those in the middle column of the table above.

73. Because it lays such stress on what remains of the existing building *after* demolition-type works, we are left with the suspicion that the Commissioners had not taken proper account of the *LDF etc* decision of McCullough J in formulating the remedy that was Note 18. In *LDF* and *Penwith* (and in *Penn*) the Tribunal had applied what was known as the "three stage *St Andrew's*" test. McCullough J considered that test in the High Court on the appeals. It was set out, as he said, in the case of *St Andrew's Building Ltd v Commissioners of Customs and Excise (VATTR 2127) ("St Andrew's")* where it was said:

> "The scope and purpose of the statutory provisions since 1977 and experience of their practical results persuaded this tribunal that in the instant case it was necessary to consider the matter at three stages. In the first place was there an 'existing building' prior to the commencement of any works. Secondly, was there still an 'existing building' once any projected demolition involved had been carried out, and thirdly, was the completed building to be described as the conversion, reconstruction, alteration or enlargement of that 'existing building', in the lesser of the senses discovered at step one or two, all these phrases having their ordinary everyday use. Thus it seemed to the tribunal that had, for example, there been an 'existing building' prior to the start of any work but that the only part of it which remained after planned demolition was a particular doorway or a window or two, then it would have been difficult to say that there was any 'existing building' going forward through the whole process, so that the result could hardly have been called merely the conversion, reconstruction,

> alteration or enlargement of it. Equally had all or almost all of the original building remained and had there then been some vast development round about into which the existing building was integrated, it should equally have been difficult to say that it was merely the conversion, reconstruction, alteration or enlargement of that original building."

74. McCullough J said of this passage:

> The second *St Andrew's* question [*was there still an 'existing building' once any projected demolition involved had been carried out*] is unsound because what the legislation requires to be asked is not whether there has been 'conversion, reconstruction, alteration or enlargement' of those parts of the original building which were not demolished, but whether there has been 'conversion, reconstruction, alteration or enlargement of an existing building', which means conversion, reconstruction, alteration or enlargement of the building as it was before *any* work, whether of demolition or construction, began. Indeed, in a case involving anything more than minimal demolition, the *St Andrew's* approach renders the word 'reconstruction' otiose, because if it had been intended to reconstruct the surviving part it too would have been demolished. 'Reconstruction' connotes replication (see *Wimpey Group Services Ltd v Customs and Excise Comrs* [1988] STC 625). That must mean replication of what was once, but is no longer, there.
>
> In the three-stage test the answer to the second question determines the result: if the answer is 'No', the third question is not asked. If the answer is 'Yes', the answer to the third question will be same, since, whatever work is done after demolition will amount to an enlargement or an extension of the undemolished part.
>
> The second question is artificial and difficult to answer. Building is not easily defined. Ask the question: 'Is there an existing building?' before any work has begun and the definitional uncertainty is unlikely to matter. But at the second stage those who think of a building as something which is (or was, before it became ruinous) substantially complete will be more likely to say that no building remained, whereas those who think the word wide enough to embrace virtually any erection of substance are more likely to say that one did survive.
>
> *Where, as will ordinarily be so, it is beyond argument that a building was in existence before the work began, all that para (a) of note (9) requires is to consider the building as it was, to consider the end result and to ask whether the work done amounts to the conversion, reconstruction, alteration or enlargement of the original building in the sense in which those words are commonly used, or whether the end result is a new building.* [Tribunal's emphasis] If a number of buildings existed before the work began the question will be whether the work amounted to the conversion, reconstruction, alteration or enlargement of one or more of them. The matter is one of fact and degree."

75. If the second *St Andrew's* question – what was there after any demolition works? – is irrelevant, as McCullough J held it to be, it seems to us to follow that the question seemingly answered by Note 18 does not need to be asked in either the current case or in relation to the facts considered in the cases we have cited to find whether Note 16 applies or in *Thakkar* and *Penn*, since Note 16, as explained in *LDF etc*, requires that judging whether the operations are performed on an "existing building" involves considering what was in place by way of building before any works commenced, and is not concerned with what happens to the building during the works.

76. It is never comfortable to find that a legal provision does not work, or has "missed fire", even if it is secondary legislation. Bearing in mind the old maxim *ut res magis valeat quam pereat* (loosely translated (by us) as "it is better to find an interpretation that works than one that does not") can a purposive or teleological interpretation of Note 18 give an answer? We can, we think, see that what is intended by Note 18 is a bright line test: based on the BNR the purpose was to give a developer or do-it-yourself builder the certainty that if, *and only if*, in the course of their works, they had demolished the existing building to ground level (ignoring the façades for the moment), then what they were doing would be a zero-rated new build because it could not amount to a reconstruction etc of an existing building where Note 16 would have had the effect that it was not zero-rated.

77. It seems to us though that to make Note 18 mean what those who created and put the instrument into effect appear to have intended requires too much by way of judicial law-making for us to contemplate that exercise. The words simply cannot be read, by us at least, on any kind of purposive interpretation as having the intended effect. We think it is telling that the Explanatory Note to the CBO does not go anywhere near as far as the BNR in articulating the intended effect of the instrument in laying down the bright line test we have suggested was what was in the official mind.

78. So our somewhat uncomfortable view on Note 18 is that it simply cannot apply to a case where, as here, the demolition was carried out in the course of the works, because what we have to compare for Note 16 are two things: the building as it was before the works, an intact coach house with extensions, and the building that there was after the works. We have made that comparison and have found that there was a construction of the "after the works" building which was not a reconstruction (meaning a replication) or alteration of the "before the works" building.

79. We might have come to the conclusion, on somewhat different facts, that the "after the works" building was indeed a reconstruction etc of the "before" building. But such a conclusion would not have depended on whether the "before" building had or had not been demolished. It might have been demolished and an exact replica built in its place: that would still be a reconstruction despite Note 18.

80. Despite all this it might however be said that Note 18 can have a function. Suppose a developer or a DIY builder buys a site on which there is the remains of a building which had been partly demolished or had collapsed of its own accord before

purchase and before any works. In that case the developer might say that what they bought ceased to be a building before they bought it, so is not an existing building. The test set out in the cases will be a comparison of what was there before the works and what is there after. Is what is there before an existing building? Note 18 could apply to say that if there is something (again ignoring façades) above ground there is still an existing building – and the works whatever they are will need to be judged by reference to the operations listed in Note 16 applied by reference to those minimal remains.

81. Finally on this part of our decision *Astral* postdates the introduction of Note 18 and has something to say about it. At [56] the UT says:

> "Ms Mitrophanous [for HMRC] pointed out that Note 18 to Group 5 of Schedule 8 to the VATA had not been enacted at the time of the events with which *Marchday Holdings* was concerned. In so far as relevant to this case, Note 18 provides that a building only ceases to be an existing building when demolished completely to ground level. Ms Mitrophanous's submission was that Note 18 showed that the church was at all times 'an existing building' for the purposes of Note 16 and it followed that there was no longer any question, as there had been in *Marchday Holdings*, whether it could be said that the existing building had been enlarged or extended."

82. And at [57]:

> "We do not accept Ms Mitrophanous's submission that Note 18 to Group 5 of Schedule 8 to the VATA has made the fact and degree test, as propounded in *London Diocesan Fund* and *Marchday Holdings* and applied in *Cantrell No 1* and *Cantrell No 2*, irrelevant in this case. Note 18 defines when a structure ceases to be an existing building. It does not say what is or is not an extension or enlargement. Note 18 does not mean that all work, no matter how extensive, done on the site of a building that is not completely demolished to ground level must be regarded as an enlargement or extension."

83. It is clear from the tenor of the decision that the UT assumes that Note 18 has a wider scope than we do, and we note that *Astral* is about a Note 16(b) case, but even with these caveats it seems to us that it must follow from what the UT says that Note 18 does not say what is or is not a reconstruction, nor does it mean that all work done on a site that is not completely demolished to ground level (as our site was not) must be regarded as a reconstruction etc and not a new build.

Is this case one where Note 18 could apply?

84. In the light of our conclusions on Note 16 (and assuming we are wrong about the scope of Note 18), we do not need to consider whether what was done amounts to the deemed demolition described in Note 18(b). But as we have said, we heard full argument on Note 18 (and indeed issued directions to enable the appellant to put forward all available evidence on the point) so we have decided to set out our views.

(a) Is the two façades case the only case governed by the planning requirement?

85. We deal first with a point put forward, with a little hesitation, by the appellant after the Tribunal raised the question with Mr Nicholson. Is the requirement that retention of façades is a condition of planning consent etc a requirement that relates only to the two façades case or to both that and the single façade case? In grammatical terms "which" in Note 18(b) would usually refer to the nearest antecedent, in this case "double façade". But there is no logic in requiring one case to be subject to a planning condition and not the other which is in fact much more likely to be relevant. And although later legislation is usually permitted as a guide to the meaning of earlier legislation only where the two are *in pari materia* (see *Bennion on Statutory Interpretation*, 5th edn at §231), we do note that the only other use in legislation of the Note 18(b) formulation is in paragraph 7(b) of Schedule B1 to the Taxation of Chargeable Gains Act 1992 inserted by Schedule 7 to the Finance Act 2015. That reads:

> "been demolished to ground level except for a single facade (or, in the case of a building on a corner site, a double facade) the retention of which is a condition or requirement of planning permission or development consent."

The drafter here has clearly borrowed from Note 18(b). The use of brackets here shows that "which" relates to a single façade as well as to the double façade case if that is what is involved. We agree with Mr Nicholson that planning permission etc is a requirement in both cases, and are further comforted in coming to that conclusion by the fact that the drafter of the clearer and arguably more grammatical paragraph 7(b) quoted above was a member of the Parliamentary Counsel's Office, unlike the drafter of Note 18.

(b) Does the party wall concession apply?

86. The appellant's grounds of appeal show that in relation to façades it argued that only the west gable wall was a façade and that the north wall was a "party wall" and therefore fell within HMRC's concession for party walls. We do not accept this: we agree with Mr Nicholson that as no part of the north wall was within the boundaries of the adjoining property the wall was not a party wall.

(c) Were the walls retained façades?

87. Mr Nicholson's objection to Note 18(b)'s application was that the two walls of the coach house not demolished were not façades, which he says means the front or principal face of a building. In the case of the coach house he would say the south wall which incorporates the entrance (and which was demolished) was the only façade. We do not accept this. We could only find "facade" (without the cedilla) in any other UK legislative context in the Crossrail Act 2008. Schedule 3 to that Act contains a list of listed buildings to which various planning rules are disapplied if they are needed for Crossrail works. Included in the list is the building 8-10 Southampton

Row (in the London Borough of Camden). The works to which the planning rules are disapplied are:

> "Demolition of interior and roof (facade to Southampton Row, Fisher Street and Catton Street to be retained)."

Thus there appear to be at least three façades to that building.

88. And of course Note 18(b) itself refers to a case where there are two façades only if there is a corner site. We think it very unlikely that this provision can only apply if both façades are the principal walls or are both properly to be regarded as the front of the building. Not all buildings which are dwellings are ones where there can be seen to be a front or even a principal wall. Think of Le Corbusier's Villa Savoye or Frank Lloyd Wright's Fallingwater. In our view two façades, not just one façade and a wall or just two walls, were retained here.

(d) Was the building on a corner site?

89. But as we have said, two façades can only be disregarded "where a corner site" as Note 18(b) inelegantly puts it. (Again paragraph 7 Schedule B1 TCGA rewrites it to better effect: "in the case of a building on a corner site"). The appellant argued that this meant simply where the building was on the corner of the site (ie the boundaries of the property) as this was. Mr Nicholson said it must be a case where there are two roads at right angles to each other and the site was on the corner of the junction.

90. We disagree with both parties. It seems to us that the reason why a planning authority would want two façades which join each other to be retained is that the crucial planning issue about façades is that they are what the public passing by the property (and not being on the property) will see, and the planning authority does not wish to upset the visual harmony of the neighbourhood, especially in a conservation area as this is.

91. In Mr Nicholson's example of a road junction then obviously a pedestrian or motorist who turns from one road into the other, or who looks from the opposite corner of the junction, will see the façades facing both roads. But we do not think that the road junction case is the only one. From the photographs and plans in the document bundles we can see that a person walking or being driven south down Moor Lane North will first see the north wall of the coach house, because it starts at the front of the site and there is no visual obstruction from any other houses to the north, the first house to the north being set back beyond the eastward extension of the coach house. As that pedestrian, or person on the Newcastle omnibus, continues south, the west, gable, wall of the coach house is clearly visible as it abuts the street. To see the south wall, that which Mr Nicholson says is the only façade, requires more intrusive activity.

92. It is also clear from maps and plans in the bundle that No 82 stands on part of a more extensive site on which a large house stood, for which the coach house in No 82 was an ancillary building. When the large house was built there was nothing to the north of the site but fields. The north boundary is also the boundary of the Gosforth

Conservation Area. We do not think it a misuse of language to say that the north-west corner of the larger site was a corner site, having regard to the general planning and amenity reasons why two adjoining façades might be required to be retained.

(e) Was the retained part of the south wall de minimis*?*

93. But that of itself would not have been enough to determine the matter in the appellant's favour. We would need to consider the retention of part of the south wall.

94. A lot of evidence was put forward by the appellant to show that the retention of the two walls was required by the planning consent, and because of that we make some findings which, as we have said in relation to other matters in this section of the decision, are not ones on which we rely for our decision on the appeal.

95. Since the hearing in this case the UT has considered Note 18(b) in *Boxmoor*. We note from that case that the UT considered whether it was possible to regard part of a building that was retained and not demolished as *de minimis* and that the UT held that it was, but that the parts retained in *Boxmoor* were not *de minimis*. We did not of course have any submission from the appellant to the effect that the part of the south wall that was to be retained was *de minimis*, as it seemed to accept that, as originally proposed and agreed, Note 18 was not satisfied. Its case depended on subsequent developments. Nevertheless we have considered whether the part of the south wall that was to be, and in fact even after the rethink, was retained was *de minimis*. In *Boxmoor* the UT said at [49]

> "*Bennion* at page 990 states that "what is relatively small within the context of the matter in question will not be dismissed as *de minimis* if it nevertheless has some real substance." What is *de minimis* in a particular case depends on the circumstances of that case and the nature of the statutory provision."

In this case we consider that the part of the south wall retained had real substance. It was not one brick or anything like it (as *Boxmoor* discusses). In our view the *de minimis* principle does not apply here.

96. It follows Note 18 cannot be satisfied because the two façades were not all that was retained and the *de minimis* principle does not apply. On this basis we would hold that if it were relevant Note 18 does apply to the works here to prevent zero-rating.

(f) Were the walls retained in accordance with planning consent etc?

97. Because the fact of retention of part of the south wall has emerged after the hearing, a great deal of the evidence put forward by the appellant in the case related to the question whether the retention of the two walls was in accordance with the planning consent or similar permission, as required by Note 18(b). Out of deference to the submissions we consider this point, making it clear that this discussion is not a necessary part of our decision. The discussion proceeds on the basis that the revised ideas were in fact carried out so that only the two walls remained.

98. This Tribunal has repeatedly said that an unduly restrictive approach is not to be taken to the question, despite HMRC repeatedly doing so. We cite only one decision, that of Judge Aleksander in *BS Design & Management Ltd* [2014] UKFTT 496 (TC) ("*BSDM*"):

> "26. HMRC contend that the planning consent granted by Southwark Council merely consents to the applicant's desire to retain the facades. They distinguish cases where the planning authority, of its own volition, makes it a requirement that the facades be retained.
>
> 27. I am aware that is a line that HMRC have taken in a number of cases, and has consistently been overturned by Tribunals. There is nothing in the statute which suggests that the motivation of the planning authority is remotely relevant to the application of Note 18, or that the requirement to retain a façade must be set out as an explicit condition of the consent. The legislation is drafted in objective terms, and the sole issue to be determined is whether the retention of the facades is a requirement of the planning consent. I find that the requirement to retain the front and side facades of 149 Southampton Way was a requirement of the planning consent.
>
> 28. Even if there was any merit in HMRC's submission (which, in my opinion, there is not), the reality is that when framing an application for planning consent, applicants take account of the planning policies of the local authority and their likely reaction to an application. If an applicant expects that a local authority will want to see the retention of historic or architectural features, it is likely that the retention of those features will be incorporated into the application. We will never know (and have no way of knowing) whether the reason why a planning consent required that a façade be retained was because of the whim of the applicant, or in order to comply with the planning approach adopted by the council."

99. We do note that in *BSDM* it was recorded that:

> "an e-mail from Southwark Council's planning department to Mr Mclean dated 9 October 2012 confirms that the "planning permission granted does not allow for the demolition of the walls to the front and side elevations …. And as such the retention of these walls form part of the development."

100. Since the hearing in this case the UT in *Boxmoor* has considered Note 18(b). In that case it records that "[t]he FTT found, however, that neither the planning consent nor the plans associated with the consent made any reference to the retention of the façade." The appellant's case in *Boxmoor* depended entirely on the construction of a letter from the appellant's architect to the appellant. The UT at [38] said:

> "38. We consider that, in order for Note 18(b) to be satisfied, the planning consent must require, rather than merely permit, the retention of the façade. Mere inference is not enough. Where planning consent is granted subject to the condition that the work will be carried out in accordance with the plans then, where those plans show that a façade is

> to be retained, the retention of that façade is a condition or requirement of the consent."

101. On the basis of that view it held that the FTT was entitled to come to the view that the façade was not retained as a condition of planning permission, and it pointed out that the consent was for alterations and extensions not demolition.

102. In this case the planning consent was for demolition, not alteration and extension. It is clear that we have to look at the whole course of dealings with the Council, so far as supplied to us, but we have to have evidence of a requirement (not just an inference) to retain just the façades, though it need not be in the consent letter itself.

103. But we start with the grant of planning consent itself. The proposal is stated as:

> "Demolition of part of original coach house and all extensions and erection of 2 1/2 storey dwelling (Class C3), widening of access and provision of timber automated sliding gates and associated landscaping as amended by plans received 29 January 2013, 11 February 2013 and 20 February 2013 and supplemented by information received 31 January 2013."

104. However there is nothing else in the consent itself which suggests that retention of the two walls of the coach house was required by the Council. The consent does however incorporate the plans. From those we have of course found that what was proposed to be retained was the two façades and a part of the south wall. In accordance with *Boxmoor* we think we would be constrained to find that the retention of the two walls, as that was shown in the approved plans, would have been a condition or requirement of the consent.

105. We cannot say we are entirely happy with this conclusion as something that can apply in every case. It seems to give carte blanche for a developer to put the retention of a façade in the plans when that is not what they really want to do simply to obtain zero-rating. So we have looked to see if there is anything which actually contradicts the inference that the Council required the retention.

106. The documents included the Gosforth Conservation Area Management Plan ("CAMP") which, as the appellant had said to HMRC, contains a presumption against demolition of properties in the Conservation Area at paragraph 4.5. But it also says, as the appellant mentioned, that:

> "prior to the Council considering the demolition of any building …in a conservation area, it will require a full assessment of the heritage/conservation value of the building addressing the following points
>
> - The building is of no architectural or historic merit in its own right
> - …"

The CAMP also says "traditional boundary treatments form an important part of the character & appearance of the conservation area & should be retained …".

107. None of these prohibits a demolition of a building in a conservation area, and of course the extensions were demolished with permission.

108. We were also supplied with a copy of the "Design & Access Heritage Statement" submitted to the Council. Although this runs to nearly 30 pages, there is nothing in it that we can see which refers to the retention of the two walls. What we find are these statements:

(1) The west gable creates a significant feature on the street elevation of Moor Road North.

(2) The later extensions to this part of the building are deemed as being of no historic or architectural value to the existing building [ie the coach house]

(3) Application Reference: 2012/0385/01 DET. Description: Erection of 3 storey dwelling with associated landscaping and boundary treatments. Status: Withdrawn

(4) Application Reference: 2012/1156/01 DET. Description: Erection of 2½ storey dwelling with associated landscaping and boundary treatments. Status: Refused

109. The Statement also referred to 4.5 of the CAMP and argued that demolition of the dormer windows in the roof of the coachhouse and of the extensions would not be contrary to paragraph 4.5. It also said that comments raised as part of the refusal of 2012/1156/01 DET were incorporated in this plan.

110. We do not have any information from the appellant about those comments or the reason why the two applications listed were withdrawn or refused. But we were supplied with a lengthy report from the Planning Committee of the Council dated 8 March 2013 on application 2012/1638/01 DET, which included the following points:

(1) The southern walls and roof slope of the coach house would be replaced …

(2) 2012/0386/01/CAC Conservation Area Consent: Demolition of unlisted single storey coach house. Withdrawn 25 May 2012

(3) 2012/1157/01/CAC Conservation Area Consent: Demolition of unlisted single storey coach house. Refused 2 November 2012

(4) The application to demolish the existing dwelling (planning reference 2012/1157/01/CAC) was refused conservation area consent for the following reason:

> "i) The proposed development would, by virtue of its design, scale massing and proposed materials, result in the creation of a visually dominant feature … As a result the scheme is not considered to proved suitable replacement development to justify demolition of the existing building."

111. The report then refers to the Unitary Development Plan and the parts relevant to the application. As to demolition it mentions in part C3.1 that:

> "Demolition of an unlisted building in a conservation area will only be allowed if:
>
> a. The building is of little merit and makes no significant contribution to the character of the conservation area…"

112. Under the heading "Principle of Development" the report says:

> "The principle of demolition of the existing dwelling and its replacement with a new dwelling on this site is therefore considered to be acceptable subject to its compliance with …. relevant local policies relating to … impact on conservation area …"

113. As to the "Design and Impact on the Conservation Area" it says:

> "22. …The existing coach house is a key feature of the street scene and of the wider area as you enter and leave the conservation area. … The alterations prepared for the coach house element of the scheme are to remove the previous extensions and to restore the roof, omitting the dormer.
>
> 23. Following the previous refusal of planning consent the applicants have amended the scheme to reduce the eaves level of the higher part of the building so that it lines through the ridge of the coach house. This was considered to be a key reason behind the decision to refuse planning consent in the previous application …."

114. In its conclusions and recommendations, the Committee says:

> "46. The coach house itself, as the most prominent structure on the main street frontage would undergo significant alteration but would ultimately benefit from the proposals as its appearance would be improved by the alterations proposed."

115. We note firstly that in the grounds of appeal the appellant says that it assumes that 2012/1157/01/CAC (demolition of the coach house) was refused because due diligence with regard to the conservation plan was instrumental in the decision to refuse demolition and that therefore because the Council would not approve a total demolition, by implication it required retention of the two walls. But this is not what is said in the Planning Committee report (see §110).

116. From the documents we have seen we draw the following conclusions:

(1) The Committee felt that the coach house was a key feature of the street scene and was aware that the west and north walls would be retained.

(2) When the Committee refers to demolition it means such demolition as is planned, not including demolition of the part of the coach house remaining.

(3) The coach house was not a building of little merit, unlike the extensions.

(4) Consent to demolition of the coach house was *not* refused on the earlier application because of the need to retain the two walls.

117. These documents do not persuade us that there was a requirement to retain the two walls. Had the demolition of the two walls been an important factor in the initial refusal (see §110(3)) then it would be surprising if their retention in a revised plan was not flagged up, instead of being left as it was to be determined from the approved plans.

118. In view of the hypothetical nature of this part of the decision, we do not intend to see if we can distinguish *Boxmoor*. But certainly without it we would have held that there was no requirement imposed by a planning consent or other permission to retain the two walls.

Decision

119. The appeal is allowed. The works consist of the construction of a building designed as a dwelling and are not prevented from being such a construction by Note 16 to Group 5 of Schedule 8 VATA, so the works fall to be zero-rated.

120. The member in this case, Mr Malcolm, who has himself experience of property development, wishes to express his unease about the decision, in that it may appear to allow a tax advantage to action going beyond the planning consent granted. Judge Thomas does not consider that the actions of the appellant in this case went beyond the planning consent, and even if they did, he would point to *Lady Henrietta Pearson v HMRC* [2013] UKFTT 332 (TC), a decision to which he was party as a member, where at [18] Judge Bishopp says:

> "…. It is sufficient to say that we have concluded that it is not a necessary requirement that HMRC or the tribunal should be satisfied that any requisite consent has been complied with in every particular. We reach that conclusion from the proposition that it is not the province of HMRC or this tribunal to police the planning rules. Whether the finished building complies with the conditions imposed by the planning authority must be a matter for that authority, and it is not for us to usurp its function. It will be apparent from what has gone before that it is difficult to resist the conclusion that the planning authority in this case has not insisted on strict compliance with the approved plans. But in the absence of any adverse action by it—and there was no evidence of any such action in this case—it is, in our view, proper for the tribunal to proceed on the footing that the work was lawful (as s 35(1)(b) requires) and that there was sufficient compliance with the planning consent to satisfy Note (2)(d)."

In the light of this extract from the *Pearson* decision, Mr Malcolm does not dissent from the decision in this case.

121. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 10 MAY 2016