[2016] UKFTT 0567 (TC)

# TC05316

**Appeal number: TC/2015/06988**

***VAT – Construction of communal leisure facilities for use of residents of retirement village – Separate building – Whether zero-rated – No – Appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**ST GEORGE'S AUGUSTINIAN CARE** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JOHN BROOKS**
**JOHN COLES**

**Sitting in public at the Royal Courts of Justice, Strand, London on 19 July 2016**

**Michael Conlon QC, instructed by Spofforths Chartered Accountants, for the Appellant**

**Howard Watkinson instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. The appellant, St George's Augustinian Care ("Care"), is a company limited by guarantee. It is controlled by the Charity of the Order of St Augustine of the Mercy of Jesus (the "Order") whose trustees are all Catholic nuns. The Order's spiritual home, *St George's Retreat*, is part of a site comprising some 250 acres known as St George's Park, Ditchling Common, West Sussex of which the trustees own the freehold. For many years three nursing homes, St Mary's, St Rita's and St Clare's have been run there by the Order. However, around 2000 it became apparent to the Order's trustees that these homes had become outdated, with many residents being accommodated in large multiple-occupancy bedrooms with no en-suite facilities. As the Order did not have the funds to replace the homes with new 60-bedroom nursing homes a decision was taken to develop unused land on the site to build a retirement village comprising self-contained apartments, together with communal facilities, to be sold to people aged 60 and over. Profits from these sales would then be used for the construction of the new nursing homes.

2. Outline planning permission was granted for the development as a whole on 28 June 2004. Development work commenced in 2005 and proceeded in phases over the next ten years as a comprehensive and continuous project. The nursing home and Phases 1, 2 and 3 of the retirement village involved "new builds". Phase 4C was to involve the conversion and refurbishment of one of the old nursing home buildings but, in the course of the development and for commercial reasons, the nursing home was demolished and two new buildings constructed, Phase 4C and Phase 4D. Retrospective amended planning permissions were granted on 20 August 2010 and 1 August 2012 respectively.

3. Care which had been established in 2003 for the purpose of holding a lease in and development of the retirement village on the site was granted a lease (the "Head Lease") for a term of 999 years by the Order on 29 March 2005. Under the terms of the Head Lease Care was *inter alia* permitted to sub-let the retirement village. On 7 December 2006, with the consent of the Order and in accordance with the Head Lease, Care granted an underlease, for a term of 200 years, to its wholly owned subsidiary, St George's Park Limited ("Park Co"). The principal activities of Park Co are to acquire underleases of parts of the development, manage the retirement village and grant approved residential leases of apartments in the retirement village, for a term of 125 years, to residents. These residential leases include the right to use the communal facilities in Phase 4D, with which this appeal is concerned, and those in Maes Court, which houses a library, gym, therapy room, hair salon, bar/restaurant and shop with such use being subject to "compliance with any regulations made from time to time by the landlord".

4. Phase 4D is a new building. The second floor contains five self-contained apartments. The first floor comprises a gym and dance studio, therapy room and games and hobbies room. There is an indoor swimming pool, changing room and spa on the ground floor. There is also a café, kitchen, launderette and hair salon on the

ground floor. These communal leisure facilities are not solely for the residents of the third floor apartments but for the use of all residents of the retirement village.

5. By letter, dated 27 July 2005, HMRC had ruled (the "Maes Court Ruling") that:

> "Work on the ground floor of Maes Court (restaurant, shop and bar) is standard rated. Work on the new self-contained apartments on the second floor is zero-rated and work on the communal residential facilities on the first floor may also be zero-rated provided that these facilities are used exclusively by residents of St George's Park [ie the retirement village] and their guests".

6. Following earlier discussions and correspondence, on 11 July 2015, Care's representatives, Spofforths Chartered Accountants, wrote to HMRC requesting a ruling that the construction of the communal leisure facilities of Phase 4D be zero-rated which, they said, would be consistent with the Maes Court Ruling.

7. HMRC replied on 21 October 2015 ruling that:

> "Zero-rating can only apply to the parts of the Phase 4D building that qualify as self-contained dwellings as per note 2 to Group 5 of Schedule 8 [to the Value Added Tax Act 1994]. Otherwise the first grant of a major interest in the Phase 4D building is to be standard rated."

It would appear from HMRC's letter that the ruling was based on:

> "… the fact that the [communal] leisure facilities incorporated into the building are for the use of all 235 dwellings across several buildings means that the Phase 4D building cannot qualify for zero-rating."

8. With regard to the Maes Court Ruling the letter stated:

> "Your reference to the zero-rating of Maes Court in 2005 cannot be allowed to influence my liability ruling of Phase 4D. This is because it is my belief that, with the benefit of hindsight, the ruling given on 27 July 2005 allowing zero-rating of the dwellings and leisure facilities in Maes Court was not correct. however, there is no scope to correct that error given the time limits that apply."

9. Care's Group Finance Director, Mr Malcolm Snowling, told us that "Phase 4D" was completed on 3 June 2016. It has now been named *Rafael Court* and was formally opened following a ceremony on 15 July 2016.

10. It is accepted that the construction of the café, launderette and hair salon in *Rafael Court* is standard rated and the five self-contained apartments are zero-rated. The issue that therefore arises from these undisputed facts is whether services in the course of construction of the communal leisure facilities at *Rafael Court* and subsequent grant of a major interest to Park Co by Care are zero-rated supplies.

11. Mr Michael Conlon QC appeared on behalf of Care and HMRC were represented by Mr Howard Watkinson. We are grateful to both for the assistance given by the content and manner of their submissions.

*Law*

12. Unless otherwise stated all subsequent statutory references are to sections and schedules and Notes contained in the Value Added Tax Act 1994 ("VATA"). Also, rather than burden the decision with extensive legislative citations we have set out the legislation to which we have referred in an appendix to this decision.

13. Under s 30(2) a supply of goods or services is zero-rated if it is of a description specified in schedule 8. Item 1(a) of Group 5 of Schedule 8 is the first grant, by a person constructing a building of a major interest in, or any part of, the building or its site and Item 2(a) a supply in the course of construction. In either case to qualify for zero-rating it must be:

> "a building designed as a dwelling or a number of dwellings"

14. Schedule 8 is, by virtue of s 96(9), to be interpreted in accordance with the notes contained in it. Note (2) provides:

> A building is designed as a dwelling or a number of dwellings where, in relation to each dwelling the following conditions are satisfied–
>
> (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 any covenant, statutory planning consent or similar provision; and
>
> (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.

15. Note (3) provides for the inclusion of the construction of a garage if built at the same time and intended to be occupied with the dwelling. Note (4) defines relevant residential purpose and Note (5) makes provision for the inclusion of buildings constructed on the same site at the same time and intended for use together as a unit solely for a relevant residential purpose. Notes (10) and (11) provide for apportionment when part of a building is not a dwelling within the meaning of Group 5.

16. These provisions have been considered by the Tribunal in cases which are very much dependent on their own facts. In *Catchpole v HMRC* [2012] UKFTT 309 (TC), a case considered by the Tribunal (Judge Nowlan and Mr Adams) to be "virtually unique". It was held, contrary to the argument advanced by HMRC that two separate units linked by decking were, on the facts of that case, a dwelling. This was despite the two buildings not individually meeting the four statutory tests of Note (2).

17. The Tribunal (Judge Nowlan and Mr Coles) reached a similar conclusion in *Fox v HMRC* [2012] UKFTT 264 (TC) decided shortly after *Catchpole*. *Fox* concerned the conversion of a barn and separate garage into a dwelling and, as in *Catchpole*, the Tribunal applied s 6(c) of the Interpretation Act 1978, which provides that the singular includes the plural, and held that Item 1(a) should be construed as applying to a building or buildings designed for use as a dwelling or number of dwellings.

18. *McCann v HMRC* [2013] UKFTT 632 (TC) concerned the construction of a dwelling with an outdoor swimming pool and heating plant which were separated from the living accommodation by a concrete void. Having considered the statutory provisions, the Tribunal (Judge Paines QC and Mr Hossein FCA FCIB) stated:

> "26. Swimming in a swimming pool is not a normal part of living in a house in the same way as cooking, eating, bathing or sleeping, and it is common knowledge that most houses do not contain one. But where a swimming pool is contained entirely within a house, constructing it is part of building the house; the service of building a house is within item 2 even if one of the rooms is designed for a use that is not intrinsic to living in a house. HMRC have accepted in the Notice that the materials of such a swimming pool are within item 4 and, by necessary implication, that its construction is within item 2. That conclusion could be said to be anomalous, and in the case of a luxury facility not within the social purpose of the zero-rate, but distinguishing between rooms on the basis of their intended use would lead to a proliferation of borderline cases such as fitness rooms, home cinemas and the like.
>
> …
>
> 30. In our view the guiding considerations here are, first, that providing a swimming pool is not related to providing a building for living in, in the sense contemplated by the legislation. Secondly, a swimming pool that is part of the same structure as a dwelling but nevertheless not contained within it cannot be said to fall within the zero-rate on the basis of the reasoning that we have discussed in paragraph 26 above. Building a swimming pool contained within a house must necessarily be regarded as part of building the dwelling. Building a swimming pool which is part of the same structure as, but not contained within, a house is not in our view part of building the dwelling. It is part of building the structure as a whole, but that is not the same thing. To hold otherwise would cast doubt over the position of other structures comprising conjoined but separate parts with different characters, such as a shop with a flat above.
>
> 31. Though we agree with [counsel for the appellant] that the service void is part of the house and its outer wall is not a separate structure, and that the materials of the swimming pool and pool house are "incorporated into the building (or its site)" within the meaning of item 4, for the reasons we have given we do not consider that that is the key to the correct application of item 2. Even if the materials of the pool and pool house are regarded as being incorporated into a single overall structure with the house, that does not answer the question whether the service of incorporating them was a service related to the construction

> of a dwelling within the meaning of the legislation as we have construed it. In our view the overall structure here is one of which only some parts are a dwelling. By the same reasoning, in our example of a shop and flat, the incorporation of building materials into the shop is not a service related to the construction of the flat.
>
> 32. We respectfully agree with the Tribunals in the *Catchpole* and *Fox* cases that a dwelling can comprise two separate buildings. But in those cases the buildings contained ordinary domestic rooms which were intended to be used, in combination, as living accommodation; they were merely distributed between separate buildings situated close to each other. The pool house in this case is, we find, designed to provide facilities for use in connection with the swimming pool. The explicit extension of the zero-rate to garages in Note 3 to Group 5 indicates that the zero-rate does not otherwise extend to separate buildings not designed for living in."

19. HMRC's Notice to which the Tribunal in *McCann* referred is VAT Notice 708 which, in relation to communal facilities in blocks of flats states:

> **16.3 Communal areas in blocks of flats**
>
> Typically, blocks of flats consist of individual dwellings and areas for the use of all residents, such as a lounge, laundry and refuse area and, occasionally, gym, pool and leisure facilities. The first sale of each flat is zero-rated and the buyer also acquires a right to use the communal areas.
>
> Where the communal areas are only used by residents and their guests, we accept that the construction of the whole building is zero-rated. Where the communal areas are partly used by others, then the construction of the communal areas is standard-rated.

*Discussion and Conclusion*

20. It is accepted that we should apply a purposive approach to the construction of Group 5 although, perhaps not surprisingly, the application favoured by Mr Conlon leads to a different conclusion to that favoured by Mr Watkinson.

21. Mr Watkinson also invites us to take a holistic view of the provisions relying on the decision in *Customs and Excise Commissioners v Zielinski Baker & Partners Ltd* [2004] STC 456 and says that as an exemption from VAT a strict construction is necessary (see *Customs and Excise Commissioners v Jacobs* [2005] STC 1518). In taking such an approach he contends that the construction advanced by Care, if correct would emasculate, render otiose or require an extension to parts of Group 5. In particular, he refers to Note (3) and Note (5). He says that the consequence of Care's argument is that those building retirement villages can effectively bring themselves within the ambit of Note (4) by bending, or abandoning, the proper interpretation of a dwelling. Mr Watkinson submits that this cannot be right as Care's interpretation offends the policy behind Schedule 8 as opposed to giving effect to it

22. While the purpose of the legislation, to facilitate home ownership for the whole population (which is apparent from the decision of the European Court of Justice in

*EC Commission v United Kingdom* [1988] STC 456 at [36]) is not disputed, Mr Conlon contends that the approach advanced by HMRC does not address the legal principles underlying Notice 708 or s 6(c) of the Interpretation Act 1978.

23. He submits that Notice 708 is not, as Mr Watkinson referred to it, a concession, but an example of an important maxim in VAT law, namely *accessorium sequitur principale*: an accessory (ancillary) right follows the same treatment as the principal right. That is why, he says, communal facilities in a block of flats follow the same VAT treatment as the flats themselves as such facilities are, self-evidently, neither "self-contained" nor does anyone "dwell" in them.

24. The issue of fiscal neutrality, a fundamental criterion of the common VAT system, was also raised by Mr Conlon. He contends that this arises from section 16.3 of Notice 708 (see paragraph 19, above) and developed his argument by means of the following example:

> "A developer constructs two buildings on separate sites, Building P and Building Q. Each building has 50 flats plus communal facilities. Construction of both buildings is zero-rated. But suppose the developer constructs Building R and Building S as part of a single development. Building R contains 60 flats. Building S contains 40 flats, plus the communal leisure facilities for the sole use of all 100 flats."

Mr Conlon contends that there can be no policy reason to justify a different VAT treatment as between, on the one hand, Buildings P, Q and R and, on the other hand, Building S and that equality of VAT treatment for Building S is achieved by purposive construction of VATA, applying the rule in s 6(c) of the Interpretation Act 1978.

25. However, despite the initial attraction of Mr Conlon's submissions we prefer the approach of Mr Watkinson. In the case of buildings intended for use for a relevant residential purpose Parliament has, by virtue of Note (5), made specific provision for buildings that are clearly not themselves for a relevant residential purpose to be treated as such provided they are constructed at the same time and on the same site as the buildings constructed and are intended to be used together with those buildings as a unit solely for a relevant residential purpose.

26. If the categories set out in Note (4) had included a retirement village, on the facts of this case the communal leisure facilities would be treated as being for a relevant residential purpose. However, they do not. Had Parliament intended that buildings that were not dwellings, but were constructed at the same time as a dwelling and intended to be used together with it should be treated as a dwelling it could have done so and made specific provision is it did in Note (3) in the case of a garage. However, it did not. Like the swimming pool and plant room in *McCann* the building in which the communal leisure facilities are housed in the present case, *Rafael Court*, is, save for its four self-contained apartments, unlike the buildings in *Catchpole* and *Fox* not designed for living in.

27. As such, we find that just because a resident of an apartment in the retirement village has a right to use the facilities contained in a wholly separate building it does not follow that these facilities are part of his dwelling or should be treated as such. Also, in *Catchpole* and *Fox*, which are in any event fact specific, the occupier had the right to occupy and utilise all of the buildings comprising the dwelling in whatever way he wished, eg for sleeping, dining, leisure, etc. Whereas under the terms of the residential lease in the present case use of the communal facilities is subject to regulations made by the landlord.

28. Therefore, for the above reasons we dismiss the appeal. In reaching this conclusion, although carefully considered, we have not found it necessary to mention every argument advanced before us on behalf of the parties.

*Appeal Rights*

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

**JOHN BROOKS**
**TRIBUNAL JUDGE**

**RELEASE DATE: 28 JULY 2016**

# Appendix

***Value Added Tax Act 1994***

**Section 30 Zero-rating**

(1) …

(2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified.

…

**Section 96 Other Interpretive provisions**

(1) "major interest", in relation to land, means the fee simple or a tenancy for a term certain exceeding 21 years…

…

(9) Schedules 7A, 8 and 9 shall be interpreted in accordance with the notes contained in those Schedules; …

**Schedule 8**

**Group 5 – Construction of Buildings ETC.**

1 The first grant by a person—

(a) constructing a building—

(i) designed as a dwelling or number of dwellings; or

(ii) intended for use solely for a relevant residential or a relevant charitable purpose; or

(b) …

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

2 The supply in the course of the construction of—

(a) a building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose or a relevant charitable purpose; or

(b) …

of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity.

*Notes*

(1) …

(2) A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied-

(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 any covenant, statutory planning consent or similar provision; and

(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.

(3) The construction of, …, a building designed as a dwelling or a number of dwellings includes the construction of, …, a garage provided that -

(a) the dwelling and the garage are constructed…at the same time; and

(b) the garage is intended to be occupied with the dwelling or one of the dwellings.

(4) Use for a relevant residential purpose means use as—

(a) a home or other institution providing residential accommodation for children;

(b) a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder;

(c) a hospice;

(d) residential accommodation for students or school pupils;

(e) residential accommodation for members of any of the armed forces;

(f) a monastery, nunnery or similar establishment; or

(g) an institution which is the sole or main residence of at least 90 per cent of its residents,

except use as a hospital, prison or similar institution or an hotel, inn or similar establishment.

(5) Where a number of buildings are—

(a) constructed at the same time and on the same site; and

(b) are intended to be used together as a unit solely for a relevant residential purpose;

then each of those buildings, to the extent that they would not be so regarded but for this Note, are to be treated as intended for use solely for a relevant residential purpose.

…

(8) References to a non-residential building or a non-residential part of a building do not include a reference to a garage occupied together with a dwelling.

…

(10) Where-

(a) part of a building that is constructed is designed as a dwelling or number of dwellings or is intended for use solely for a residential purpose or relevant charitable purpose (and part is not); or

(b) …

then in the case of –

(i) a grant or other supply relating only to the part or designed or intended for that use (or its site) shall be treated as relating to a building so designed or intended for such use;

(ii) a grant or other supply relating only to the part neither so designed nor Intended for such use (or its site) shall not be not be so treated; and

(iii) any other grant or other supply relating to, or to any part of, the building (or its site), an apportionment shall be made to determine the extent to which it is to be so treated."

### *The Interpretation Act 1978*

### Section 6 Gender and number

In any Act, unless the contrary intention appears,—

(a) words importing the masculine gender include the feminine;

(b) words importing the feminine gender include the masculine;

(c) words in the singular include the plural and words in the plural include the singular.