Appeal number: FTC/06/2009

ZERO-RATING – alterations to listed building – new building in the curtilage of listed building – planning permission that it "shall only be used for purposes either incidental or ancillary to the residential use" of the main listed building – whether a prohibition on separate use (Note 2(c) VATA 1994 Sched 8 Group 6) – no – appeal allowed

UPPER TRIBUNAL

CHANCERY AND TAX

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Appellants**

- and -

STEVEN LUNN **Respondent**

TRIBUNAL: JOHN F AVERY JONES CBE
ADRIAN SHIPWRIGHT (JUDGES OF THE UPPER TRIBUNAL)

Sitting in public in London on 19 November 2009

Owain Thomas, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Appellants

Sadiya Choudhury, counsel, instructed by Deloitte LLP, for the Respondents

DECISION

1. This is an appeal by HMRC against a decision of the VAT and Duties Tribunal released on 20 March 2009 to the effect that certain building works to a listed building were zero-rated for VAT. Mr Owain Thomas appeared for the Appellants ("HMRC"), and Miss Sadiya Choudhury for the Respondent taxpayer.

2. Under Item 2 of Group 6 of Schedule 8 to the Value Added Tax Act 1994 zero-rating applies to:

> "The supply, in the course of an approved alteration of a protected building, of any services other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity."

Note 1 says that a "protected building" is "a building which is designed to remain as or become a dwelling or number of dwellings (as defined in Note 2 below) …".

Note 2 provides that:

> A building is designed to remain as or become a dwelling or 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 the terms of any covenant, statutory planning consent or similar provision,
>
> and includes a garage (occupied together with a dwelling) either constructed at the same time as the building or where the building has been substantially reconstructed at the same time as that reconstruction.

"Approved alteration" is defined in Note 6.

It is common ground that the works at issue fell within all the applicable requirements, except for that in Note 2(c).

3. The VAT and Duties Tribunal recorded that there was an agreed statement of facts. Their summary of the facts was as follows:

> (1) "The appeal concerns a new building ("the Building") within the curtilage of a property known as Radbrook Manor, which is a Grade II* listed building near Stratford-on-Avon; the Building is physically separate from the Manor, and the freehold of both the Manor and the Building is owned by the Appellant.

(2) The Building consists of a ground floor and a first floor, and comprises self-contained living accommodation as follows: a lounge, a bar and dining area, an entertainment area, a study, five bedrooms, two bathrooms, a dressing room, a shower and WC, a kitchen and a preparation kitchen, a personal gym, a boiler room and a garage. The planning and listed building consents for the Building as it now stands were dated 13 May 2005 and 6 April 2006. The planning approval was subject to this condition:

> 'The development hereby permitted shall only be used for purposes either incidental or ancillary to the residential use of the property known as Radbrook Manor and shall not be used for commercial purposes.'

(3) The development, which is now complete, is constructed from a former cottage and pigsties, and an earlier addition to them known as 'the country club' (demolished in the course of the reconstruction). It is common ground that listed building consent was needed and obtained, and that the requirements of the planning and listed building consents have been complied with."

4. The essential part of the VAT and Duties Tribunal's decision appealed against was:

> "30. … By contrast, the ordinary un-glossed meaning of the statutory words appears designed to give relief to the provision of distinct self-contained dwellings which are not part and parcel of another dwelling, either physically or for reasons of provisions of private or public law. It is consistent with an overall policy of simply encouraging the provision of self-contained units of housing accommodation.
>
> 31 If that is right, then the question for the tribunal is: do the facts of this case, including the terms of the planning conditions, fall within precise (*sic*) the relief provided by the statute? It is not in dispute that the Building as it now stands is self-contained living accommodation, nor that there is no question of internal access to any other dwelling. It cannot be that the *distinct* use of the new building is prohibited by the planning consent, because it is manifestly adapted for such use and there would otherwise be no purpose in the limitation in the consent to the use being "incidental or ancillary to … Radbrook Manor"; if the Building could *only* be used as incidental or ancillary, these words would be otiose.
>
> 32 Against that background, we are not aware of any proposition of law that an incidental or ancillary use can never be a separate use. Common observation suggests that there are many examples of such situations, a frequent one being found where there are 'tied' cottages adjoining or close to a farm and reserved for occupation by the workers whose work requires them to live on site. The fact that the use of the Building "for commercial purposes" is prohibited does not alter the analysis; though it clearly limits the scope of what can be done with it, there are several possibilities, among which are the use of the Building as accommodation for the house guests of the owner of Radbrook

> Manor, or its use as accommodation for dependent relatives of the owner. No doubt there may be others."

5. The VAT and Duties Tribunal interpreted "separate use" to mean a distinct use, or use as a separate household, hence the examples of accommodation for house guests or dependent relatives. It is only on that interpretation that they could have considered that "we are not aware of any proposition of law that an incidental or ancillary use can never be a separate use." We shall call this interpretation "the separate household" meaning, which is contended for by Miss Sadiya Choudhury for the Respondent taxpayer.

6. If, on the other hand, "separate use" means use that is separate from that of the main building then it follows that a use which must be incidental or ancillary to the use of the main building cannot be a separate use. We shall call this the "separate from" meaning, which is contended for by Mr Owain Thomas for HMRC. We have to determine which of these two interpretations is the correct one.

7. Mr Owain Thomas, for HMRC, contends in outline:

(1) Note 2(c) is an exception to an exemption and should be given a wide construction.

(2) The purpose of Note 2 is to restrict the availability of zero-rating to separate dwellings which do not exist in a physically (Note 2(a) and (b)) or legally (Note 2(c)) dependent relationship with another dwelling.

(3) A requirement that the use of the Building be ancillary to or incidental to the use of another building amounts to a prohibition on separate use on the ordinary meaning of ancillary and incidental. It is inherent in Note 2(a) that the building referred to in Note 2(c) will be used as a separate household.

(4) This interpretation is supported by the weight of decisions in the VAT and Duties Tribunal on similar wording of planning permissions, sometimes including the addition of "and not as a separate unit of residential accommodation in its own right" (*Giblin v HMRC* (2007) VAT Decision 20352). The decision to the contrary in *Dr Nicholson v HMRC* (2005) VAT Decision 19412 was out of line with the other decisions in adopting the "separate household" meaning rather than the "separate from" meaning, and was wrongly decided.

8. Miss Sadiya Choudhury, for the taxpayer, contends:

(1) The VAT and Duties Tribunal applied the correct approach to the interpretation of "separate use."

(2) At most the planning permission imposed a restriction and not a prohibition on the type of use.

(3) In the other cases decided by the Tribunal the planning permission had the additional words such as "and not as a separate unit of residential accommodation in its own right," with the implication that it was

necessary to include them and so the position is different where, as in this case, they are not present.

(4) The wording of the planning restriction in *Dr Nicholson* was similar to this case. The Tribunal asked "Can a use of residential accommodation be only incidental to the use of another dwelling, yet also be a separate use? We believe it can." The Tribunal in this case came to the same conclusion, thereby adopting the "separate household" meaning.

9. In construing Note 2, the former cottage is to be treated as a listed building because it is in the curtilage of Radbrook Manor which is a listed building (s 1(5) Planning (Listed Buildings and Conservation Areas) Act 1990). This point was left open by the House of Lords in *Zielinski Baker v Customs and Excise Commissioners* [2004] STC 456 and HMRC reserve the right to address the issue in the Supreme Court. Note 2 envisages the situation where there is a new separate building (which is the building referred to in the Note and defined by the Tribunal as the Building) which is subsidiary to an existing listed main building. As mentioned it is common ground that the Building complies with Notes 2(a), that the dwelling in the Building consists of self-contained living accommodation, and 2(b), that there is no provision for direct internal access from the dwelling to another dwelling (see paragraph 2 above).

10. We consider first the purpose of Note 2(c). If the "separate from" meaning of "separate use" is correct, the purpose of the Note is to prevent zero-rating unless the new subsidiary dwelling could, in accordance with planning restrictions, be used independently of the main building. A planning restriction preventing use separate from the main building would commonly apply on the creation of a "granny" annex. We have taken the liberty of looking up the reference made in *Cartagena v HMRC* (2005) VAT decision 19454 to the model planning conditions in Planning Permission Circular 11/95 which under the heading "Granny" Annexes contains the model provision that "The extension (building) hereby permitted shall not be occupied at any time other than for purposes ancillary to the residential use of the dwelling known as […]." This suggests that the planning restriction in this case, which is similar except that it also refers to incidental use, is a common one, and therefore something that Parliament might have had in mind as the purpose of Note 2(c). On the other hand, if the "separate household" meaning is correct Note 2(c) would mean that what is (by virtue of Note 2(a)) self-contained living accommodation must not be prevented from being used as such. The only case where this might possibly apply is where the planning permission restricted the use to holiday lets for a limited duration. It seems less likely to us that the draftsman of Note 2(c) had this in mind when referring in general terms to separate use being prohibited. Also the concept of planning considerations requiring that a dwelling containing self-contained living accommodation must not be used as such seems unusual, and therefore it is less likely that VAT legislation would want to deal with such a possibility.

11. The context of Note 2(c) is that it can apply only where the rest of Note 2 is satisfied, that is (a) that the dwelling consists of self-contained living accommodation, and (b) that there is no provision for direct internal access from the dwelling to any

other dwelling (or part of a dwelling). Both of these consider the separateness of the dwelling from another dwelling, so that the dwelling in question must (a) contain all the necessary facilities for self-contained accommodation (and therefore not rely on any facilities in the main dwelling), and (b) not be interconnected with the main building. Interpreting Note 2(c) as the "separate from" meaning follows naturally from the foregoing parts of Note 2. It would be looking not at physical separation but separation in actual use. On the other hand the "separate household" meaning would mean that although in (a) the accommodation must be self-contained, the use as a separate household must not be prohibited, which does not fit the context and would be dealing with what seems to be an unlikely state of affairs.

12. The issue of whether a restricted use is a prohibited use can apply only to the "separate household" meaning; the restriction on use to purposes incidental or ancillary to that of the main dwelling can properly be described as a restriction rather than a prohibition on use as a separate household. On the other hand, if the "separate from" meaning is correct a restriction to purposes incidental or ancillary to that of the main dwelling is necessarily a prohibition on use separate from the main dwelling. The word "prohibited" is the natural expression to use with the "separate from" meaning.

13. A number of other VAT and Duties Tribunal decisions have dealt with a variation on the planning restriction in this case to which we have added italics, including the following to which the First-tier Tribunal referred:

> The barn conversion to form a granny annex herby permitted shall be occupied solely for purposes incidental to the occupation and enjoyment of Poplars Place as a dwelling *and shall not be used as a separate unit of accommodation.* (*Ford v CCE* (1999) VAT decision 16271).
>
> That the annex shall only be used for ancillary accommodation in association with the main dwelling and for no other purpose whatsoever *and in particular shall not be occupied as an independent unit of residential accommodation*. (*D & L Clamp v CCE* (1999) VAT decision 16422).
>
> The accommodation hereby approved shall be occupied solely in connection with and ancillary to the main dwelling at 176 Long Street, Atherstone, *and shall not be occupied as an independent dwelling house*. (*Milligan v HMRC* (2005) VAT decision 19224).

The italicised parts are missing in this case but if one considers the meaning of them they must all have the "separate from" meaning; it is inconceivable from the context that they can have the "separate household" meaning, which would mean that that the use must be (a) incidental to that of the main building, and (b) not as a separate household at all. On that basis these planning restrictions are effectively the same as the one in this case. In spite of Miss Choudhury's careful analysis of the cases we do not consider that the decisions in all of these cases, that there was such a restriction as is mentioned in Note 2(c), can be distinguished because of the different wording of the planning restriction in this case.

14. We agree with Mr Thomas that *Dr Nicholson* is out of line with these cases. The following question and answer by the Tribunal in that case is only meaningful if they had the "separate household" meaning in mind: "Can a use of residential accommodation be only incidental to the use of another dwelling, yet also be a separate use? We believe it can." We consider that it is wrongly decided and should not be followed.

15. These considerations all point to the "separate from" meaning of "separate use" and we conclude that this is the correct meaning. On that basis the planning restriction in this case means that the Building cannot be used separately from that of Radbrook Manor. Note 2(c) is not satisfied and therefore the building services in this case are not zero-rated.

16. Accordingly we allow the appeal and reverse the decision of the VAT and Duties Tribunal. HMRC do not ask for costs.

JOHN F AVERY JONES

ADRIAN SHIPWRIGHT
JUDGES OF THE UPPER TRIBUNAL
RELEASE DATE: