[2016] UKUT 0091 (TCC)

Appeal number: UT/2015/0025

VALUE ADDED TAX - zero rating - Item 2 and Notes 16 and 18 Group 5 Schedule 8 VAT Act 1994 – supplies in course of construction following demolition of building except for part of façade - whether retention of façade condition of planning consent or similar permission - no - whether part of façade retained disregarded as de minimis - no - whether works reconstruction, alteration, enlargement and extension to existing building - yes - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

BOXMOOR CONSTRUCTION LIMITED

Appellant

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Greg Sinfield
Judge Judith Powell

Sitting in public at the Royal Courts of Justice, Strand, London WC2A 2LL on 15 December 2015

Charles Bradley, counsel, instructed by VAT Advisory Services Limited, for the Appellant

Jennifer Thelen, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant ('Boxmoor') appealed to the First-tier Tribunal ('FTT') against a decision of the Respondents ('HMRC') that certain supplies by Boxmoor were not zero-rated supplies in the course of construction of a building designed as a dwelling within item 2 of Group 5 of Schedule 8 to the Value Added Tax Act 1994 ('VATA') but were chargeable to VAT at the standard rate. HMRC had reached that conclusion because the house that had originally stood on the site had not been completely demolished to ground level. A small portion of the front façade, including part of a projecting bay, had been retained which, in HMRC's view, meant that the works were extensions and alterations to an existing building. Boxmoor contended that the original building had ceased to be an existing building because it met the condition in Note 18(b) to Group 5 of Schedule 8, namely that the retention of the projecting bay was a condition or requirement of the planning consent or similar permission.

2. In a decision released on 21 August 2014, [2014] UKFTT 833 (TC), ('the Decision'), the FTT (Judge Short) dismissed Boxmoor's appeal. The FTT decided that there was no evidence of any positive statement in the planning application or the consent that the projecting bay should be retained and no basis on which the FTT could deem or infer that the retention of the part of the front facade was a condition of the planning consent. Accordingly, the FTT concluded that, while in substance the works might have amounted to the construction of a new dwelling, the conditions in Note 18 to Group 5 of Schedule 8 had not been complied with and, therefore, Boxmoor's supplies were standard rated for VAT purposes.

3. Boxmoor now appeals, with permission of the Upper Tribunal, against the Decision. The appeal raises three issues which are described more fully below. In brief, the first issue is whether the FTT was entitled to conclude that the retention of part of the front facade was not a condition or requirement of statutory planning consent or similar permission. If so, the second issue is whether the part of the original building that was retained should be disregarded as de minimis. The final issue is, even if the original house had not ceased to be an existing building, whether the construction works were the conversion, reconstruction, alteration, enlargement or extension of the previous house and excluded from zero rating by Note (16) to Group 5 of Schedule 8.

4. For the reasons set out below, we have decided that the FTT was entitled to conclude that the retention of part of the facade was not a condition or requirement of statutory planning consent or similar permission and the part retained could not be disregarded as de minimis. We have also concluded that the FTT found that the works were the alteration and extension of the original building. Accordingly, Boxmoor's appeal is dismissed.

Background facts

5. References below to numbers in square brackets are, unless otherwise apparent, references to paragraphs of the Decision. The FTT set out the agreed facts at [2] - [7], described the evidence before it in [17] – [26] and its findings of fact at [37] - [40]. For the purposes of this appeal, the relevant facts may be summarised as follows.

6. On 6 August 2010 Harrow Council granted Mr and Mrs Mark Pearlman planning permission for works to their house at 28 Cavendish Drive, Edgware ('the original

house'). The planning consent described the approved works as "single storey side, single and two storey side to rear extensions incorporating front dormer and roof alterations". Condition 2 in the planning consent was that the development would be carried out in accordance with the approved plans and documents. Only two plans were put in evidence before the FTT: one showed the elevations and floor plans of the original house and the other showed the elevations and floor plans of the new house. The FTT did not discuss the plans in any detail in the Decision but noted, at [46], that the plans made no reference to the retention of the façade. On examining the plans, we noted that the plan showing the new house stated "New brickwork to match existing", "Walls rendered to match existing" and "New roof tiling to match existing". That appeared to us to indicate that the plans envisaged that more of the original house would be retained than just the front bay but the FTT made no finding on this point.

7. Boxmoor was appointed as contractor to carry out the works at 28 Cavendish Drive in autumn 2012. In December 2012, Harrow Council's Building Control Department issued a "Conditional Full Plans Approval Notice" confirming that the plans for the work at 28 Cavendish Drive had been passed as complying with building regulations. The Notice described the works as:

> "Two storey side and rear part single storey front extension. Loft conversion and internal alterations including relocation of ground floor staircase. Removal of load bearing walls and formation of two first floor en-suites".

8. The works actually carried out by Boxmoor pursuant to the planning consent involved the demolition of the whole of the original house except for some brick work immediately under the ground floor bay window at the front of the house (the window itself was removed) and a column of bricks immediately adjacent to the bay at the corner of the house which extended to the first floor. A drawing, which was before the FTT, showed that what was retained of the original house formed an L-shaped section of the front façade. We were also shown a photograph that had been in evidence before the FTT which showed that, at one stage of the building project, everything had been completely demolished except for the brick work immediately under the ground floor bay window and the adjacent side wall of the house (we assume that this was demolished subsequently apart from the column of bricks referred to above). The FTT referred to the retained part as "the projecting bay" although it also included the column at the corner immediately adjacent to the bay. We adopt the same terminology and references in this decision to the "projecting bay" include the column of bricks at the corner.

9. Following the demolition, Boxmoor constructed a new residential property on the site. The projecting bay was then incorporated into the new house. Mr Paul Dewick, the managing director of Boxmoor, told the FTT (and the FTT appears to have accepted) that the retention of the projecting bay had entailed considerable additional work and it had been supported by a temporary structure when the rest of the building had been demolished. His evidence was that it would have been much more convenient to demolish the whole building but he had understood that it was not possible because it would be contrary to the planning consent. The FTT stated, at [20] and [24], that Mr Dewick had not had any direct conversations or contact with the Harrow Planning Department but had gained his understanding from Mr Jeffrey Howard, the architect responsible for drawing up the plans and submitting the planning application.

10. Boxmoor considered that they were making supplies in the course of the construction of a building designed as a dwelling and treated them as zero-rated for VAT purposes.

11. During a visit to Boxmoor in May 2013, HMRC formed the view that the work at 28 Cavendish Drive did not qualify as the construction of a building designed as a dwelling for VAT purposes. Consequently, HMRC considered that Boxmoor's supplies were not zero-rated but chargeable to VAT at the standard rate.

12. On 30 July 2013, Mr Howard wrote a letter to Mr Dewick. Mr Howard did not give evidence at the hearing but the letter was admitted in evidence. The letter stated:

> "I can confirm that the small section of the façade was retained after discussion with the planning authorities who explained that if it was completely demolished it would nullify the planning permission already granted. The planners were very keen in ensu[r]ing that the building retained much of its original character, and considered it very important that we maintain what we have although it would structurally have been more sensible to demolish the whole property. The projecting bay was considered one of the characteristic features of the whole estate."

13. At the hearing of the appeal, Mr Pearlman gave evidence, which the FTT accepted. He confirmed that he had no documentary evidence relating to any requirement to retain the projecting bay at the property. He said that he had discussed the requirement with Mr Howard and was happy to comply because he was keen to get the house built. Retaining the projecting bay had made the whole project more expensive than it otherwise would have been but he had had comments that his new property blended in with the rest of the street, as intended.

14. On 17 September 2013, HMRC assessed Boxmoor for VAT due for accounting periods 10/12 and 01/13 and reduced the amounts of VAT already claimed for the 03/13 and 06/13 periods on the basis that the work at 28 Cavendish Drive was chargeable to VAT at the standard rate. HMRC's decision was upheld on review on 26 November and Boxmoor appealed to the FTT.

Legislation

15. Section 30(2) of the VATA provides that a supply of goods or services is zero-rated if the goods or services or the supply are of a description specified in Schedule 8 to the VATA. Item 2 of Group 5 of Schedule 8 describes the following supply:

> "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."

Supplies of building materials by a supplier of services within Item 2 that include the incorporation of the materials into the building or its site are also zero-rated by Item 4 of Group 5.

16. By virtue of section 96(9) of the VATA, Schedule 8 must be interpreted in accordance with its notes. Note (16) to Group 5 of Schedule 8 relevantly provides as follows:

> "(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 …"

17. Note (18) to Group 5 of Schedule 8, in so far as relevant, is as follows:

> "(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 façade … the retention of which is a condition or requirement of statutory planning consent or similar permission.

The Decision

18. The only issue in the appeal was whether the works carried out by Boxmoor at 28 Cavendish Drive were zero-rated supplies in the course of the construction of a building designed as a dwelling for the purposes of Item 2 of Group 5 of Schedule 8 of the VATA. The evidence and submissions before the FTT focussed on whether the retention of the projecting bay was a condition or requirement of the planning consent.

19. On the basis of the evidence described above, the FTT made the following findings of fact:

> "37. There is no specific reference to the need to retain any part of the projecting bay at 28 Cavendish Drive as part of the planning consent obtained from Harrow Council for the works to be done, either in the narrative description or in the drawings provided.
>
> 38. That planning consent was couched in terms of extensions and alterations rather than demolition and new build.
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> 39. As a matter of fact, the property at 28 Cavendish Drive had been virtually demolished save for a small section of the façade, the projecting bay, before being substantially re-built."

20. At [43], the FTT noted, as was common ground, that Boxmoor had the burden of proving that the supplies could properly be treated as a zero-rated. At [44], the FTT held that it was clear that what had occurred was 'the almost complete demolition of the existing building and the construction of a new building'. The FTT also found, in [45], that:

> "45. … it is equally clear that a small part of the existing building was retained … It is also clear that this was retained for a reason, as understood by Mr Pearlman and explained by his architect, to ensure that the new building blended in with existing buildings and to ensure that Mr Pearlman's planning consent was not nullified."

21. The FTT then addressed the question of whether the retention of the projecting bay was a condition or requirement of the planning consent. At [46] – [49], the FTT set out its conclusions:

> "46. … Note 18 makes it clear that if a façade is retained, it will not stop construction works being treated as the demolition of a building as long as the retention of the façade is a condition of planning consent. We were not provided with any evidence that this was the case for 28 Cavendish Drive; the planning consent made no reference to the retention of the façade. Nor did the plans of the works which we were shown. The only evidence that we have to suggest that the retention of the projecting bay was a condition of the planning consent is the architect's letter of 30 July 2013.
>
> 47. Taking a step back, it would be rather surprising if this planning consent had contained any conditions stipulating that some part of the building should be retained, since it was couched in terms not of demolition, but of alteration and extension. It would not have made sense, in that context, to be providing that a particular part of the building should be protected from demolition, since no mention was made in that planning consent of any planned demolition of the whole building.
>
> 48. … taking account of the lack of any actual stipulation in the planning consent itself and the fact that any such stipulation would have been counter to the terms of the planning consent, the Tribunal cannot see any basis on which it can deem or infer as a condition of this planning permission that the projecting bay should be retained. At best, the retention of the façade was part of an understanding between the architect and the planning authorities about the limit to the acceptable degree of demolition which would be accepted at a property without contravening a planning consent which was for alterations and extensions not demolition.
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> 49. The Tribunal has taken account of the decisions to which we were referred, in particular [*Eaton Mews Trust v HMRC* [2012] UKFTT 249 (TC) ('*Eaton Mews*')] on which Mr Owen [representing Boxmoor] relied, but have concluded that this can be readily distinguished from the facts under consideration here. We take from that decision that the test to be applied is to establish as a question of fact whether or not there is a condition in the planning consent that the façade of the building should be retained. However, in that case the planning consent was for demolition and the plans attached to the relevant planning permission did refer to the need to retain the party wall despite the demolition of the remainder of the building. There was a positive statement as a part of the planning application that the wall needed to be retained. We have not been provided with any evidence that this was the case for the projecting bay at 28 Cavendish Drive."

22. The FTT concluded, in [50], that, although the works might have amounted to the construction of a new dwelling in substance, the construction at 28 Cavendish Drive did not meet the conditions of Note 18 to Group 5 of Schedule 8 VATA and so Boxmoor's supplies were not zero-rated.

Application for permission to appeal and to amend the grounds of appeal

23. Boxmoor applied to the FTT for permission to appeal to the Upper Tribunal on two grounds:

(1) the conclusion that the retention of the projecting bay was not a "condition or requirement of statutory planning consent or similar permission" and thus the condition in Note 18(b) to Group 5 of Schedule 8 was not satisfied was wrong in law; and

(2) on the proper construction of Note (18)(a) to Group 5 of Schedule 8, the retention of the projecting bay was de minimis and the original building should be regarded as having been completely demolished to ground level.

The second ground was a new ground raised for the first time in the application for permission to appeal. In a Decision Notice issued to the parties on 15 December 2014, the FTT refused Boxmoor permission to appeal on both grounds.

24. Boxmoor applied to the Upper Tribunal for permission to appeal on the same two grounds. In a decision dated 28 January 2015, Judge Berner granted permission to appeal on the first ground. In relation to the second ground, Judge Berner noted that it was not appropriate to consider whether to admit a new ground of appeal on the papers and without giving HMRC the opportunity to make representations. He indicated that, if he considered that permission might be granted, he would leave the question of whether to grant permission on the second ground to the tribunal that hears the appeal on the first ground. Judge Berner observed that, in any event, he would have refused permission to appeal on the second ground because it was not an arguable point on which Boxmoor would have a reasonable prospect of success. As it was entitled to do, Boxmoor sought to renew its application to appeal on the second ground at an oral hearing. Following Judge Berner's suggestion, the application for permission to appeal on the second ground was considered at the start of the hearing of the appeal before us.

25. In its skeleton argument, which was served on 1 December 2015, Boxmoor also sought permission to amend its grounds of appeal to include a third ground, namely that, even if the original house had not ceased to be an existing building because it failed to meet the conditions in Note 18, the FTT should have asked whether the works comprised the conversion, reconstruction, alteration, enlargement or extension of the previous house within Note 16 and, if not, whether they were the construction of a building. Like the second ground, the third ground had not been argued before the FTT and was not discussed in the Decision. Mr Bradley, who appeared for Boxmoor, submitted that it was clear from our decision in *HMRC v Astral Construction* Ltd [2015] UKUT 21 (TCC), [2015] STC 1033 ('*Astral*'), that, by itself, Note 18 is not determinative. Although Note 18 might determine whether a structure is an existing building, the FTT should also have considered whether the works fell within Note 16. If not, then the FTT should have considered whether the works in fact amounted to the construction of a new dwelling. Mr Bradley submitted that, given the findings in [39] and [50], the FTT would have been bound to conclude that the works amounted in substance to the construction of a new building.

26. In relation to both new grounds, Mr Bradley referred us to *Pittalis v Grant* [1989] QB 605 at 611 which set out the principles to be applied when considering whether to allow a new point of law to be raised on appeal. We discussed that case and others dealing with the same point in *Astral* at [27] – [33]. It is not necessary to set out those paragraphs again here. In summary, a party will not normally be permitted to raise a new point on appeal which could have been argued at first instance and which, had it been argued, would or might have affected the conduct of the hearing below in a material way. Permission will normally be given, however, where the new point is a

pure question of law which would not have affected the way the case was conducted below and, in particular, any evidence or its evaluation in those proceedings provided that the other party has sufficient notice to respond to the new point and has not acted to its detriment as a result of the failure to raise it earlier. Where the new point succeeds, it may be appropriate to make a special order as to costs to reflect the fact that the appeal might not have been necessary, and costs might have been avoided, if the successful party had raised the new point at an earlier stage.

27. Mr Bradley accepted that Boxmoor did not take the second ground before the FTT. He submitted that the de minimis point is a pure point of statutory construction requiring no new evidence. He also contended that Judge Berner had been wrong to regard the point as unarguable. Boxmoor did not seek to argue that the de minimis principle applied to Note 18(b) but that it applied when considering whether a building had been demolished completely to ground level for the purposes of Note 18(a). Mr Bradley submitted that Judge Berner was wrong to conclude that Note 18(b) showed that there was a contrary intention and thus no room for the application of the de minimis principle. Ms Thelen, for HMRC, opposed Boxmoor's application on the grounds that it is unarguable for the reasons given by Judge Berner, it is not a pure point of law and there was no finding of fact by the FTT as to whether the projecting bay was de minimis so the case would have to be remitted if Boxmoor succeeded and, further, it was too late to bring this point on appeal.

28. We discuss the arguments in relation to the second ground further below but it is enough to indicate at this stage that we consider that whether the de minimis principle applies to Note 18(a) is an arguable point of law. We also consider that the FTT would have been able to determine whether the projecting bay was de minimis based on the undisputed evidence as to the extent of the demolition that was before it. As we have the same evidence, we are also able to decide the point without having to remit the case to the FTT.

29. Mr Bradley submitted that the third ground was also a pure point of law, arising from our decision in *Astral*. He contended that HMRC had not identified any detriment to them as a result of the point not being argued below. He stated that HMRC could not have adduced any other evidence or have wished to conduct the case differently had the point been taken below. Mr Bradley also submitted that there would be significant prejudice to Boxmoor if it were not allowed to raise this point as it would be deprived of an argument simply because *Astral* had not been decided at the time of the FTT hearing.

30. In relation to the application to include the third ground of appeal, Ms Thelen submitted that the point could have been taken before as the decision of the FTT in *Astral* had been issued before the hearing in this case and Boxmoor had not given any explanation why the point was only raised in the skeleton argument some ten months after our decision. Ms Thelen also contended that the point was not one of pure law but would require a finding on the facts as to the nature of the building both before and after the works. Ms Thelen said that there was insufficient evidence about the nature of the building to enable us to reach a conclusion on the nature of the works.

31. We agree with Ms Thelen that the third ground would require an assessment of the nature of the building both before and after the works and that, because the point was not raised, the evidence needed to make that assessment was not fully investigated by the FTT. We did not regard this objection as being sufficiently serious in the

circumstances of this case to compel us to refuse to hear argument on the point. If necessary, we could remit the case to the FTT to hear further evidence on this issue.

32. We consider that it is in the interests of justice that all the issues relevant to the VAT liability of the supplies by Boxmoor should be explored and dealt with in this appeal. In our view, allowing Boxmoor to raise the further arguments at this stage would not cause injustice or prejudice to HMRC which, as Ms Thelen's comprehensive submissions showed, had sufficient notice to be able to respond. Accordingly, our decision, given at the hearing, was that Boxmoor should be given permission to appeal on the second ground and allowed to amend its grounds of appeal to include the third ground.

Ground 1

33. Boxmoor contends that the FTT's conclusion, at [46] – [49], that the retention of the projecting bay was not a "condition or requirement of statutory planning consent or similar permission" was wrong in law. It was not disputed that the works carried out were in conformity with the planning consent. The FTT found, however, that neither the planning consent nor the plans associated with the consent made any reference to the retention of the façade. Boxmoor's case on this ground rested entirely on the wording of the letter of 30 July 2013 from the architect, Mr Howard, to Boxmoor. Mr Bradley submitted that the FTT's finding, in [45], that part of the façade was retained to ensure that the planning consent was not nullified was a reference to the architect's letter and showed that the retention of the projecting bay was a condition or requirement of the planning consent. He contended that if the demolition of the projecting bay would have nullified the planning consent, it followed that the retention of the projecting bay was a condition or requirement of the planning consent. He submitted that the FTT's conclusion in [46] – [49] that the planning consent did not require the retention of the projecting bay was irrational and an error of law of the type identified in *Edwards v Bairstow* [1956] AC 14.

34. Mr Bradley also contended that the FTT was wrong to focus on the language of the planning consent and the fact that it did not contain any express stipulations. He referred us to *Wilson v HMRC* [2014] UKFTT 320 (TC), a decision of the FTT where an informal agreement to vary a planning consent for an extension which imposed a requirement to retain two external walls was held to be a "similar permission" within Note 18(b) to Group 5 of Schedule 8. Mr Bradley submitted that the understanding between the architect and the planning authority in this case was a "similar permission" that imposed a condition or requirement that the projecting bay must be retained.

35. The issue in this ground of appeal is whether the FTT, having taken account of the architect's letter, was entitled to conclude that the retention of the projecting bay was not a condition or requirement of the statutory planning consent or any similar permission. In order to succeed on this issue, Boxmoor must satisfy us that the only conclusion that the FTT was entitled to reach on the evidence of the architect's letter was that retention of the projecting bay was a condition or requirement of the planning consent or similar permission. The relevant evidence and findings of fact by the FTT are as follows.

36. The FTT found as a fact in [37] that there was no specific reference to the need to retain any part of the projecting day in the planning consent. The FTT also found in [38] that the planning consent was for extensions and alterations. In [45], the FTT

found that the projecting bay was retained to ensure that the planning consent was not nullified. At [46], the FTT stated:

> "We were not provided with any evidence that this [i.e. retention of the facade was a condition of the planning consent] was the case for 28 Cavendish Drive; the planning consent made no reference to the retention of the facade. Nor did the plans of the works which we were shown. The only evidence that we have to suggest that the retention of the projecting Bay was a condition of the planning consent is the architect's letter of 30 July 2013."

37. In [48], the FTT found that "the retention of the facade was part of an understanding between the architect and the planning authorities about the limits to the acceptable degree of demolition which would be accepted at the property without contravening a planning consent which was for alterations and extensions not demolition." In [49], the FTT referred to the approach of the FTT (Judge Bishopp) in *Eaton Mews*, namely that there must be a "positive requirement and inference is not enough". The FTT stated in paragraph 49 that "we have not been provided with any evidence that this was the case that the projecting Bay at 28 Cavendish Drive."

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. That is not the situation in this case. It is clear that nothing in the terms of the planning consent or the plans required the retention of the projecting bay. Indeed, it appears to us that the planning consent and plans envisaged the retention of rather more than the projecting bay although the FTT made no finding on that point and it is not part of our decision.

39. Our view is that the FTT was not satisfied on the evidence that there was a positive condition or requirement in the planning consent or any similar permission that the projecting bay must be retained. The letter of 30 July 2013 from the architect, Mr Howard, to Boxmoor states that the planning authorities informed the architect that if the facade were completely demolished, ie the building was completely demolished, the planning permission would be nullified. Although the discussion, as reported in the architect's letter, could be interpreted as a requirement that part of the facade must be retained, it could also be interpreted as a statement that the planning consent would be nullified if the building were completely demolished rather than a specific condition or requirement that the projecting bay must be retained. The architect's letter can be read as a warning, or perhaps advice, that the planning permission would be nullified if the building were demolished completely. In our view, the FTT was entitled to consider that that the discussion and understanding between the architect and the planning authorities did not amount to a positive condition or requirement to retain the projecting bay. We also consider that the FTT was entitled to decline to infer that the retention of the projecting bay was a requirement of the planning consent or any similar permission. Like the FTT, we cannot infer from the letter that the planning consent contained a condition or requirement that the projecting bay must be retained. We cannot see that there are any grounds on which the conclusion of the FTT on this issue can be impugned.

40. We do not accept Mr Bradley's submissions in relation to *Wilson*. In that case, there was clearly an approval by the planning authority of the change of plan which amounted to revised planning consent or similar permission even though the authority did not require Mr Wilson to submit a revised planning application. The FTT in *Wilson* found that the revised planning consent or similar permission included a specific requirement to retain the two external walls. That is not the case in this appeal. In our view, the architect's letter does not reveal any "similar permission" to vary the planning consent to include a condition or requirement that the projecting bay must be retained as was the case in *Wilson*. The letter reveals that the planning authorities were concerned that the existing planning consent should not be nullified rather than providing any "similar permission" for a revised planning consent as happened in *Wilson*. Even if the discussions between the architect and the planning authorities could be regarded as a "similar permission", our view would be the same as in relation to the planning consent. The architect's letter does not state that the planning authority required the retention of the projecting bay as a condition of a revised consent in a similar permission. The letter states that the planning authorities considered that completely demolishing the original house would nullify the planning permission that had been granted. If Mr Howard meant to say that the authorities required the retention of the projecting bay as part of a revised consent for which the authorities had given permission then it is unfortunate that he did not clarify the position in a witness statement or oral testimony.

41. In conclusion, we consider that the FTT was entitled to conclude, on the evidence available, that the planning consent in this case did not require the retention of the projecting bay and there was no evidence that compelled the FTT to conclude that such a condition was imposed by any subsequent discussions with the planning authorities that amounted to a "similar permission".

Ground 2

42. Boxmoor's second ground of appeal is that the FTT should, on the proper construction of Note (18)(a) to Group 5 of Schedule 8 VATA, have found that the retention of the projecting bay was de minimis and the original building should be regarded as having been completely demolished to ground level. This ground raises two issues, namely:

(1) does the de minimis principle apply to Note 18(a); and

(2) if so, is the projecting bay de minimis?

43. The de minimis principle is expressed more fully in the Latin phrase "de minimis non curat lex", the usual English translation of which is "the law is not concerned with very small things". *Bennion on Statutory Interpretation: A Code* (6th ed, 2013) at section 343 states that:

> "Unless the contrary intention appears, an enactment by implication imports the principle of the maxim de minimis non curat lex (the law does not concern itself with trifling matters)."

As *Bennion* acknowledges, the contrary intention may be ascertained from the words of the legislation or, by implication, from the purpose of the legislation.

44. Ms Thelen adopted the reasoning of Judge Berner in his decision refusing to grant Boxmoor permission to appeal on this ground. Judge Berner concluded that the de minimis principle is excluded by a contrary indication in the legislation:

> 'There is no room for the application of a de minimis test in relation to Note (18)(a) when, in the same provision – in Note (18)(b) – the legislation expressly contemplates circumstances where there remains only part of a building up to a single or double façade as the case may be. There can be no argument that this does not extend to any remaining parts, of whatever nature, that do not exceed those limits. The legislation has, in that respect, chosen to permit the retention of those parts, but only if required by planning consent. There is no question of that condition being inapplicable in de minimis cases.'

45. Ms Thelen also submitted (and it was common ground) that, like provisions for exemption (see Case C-348/87 *Stichting Uitvoering Financiele Acties v Staatssecretaris van Financien* [1989] ECR 1737 at [13]), provisions for zero rating, such as those at issue in this appeal, must be interpreted strictly although that does not mean that they 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]). Ms Thelen submitted that the requirement that the provision must be construed strictly and the presence of the word 'completely' are clear indications that the de minimis principle should not apply to Note (18)(a).

46. Mr Bradley submitted that there is nothing in the wording or policy of the legislation to indicate that a conclusion that a part of the building remaining above ground may be within Note (18)(a) if it is de minimis. He contended that there is no indication in the statute that Note (18)(a) is not amenable to a de minimis construction and the use of the word 'completely' did not indicate that the de minimis principle should not apply.

47. With respect to Judge Berner, who did not have the benefit of argument on the point, our approach to the question of whether the de minimis principle applies to Note 18(a) differs from his. We consider the application of the de minimis principle to Note 18(a) in isolation from Note 18(b), as the two provisions are alternative conditions based on separate criteria. We then consider whether the de minimis principle is applicable in the context of the wider legislation, including Note 18(b), relating to the construction of a building.

48. In our view, there is nothing in the language of Note 18(a) "Demolished completely to ground level" to indicate that the de minimis principle is excluded. To take a hypothetical example, if the entire structure of a building were removed down to ground level save for a single brick that remained above the foundations, it could not reasonably be said that the building had not been completely demolished to ground level. What remains above ground level is not a building or part of one; it is a brick. In the context of Note 18 as a whole, it is clear that the retention of a façade cannot be regarded as de minimis otherwise there would be no need for the specific exemption in Note 18(b) where such retention is a condition or requirement of the planning consent or similar permission. In our view, however, Note 18(b) does not show that something much smaller than a façade, such as a single brick, cannot be considered to be de minimis. We do not perceive anything in the wider VAT legislation relating to the construction of buildings that indicates that the de minimis principle is excluded when considering whether the test in Note 18(a) has been satisfied in any particular case. The legislation in Group 5 applies zero-rating to buildings or parts of them that constitute separate dwellings and independent annexes. Those are substantial structures and, in

our view, they do not indicate that the de minimis principle, which disregards very small things, is excluded when construing Note 18(a).

49. Our conclusion that the requirement in Note 18(a) that a building must be demolished completely to ground level before it ceases to be an existing building is subject to the de minimis principle does not determine this ground of appeal. *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. Mr Bradley accepted that in most cases where Note 18(b) applies (ie there is a façade the retention of which is required by planning consent or other similar permission), the façade remaining above ground will not be de minimis. Nevertheless, he contended that the projecting bay in this case was de minimis. This followed, he submitted, from the fact that the evidence clearly showed that the projecting bay was only a very small part of the original house and it had to be supported by a temporary structure after the demolition of the remainder.

50. Without attempting to decide what might be considered to be 'de minimis' in the context of Note 18(a), we conclude that the projecting bay in this case cannot be considered to be de minimis. We reach this conclusion because we consider that if what remains is capable of being a façade for the purposes of Note 18(b) then that remaining part is clearly of real substance and not de minimis. We reach that view because the retained façade would, in the absence of Note 18(b), mean that the building could not be regarded as having been completely demolished even if its retention were a condition of planning consent or similar permission. The fact that what is left is enough to prevent the building being completely demolished from the point of view of the planning authority (see the architect's letter dated 30 July 2013) provides additional support for our view that it cannot be regarded as de minimis for the purposes of Note 18(a).

Ground 3

51. In its third ground of appeal, Boxmoor contends that the FTT should have asked whether or not, viewed in the round, the works comprised the conversion, reconstruction, alteration, enlargement or extension of the original house within Note 16 to Group 5 of Schedule 8 VATA. Mr Bradley submitted that the FTT's conclusion that the original house had not ceased to be an existing building under Note 18 was not determinative of this point. Mr Bradley relied on a passage from our decision in *Astral* where we rejected submissions by HMRC that, because the building (a church) had not been demolished completely to ground level, it remained an existing building by virtue of Note 18 and the works carried out must be regarded as an enlargement or extension of it within Note 16. We held in *Astral* that Note 18 defines when a structure ceases to be an existing building but does not say what is or is not an extension or enlargement. Our view was that simply because what remains after demolition might be an existing building by virtue of Note 18, it does not follow that all work, no matter how extensive, done on the site must be regarded as an enlargement or extension. In *Astral*, we decided that that the FTT in that case had been entitled to regard the construction of a new building or buildings connected to and incorporating the church as not being not an enlargement or extension of the existing building but the construction of a new building.

52. Mr Bradley submitted that, even if the retention of the projecting bay meant that there continued to be an existing building, it could not be said that the works were the conversion, reconstruction, alteration, enlargement or extension of the original house.

Mr Bradley contended that we could determine the question of whether what had been built was the construction of a new building because it was the obvious and only conclusion on the facts as found by the FTT. He relied on the FTT's finding in this case, at [44], that:

> "The photographic evidence which was produced to the Tribunal made it clear that what had actually occurred, despite what was stated in the relevant planning permission, was the almost complete demolition of the existing building and the construction of a new building."

Mr Bradley further submitted that if we were unable to determine the issue then the case should be remitted to the FTT.

53. Ms Thelen submitted that, where Note 18 is not satisfied, it is almost always determinative because where there is an existing building it is necessary to ask whether the works are excluded from being the construction of a building because they fall within Note 16.

54. We agree with Mr Bradley that Note 18 is not necessarily determinative of the question of whether works are the construction of a building. In suitable cases, such as *Astral*, it is appropriate to consider both Note 16 and Note 18 and ask whether the works, if they are not the conversion, reconstruction, alteration, enlargement or extension of the existing building, are the construction of a building.

55. We note that whether or not the works fell within Note 16 was not argued before the FTT. However, we consider that the FTT found that the works were not the construction of a new building but were the alteration and extension of the original house and accordingly within Note 16. Notwithstanding what it said in [44], the FTT found as a fact in [38]:

> "That planning consent was couched in terms of extensions and alterations rather than demolition and new build."

The FTT noted that the planning permission was for alterations and extensions in [2], [17], [18], [47] and [48]. In [48], the FTT held that the retention of the projecting bay was to ensure that the planning authorities would accept that the works did not contravene the planning consent which was for alterations and extensions not demolition. In our view, it is implicit in the Decision that the FTT formed the view (and would have found explicitly had the point been argued) that the works were the alteration and extension of the original house within Note 16 and, therefore, not the construction of a building.

Conclusion

56. For the reasons given above, we have decided that the FTT was entitled to conclude that the retention of the bay was not a condition or requirement of the planning consent or similar permission and thus the building work carried out by Boxmoor was not the construction of a building for the purposes of Item 2 of Group 5 of Schedule 8 to the VATA. We have also decided that the small section of the front façade that was retained could not be regarded as de minimis and disregarded for the purposes of Note 18(a) to the Group. Accordingly, the structure remained an existing building. We also conclude that the FTT regarded the works as the alteration and extension of an existing

building within Note 16 to the Group. Accordingly, Boxmoor's supplies were not zero-rated.

Disposition

57. Boxmoor's appeal against the Decision is dismissed.

Costs

58. Any application for costs in relation to this appeal must be made within one month after the date of release of this decision. As any order in respect of costs will be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Judge Greg Sinfield
Judge of the Upper Tribunal

Judge Judith Powell
Judge of the Upper Tribunal

Release date: 22 February 2016