[2018] UKUT 0173 (TCC)

Appeal number: UT/2017/0083

VALUE ADDED TAX – reduced rate supply –energy saving materials - whether appellant's Solid Roof System a supply of insulation for roofs within VATA 1994 Schedule 7A Group 2 – no – appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

WETHERALDS CONSTRUCTION LIMITED **Respondent**

TRIBUNAL: JUDGE ROGER BERNER
JUDGE THOMAS SCOTT

Sitting in public at the Royal Courts of Justice, Strand, London WC2 on 26 April 2018

Hui Ling McCarthy QC, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Tim Brown, counsel, Instructed by Hallmark Solicitors, for the Respondent

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DECISION

Introduction

1. HMRC appeal against a decision of the First-tier Tribunal ('FTT') released on 13 December 2016. In that decision, the FTT (Judge Thomas) allowed the appeal by Wetheralds Construction Limited ('Wetheralds') against the decision of HMRC that its supplies of the "Solid Roof System" did not qualify for the reduced rate of VAT under Group 2 of Schedule 7A to the Value Added Tax Act 1994 ('VATA 1994').

2. HMRC put their case on this appeal on two grounds. The first was that the FTT had erred in its application of the decision in *Revenue and Customs Commissioners v Pinevale Limited* [2014] UKUT 202 ('*Pinevale*'). The second was that the FTT had erred in its application of the relevant principles in determining whether the supply in question was a single supply and, if so, the nature of the supply. Judge Thomas gave permission to appeal on the first ground but refused it on the second. The Upper Tribunal gave permission to appeal on the second ground.

Legislation

3. The relevant legislation is contained in the following provisions of VATA 1994.

4. Section 29A, which provides for the reduced rate of VAT in respect of certain supplies, states, so far as relevant:

> "**29A Reduced rate**
>
> (1) VAT charged on—
>
> (a) any supply that is of a description for the time being specified in Schedule 7A…
>
> shall be charged at the rate of 5 per cent."

5. Section 96(9) provides that:

> "[Schedules 7A, 8 and 9] shall be interpreted in accordance with the notes contained in those Schedules; and accordingly the powers conferred by this Act to vary those Schedules include a power to add to, delete or vary those notes."

6. Schedule 7A contains various groups of supplies which attract the reduced rate of VAT. Group 2 is headed "Installation of Energy-Saving Materials" and contains the following two items:

> "Item No.
>
> 1. Supplies of services of installing energy-saving materials in residential accommodation.
>
> 2. Supplies of energy-saving materials by a person who installs those materials in residential accommodation."

7. The notes to Group 2 state as follows, with (a) being the relevant note in this appeal:

> "NOTES:
>
> *Meaning of "energy-saving materials"*
>
> 1 For the purposes of this group "energy-saving materials" means any of the following—
>
> (a) insulation for walls, floors, roofs or lofts or for water tanks, pipes or other plumbing fittings;
>
> (b) draught stripping for windows and doors**;**
>
> (c) central heating system controls (including thermostatic radiator valves);
>
> (d) hot water system controls;
>
> (e) solar panels;
>
> (f) wind turbines;
>
> (g) water turbines;
>
> (h) ground source heat pumps;
>
> (i) air source heat pumps;
>
> (j) micro combined heat and power units;
>
> (k) boilers designed to be fuelled solely by wood, straw or similar vegetal matter."

The FTT decision

Findings of fact

8. The FTT's decision, reported at [2016] UKFTT 827, runs to 37 pages, much of which deals in detail with the evidence considered by Judge Thomas and his findings of fact. The judgment records, at [24] to [33], various facts which were not in dispute, and which it is helpful briefly to summarise.

9. The patent application for Wetheralds' Solid Roof System included the following statements:

> "The invention relates to a roofing assembly for a conservatory to improve the thermal insulation of the conservatory. The invention further relates to a method of providing an insulated roof for a conservatory, and to a conservatory roof conversion kit for mounting to an existing conservatory glazing bar framework…
>
> Installation of insulation into a conservatory to improve the thermal retention during the winter and/or to reduce heat build up during the summer suffers from several problems. Firstly the aesthetic appearance of the conservatory is significantly diminished by the presence of insulation, particularly from the outside looking inwards, as the insulation will be visible. Furthermore insulation, if installed into the

> roof of the conservatory, can place too great a strain on the glazing bars of the roof, which can result in a catastrophic collapse of the roof if overburdened.
>
> It is therefore an object of the present invention to provide a roofing assembly for a conservatory to allow a thermally insulated roof to be provided, without the need for the complete dismantling of an existing conservatory roof…
>
> The roofing assembly comprises the roof glazing bars of the conservatory acting as the primary roofing structure in addition to a plurality of joists which are mountable to the roof glazing bars to form the secondary roofing structure. A roof covering is also provided as part of the roofing assembly in addition to at least one insulation layer."

10. A flowchart at the end of the patent application showed the following stages of the work required to install the system:

(1) Expose glazing bars of conservatory roof

(2) Provide lightweight roof structure

(3) Mount lightweight roof structure to exposed bars of conservatory room

(4) Mount roof covering to lightweight roofing structure

(5) Provide insulation layer mounted to lightweight roofing structure or glazing bars

(6) Mount battens to underside of roof glazing bars and mount further insulation layer thereto.

11. The Solid Roof System was registered with the Local Authority Building Control ('LABC'), which is the organisation representing all local authority building control teams in England and Wales. The certificate from the LABC referred to a "solid roof insulation system which replaces existing translucent panes or panels of a domestic conservatory…whilst retaining the existing aluminium profiles, ties and other structural components to the roof." The Conditions of the certificate stated that "the Registered Detail relates to the reroofing of existing conservatory…roofs."

12. Extracts from the relevant advertising and marketing material included the following statement:

> "A Wetheralds Solid Roof System replaces your existing polycarbonate or glass conservatory with a quality, bespoke and fully insulated tiled roof…
>
> Your new roof incorporates high quality materials and is fully guaranteed for 10 years…
>
> We can transform your conservatory into a comfortable all year living environment with our solid roof insulation system…Wetheralds Solid Roof System replaces the existing polycarbonate or glass roof with a tailor made roof system using lightweight tiles."

13. Judge Thomas found as a fact that the marketing material accurately described what Wetheralds sought to provide for the customer and what the customer could expect.

14. As regards the Solid Roof System, the FTT's conclusions on the facts stated as follows (at [124]):

> "The provision of the system has a number of components. Mindful of the need not to analyse the supply in minute detail I find the components to be (1) the supply of insulating material together with the wooden structure to which it is attached; (2)…the supply of roofing tiles (with battens and felt) required to cover the insulation material; (3) the supply of a skimmed plasterboard ceiling, with sometimes electric cable and light fittings and (4) the supply of soffits and rainwater goods."

15. These components are subsequently referred to in the FTT judgment as the "four elements" comprised in the supply by Wetheralds.

Analysis of the issue

16. Judge Thomas set out his approach to the issue before the FTT by summarising a number of propositions put forward by Mr Brown, who also represented Wetheralds before the FTT: [140]. Those propositions were derived from the case law of the Court of Justice of the European Union ("CJEU") and its predecessor, the European Court of Justice. Mr Brown suggested that the starting point in the analysis must be to determine whether there was a single supply or several supplies. Mr Brown's propositions went on to set out how one should determine that question, referring in particular to the approaches set out in Case C-349/96 *Card Protection Plan Ltd v Customs and Excise Commissioners* [1999] STC 270 ('*CPP*') and Case C-41/04 *Levob Verzekeringen v Staatssecretaris van Financien* [2006] STC 766 ('*Levob*').

17. Judge Thomas stated that he accepted all of Mr Brown's propositions, with the caveat that the *CPP* and *Levob* approaches were alternatives, which he subsequently determined to be mutually exclusive: [142] and [148]. He summarised the *CPP* approach as applying where there is a predominant supply with ancillary supplies (an "apex" case) and *Levob* as applying where there is a bundle of supplies which are integral to each other but one supply predominates (a "table-top" case): [143].

18. The submissions of the parties were evaluated through the lens of this approach and divided into "apex" arguments and "table-top" arguments. The VAT status of the supply of the Solid Roof System was then determined in a manner which can be broken down into the following stages:

(1) The FTT first considered whether any of the four elements was "ancillary": [150].

(2) It concluded that element 3 (the plasterboard ceiling, sometimes with cables and light fittings) and element 4 (the soffits and rainwater goods) were ancillary: [151] and [152].

(3) Of the two remaining elements, 1 (insulating material together with the wooden structure to which it is attached) and 2 (roofing tiles with battens and felt), neither was ancillary to the other: [153] and [154].

(4) There was therefore no "apex", so the *Levob* table-top analysis must be applied: [155].

(5) This required a determination of which element predominated between elements 1 and 2: [158].

(6) It was clear that element 1 (insulation) predominated over element 2 (tiles): [159].

(7) There was therefore "a single supply of insulation materials with their supporting framework and the other elements that make it both more pleasing to look at and more durable.": [159].

19. The FTT then turned to whether the single supply found by this process was of "insulation for…roofs" within Note 1(a) to Group 2 of Schedule 7A: [160]. It identified that that question had been addressed in *Pinevale*: [160]. The FTT recognised that it was bound by *Pinevale* but would have followed it in any event: [170].

20. Having considered the meaning of "roof", and the sense in which it was used in *Pinevale*, Judge Thomas concluded as follows:

> "175…it is also clear to me that the insulation assembly of the appellant *is* "insulation for roofs". As I have said, it doesn't matter whether "roof" in Note 1(a) means the roof covering or the roof structure or both – it depends on the method of installation, how they are in the UT's words [in *Pinevale*] "attached or applied" to a roof. The appellants' insulation is attached or applied to the structure being the glazing bars.
>
> 176. It is not attached, as I have understood it, to the roof covering, the tiles or to the batten and felt underneath them. But even if it had been it would still have been insulation for roofs, and distinguishable from the Pinevale product which was an insulated roof covering, and so one of the things that insulation had to be attached or applied, not the insulation itself…"

21. The FTT's conclusion is set out at [180]:

> "My conclusion is that since the entire supply by the appellant of the Solid Roof System is a single supply, and it is a single supply of insulation for roofs, it follows that the entire supply falls to be reduced-rated."

Discussion

22. HMRC argued that the FTT made two errors of law in reaching its decision. First, it erred in its application of *Pinevale*. It should have adopted the reasoning in *Pinevale* and concluded that the supplies in issue were not merely supplies of insulating materials applied to a pre-existing roof. Further or alternatively, the FTT erred in its application of the principles in *CPP/Levob* in concluding that insulation predominated overall to determine the characterisation of the supply. The FTT should instead have concluded

that the various elements of the supply by Wetheralds formed a single indivisible supply of a roof, not merely of "insulation for…roofs", which fell to be taxed at the standard rate.

23. For Wetheralds, Mr Brown submitted that the correct approach, as adopted by the FTT, was to consider these questions in the reverse order. The primary question was whether the FTT had erred in finding that Wetheralds had made a single supply of insulation materials. Only if we found that the tribunal had so erred would it be necessary to consider *Pinevale*. In view of the FTT's finding that there was a single supply of insulating materials, *Pinevale* was simply irrelevant because it had determined that very question differently in relation to the supply in that case.

24. There was no challenge by either party to the FTT's findings of primary fact. The issue before the FTT was the classification of the supply for VAT purposes. While that question inevitably involves findings of fact, classification is a question of law: see *Revenue and Customs Commissioners v National Exhibition Centre Ltd* [2015] UKUT 23 (TCC) at [25].

25. The question of law which fell to be determined by the FTT was not whether the supply by Wetheralds was a single supply and, if so, its nature. The question was whether that supply was "insulation for…roofs" within the meaning of Note 1(a) of Group 2 to Schedule 7A.

26. The decision of the Upper Tribunal in *Pinevale* is authority, binding on the FTT, on that question of statutory interpretation. The correct approach should therefore have been to begin by considering the application of *Pinevale* to the facts of the case, and not by considering whether there was a single supply and its characterisation.

27. In our judgment, the FTT erred in law in its approach. It is therefore necessary to consider whether *Pinevale* should be followed, and whether the FTT's decision would have been different if it had approached the question by considering the application of *Pinevale*.

28. As to whether *Pinevale* should be followed, while it is not strictly binding on us we would follow it unless it was in our judgment obviously wrong. While the decision of Richards J as he then was does result in a strict approach to the language of Group 2, which could in some situations result in fine distinctions, in our respectful judgment it does so on a logical and reasoned basis, and should be followed.

29. We turn now to the decision in *Pinevale*. The supply in that case is summarised at paragraph [4] of the decision:

> "The roof panels in issue are used to form the roof of a conservatory, either (as Pinevale considered desirable for achieving maximum effect) replacing or constituting the entire roof, or replacing parts of an existing roof. Their purpose is to achieve much higher levels of insulation than would be the case with a conventional conservatory roof, including a double-glazed roof."

30. Pinevale argued that the panels were "insulation for roofs" because they provided insulation by forming a barrier to regulate changes in temperature. HMRC argued that the panels were not insulation for roofs but the roof itself, because they replaced the roof or panels with a new roof or panels. The Upper Tribunal set out its reasoning and conclusions in allowing HMRC's appeal as follows, at paragraph 17:

> "17. There is a distinction between Note 1(a), which specifies insulation "for walls, floor, ceilings, roofs or lofts or for water tanks, pipes or other plumbing fittings" and paragraphs (c) to (j) which specify particular products such as central heating system controls or solar panels. A material which is insulation for a roof is not the same thing as the roof itself. It presupposes that there is a roof to which the insulating material is applied. If the intention had been to apply the reduced rate of VAT to energy-efficient roofs or walls, this could have been specified, just as more generally building materials are specified in schedule 8. The same point can be made in respect of water tanks. It is not energy-efficient water tanks, such as those which incorporate insulation as part of their construction, which attract the reduced rate of VAT, but insulation for water tanks. Again it presupposes that there is a water tank to which an insulating material is attached or applied."

31. In our judgment, the FTT erred by considering the application of *Pinevale* to the facts only after determining, on a *CPP/Levob* analysis, that the supply was a single supply of insulation. Such an approach begs the very question which must be determined, namely whether the supply was of "insulation for roofs". Although it is not entirely clear, the FTT appears to have first determined that the supply was "insulation", and then that because of its place of installation it must be "for roofs". However, as *Pinevale* sets out, in interpreting the statutory language the critical question is whether the supply of energy-saving materials is "for" a wall, floor, ceiling etc, or is a more extensive supply, such as the wall, floor, ceiling etc itself. That was the question on which the FTT should have focussed. On the facts found by the FTT, the supply by Wetheralds was effectively of all the elements comprised in a roof save for the original glazing bars. The old roof covering was removed, and a new roof covering (tiling) was added, as well as a new plasterboard ceiling, soffits and rainwater goods. However one defines "roof", we can see no reasoned basis on which that supply was no more than insulation.

32. The FTT appears to have interpreted *Pinevale* (at [175] and [176]) as determining that the relevant test is whether or not what is supplied is "attached or applied" to a "roof". However, although Richards J does use those words, he does so only in illustrating his analysis of the words "insulation for" and his conclusion in relation to the Pinevale product. In our view, therefore, the scope of the reduced rate for supplies within Note 1(a) is not determined by whether or not the materials are "attached or applied", but by whether what is supplied is confined to insulation or extends further than that, to a roof or a replacement roof itself.

33. The FTT also failed in our judgment to give sufficient weight to the extensive findings of fact regarding Wetheralds' own presentation of the Solid Roof System and the expectations of the customer, some of which are summarised at [9] to [13] above. The patent application referred repeatedly to "a roofing assembly", and the LABC

certificate referred to "the reroofing of conservatory…roofs". The marketing material referred to the Solid Roof System as a replacement "fully insulated tiled roof" and as "your new roof". If these facts had been given proper weight, they would in our view have led to the conclusion that what was supplied was not merely insulation.

34. Our conclusion on this issue is sufficient for HMRC's appeal to succeed. However, we have also considered the FTT's approach to the "single supply" analysis, even though such an analysis was unnecessary in view of *Pinevale*.

35. Following the FTT decision in this appeal, the Upper Tribunal has recently considered in detail the correct approach to classification of a single supply where the supply contains various elements, in *Revenue and Customs Commissioners v Metropolitan International School Limited* [2017] UKUT 431(TCC). The decision endorses the approach taken by the CJEU in *Mesto Zamberk v Financcni reditelstvi v Hradci Kralove* [2014] STC 1703 ("*Mesto*"). The Tribunal's analysis of the authorities concludes as follows, at paragraph 78:

> "On the basis of those authorities we find:
>
> (1) The *Mesto* predominance test should be the primary test to be applied in characterising a supply for VAT purposes.
>
> (2) The principal/ancillary test is an available, though not the primary, test. It is only capable of being applied in cases where it is possible to identify a principal element to which all the other elements are minor or ancillary. In cases where it can apply, it is likely to yield the same result as the predominance test.
>
> (3) The "overarching" test is not clearly established in the ECJ jurisprudence, but as a consideration the point should at least be taken into account in deciding averments of predominance in relation to individual elements, and may well be a useful test in its own right."

36. In our judgment the FTT's approach to determining the nature of the supply by Wetheralds was wrong in law. The FTT was wrong to regard the *CPP* and *Levob* tests as mutually exclusive. Whichever test or tests is applied, the process should not involve eliminating from consideration of the characterisation elements which are "ancillary", and then making a binary choice between the remaining elements in order to characterise the supply. That is what the FTT appeared to do in its analysis. The characterisation of a supply should take account of all elements of the supply, while avoiding an unduly detailed dissection of the elements comprised in the supply. We agree with the example proposed by Ms McCarthy, that the characterisation of the supply of a motor car is not to be determined by dissecting the vehicle into its many component parts and then, for instance, determining whether the engine predominates over the chassis, or vice versa. The "typical consumer" posited in *Mesto* would not hesitate to describe the supply as a supply of a motor car. In this appeal, we consider that a typical consumer of the Solid Roof System would have described the supply as a thermally efficient replacement roof, and not merely as the insulation included within the System.

Disposition

37. For the reasons given, the appeal is allowed. The FTT decision is set aside, and we remake it so that HMRC's decision to apply the standard rate of VAT to supplies of the Solid Roof System is restored.

JUDGE ROGER BERNER
JUDGE THOMAS SCOTT

RELEASE DATE: 30 May 2018