



UT Neutral citation number: [2026] UKUT 00258 (TCC)

UT (Tax & Chancery) Case Number: UT/2025/000093

**Upper Tribunal
(Tax and Chancery Chamber)**

Hearing venue: 52 Melville Street, Edinburgh

**Heard on: 12 May 2026
Judgment date: 7 July 2026**

VALUE ADDED TAX – zero rating – construction services – item 2 Group 5 Schedule 8 Value Added Tax Act 1994 – whether accommodation wing at secure inpatient mental health facility intended for use for a “relevant residential purpose” – no – appeal dismissed

Before

**JUDGE ASHLEY GREENBANK
JUDGE PHYLLIS RAMSHAW**

Between

NHS AYRSHIRE AND ARRAN HEALTH BOARD

and

**THE COMMISSIONERS FOR HIS MAJESTY’S
REVENUE AND CUSTOMS**

Appellant

Respondents

Representation:

For the Appellant: Philip Simpson KC instructed by Clyde & Co.

For the Respondents: Peter Mantle, counsel, instructed by the General Counsel and Solicitor for His Majesty’s Revenue and Customs

DECISION

Introduction

1. This is an appeal by the NHS Ayrshire and Arran Health Board (“NHS Ayrshire”) against a decision of the First-tier Tribunal (Tax Chamber) (the “FTT”) released on 1 May 2025 (the “FTT Decision”)¹. The Respondents are the Commissioners for His Majesty’s Revenue and Customs (“HMRC”).

2. The appeal concerns the value added tax (“VAT”) treatment of supplies of construction services and materials used in building the National Secure Adolescent Inpatient Service (“NSAIS”), a medium-secure inpatient mental health facility, within the grounds of Ayrshire Central Hospital. The FTT dismissed the appeal by NHS Ayrshire against a decision of HMRC that construction services provided to NHS Ayrshire relating to the construction of an accommodation or bedroom wing (referred to in the FTT Decision as the “Bedroom Wing”) could not fall within item 2, Group 5, Schedule 8 of the Value Added Tax Act 1994 (“VATA”) and so could not be zero-rated for VAT purposes. In summary, the FTT found that the Bedroom Wing was not intended to be used solely for a “relevant residential purpose” within item 2, Group 5, Schedule 8 VATA.

3. The FTT refused permission to appeal. NHS Ayrshire applied to the Upper Tribunal (“UT”) for permission to appeal. The UT granted permission on three grounds. We have set out those grounds of appeal later in this decision notice.

Relevant legislation

4. As we have mentioned above, this appeal concerns whether supplies made to NHS Ayrshire in the course of construction of NSAIS are zero-rated for VAT purposes.

5. The relevant provision is item 2, Group 5, Schedule 8 VATA which allows for zero-rating of supplies in the construction of buildings intended for use for a “relevant residential purpose”. It provides, so far as relevant:

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.

6. The meaning of “use for a relevant residential purpose” is found in Note (4) to Schedule 8. It provides:

(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;

¹ The FTT Decision is reported with neutral citation number [2025] UKFTT 502 (TC). We refer to paragraphs in the FTT Decision in the format “FTT [xx]”.

- (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.

7. Note (10) is also relevant to this appeal. It applies in circumstances where only part of a building is intended for use for a relevant residential purpose. It provides, again so far as relevant:

(10) Where—

(a) part of a building that is constructed is... intended for use solely for a relevant residential purpose... (and part is not); or

(b) ...—

then in the case of—

(i) a grant or other supply relating only to the part so 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 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.

Facts

8. The FTT made extensive findings of fact in the FTT Decision. We will consider some of those findings in greater detail when we discuss the grounds of appeal. For present purposes, the following summary will suffice.

9. NSAIS was designed as a national facility to provide secure inpatient mental health treatment for up to twelve young persons aged between 12 and 18, who suffer from mental disorders. The patients would have been detained pursuant to court orders under the Criminal Procedure (Scotland) Act 1995 (the “1995 Act”) or the Mental Health (Care and Treatment) (Scotland) Act 2003 (the “2003 Act”). All patients of NSAIS will have mental health disorders and in most cases will have been convicted of violent criminal offences (FTT [40], [48]-[54], [257]).

10. Patients are only detained at NSAIS if mandated by a court and must receive “medical treatment in accordance with Part 16 of the 2003 Act” which is likely to prevent their mental disorder from worsening or alleviate any of its symptoms or effects. For these purposes, “medical treatment” is defined in section 329 of the 2003 Act as:

“medical treatment” means treatment for mental disorder; and for this purpose “treatment” includes –

- (a) nursing;
- (b) care;
- (c) psychological intervention;

(d) habilitation (including education, and training in work, social and independent living skills); and

(e) rehabilitation (read in accordance with paragraph (d) above).

(FTT [54], [257]-[258]).

11. The Bedroom Wing contains 12 bedrooms with en-suite bathrooms, two social areas or lounges, an external courtyard, a number of ancillary rooms (such as bathrooms and linen cupboards), and a corridor which links them. In addition to the Bedroom Wing, the complex as a whole contains: clinical areas, including areas for mental health care, treatment, and therapy; age-appropriate educational areas; dining areas; shared areas, including areas for plant, facilities management, the staff-operated kitchen; and staff-only areas (FTT [34], [59]-[60], [70], [299]).

12. All areas are covered by active security systems and CCTV, with the exception of the bedrooms. The Bedroom Wing is designed to be a quieter and more private area, with no CCTV in the bedrooms, but it remains subject to strict security features. Nursing staff may override bedroom locks and observe patients using vision panels and lighting. Patients are observed by nursing staff every 15 to 20 minutes on a continuous basis (FTT [61]-[65], [77], [314]-[316], [321]).

13. Nursing staff working in the Bedroom Wing are professionally qualified mental health nurses. They are part of the multidisciplinary treatment team (“MDT”). Their observations and interactions with patients form part of the patients’ treatment and inform care plans and treatment decisions (FTT [279], [314]-[316]).

14. While formal therapies principally take place in clinical and therapy areas, treatment within the meaning of the 2003 Act is not confined to designated clinical rooms. The FTT found as a fact that medical treatment as defined in the 2003 Act is delivered throughout the complex including in the Bedroom Wing (FTT [283]). The FTT made the following specific findings at FTT [280]-[281]:

280. We do not accept that psychological intervention and therapy ceases at the entrances to the Bedroom Wing. Whereas they may not be explicitly carried on in the Bedroom Wing, in the same way that some treatment would be carried out in a therapy room, FB [Fraser Bell, a witness for NHS Ayrshire] stated, 'the design of the space focuses upon contemplation and relaxation'. We consider that contemplation and reflection following types of treatment such as CBT forms part of the patients' medical treatment.

281. In addition, it is clear that any medicine or medication given to patients continues wherever the patients are and is not confined to specific areas. The description of "a typical day" says that the Bedroom Wing may be used for the types of activity which comprise the 2003 Act definitions of habilitation and rehabilitation in its definition of 'treatment'.

and at FTT [315]-[317]:

315. We consider that these observations [every 15 to 20 minutes] are part of treatment carried out by professionally skilled nursing staff...

316. The observations provide for the noting down of any matters which directly would result in the MDT reconsidering whether there should be any changes to a patient’s Care Plan, which is an integral part of the treatment patients receive under Part 16 of the 2003 Act...

317. We do not accept that the treatment in the form of CBT and similar therapies and medication stops at the entrance to the Bedroom Wing...[they] must be seen in the

context of the need and requirement for such consistent observations particularly as there is CCTV in the Bedroom Wing, just not in the bedrooms.

15. Patients sleep and use bathroom facilities in the Bedroom Wing, but do not take meals there; meals are taken in dining areas elsewhere in the complex. Family visits do not take place in the Bedroom Wing, and access to lounges and courtyards is subject to strict controls (FTT [299]-[301]).

16. The patients' legal residence and address is NSAIS, not the Bedroom Wing. Patients are registered with GPs at NSAIS not the Bedroom Wing (FTT [268]-[269]).

17. The anticipated length of stay at NSAIS is significantly longer than in many general hospitals, commonly between 18 months and several years (FTT [284]-[295]).

The FTT Decision

18. The FTT directed itself that the central issue was “whether NSAIS is a hospital or similar institution... or whether the Bedroom Wing... is a distinct and separate part of the building designed and intended to be used solely for a [relevant residential purpose] in which case zero-rating is granted” (FTT [15]).

19. The FTT emphasised that the statutory test is one of intended use, and that the purposes for which NSAIS was designed and constructed, including the reasons why patients are detained there, were directly relevant to that inquiry (FTT [259]-[262]).

20. The FTT found that NSAIS was designed and constructed as a facility whose primary purpose is to deliver medical treatment to detained patients with mental disorders, and that this purpose permeates the design of the complex as a whole, including the Bedroom Wing (FTT [258], [262]-[263], [282]-[283]).

21. With reference to *Fenwood Developments Ltd v HMRC* [2005] EWHC 2954 (Ch) (“*Fenwood*”) and *Pennine Care NHS Trust v HMRC* [2016] UKFTT 222 (TC) (“*Pennine*”), the FTT concluded that NSAIS was not a care home. NSAIS exists principally to treat and rehabilitate patients, rather than to provide long-term residential care where medical treatment is merely ancillary (FTT [275]-[278]).

22. The FTT rejected the contention that no medical treatment takes place in the Bedroom Wing. As noted above, the FTT found that medical treatment is delivered throughout the complex, including the Bedroom Wing (FTT [279]-[283], [314]-[317]).

23. The Bedroom Wing lacked key attributes of residential accommodation; patients did not eat or receive visitors there, and access was highly controlled. The Bedroom Wing functioned primarily as sleeping accommodation within a secure treatment environment (FTT [296]-[304]).

24. The Bedroom Wing was “inextricably and inevitably linked” to the delivery of medical treatment at NSAIS. It could not realistically be viewed as independent residential accommodation divorced from that treatment function (FTT [306], [322]).

25. The FTT therefore concluded that:

(1) the Bedroom Wing is a hospital or similar institution, and is used as such as part of the complex (FTT [299], [311], [323]);

(2) the Bedroom Wing was not intended for use solely for a relevant residential purpose within Note (4) (FTT [322]);

(3) although Note (10) permits partial zero-rating where part of a building is intended solely for qualifying use and part is not, Note (10) had no application on the facts because no part of the complex, including the Bedroom Wing, was intended for use solely for a relevant residential purpose (FTT [324]-[327]).

26. The FTT therefore dismissed North Ayrshire’s appeal (FTT [328]).

The Grounds of Appeal

27. The FTT refused permission to appeal. Following an application to the UT, the UT granted permission to appeal on the following three grounds:

(1) **Ground 1:** The FTT erred in law in concluding that the Bedroom Wing was not a ‘part of a building’ within Note (10) at [327] of the Decision. The FTT should have held that the Bedroom Wing was a ‘part of a building’ for the purposes of Note (10).

(2) **Ground 2:** The FTT erred in concluding that the intended use of the Bedroom Wing did not fall within any of Note (4)(a) to (g). It erred in relying on the reasons that: (i) not all the normal activities of living could take place there because the residents could not take meals in the Bedroom Wing and (ii) medical treatment took place there. The FTT should have held that the Bedroom Wing comes within either Note (4)(a) or (b) or (g) namely:

(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; or

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

(3) **Ground 3:** The FTT erred in concluding that the intended use of the Bedroom Wing (with or without the common kitchen and dining areas) is ‘use as a hospital’ so as to exclude the relevant construction supplies from zero-rating. The FTT should have held that a relevant residential purpose is the ‘sole’ (or alternatively, primary) intended use of the Bedroom Wing so that it does not fall within the exception for use as a hospital or similar institution in Note (4).

The new issue

28. The reference in Ground 3 to the “intended use of the Bedroom Wing (with or without the common kitchen and dining areas)” requires some explanation.

29. Before the FTT, NHS Ayrshire’s case was limited to an appeal against HMRC’s decision in relation to the construction costs of the Bedroom Wing and was focussed on whether the Bedroom Wing was intended for use for a “relevant residential purpose” within item 2 Group 5 Schedule 8 VATA. In its application to the FTT for permission to appeal, NHS Ayrshire included a claim that “the common kitchen and dining areas that are contiguous” to the Bedroom Wing should be included within the part of the building that was intended for use for a relevant residential purpose. The FTT rejected that claim on the basis that it had not formed any part of the appeal before the FTT.

30. The new claim was reflected in NHS Ayrshire’s renewed application to the UT for permission to appeal. As noted above, the UT gave permission to appeal on the three grounds that are set out at [27] above. Those grounds included the words in parenthesis in Ground 3 relating to the common

kitchen and dining areas. No explanation was given in the UT’s decision granting permission to appeal for the inclusion of those words.

31. In his skeleton argument for this appeal, Mr Simpson KC, for NHS Ayrshire, sought to include reference to the common kitchen and dining areas (to which he referred as “the contiguous rooms”) in relation to each of the Grounds of Appeal (not just Ground 3). He acknowledged that this proposition had not been put to the FTT. In his skeleton, Mr Mantle, for HMRC, objected to the extension of the argument to include the common kitchen and dining areas.

32. We decided that we should treat Mr Simpson KC’s submissions as an application to introduce a new argument. At the commencement of the hearing, we heard submissions from both parties on that application on the basis that we would give a decision on whether to admit the new argument following the hearing as part of this decision notice. We then heard submissions on the grounds of appeal including references to the common kitchen and dining areas. To the extent that those submissions referred to the common kitchen and dining areas as part of the building that was intended for use for a relevant residential purpose, we heard those submissions conditional upon our decision on the application.

33. An appellant should only be permitted to raise on appeal a point that was not raised before the first-instance tribunal if the appellate court or tribunal is satisfied that the other party will not be at risk of prejudice if the new point is allowed. The other party may be at risk of prejudice where it might have adduced other evidence or otherwise conducted the case differently if the point had been raised before the first-instance tribunal. Permission to raise a new point should not be given lightly unless there is a point of law that does not involve any further evidence and which involves little variation in the case which the other party has already had to meet (*Manduca v HMRC* [2015] UKUT 262 (TCC) per Rose J at [40], referring to decision of the Court of Appeal in *Crane (t/a Indigital Satellite Services) v Sky In-Home Ltd* [2008] EWCA Civ 978).

34. We have decided to refuse the application for the following reasons:

(1) The point was not part of NHS Ayrshire’s case before the FTT. In its initial claim made to HMRC, and in the initial stages of its appeal to the FTT, NHS Ayrshire’s case was that the construction services in relation to the whole complex were zero-rated. NHS Ayrshire’s case was subsequently limited to the cost of services provided in relation to the construction of the Bedroom Wing and had been so limited for some considerable time before the FTT hearing. From the documents in the hearing bundle, NHS Ayrshire’s case has been restricted to matters relating to the Bedroom Wing since, at the latest, August 2023 – some 16 months before the FTT hearing in December 2024 – when a submission to that effect was made to HMRC.

(2) This is not a point of law that requires no new evidence. The evidence before the FTT was focused on the use of the Bedroom Wing. The documentary evidence before the FTT included plans distinguishing the different areas within the complex, showing the Bedroom Wing as a separate and distinct part of the building. It did not distinguish the common kitchen and dining areas in the same way from other parts of the building. The witness evidence was also focused on the use of the Bedroom Wing. The witnesses were cross-examined on that basis. If we were to admit the new point, we would need to revisit that evidence.

(3) Although the tribunal has powers to require the submission of evidence and the attendance of witnesses, if we were to admit the new point, the hearing of the appeal would have to be adjourned to permit the filing of that evidence and to provide for the attendance

of witnesses at a further hearing so that they could be cross-examined on their evidence. That would disrupt the appeal process and would materially prejudice HMRC. It would also allow the appeal to be relitigated on a basis that was not before the FTT. We are reminded of the comments of Lewison J in *Fage UK Ltd and another v Chobani UK Ltd and another* [2014] EWCA Civ 5 (at [114]) that the “trial is not a dress rehearsal” affording taxpayers a second bite of the cherry to pursue arguments that could have been, but were not, put before the FTT. It cannot be in the interests of justice to do so and, in our view, would not be in accordance with the overriding objective to deal with cases fairly and justly.

Ground 1

35. We therefore turn to Ground 1. By this ground, NHS Ayrshire asserts that the FTT erred in law by failing to give effect to Note (10) to Group 5, Schedule 8 by not holding that the Bedroom Wing was a “part of a building” for the purposes of Note (10).

The parties’ submissions in outline

36. Mr Simpson KC, for NHS Ayrshire, submitted that the FTT erred in law in its approach to Note (10) when it concluded (at FTT [327]) that “the Bedroom Wing is an integral and inextricable part of a building, which is a hospital or similar institution and used as such”. In summary, he says:

(1) The FTT should have determined that the Bedroom Wing was “part of a building” before then proceeding (see Grounds 2 and 3) to consider whether that part was used solely for a relevant residential purpose and whether the exception in Note (4) applied.

(2) The correct test in Note (10) is a physical and spatial one: whether the relevant area is capable of being identified as a discrete part of a building. The Bedroom Wing was plainly a distinct and identifiable part of a building.

(3) The VAT Tribunal decision in *University Court of the University of St Andrews v Customs & Excise Commissioners* (2005) VAT Decision 19504 (“*St Andrews*”) and the FTT decision in *New Deer Community Association v HMRC* [2014] UKFTT 1028 (TC) (“*New Deer*”) (which was affirmed by the UT – see [2015] UKUT 604 (TCC)) served as examples of the correct approach and demonstrated that individual rooms or identifiable areas within a building may constitute “part of a building” within Note (10) with a relevant residential purpose even where the building as a whole was designed for a purpose which was not a relevant residential purpose.

(4) Any connection in use or purpose between the part of the building in question (the Bedroom Wing) and the building as a whole is irrelevant to the analysis. If that were not the case, Note (10) would be deprived of much practical effect.

37. Mr Mantle, for HMRC, argued that Ground 1 was misconceived. He submits:

(1) For the purpose of Note (10), the FTT had to decide if the Bedroom Wing was “part of a building... intended for use solely for a relevant residential purpose”. The references in the FTT Decision (e.g. at FTT [327]) to the Bedroom Wing being an “integral and inextricable part” of the building complex were directed to its use, not to whether it was part of a building for the purpose of Note (10).

(2) The FTT did not decide that the Bedroom Wing was not a “part of a building”. On a fair reading of the FTT Decision as a whole, the FTT proceeded on the basis that the Bedroom Wing was part of the NSAIS building but concluded that Note (10) could not

apply because no part of the building was intended for use solely for a relevant residential purpose.

(3) The decision of the VAT Tribunal in *University of St Andrews* and the decision of the FTT in *New Deer* did not support NHS Ayrshire's case. There was no dispute in either case as to whether any particular room or area was "part of a building" for the purposes of Note (10).

Discussion

38. The discussion at the hearing on Ground 1 tended to stray into the other grounds. There are good reasons for this. Note (10), which in broad terms allows zero-rating to be applied to construction costs of part of a building that is intended for use as a relevant residential purpose, includes reference to the concept of "use for a relevant residential purpose" which is defined in Note (4) and is the focus of Grounds 2 and 3.

39. NHS Ayrshire's Ground 1 addresses only the first part of Note (10). That is the question of whether the Bedroom Wing is a part of a building. Mr Simpson KC criticizes the FTT for not making a separate determination of that issue. His underlying argument is that, by not separately deciding that question, the FTT failed to focus on what the Bedroom Wing itself is intended to be used for and instead has allowed the use of the building as a whole to influence its decision on the use of the Bedroom Wing itself.

40. Mr Mantle says that throughout the FTT Decision, the FTT is addressing the entire question posed by Note (10) - that is, is the Bedroom Wing a part of the building and is that part intended for use solely for a relevant residential purpose? He argues that Note (10) poses a composite question (similar to that addressed by the Court of Appeal in *Proctor & Gamble UK Limited v HMRC* [2009] EWCA Civ 407). And, as the Court of Appeal advised (*Proctor & Gamble* at [13]) although it might be convenient to separate out parts of that question, it is necessary to take into account the composite nature of the question.

41. Notwithstanding those issues, but mindful of the context of the question posed by Ground 1, we will deal with it separately. We will come back to the other aspects of Note (10) later in this decision notice.

42. The FTT identifies the relevant issue before it at FTT 15. It says this:

15. The substantive issue before the tribunal is to determine whether NSAIS is a hospital or similar institution in which case supplies are not zero-rated, or whether the Bedroom Wing, which surrounds, on three sides, a therapy court and which was marked in yellow on a site plan ("the yellow zone/accommodation wing") submitted to the tribunal, is a distinct and separate part of the building designed or intended to be used solely for a RRP, in which case zero rating is granted.

43. It is clear therefore in its self-direction that the FTT is directing itself to treat the Bedroom Wing as a "distinct and separate" part of the building and to the purpose for which it, as a separate part, was designed or intended to be used.

44. The FTT refers to the Bedroom Wing as part of a building at various points in the FTT Decision. By way of example only:

(1) The findings of fact made by the FTT are directed at the functionality of the Bedroom Wing and other parts of the complex considered separately: the findings refer to "zones"

within the complex (see for example FTT [34], FTT [59]), and the distinct and separate functionality and use of the Bedroom Wing (see for example FTT [68] and FTT [74]).

(2) The analysis of the use and purpose of the Bedroom Wing is equally conducted by reference to the distinct functionality of the Bedroom Wing itself (see FTT [296]-[304]).

45. The paragraphs in the FTT Decision to which Mr Simpson KC specifically refers are at [322] and [327]. The FTT says this at FTT [322]:

322. We find that it is artificial to claim that the Bedroom Wing is intended for use solely for a RRP. It is an integral and inextricable part of the Building Complex whose intended use is a hospital or similar institution primarily to deliver medical treatment to patients under Part 16 of the 2003 Act and protect the staff and public whilst doing so. Accommodation and education are ancillary activities which are necessary only to deliver the medical treatment and security required in view of the practicalities of delivering that medical treatment and taking account of the legal entitlements of the patients given their ages.

And this at FTT [327]:

327. For the reasons stated we do not find that the Building Complex or any part of it was solely intended for use as a RRP. The Bedroom Wing is an integral and inextricable part of the NSAIS Building Complex, which is a hospital or similar institution and used as such, which in turn, denies the applicability of Note 4. We find that no part of the Building Complex was intended for use solely for a RRP and so the comparison in Note 10 does not exist.

46. Having reviewed the FTT Decision as a whole, we agree with Mr Mantle. In these examples, the FTT is not deciding that the Bedroom Wing is not an identifiable part of a building. The FTT clearly recognizes the difference between a building and a part of a building. At [323], immediately following the paragraph Mr Simpson KC referred to at [322], the FTT specifically found:

323. ...we find that the accommodation zone/Bedroom Wing is a hospital or similar institution and used as such as part of the Building Complex as a whole.

At FTT [327], the FTT is answering the composite question namely whether or not the Bedroom Wing is a part of a building and whether or not that part is intended for use solely for a relevant residential purpose. Note (10) only applies where “part of a building that is constructed is ... intended for use solely for a relevant residential purpose ... (and part is not).” The FTT is simply answering that question.

47. On any fair reading of the FTT Decision as a whole, the FTT clearly applies the relevant tests to the Bedroom Wing, treating the Bedroom Wing as a separate part of the NSAIS complex. There is no material error of law of the kind described in Ground 1. We can appreciate that there may be a separate argument that the FTT allowed the design and intended use of the complex as whole to infect its assessment of the design and use of the Bedroom Wing. But that is the subject of Ground 2 and Ground 3. We will address that issue in our discussion of those grounds.

48. We do not gain much assistance from the cases to which Mr Simpson KC referred us.

(1) The VAT Tribunal in *St Andrews*, was concerned with the question as to whether certain parts of a facilities building which were for mixed use (i.e. partly for a relevant residential purpose and partly not) could fall within Note (10). The VAT Tribunal found that they could not.

(2) In *New Deer*, the FTT was concerned with whether a sports pavilion could be regarded as intended for use for a “relevant charitable purpose” and so whether services supplied in the course of construction of the pavilion could be zero-rated (under item 2, Group 5, Schedule 8 VATA). The FTT decided that a meeting room and a kitchen within the pavilion could fall within the scope of zero rating. But there was no issue before the FTT as to whether those rooms constituted part of a building.

In neither case was the question as to the requirements that might have to be met before any room or area could be “part of a building” decided by the tribunal. In *St Andrews*, the parties had agreed parts of the building the construction of which could fall within the provisions for zero-rating and the parts which could not, leaving the treatment of the construction of other parts (which were mixed use) for determination by the VAT Tribunal. In *New Deer*, the FTT arrived at a conclusion that the use of certain parts of the building was for a “relevant charitable purpose” and made an apportionment of the costs of the construction services by floor area. At no point, did the FTT set out any criteria for determining what might or might not be regarded as a part of a building.

49. In any event, for the reasons that we have given, the point does not arise in this case. The FTT treated the Bedroom Wing as a distinct and separate part of a building.

Conclusion

50. We dismiss this ground of appeal.

Ground 2 and Ground 3

51. For reasons that will become apparent, we prefer to deal with Grounds 2 and 3 together.

(1) By Ground 2, NHS Ayrshire asserts that the FTT erred in concluding that the intended use of the Bedroom Wing did not fall within any of Note (4)(a), (b) or (g).

(2) By Ground 3, NHS Ayrshire asserts that the FTT erred in law in concluding that the intended use of the Bedroom Wing was “use as a hospital”.

The parties’ submissions in outline

52. In summary, Mr Simpson KC, for NHS Ayrshire, made the following submissions.

In relation to Ground 2:

(1) On any view, the primary use of the Bedroom Wing was as residential accommodation within Note 4(a) or (b).

(2) The FTT’s principal reasons for holding otherwise were: (i) that not all activities associated with residential accommodation took place in the Bedroom Wing (FTT [296]-FTT [304]), and (ii) that medical treatment continued whilst patients were in the Bedroom Wing (FTT [279]-[281]).

(a) The concept of residential accommodation is broader than that of a dwelling. The fact that certain activities (e.g. eating meals, meeting visitors) did not take place in the Bedroom Wing was not determinative. Any other conclusion was contrary to the approach of the tribunals in *St Andrews* and *New Deer*.

(b) The fact that medical treatment might continue whilst patients were in the Bedroom was not determinative. In any event, the reference by the FTT to the definition of “medical treatment” found in the 2003 Act – which included

“habilitation” and “rehabilitation” – was inappropriate in the context of the VATA.

(3) The FTT erred in concluding that the Bedroom Wing could not fall within Note (4)(g) on the grounds that it was not the “residence” of the patients. For many patients, the Bedroom Wings was their only residence. They were required, by law, to reside in the Bedroom Wing. The reasons why they were required to reside there were not relevant to the enquiry.

In relation to Ground 3:

(4) The Bedroom Wing was not intended for use “as a hospital... or similar institution”:

(a) the use of other parts of the building was irrelevant (see *St Andrews and New Deer*) as is the purpose for which the patients were detained there;

(b) any “treatment” that took place in the Bedroom Wing was not of a nature that the Bedroom Wing should be characterized as a hospital or similar institution;

(c) all matters regarded by the FTT as “treatment” that took place in the Bedroom Wing – nursing staff carrying out observations, contemplation and relaxation, administering medicines prescribed elsewhere, monitoring the effects of medicines, and “habilitation and rehabilitation” (within the meaning of the 2003 Act) – were ancillary to the primary function of the Bedroom Wing as residential accommodation.

53. Mr Simpson KC, in reply to a submission made by Mr Mantle on behalf of HMRC, confirmed that NHS Ayrshire does not challenge the FTT’s findings of fact on the basis of the principles in *Edwards v Bairstow* [1956] AC 14. The errors of law, he submitted, were in the conclusions reached by the FTT from the facts as found. For example, he argued: in relation to Ground 2, that it was an error of law for the FTT to conclude that the Bedroom Wing was not for a relevant residential purpose because the patients could not undertake all activities associated with daily living (e.g. eating) there; and, in relation to Ground 3, that it was an error of law for the FTT to have regard to the use and functions of NSAIS in determining the use of the Bedroom Wing.

54. Mr Mantle made the following submissions for HMRC:

In relation to Ground 2:

(1) The FTT was entitled to reach conclusions on the use of the Bedroom Wing in the context of the use of the complex as a whole, which was used as a hospital or similar institution.

(2) NHS Ayrshire’s arguments failed to reflect:

(a) that the Bedroom Wing is not itself a “home or institution” within Note (4)(a) or (b) or a “institution” within Note (4)(g) (see *Derby YMCA v HMRC* (2000) VATD 16914 (“*Derby YMCA*”) at [44]);

(b) the need to reflect the fact that the sub-paragraphs of Note (4) are subject to the exception.

(3) The FTT was entitled to consider, as part of its multifactorial evaluation, the aspects of residential use that the Bedroom Wing lacked.

In relation to Ground 3:

(4) The FTT was entitled to conclude as it did at FTT [323], [324], and [327], that the Bedroom Wing was intended for use as part of a hospital and that the exception to Note (4) would therefore apply.

(5) The FTT was entitled to take into account:

- (a) the physical location of the Bedroom Wing as part of a hospital;
- (b) that some medical treatment took place in the Bedroom Wing;
- (c) that the staff in the Bedroom Wing were medically qualified and trained;
- (d) that the Bedroom Wing was a place where the effect of medical treatment could be observed and monitored; and
- (e) that patients were in the Bedroom Wing (and at NSAIS) because they were required by law to have medical treatment there.

The FTT Decision

55. The FTT Decision is wide-ranging. But before we turn to our discussion of these issues, it is useful to have regard to some of the key passages in the decision to which our attention was drawn by the parties.

56. As part of its discussion of the medical treatment afforded to patients at NSAIS, the FTT says this at FTT [278]-[283]:

278. *Pennine* decided that care homes may provide residential care which may involve the treatment and management of pre-existing conditions, and some form of medical treatment is likely to take place in any care home. The principal purpose of a care home, however, is not medical treatment whereas it is at NSAIS.

279. The Applicant states that no active care will be provided within the Bedroom Wing and that the staff may present and engage in 'normal human interaction'. The staff are trained nursing staff and not security staff. We consider that the requirement for a professional nursing qualification is both relevant and intentional and their interaction and observations form part of the patients' treatment, as defined in the 2003 Act.

280. We do not accept that psychological intervention and therapy ceases at the entrances to the Bedroom Wing. Whereas they may not be explicitly carried on in the Bedroom Wing, in the same way that some treatment would be carried out in a therapy room, FB stated, 'the design of the space focuses upon contemplation and relaxation'. We consider that contemplation and reflection following types of treatment such as CBT forms part of the patients' medical treatment.

281. In addition, it is clear that any medicine or medication given to patients continues wherever the patients are and is not confined to specific areas. The description of "a typical day" says that the Bedroom Wing may be used for the types of activity which comprise the 2003 Act definitions of habilitation and rehabilitation in its definition of 'treatment'.

282. Accordingly, we agree with the Respondents that in the case of NSAIS, the primary purpose is to treat patients so that they can be rehabilitated to a point where they are able to be reintroduced into society. The outcome for some patients may be that they will be cared for until they become adults and at such time they will be reallocated to an adult facility.

283. We find that nursing is part of medical treatment and that medical treatment, as defined in the 2003 Act, is delivered throughout the Building Complex, including the Bedroom Wing.

57. The FTT then considered whether, in the light of comments of Sir Andrew Morritt C in *Fenwood* and the FTT in *Pennine*, the length of the average stay of a patient at NSAIS indicated that NSAIS should be regarded as an institution providing care rather than a hospital or similar institution. The FTT concluded that it should not (FTT [295]).

58. The FTT addresses residential purpose at FTT [296]-[304] in the following terms:

296. The Appellant says that NSAIS is the patients' home as it is where they live and emphasise the positive aspects from both care and treatment perspectives of the design of the bedrooms being the personal spaces of the patients. This includes a limited ability to lock their rooms, to decorate them and carry out certain activities there.

297. The examples of the daily activities in the "a typical day" document, albeit for staff and carers, indicate that access to the Bedroom Wing is limited throughout a 24-hour period and throws doubts on whether the Bedroom Wing is solely intended as a home or "residential accommodation", as opposed to the places where the patients sleep, use the ensuite bathroom facilities and can carry out a number of activities particularly if they are not required to attend schooling, and presumably during school holidays.

298. The Concise Oxford Dictionary defines "residential" as "suitable for or occupied by private houses" or "used as a residence" and defines "residence" as "the place where a person resides; an abode". It defines "accommodation" as a room for receiving people, especially a place to live or lodgings.

299. Although we consider that the Bedroom Wing is a hospital or similar institution, when considering the activities of daily living, which include dressing, toileting, washing, mobility, transferring and eating, as a useful measure by which to ascertain whether a building is accommodation or a home or a residence, there is one major activity of daily living that cannot be carried out in the Bedroom Wing and that is eating. This is carried out in the dining area or dining court.

300. Similarly, there are two lounges in the Bedroom Wing where the patients can "socialise" but given the precautions that have to be taken regarding which patients can enter and meet in the courtyard, onto which the Bedroom Wing faces, at any one time so as to avoid any potential conflicts or difficulties between different patients, this must also apply to the occupancy of the lounge areas.

301. When the patients meet their families this can only take place in areas that specifically does not include the Bedroom Wing.

302. These restrictions are such that the Bedroom Wing does not provide the normal attributes of residential accommodation or a home or a residence as they do not provide the occupants with the necessary facilities to live a domestic life independently.

303. The Bedroom Wing is where the patients sleep and can use the bathroom facilities, in many respects similar to a hotel or similar establishment.

304. Accordingly, we do not consider that the Bedroom Wing is used solely for a RRP as it is only a place for sleeping, bathing, toileting and some work or leisure activities and where access to them is restricted at times of the day.

59. Having then considered the application of the exception to Note (4), the FTT concludes at FTT [311]:

311. Nevertheless, we prefer the Respondent's submissions on the inapplicability of notes (4) (a), (b), (d) and (g) because the conditions to which they refer are not met. Fundamentally we do not believe the Bedroom Wing is intended for use solely for a RRP, because we consider that it is artificial to consider that the Bedroom Wing is not part of the Building Complex which we consider in its entirety is a hospital or similar institution. Consequently Note 4 and Note 10 do not apply.

Discussion

60. We are taking these grounds of appeal together because of the extent to which the issues to which they give rise overlap.

61. As a starting point, we should record some of the background to the questions posed by these grounds of appeal. As far as we are aware, these points are not contested.

(1) First, it has not been argued by HMRC at any stage that NSAIS is a “prison or similar institution” for the purposes of Note (4) notwithstanding that the patients have all committed criminal offences and are being detained in part for that reason.

(2) Second, the NSAIS complex as a whole is a “hospital... or similar institution” for the purposes of Note (4). The NSAIS complex as a whole cannot fall within Note (4).

62. The argument is that the Bedroom Wing, as part of a building, can be treated separately in accordance with Note (10). It can only do so if the Bedroom Wing itself is “intended for use solely for a relevant residential purpose” within Note (4). It is in that context that Note (4) is relevant for the purposes of this appeal.

Note (4)

63. With that in mind, we turn first to the principles governing the application of Note (4) itself.

64. We have been referred by the parties to various case law authorities. We have also been referred to some FTT decisions that are not binding on us, but which provide useful illustrations of the way in which tribunals have approached these issues. We will not refer to all the authorities and FTT decisions in this decision. However, we have taken them into account.

65. The decision that we found most helpful was the decision of Sir Andrew Morritt C in *Fenwood*. That case involved a claim for zero-rating of construction services under item 2 Group 5 Schedule 8 VATA on the grounds that the building in question was intended for use for a relevant residential purpose within Note (4). The building in question was a mental home for women detained under the Mental Health Act 1983, but who no longer needed or could not benefit from medical treatment. The VAT Tribunal concluded that the intended use of the home was to provide care for its residents and not to treat them for their various conditions. As a result, the construction of the home fell into Note (4)(b) and was not excluded by virtue of being a “hospital... or similar institution”. Sir Andrew Morritt C dismissed HMRC’s appeal.

66. The key points that we take from the judgment of Sir Andrew Morritt C are:

(1) The meaning given to “hospital” in Note (4) is the ordinary meaning of that word (*Fenwood* [16]). Definitions of “hospital” and “medical treatment” in other statutory contexts are of little assistance. They may or may not reflect the meaning of “hospital” in Note (4) (*Fenwood* [14]-[15]).

(2) Note (4) permits zero-rating for the construction of the residential accommodation, but zero rating is excluded if the building is a hospital i.e. an institution providing medical

treatment and associated care. It is a product of the structure of Note (4) that some buildings, or parts of buildings, that contain what might otherwise be regarded as residential accommodation will fall within the exception because it is residential accommodation in a hospital, prison or similar institution.

(3) In these cases, it is therefore necessary in each case to contrast the relevant paragraph of Note (4) with the relevant part of the exception. Sir Andrew Morritt C said this about the interrelationship of the various paragraphs in Note (4) and the exception and its consequences for the meanings of “residential accommodation” and “hospital or similar institution” in Note (4) (*Fenwood* [18]):

18. In their normal meaning neither hospitals, prisons, hotels nor inns exist for the purpose of providing residential accommodation; nor are they normally occupied as residences by those who are accommodated therein. Thus the exceptions appear to me to be designed to exclude the specified institutions if and insofar as their use might actually come within the principal parts of the definition. Accordingly, it is necessary in each case to contrast the relevant paragraph of Note (4) with the relevant part of the exception. If, as is accepted in this case, the Dene is “a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of past or present mental disorder”, then it can only be excluded if its use is as a hospital or similar institution. The contrast is between a home or institution providing residential accommodation with personal care for those who need it for the prescribed reason and an institution providing medical treatment and associated care, usually on a short-term basis. Accordingly, I accept the submission of counsel for *Fenwood* summarised in the last sentence in paragraph 13 above as reflecting the proper construction of the relevant words in the appropriate context.

(4) The submission to which Sir Andrew Morritt C refers in the passage above is a submission from counsel to the effect that “a hospital is a building used for treatment for the cure or amelioration of a medical condition as opposed to personal care; the former is likely to require short term occupation, the latter long-term residence” (*Fenwood* [13]).

67. In our view, the *Fenwood* case therefore demonstrates the importance, in a case where the exception to Note (4) is potentially in point, of the comparison of the relevant paragraph in Note (4) with the relevant part of the exception – and, in this case, supports our approach of addressing Grounds 2 and 3 together.

Note (10)

68. We must now turn to the principles governing the application of Note (4) to part of a building under Note (10). This leads to an important question for the purposes of this appeal: the extent to which it is necessary or permissible to take into account the functions and uses of the other parts of the building in determining for the purposes of Note (4) in the context of Note (10) whether the part of the building in question – in this case the Bedroom Wing – is intended for use for a relevant residential purpose.

69. Mr Simpson KC’s submissions rely on being able to treat the Bedroom Wing independently of the remainder of the NSAIS for the purposes of Note (4) when it is applied for the purposes of Note (10). In this respect, he places some reliance on the approach of the tribunals in *St Andrews* and *New Deer*.

70. The decisions of the tribunals in *St Andrews* and *New Deer* are narrowly focussed and do not address this point directly. That having been said, we acknowledge that the effect of the decisions in *St Andrews* and *New Deer* is that the non-qualifying use of other parts of the building in each case

did not prevent the parts of the building in question from being regarded as having a relevant qualifying purpose.

71. We note, however, the following points arising from those decisions:

(1) First, in both cases, the exception in Note (4) was not relevant. In *St Andrews*, the other parts of the building were a facilities building for the University. The exception in Note (4) was not in point. *New Deer* was a case concerning Note (6) (relevant charitable purpose) to which there is no equivalent exception.

(2) Second, even in *St Andrews*, the intended use of the parts of the building in question is not viewed entirely independently. Its context is important. The parts of the facilities building that qualified in *St Andrews* as residential accommodation within Note (4)(d) – a corridor, toilets and first aid room – could only qualify because of their proximity to and use as part of the related student accommodation.

(3) There is no discussion in *St Andrews* of the issue that arose in *Derby YMCA* – to which Mr Mantle refers – of the requirement for certain of the paragraphs in Note (4) for the accommodation to be intended for use as a “home” or “institution”. Note (4)(d), the relevant paragraph in *St Andrews*, contains no such requirement.

Application to this case

72. With those principles in mind, we turn to the present case.

73. NHS Ayrshire in its grounds of appeal (including Ground 1) and Mr Simpson KC in his submissions seek to break down the enquiry into its constituent parts:

- (1) whether the Bedroom Wing is part of a building for the purposes of Note (10);
- (2) whether any of the relevant paragraphs in Note (4) apply
- (3) whether the exception to Note (4) can apply.

74. In relation to each of those elements, NHS Ayrshire seeks to treat the Bedroom Wing in isolation from the remainder of the NSAIS complex. Mr Simpson KC relies on the decisions of the tribunals in *St Andrews* and *New Deer* in support of that approach. In essence, the core principle underlying these submissions is that the Bedroom Wing must be looked at in isolation for the purposes of the application of Note (10) and without reference to the functions and uses of other parts of the building.

75. The FTT on the other hand takes a rather different approach. As we have described above, the FTT, in its consideration of the application of Note (4) as part of its application of Note (10), addresses the constituent elements of Note (4) as part of the same question, and finds that it is not possible to divorce the use of the Bedroom Wing from the use of the other parts of the NSAIS complex. That approach is supported by Mr Mantle in his submissions.

76. On this matter of principle, we can find no material error in the FTT’s approach.

- (1) First, even if it is convenient, in some cases, to break down the enquiry into its constituent parts, it is always necessary to have regard to the overall position. As we have discussed above, the application of Note (4) in cases where the exception may be in point requires the comparison between the relevant paragraph of Note (4) and the terms of the

exception (*Fenwood* [18]). The position is no different when Note (4) is applied by virtue of Note (10).

(2) Second, in our view, there will be circumstances where the determination of the use and purpose of part of a building for the purpose of Note (10) is informed by the use and purpose of the remainder of the building and/or the context of the location of the building or part of a building and the purposes for which relevant persons are accommodated there. The results of the tribunal cases (see, in particular, *St Andrews*) demonstrate this.

77. It follows that we do not agree with Mr Simpson KC's submission that the use and function of other parts of the building and the reasons why patients are accommodated in the Bedroom Wing are irrelevant to the determination of the application of Note (4) to the Bedroom Wing. For the reasons that we have given above, there are cases where, in the application of Note (4) for the purposes of Note (10), it is necessary to draw upon the wider context and situation of the part of the building in question in order to determine whether its purpose falls within the paragraphs in Note (4) and whether the exception in Note (4) applies. This may involve reference to the functions and intended uses of other parts of the same building or indeed the complex of which the building forms part. This will particularly be the case where there is an interdependence between the uses of the different parts of the building. This is one such case.

78. We turn now to address NHS Ayrshire's specific criticisms of the FTT's approach. In relation to Ground 2, these are that the FTT should have acknowledged that the Bedroom Wing was the only place of residence of the patients and that the factors that the FTT took into account in determining that none of the paragraphs in Note (4) could apply – the lack of certain aspects of daily living and the continuation of medical treatment whilst patients were in the Bedroom Wing – should not have disturbed that conclusion. In relation to Ground 3, NHS Ayrshire asserts that the exception to Note (4) should not apply because the aspects of medical treatment that take place in the Bedroom Wing are ancillary to its primary function.

79. We note the following points.

(1) Mr Simpson KC refers to the fact that patients reside in the Bedroom Wing; they have no other residence. The thrust of that submission is that if a building (or part of a building) is the sole residence of the relevant person/s, then the intended use of the building (or part) must automatically be for a relevant residential purpose. No other factors can displace that conclusion. We do not agree. There is nothing in the statutory provision that suggests that relevant residential purpose is to be interpreted in that way. There is also nothing in the case law to support such an approach. Indeed, it is implicit in the structure of Note (4) that the exception can apply to a building or part of a building that would otherwise be regarded as residential. In our view, a holistic assessment of the evidence is required.

(2) Furthermore, that submission ignores the fact that aspects of the patients' daily living – including eating and meeting visitors – take place in other parts of the NSAIS complex. That complex as a whole is a "hospital... or similar institution" within the terms of the exception. This is not a case – such as that in *St Andrews* – where the activities that may be regarded as part of daily living and so relevant to determining whether accommodation is residential take place in other parts of the building or other nearby buildings the purpose of which do not fall within the exception.

(3) If the Bedroom Wing is to meet the requirements of Note (4)(a), (b), or (g), in addition to being residential accommodation, it must be a "home" or "institution" (in the case of Note (4)(a) or (b)) or an "institution" (in the case Note (4)(g)). We take the FTT's findings at various points in the FTT Decision that the Bedroom Wing is part of a single unit or

facility (see for example, FTT [209], [229], [269]) as findings that the Bedroom Wing is not a self-standing “home” or “institution”. The only institution of which it is a part is NSAIS, which is a “hospital... or similar institution” within the exception.

(4) As regards the issues surrounding medical treatment, the submission that the treatment that is given in the Bedroom Wing is not determinative of the use or purpose of that part of the building ignores the fact (as found by the FTT, FTT [280]-[281]) that the treatment is a continuation of the treatment that takes place in other parts of the complex, which is a “hospital... or similar institution”. As the FTT found, the staff on duty in the Bedroom Wing are trained nurses and their observations feed into care and treatment plans of the hospital (FTT [315]-[316]). It is not possible to separate the treatment that is provided in the Bedroom Wing from the treatment that takes place in other parts of the complex. It is an integrated course of treatment.

(5) Furthermore, the patients are present in the NSAIS complex and in the Bedroom Wing because they are detained in NSAIS to receive medical treatment. The patients are restricted in access to and use of communal areas (the lounges and courtyard) for security and protection). This is a different case from *Fenwood* and *Pennine*. In those cases, the primary purpose of the building in question was to provide care rather than treatment. In this case, as the FTT found, the primary purpose is to provide treatment (FTT [307]-[314]).

(6) NHS Ayrshire also criticizes the references by the FTT to definitions of “hospital” and “medical treatment” in other statutes to which the FTT refers. Notwithstanding the references to which NHS Ayrshire points, it is clear from other parts of the FTT Decision (see for example, FTT [264]-[265]) that the FTT did not regard these definitions as determinative. However, the FTT was clearly entitled to take into account that NSAIS met the requirements of the legislation for the purpose of the making of orders regarding the detention of patients and the statutory purpose of that detention.

80. For these reasons, in our view, the FTT was entitled on the evidence before it to reach the conclusion that it did.

(1) In comparing whether the intended use of the Bedroom Wing should fall within one of the paragraphs in Note (4) or the exception to Note (4) – the FTT was entitled to find that the Bedroom Wing was a hospital and that the exception must therefore apply.

(2) For these purposes, given the interdependence of the use of the Bedroom Wing and the remainder of the complex, the FTT was entitled to take into account the use and functions of the remainder of the complex of which the Bedroom Wing forms part.

Conclusion

81. We find no material error of law in the FTT Decision of the kind described in Grounds 2 and 3. We dismiss these grounds of appeal.

Disposition

82. We dismiss this appeal

**JUDGE ASHLEY GREENBANK
JUDGE PHYLLIS RAMSHAW**

RELEASE DATE: 07 July 2026