TC02570

Appeal number: TC/2011/07622

Value added tax – supply of building materials – zero-rate – Item 4 of Group 5 of Schedule 8 Value Added Tax Act 1994 – Note (22) – definition of "building materials" – whether fire barrier retractable curtains are goods of a description ordinarily incorporated by builders in a building – yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

COOPERS FIRE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE EDWARD SADLER
JULIAN SIMS ACA CTA

Sitting in public at Havant on 2 November 2012

Robert Tucker, a director of the Appellant, for the Appellant

Martin Priest of the Appeals and Reviews Unit of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Coopers Fire Limited ("the Appellant") appeals against a decision of The Commissioners of Her Majesty's Revenue and Customs ("the Commissioners") given in their letter dated 6 September 2011 to the Appellant. That decision is to the effect that certain products of the Appellant, namely fire curtains (retractable fire barriers), are not "building materials" for the purposes of the value added tax provisions which relate to supplies at the zero rate (or the reduced rate) of certain goods and services where those supplies are made in the course of the construction of dwellings (or in the course of the conversion of buildings into dwellings). In order to qualify as "building materials" for those purposes, goods must, in relation to any description of building, be "goods of a description ordinarily incorporated by builders in a building of that description". The decision of the Commissioners is that the Appellant's fire curtain product does not satisfy that requirement, on the grounds that it is a product of a specialist nature which a builder would incorporate into a building upon special request and not as a matter of course.

2. The Appellant's case is that fire curtains are now an established alternative to other fire protection products such as fire doors and fire-rated walls and glass, and that fire curtains are increasingly used in place of such other products, all of which are supplied at the zero rate or reduced rate under the relevant provisions. To meet its customers' requests the Appellant wishes to supply fire curtains as zero-rated or reduced-rated building materials and for that purpose wrote to the Commissioners for their decision on the point. No tax assessment is in dispute in this appeal – the Appellant has charged VAT at the standard rate on supplies of its products. Its purpose in appealing is to challenge the decision which the Commissioners have given with the intention of making supplies at the zero rate or the reduced rate if it succeeds.

3. As we mention below, since the appeal proceedings began the Commissioners have given further consideration to the Appellant's arguments and have conceded that in certain circumstances the Appellant may supply its fire curtains at the zero rate (or the reduced rate), but the Appellant considers that this concession leads to confusion and does not meet in full the case it has put to the Commissioners.

4. The parties are agreed that the issue which we have to decide is whether, when the Appellant's fire curtain product is supplied in the course of the construction of a dwelling, that product comprises "building materials", that is, in relation to any description of building, comprises goods of a description ordinarily incorporated by builders in a building of that description.

5. For the reasons we give below our decision is that, in these circumstances, the Appellant's fire curtain product comprises such "building materials", and the Appellant therefore succeeds in its appeal.

The relevant legislation

6. Section 30 of the Value Added Tax Act 1994 ("VATA 1994") makes provision for the supply of goods or services at the zero rate. The goods or services must be of a description as specified in Schedule 8 to VATA 1994. Section 29A VATA 1994 makes provision for the supply of goods or services at the reduced rate of 5 per cent. The supply must be of a description as specified in Schedule 7A to VATA 1994.

7. Group 5 of Schedule 8 to VATA 1994 is headed "Construction of buildings, etc". Item No 2 of Group 5 is in these terms (so far as relevant to this appeal):

> *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.*

Item No 3 of Group 5 is in similar terms, relating to the supply of services to a housing association in the course of the conversion of a non-residential building into a dwelling or dwellings.

Item No 4 of Group 5 provides:

> *4 The supply of building materials to a person to whom the supplier is supplying services within item 2 or item 3 of this Group which include the incorporation of the materials into the building (or its site) in question.*

8. The issue we have to determine, as mentioned, is whether the fire curtain product of the Appellant comprises "building materials" within Item 4. Notes (22) and (23) to Group 5 define "building materials" for the purposes of Item 4, and are in these terms:

> *(22) "Building materials", in relation to any description of building, means goods of a description ordinarily incorporated by builders in a building of that description, (or its site), but does not include –*
>
> *(a) finished or prefabricated furniture, other than furniture designed to be fitted in kitchens;*
>
> *(b) materials for the construction of fitted furniture, other than kitchen furniture;*
>
> *(c) electrical or gas appliances, unless the appliance is an appliance which is -*
>
> *(i) designed to heat space or water (or both) or to provide ventilation, air cooling, air purification, or dust extraction; or*

(ii) intended for use in a building designed as a number of dwellings and is a door-entry system, a waste disposal unit or a machine for compacting waste; or

(iii) a burglar alarm, a fire alarm, or fire safety equipment or designed solely for the purpose of enabling aid to be summoned in an emergency; or

(iv) a lift or hoist;

(d) carpets or carpeting material.

(23) For the purposes of Note (22) above the incorporation of goods in a building includes their installation as fittings.

9. With regard to supplies in relation to the conversion of buildings into dwellings, and the reduced rate of VAT, it is only necessary to say that Group 6 of Schedule 7A to VATA1994 is concerned with the supply of "building materials" in connection with the supply, in the course of a qualifying conversion, of qualifying services related to the conversion, and that Note (12) to Group 6 incorporates Notes (22) and (23) to Group 5 of Schedule 8 for the purposes of defining "building materials" in such a case.

10. For the sake of completeness we should mention that the Appellant's appeal is relevant also to the zero-rated supply of "building materials" in the course of an approved alteration of a protected building under Group 6 of Schedule 8 to VATA 1994 (which again incorporate the definition of "building materials" in Notes (22) and (23) to Group 5 of Schedule 8).

The evidence and the findings of fact

11. Mr Robert Tucker, the finance director of the Appellant, represented the Appellant at the hearing of the appeal. He gave evidence as to the development of the fire curtain by the Appellant for use in commercial and domestic settings; its design and specification; its use and operation in dwellings; its relation to fire doors, fire-rated glass and walls; producers of similar products; the Appellant's market in the product; the relevant British Standard code of practice on fire safety in the design, management and use of residential buildings produced by the British Standards Institute; and the Fire Safety Requirements of the Building Regulations 2010.

12. We also had in evidence the correspondence by letter and email between the parties in relation to the dispute leading to this appeal; an installation manual and publicity material relating to the Appellant's fire curtain; a letter and a technical note prepared by Mr Peter E Jackman, MIFireE IEng FIWSc, the technical director of International Fire Consultants Ltd; and a copy letter dated 26 January 2012 from the Department of Building Control in the Planning and Borough Development office of The Royal Borough of Kensington and Chelsea to Mr Jackman relating to the use of active fire curtain barriers and their approval through an industry-wide accreditation scheme.

13. There were no witnesses for the Commissioners.

14. Our findings of fact from the evidence are set out in paragraphs 15 to 27.

15. The Appellant is registered for VAT purposes. Its business comprises the manufacture and sale of fire and smoke protection products, including smoke curtains and fire curtains. It is the market leader in these products.

16. In 1985 the Appellant developed the concept of smoke curtains, that is a smoke barrier effected by means of a roller blind system automatically deployed in the event of fire and designed for commercial buildings to confine smoke to areas where ventilators can operate to extract the smoke from the building.

17. Fire curtains were developed later, using similar technology. Their purpose is to act as a fire retarding barrier, retaining fire in a defined area, which they can do for up to four hours.

18. A fire curtain is installed in the appropriate location at ceiling level or at the highest point in the space in which it is to operate (thus, across the doorway lintel where it is to provide a barrier in a doorway). It is, in essence, a roller blind: the curtain is, when not deployed, wound round a roller stored in a headbox, and the roller is connected to an electric motor and system of contacts. The curtain is made of glass fibre and stainless steel woven fabric coated in a special fire-retardant polymer. Along the foot of the curtain there is a metal bottom bar which incorporates a weight bar. This ensures the rapid descent of the fire curtain when it is deployed, and also ensures that it remains in place at floor level when in the drop position. On either side of the protected space served by the fire curtain, and for the full height of that space, there is a metal guide channel, so that when the curtain is deployed its sides are confined to the side channels, and the curtain thereby creates a complete barrier to the fire.

19. The electrical components have two functions: the curtain is held in the raised position by electrical contacts until such time as those contacts are broken by a fire alarm or other warning system (at which point the curtain falls into position under its own weight by the effect of gravity); and an electric motor operates to rewind the curtain around the roller after it has been deployed and once the threat of fire has passed.

20. A distinguishing property of a fire curtain is that it provides fire protection without the obstruction which is a feature of other types of barrier (typically, a fire door or a fire-rated wall or glazing). This feature enables a fire curtain to be used where other types of barrier are impractical or aesthetically unattractive, as where barriers are required for large openings (as in open plan spaces); or in listed buildings where a fire door would be obtrusive or unsightly; or where a doorway or other space must remain open for better access for the elderly or disabled. The flexibility which fire curtains give can allow buildings to be designed in different ways.

21. More generally, a fire curtain can be used as a fire barrier in most if not all situations where other types of fire barrier may be used. Other types of fire barrier

may have features which enable them to provide additional functions. Thus a fire door may operate as a door as well as a fire barrier, that is, to provide security or privacy. A fire curtain does not have these features, but can be used in a doorway as a fire barrier in conjunction with a door which does not have fire barrier properties (and which therefore can be of lighter construction and is not required to be kept closed).

22. Initially the Appellant designed, manufactured and supplied fire curtains for installation in a wide range of commercial and public buildings, including airports, offices, retail stores and even royal palaces. Since the late 1990s there has been a growing demand for fire curtains to be installed in domestic buildings, to meet the requirements of architects designing more "open plan" dwellings. In response to this demand the Appellant developed the product known as the V Fire Curtain specifically designed for use in domestic dwellings.

23. There are other fire curtain manufacturers in the United Kingdom supplying the market for these products installed in dwellings. The Appellant is thought to be the market leader. We had no evidence of the total size of the market for fire curtains in dwellings, or of the size of that market relative to the size of the market for other forms of fire barriers in dwellings. The Appellant's business in this area is growing in response to increased demand and currently it is installing between 400 and 500 units a year.

24. Not all newly-constructed dwellings are required to have fire partitioning or barriers. Single or two storey single-family dwellings will not require fire partitioning unless they are unusually large or have other features which present a fire risk (so that all dwellings with integral garages that have direct access to the main house will require a fire barrier at that point of access). Dwellings of three or more storeys will require some fire partitioning (for example between the second and third storeys). If there is more than one dwelling in a building (as in a block of flats) fire partitioning will be required in the common parts.

25. The Building Regulations (currently SI 2010 No.2214) are not prescriptive of the types of fire protection and fire barriers which must be installed to meet statutory requirements. They are functional in their approach, requiring that buildings are constructed so as to provide an exit route from a building which is fire-protected using barriers that provide a specified level of fire safety (see Regulation 4 and Part B Fire Safety of Schedule 1). This approach does not require fixed physical barriers: it permits other means of providing fire protection which become operative after fire has been detected, such as fans, ducts and fire curtains. Any form of barrier which is of fire-resisting construction is compliant with the Building Regulations. The Appellant's fire curtains are so compliant.

26. The British Standards Institute issued in 2011 British Standard BS991:2011 – a Code of Practice for fire safety in the design, management and use of residential buildings. That Code of Practice refers to fire curtains as fire-resisting barriers alongside glazed screens and fire doors and makes clear that fire curtains can be used in place of fire doors, fire-rated glass partitions, and other fixed barriers. The British

Standards Institute issued in 2007 as a Publicly Accepted Standard a specification for active fire curtain barrier assemblies under the reference PAS 121:2007.

27. In January 2012 the Department of Building Control of the Royal Borough of Kensington and Chelsea stated that, consistent with its policy to support the use of innovative products that promote better fire safety and flexibility for its clients, it has permitted the use of active fire curtain barriers as a direct replacement for, and an alternative to, fire doors and partitions for use creating protected escape routes, provided that such barriers comply with PAS 121:2007. To deal with manufacturers submitting their products for testing by the Borough, it stated that the manufacturers should organise a third party accreditation arrangement as independent verification that their products comply with that standard, obviating the need and cost for individual local authorities to carry out their own compliance tests, and thereby permitting an easier approval route for such products and at a reduced cost for local authorities.

The concession made by the Commissioners

28. After the Appellant had appealed to the Tribunal, and following correspondence between the parties, the Commissioners wrote to the Appellant on 7 March 2012 to say that they were now of the view that fire curtains should be accepted as "building materials" within Note (22) in certain circumstances:

> "They will be accepted when installed into open plan living accommodation where the lack of walls and doors is considered to be a fire risk and regulations require that a suitable barrier is in place that will provide some protection should a fire break out. The curtain installed must be in place of and not in addition to walls and/or doors."

29. Mr Priest, who represented the Commissioners at the hearing, expressed this concession in rather different (and, in our view, more cogent) terms. He said that the general policy of the Commissioners in relation to whether goods can, for the purposes of the "building materials" definition, be regarded as "ordinarily incorporated by builders in a building" is to accept that if something is required by any legal provision to be incorporated into a building, then it will be regarded as "ordinarily incorporated" for these purposes (and hence the supply of such goods will be zero-rated or reduced-rated, as appropriate).

30. Applying (as Mr Priest saw it) this general policy to the Appellant's product, where the circumstances are such that the fire curtain is the *only* form of fire protection which can be installed in a particular building where such protection is required by law, and is not simply one of a range of possible forms of fire protection, then it will be regarded by the Commissioners as "ordinarily incorporated by builders in a building". Thus, by way of example, where the building is open plan, so that the required fire protection can only be provided by a fire curtain (fixed barriers such as walls and fire doors being incompatible with the design of the building), the "ordinarily incorporated" test is satisfied. This would also be the case, by way of further example, where a fire curtain is the only form of barrier which meets a planning authority's requirement to preserve the aesthetics of a listed building.

31. However, Mr Priest made it clear that the Commissioners remain of the view that where fire protection is required, and it is possible, without legal impediment, to provide such protection either by a fire curtain or by a fire door or a fire-rated wall or glazing, so that there is a choice in the matter, a fire door (or wall or glazing) would be the product "ordinarily incorporated by builders in a building", whereas the fire curtain would not.

The parties' submissions

32. Mr Tucker's case for the Appellant was simple: fire curtains are increasingly the choice of developers as the product becomes more widely-known and as the design of new dwellings evolves. They are now an established means of providing fire protection barriers alongside, and in competition with, other forms of such barriers such as fire doors, fire-rated walls and fire-rated glazing, and as such they should be subject to the same VAT treatment.

33. The Appellant acknowledges that some concession has been made by the Commissioners (as clarified by Mr Priest), but that such concession is open to a number of objections. In the first place it implicitly categorises fire curtains as a specialist product – used only in situations where other forms of barrier are not possible. That is to disregard the fact that fire curtains are increasingly used as a matter of choice by developers and builders, and not just as a matter of need. Secondly, it can lead to confusion, especially in circumstances where in some parts of a dwelling the design requires a fire curtain, but in other parts there is not that requirement – in such a case the developer may well wish to install fire curtains throughout the dwelling, for the sake of consistency, and the question then arises as to whether part of the total installation is zero-rated and part standard-rated.

34. Mr Tucker referred to recent developments in the building industry such as the 2011 BSI standard dealing with fire safety, the approach of the Building Regulations, and the views of the National House Building Council (who accept fire curtains as a like for like product with fire doors and other fire barrier products) and the readiness of local authorities to categorise fire curtains as standard fire protection barriers, as pointing to the penetration of the market by fire curtains, and their position as standard products alongside other forms of barrier. In his view it was right to describe fire curtains as "goods of a description ordinarily incorporated by builders" into a dwelling which was required to have fire-resisting barriers.

35. Mr Priest for the Commissioners took us to the relevant legislation and to the cases on the definition of "building materials". The position of the Commissioners, in the light of the case law, is that where the evidence is that goods are in the ordinary way incorporated into a building of a particular description, they will comprise "building materials"; but if they are specialist goods – that is, they are incorporated only to meet special conditions, or upon special request, then they do not meet the test. The case of *Customs & Excise Commissioners v Smitmit Design Centre Ltd; Customs & Excise Commissioners v Sharp's Bedroom Design Ltd* [1982] STC 525, is authority for the proposition that "ordinarily" means "commonly" or "usually".

36. Mr Priest pointed out that it is necessary to identify a description of building to determine whether goods are ordinarily incorporated by builders in buildings of that description, that is, to identify a generic type of building, rather than a specific building – if the category of building is too narrow (such as, "buildings in which fire curtains are installed") the test of whether or not goods are ordinarily installed in such a building becomes meaningless or at best self-serving. He proposed that the correct test in the present case was to take all dwellings as the relevant buildings benchmark – it could not be said that fire curtains are ordinarily incorporated in such buildings. He accepted that the Tribunal case of *Rainbow Pools London Limited* (VAT Decision 20800), and cited by the Appellant, had identified, in a case concerning electrically-powered retractable swimming pool covers, "luxury dwelling houses" as the appropriate description of building when testing whether such pool covers were ordinarily incorporated into a building, but in the view of the Commissioners that was too narrow a description, even in the circumstances of that case.

37. Mr Priest referred us to the Tribunal decision in the case of *John Price* [2010] UKFTT 634 (TC) where roller blinds were considered to be goods of a description ordinarily incorporated by builders in a dwelling house, on the basis that there was nothing "extraordinary" about their incorporation into a dwelling house by builders. In contrast, in the Tribunal case of *Tom Perry* (VAT Decision 19428), electric blinds (both internal and external) which were operated automatically according to weather conditions and were installed in a steel and glass low energy consumption "eco house" were considered by the Tribunal to be specialist products which could not be said to be ordinarily incorporated into a dwelling. (In the *Tom Perry* case the Tribunal held that it was necessary to look at the whole spectrum of dwelling houses in applying the "ordinarily incorporated" test, not just dwellings of a particular kind, such as those built to rigorous energy-saving specifications.)

38. The Commissioners acknowledge that circumstances may change, and that what was once incorporated into a building as a specialist product may become over time something which is incorporated as a standard or routine matter, and they are open to persuasion on the point. In the present appeal they feel that they do not have the evidence to establish to their satisfaction that fire curtains have yet attained that status. This was the difficulty faced by the taxpayer in the Tribunal case of *Michael McCarthy and Georgina McCarthy T/A Croft Homes* (VAT Decision 16789), where there was no evidence of the practice of builders generally in relation to the installation of electric gates and the Tribunal was unable to conclude that such gates were goods ordinarily incorporated by builders in a building.

Decision

39. We have to decide whether the Appellant's fire curtain products, designed for the domestic market, are "building materials" as defined in Notes (22) and (23) of Group 5 of Schedule 8 to VATA 1994. That is the case if it can be said, in relation to "any description of building", that they are "goods of a description ordinarily incorporated by builder in a building of that description". Certain categories of goods which would otherwise fall within that general statement as to what constitutes "building materials" are nevertheless expressly excluded. With one possible

exception (which we deal with below) we are not concerned in this case with those express exclusions.

40. The Appellant's fire curtains are installed in a completed, or near-completed, building, rather than built into the fabric of the building, but Note (23) tells us that for the purposes of Note (22) "the incorporation of goods in a building includes their installation as fittings". Accordingly they are to be regarded as "incorporated by a builder in a building".

41. We agree with Mr Priest that the first issue we have to consider is what is the "description of building" which in the circumstances of this case provides the benchmark when testing whether the goods are ordinarily incorporated into building of that kind. The building has to be a dwelling, since the zero-rating (and reduced-rating) rules are concerned with buildings designed as a dwelling.

42. The Commissioners argue that we should take as such benchmark all dwellings, and that on that test the Appellant fails since it cannot be said that fire curtains are ordinarily incorporated into dwellings taken as a single categorisation or class. They adopt the approach of the Tribunal in the *Tom Perry* case (the test is applied by reference to all dwellings, not just specialist low-energy eco houses) and reject the approach of the Tribunal in the *Rainbow Pools* case (for a luxury product such as a swimming pool cover, the test is applied by reference to "luxury dwellings", not the entire class of dwellings).

43. The evidence before us is that the "normal" one and two storey single-family dwelling is not required to have any fire protection barriers (unless there is an integrated garage with direct access to the living quarters). Single-family dwellings of three or more storeys, and buildings with multiple dwellings will, in different degrees, require fire protection barriers.

44. It seems clear to us that Note (22), in context, anticipates that for its purposes of providing a definition there will be some classification of dwellings – that the definition of "building materials" has to be applied to particular types or description of dwelling, as otherwise (since as a definition it is concerned only with dwellings) it would simply provide: "'Building materials' means goods of a description ordinarily incorporated by builders in a dwelling". To take an obvious example, what might ordinarily be incorporated in a block of flats (a lift, say) might not ordinarily be incorporated in a two-storey house. Note (22), as drafted, permits the "ordinarily incorporated" test to be applied in relation to particular goods to those types or description of dwelling for which those goods are relevant. A lift incorporated into a block of flats satisfies the test if the benchmark is blocks of flats (which seems an entirely sensible outcome), but may not do so if the benchmark is all dwellings of whatever kind (which does not seem sensible). This line of reasoning led the Tribunal in the *Rainbow Pools* case to determine that in the case of retractable covers for indoor swimming pools the benchmark description of building for the purpose of applying the "ordinarily incorporated" test should be luxury high-rise flats and houses. We agree with that approach.

45. In relation to fire protection goods, a high proportion of dwellings – perhaps even the majority – do not require fire barriers. Therefore, if one uses the benchmark of *all* dwellings it is questionable whether any kind of fire barrier satisfies the "ordinarily incorporated" test. That must call into question whether it is the right benchmark. It would seem in any event that it is not the benchmark that in practice the Commissioners use, since they accept that certain fire barrier products do in fact meet the "ordinarily incorporated" test. Further, implicit in the concession which the Commissioners are prepared to allow to the Appellant in this case is an acceptance that the benchmark description of building in the case of fire curtains is a building in which a fire curtain must be incorporated, consequent upon the design or planning status of the building, in order to meet legal requirements.

46. We consider that the expression "any description of building" must in any particular case require a type or category of building to be identified which, in its nature and scope, is relevant to the context presented by the nature of the particular goods which are under consideration as "building materials" – lifts must be considered in relation to a description of building where means of access to upper storeys may be a relevant feature; retractable pool covers must be considered in relation to a description of building where indoor swimming pools may be a relevant feature. In the case of fire protection barriers the appropriate description of building is those types of single-family dwellings and multiple-dwelling buildings either in which fire protection measures are required by law to be installed or in which it may be considered prudent to install such measures.

47. If the question is posed whether fire doors are ordinarily incorporated in a building that falls within that description the Commissioners say that it is. But they are not yet convinced that the Appellant's fire curtains can be so regarded.

48. As Mr Priest reminded us, the expression "ordinarily incorporated by builders" was judicially considered in the *Smitmit Design Centre* case (at that time the relevant expression in the corresponding zero rating provision was "articles of a kind ordinarily installed by builders as fixtures", but nothing turns on the small difference in the language for the purposes we have to consider). In that case Glidewell J disagreed with an earlier purchase tax case which equated the word "ordinarily" with "invariably". He said:

> "'Ordinarily' means in the ordinary way; other synonyms would be 'commonly' or perhaps 'usually.'"

49. We do not think that in suggesting the synonym "usually" the judge had in mind the sense of "more often than not" – it seems to us that something may be done "ordinarily", or "in the ordinary way", or "commonly" without necessarily being done more than 50 per cent of the time or in more than 50 per cent of the circumstances in which it might be done.

50. However, a prior question is to determine what it is that must be subjected to the "ordinarily incorporated" test, and it is in this regard that we consider the Commissioners to be mistaken in reaching their decision in this case. Note (22) defines "building materials" to mean "*goods of a description* ordinarily incorporated

by builders in a building" of the relevant description. What in cases such as this are the "goods of a description" to which we need to apply the test?

51. In circumstances where a number of products fulfil the same or a similar function, we consider that together they comprise "goods of a description", so that if, taken as a class of goods, they can be said to be ordinarily incorporated in a building, every product within that class, regardless of how frequently it individually is actually incorporated in a building, will satisfy that test. This approach is not only consistent with the language of Note (22), but is in accord with common sense and practicality. If there are different products which fulfil the same function, but by different means, so that they are in competition, there are obvious difficulties and distortions which result if the VAT treatment of Product A is different from that of Product B because Product A has a smaller market share than Product B, when it might be said that Product B is ordinarily incorporated in a building whereas Product A is not.

52. This approach was explained in the Tribunal decision in *F Booker (Builders & Contractors) Ltd v Customs & Excise Commissioners* [1977] VATTR 203. The point at issue in the case was whether gas fires installed in dwellings were entitled to be zero-rated on the grounds that they were "articles of a kind ordinarily installed by builders as fixtures". The Commissioners argued that they were not so ordinarily installed because they were not as commonly installed as other types of heating. The Tribunal considered that the question was whether heating is, or forms of heating are, ordinarily installed by builders as fixtures, and if so, then all forms of heating installation should be so treated:

> "...this tribunal considers that it is a wrong approach to look at any article in its specific capacity, that is to say to look at it either as a gas fire or as a central heating unit or as a solid fuel heating arrangement. What has to be looked at, in our view, for the purposes of the Statutory Instrument is the generic description of a heating installation."

53. That approach was specifically approved of and adopted by Glidewell J in the *Smitmit Design Centre* case at p 532. It is true that the predecessor legislation considered by both the *F Booker* case and the *Smitmit Design Centre* case is in terms of "articles of a kind" ordinarily installed by builders, and not "goods of a description" ordinarily incorporated by builders, but the approach, and the reasoning for it, holds good, in our view, for the language now found in Note (22).

54. Applying this approach, we consider that the "goods of a description" which have to satisfy the "ordinarily incorporated" test are goods which satisfy the generic description of fire barrier products. The question then is whether goods which fit that description are ordinarily incorporated by builders in a building which falls within the type or description of building which is relevant to that question, namely those types of dwellings in which, because of their design or planning status, it is prudent or required to install fire protection barriers. The answer to that question is clearly in the affirmative – when the question is posed in this manner it seems the Commissioners do not quibble with that answer, since it accords with their practice of treating supplies of most forms of fire barrier as zero-rated or reduced-rated supplies.

55. The next question for the Appellant is whether its products are goods which satisfy the generic description of fire barrier products. They clearly do. Their sole function is to provide a fire-retarding barrier for the same purpose and to the same effect as other fire barrier products such as fire doors. The fact that they function differently from other fire barriers is irrelevant. It is also irrelevant that they may be used either in substitution for other fire barriers or in circumstances where other fire barriers are not possible.

56. All the evidence before us supports that conclusion including, most significantly, the terms of the BSI Code of Practice and the letter from The Royal Borough of Kensington and Chelsea. It is clear that the building industry, and those responsible for setting the relevant regulations and standards or for ensuring compliance with those regulations and standards, regard fire curtains used for both commercial and domestic buildings as an acceptable method of providing fire safety by means of barriers.

57. That, in our judgment, determines the matter in favour of the Appellant.

58. We would add that our approach is consistent with the published view of the Commissioners: although our attention was not drawn to this, we note that in their VAT manual on Construction (see VCONST 13420) in the context of heating systems and lighting systems they state: "However, to allow for changes in technology and consumer preference, the test explained above [i.e. the "ordinarily incorporated" test] is applied to the generic description of the article in issue". That approach reflects the case law, as we have explained, and is not to be limited to heating and lighting systems.

59. If, nevertheless, we are wrong in our approach, and the proper question is whether fire curtains themselves are the "goods of a description" which have to satisfy the "ordinarily incorporated" test in order to qualify for zero-rating treatment, then we find in favour of the Appellant on this basis also.

60. We have referred to the evidence as to building standards and requirements, and the view of a leading local authority that the use of fire curtains is sufficiently common to require external accreditation in order to reduce the compliance-checking burden on its officers. That establishes that fire curtains are an established and fully-accepted method of providing fire safety and fire protection in dwellings in which such features are required to be incorporated or where it may be prudent to incorporate them. That demonstrates that they are incorporated "in the ordinary way" or "commonly" in dwellings of the relevant description. That is so even if they have only a relatively small part of the total market for fire barriers in dwellings (we had no evidence on the point) and even if they are principally used in circumstances where other fire barriers cannot be used for any reason (again, we had no evidence on this point). They are one of a range of fire barrier products a builder may use in the ordinary way, in a way which is not extraordinary or out of the ordinary, when building a single dwelling or multiple dwellings which have to be built to the required fire safety standard. A builder who chooses fire curtains over other fire barrier products does not, at least as to function, purpose, effect and regulatory compliance,

have to make special justification of that choice. In that sense fire curtains can fairly be regarded as ordinarily incorporated by builders in a building of the relevant description.

61. Finally, we need to make brief reference to the question of whether fire curtains are an "electrical appliance": for Note (22) purposes an electrical appliance cannot be "building materials", unless it is an appliance which is (in the context relevant to this case) fire safety equipment. We do not consider that fire curtains are an "electrical appliance". They are held in the raised position by contact points which rely on an electric current, but they are specifically designed so that when that current is broken (whether by a fire alarm or failure of the power supply) the barrier falls into place without the use of any electricity-powered mechanism (simply by the force of gravity). A fire curtain is installed with an electric motor, but that is for raising the curtain after it has been activated. Since a fire curtain operates in its essential function without electricity we do not consider that it is an electrical appliance.

62. For these reasons we allow the Appellant's appeal.

Right to apply for permission to appeal

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

EDWARD SADLER
TRIBUNAL JUDGE

RELEASE DATE: 27 November 2012