TC04107

Appeal number: TC/2013/04802

VAT – alterations to protected buildings – reconstruction of detached garage at the same time as of reconstruction of house – whether garage part of protected building; whether earlier works constituted a substantial reconstruction.

FIRST-TIER TRIBUNAL
TAX CHAMBER

A D TREVIVIAN **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
MR JULIAN STAFFORD

Sitting in public in Truro on 30 July 2014 with later written submissions

Ian Moores of Lang Bennetts for the Appellant

Martin Priest for the Respondents

DECISION

1. This decision incorporates much of the text of an earlier document in which we made directions in relation to the provision of further evidence and submissions.

Background

2. Section 30 and Group 6 Schedule 8 VAT Act 1994 provide for the zero rating of certain supplies in relation to listed buildings.

3. Killiganoon Manor is a listed building. It was substantially altered by the present owner (Mr Bolshaw) in the period in and after 2010. This appeal relates to whether supplies of goods and services made by Mr Trevivian (the building contractor) in the course of the demolition and reconstruction of a garage at Killiganoon Manor at the same time as the works on the house were eligible for the benefit of that zero rating.

The facts

4. There was no dispute about the following facts.

5. Killiganoon Manor is a listed building. It has a Georgian part to which a Victorian wing had been added. In the 1980s a large amount of work was carried out on the house. In 2010 the present owner, Christopher Bolshaw, obtained listed building consent for a major reconstruction of the building. Roofs, windows, floors and walls were replaced and a new wing added in a style to match the Victorian wing.

6. As part of these works a garage (the "old garage"), which was about 4 yards from the house, was demolished and replaced by a building which may house more than one car and which includes a log store. This building we call the "replacement garage".

7. At the hearing Mr Bolshaw told us that it was possible that the old garage had been built at the time of the 1980s works but without making further enquiries he could not be sure. After the hearing he provided further details of the works carried out in the 1980s. We consider this further information later in this decision.

The relevant provisions of Group 6.

8. Item 2 of Group 6 specifies the following supplies:

> 2. The supply, in the course of an approved alteration of a protected building, of any services other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity.

9. The supplies at issue in this appeal were, we understood, agreed not to include those of architects etc. The only question was whether the supply made in providing the new garage was:

"in the course of an approved alteration of a protected building".

10. The Notes to Group 6 provide so far as relevant:

> (1) "Protected building" means a building which is designed to remain as or become a dwelling or number of dwellings (as defined in Note (2) below) ... which ... is
>
> (a) a listed building ...
>
> (2) A building is designed to remain as or become a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied -
>
> (a) the dwelling consists of self-contained living accommodation;
>
> (b) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;
>
> (c) the separate use, or disposal of the dwelling is not prohibited by the terms of any covenant, statutory planning consent or similar provision,
>
> and includes a garage (occupied together with the dwelling) either constructed at the same time as the building or where the building has been substantially reconstructed at the same time as that reconstruction.
>
> …
>
> (6) "Approved alteration" means -
>
> (a) in the case of [certain ecclesiastical buildings], any works of alteration,
>
> (b) in the case of [a scheduled monument], works of alteration;
>
> (c) in any other case, works of alteration which may not, ... be carried out unless authorised under ...
>
> (i) Part I of the Planning (Listed Buildings and Conservation Areas) Act 1990 ...
>
> (10) For the purposes of Item 2 the construction of a building separate from, but in the curtilage of, a protected building does not constitute an alteration of the protected building.

The parties' arguments.

11. We must pay tribute to the clarity with which Mr Moores and Mr Priest set out their arguments on legislation which was far from clear.

12. The core of the appellant’s argument was that because the replacement garage was constructed at the same time as a substantial reconstruction of the house the tailpiece of Note (2) had the effect of defining the "protected building" to include the replacement garage so that its construction was part of the approved alteration of that protected building. We shall address the steps in this argument below.

13. Mr Priest says that Item 2 zero rates the alteration of a protected building, but that in order to know whether there is an alteration you need to know what the protected building is which is being altered. Note 2 he says tells the reader the extent of the protected building whose alteration may be zero rated: it describes the extent of the building which is being altered. Its description thus does not encompass the effect of the alterations under consideration: unless the old garage was part of the "protected building" before the alteration started the alteration of the old garage could not fall within the Item 2. Mr Priest also relied on Note (10). Finally, Mr Priest argued that, even if the garage were deemed part of the protected building, the demolition and reconstruction did not amount to an alteration as construction and alteration were mutually exclusive.

Discussion

14. Mr Moores makes his argument by three propositions.

15. **Proposition 1**. In order to benefit from zero rating the supply must:

(1) be in the course of an approved alteration

(2) be of a protected building, and

(3) exclude architect's services etc.

16. We agree with Mr Moores' summary. There was no suggestion that condition (3) was not satisfied.

17. **Proposition 2.** Note (6) defines "approved alteration" as works for which listed building consent was required and given. Listed building consent was given for the reconstruction and extension of the house and the garage. The works were therefore an "approved alteration". Therefore the first condition is satisfied.

18. We observe, first, that for there to be an approved alteration there has first to be an alteration, and second, that Item 2 applies to an approved alteration <u>of</u> a protected building. An approved alteration is any alteration which needs and obtains approval, but the alteration falls within item 2 only if it is <u>of</u> a protected building.

19. Thus for example approved works of alteration to the curtilage of a protected building would not fall within Item 2 unless that part of the curtilage was treated as part of the protected building for the purposes of Group 6. If the relevant part of the curtilage was not so treated those works would be approved alterations <u>relating to</u> a protected building but would not be approved alterations <u>of</u> a protected building. Thus it is only if the garage falls to be treated as part of the protected building that an approved alteration to it is zero rated.

20. **Proposition 3**. Note (1) defines a protected building as a building which satisfies the conditions (a) that it is designed to remain as or become a dwelling or a number of dwellings (as defined in Note (2)), and (b) that it is listed. There was no dispute that Killiganoon Manor is listed. The only question is whether it is designed to remain or become a dwelling as that phrase is expanded in Note (2).

21. There was no dispute, he said, that each of the conditions (a), (b) and (c) of Note (2) were satisfied in relation to the house. The effect of the tailpiece of Note (2) was that the garage (which would be occupied with the dwelling house) was included in the term "protected building" as part of the protected building, and because alterations to it also required, and were given, consent, the alterations to the garage were part of an approved alteration of the protected building.

22. We observe that Note (2) contains a change of gear: it moves from requirements relating to the design of the building to requirements in relation to the dwelling. The building is required by Note (1) to be designed as a dwelling, but it is the dwelling which must satisfy the conditions in Note (2). The tailpiece addresses whether or not such a building may include a garage.

23. It is helpful at this stage to repeat the tailpiece to Note (2):

> "and includes a garage (occupied together with the dwelling) either constructed at the same time as the building or where the building has been substantially reconstructed at the same time as that reconstruction"

24. Thus, says Mr Moores, a garage (whether attached to a building or otherwise) is treated as part of the protected building if either:

(1) it was constructed at the same time as the dwelling, or

(2) where there has been a substantial reconstruction of the building, it is a garage instructed the same time as that reconstruction.

25. In this case the dwelling - the house - was constructed many years before the garage. Thus the first alternative does not apply.

26. In relation to the second alternative Mr Priest accepted that the 2010 works were a substantial reconstruction of the building.

27. Mr Moores says that the second condition should be read as providing that a garage qualifies as part of the "protected building" if it is constructed at the same time as the substantial reconstruction. The 2010 reconstruction was a substantial reconstruction and the garage was constructed at the same time. Thus the garage forms part of the protected building and its rebuilding is an alteration of that protected building.

28. We do not read this tailpiece in the same way. It seems to us that in relation to a substantial reconstruction, it relates to a substantial reconstruction of the building which occurred prior to the alteration which is being considered for zero rating. That is for the following reasons.

29. First, Item 2 applies to the alteration of something. As we have noted already an approved alteration is an alteration which has been approved. There must be works of alteration before the provision can bite. We agree with Mr Priest that "alteration" presupposes that you know what the thing is which is being altered. The words

"alteration of" indicate that what follows them has already been identified and is not dependent on the alteration.

30. Second, the words "has been" in the tailpiece to Note (2) indicate something which has happened in the past: in other words before the supply under consideration. The garage is included by these words if it is a

> "garage constructed,…where the building has been substantially reconstructed, at the same time as the reconstruction"

and this is not the same as:

> a garage which is constructed at the same time as a substantial reconstruction.

The legislature chose different words with a different meaning.

31. We therefore conclude that the 2010 substantial reconstruction does not cause the garage to be treated as part of the protected building for the purposes of determining whether the approved works of alteration to the garage were works of alteration to the protected building.

32. We were referred to the case of David Leslie Wilson (VAT Decisions archive 15803) where the Tribunal at para 15 appeared to have taken the view that the legislation was referring to the present tense and that one did look at the works to be undertaken in reaching a conclusion on whether the garage formed part of a listed building. For the reasons stated above we decline to follow this interpretation.

Note (10).

33. In HMRC's skeleton argument reliance was placed on Note (10) which provides that the construction of a building separate from, but within the curtilage of, a protected building does not constitute an alteration of the protected building.

34. Mr Moores says that if by Note (2) the garage is already part of the "protected building", Note (10) can have no application because the garage is not separate from the protected building.

35. We agree. Note (10) applies only to a building "separate from" the protected building; something which is "included" in the "protected building" by Note (2) cannot be separate from it.

36. Thus we conclude that in summary the legislation has the following effects in relation to a listed house.

> (1) House built with integral garage.
>
> In relation to any subsequent alteration the protected building includes the garage and an approved alteration to the garage would qualify within Item 2.
>
> (2) House built without garage. Attached garage added to the house.

The garage is an alteration to the protected building. Its construction falls within Item 2. (See also *Ian Owen* TC 03384). Later alterations to the garage are alterations to the protected building.

(3) House built with detached garage at the same time as house.

In relation to a subsequent alteration the garage is part of the protected building (Note (2) and an approved alteration to the garage would fall within Item 2.

(4) House built without garage. Detached garage added subsequently as a self-contained work.

The addition of the garage is not an alteration of the building (Note 10). The garage does not form part of the protected building. Any later alteration to the house and garage is not within Item 2 so far as concerns the works on the garage.

(5) House built without garage. Detached garage added as part of substantial reconstruction.

The addition of the garage is not itself an alteration within item 2 (because of Note (10)). In relation to any subsequent alteration, the protected building includes the garage.

The 1980s reconstruction

37. We have explained that Mr Bolshaw told us that substantial works had been carried out on the house in the 1980s, and that these works may have included the building of the garage.

38. If (i) these works were a "substantial reconstruction" of the then protected building for the purposes of Group 6, and (ii) the old garage was built at the same time as that reconstruction the position would be as follows:

(1) by the tailpiece of Note (2) the old garage would, for the purposes of determining whether there was an approved alteration of a protected building at the time of the 2010 works, be included in the term "protected building";

(2) Note (10) would not have effect to change this particular deeming. It provides that reconstruction of a separate building is not an "alteration"; it does not affect the inclusion in the definition of the protected building of the (separate) garage;

(3) the approved alteration in 2010 of the "protected building" (as determined in 2010 prior to the alteration) would include the alteration of the garage;

(4) Note (10) would not cause an alteration of the garage to fall outside Item 2 because it applies only to a building "separate from" the protected building, and the garage was part of and not separate from the protected building.

39. In this case however the old garage was demolished and the replacement garage built. Thus the alteration consisted of demolition and reconstruction. The construction was of a new garage on the footings of the old garage. The questions therefore arise as to (i) whether such works are an “alteration”, and (ii) whether this means that because

the old garage ceased to exist it then ceased to be part of the "protected building" and the construction of the replacement garage fell within Note (10) and therefore outside Item 2.

40. In relation to the first question Mr Priest drew our attention to Note (18) to Group 5 which, in the context of whether the construction of a building included the conversion of an existing building, provided that a building ceased to be an existing building when it was demolished to the ground. That Note he said did not of course apply to Group 6 but he suggested that it was helpful guidance.

41. We concluded however that the demolition and reconstruction of the garage could properly be called an alteration of the protected building because the protected building was more than the garage: by 2010, on the assumptions above, the protected building would have been the house and the garage and the demolition and reconstruction of the garage would have been an alteration to the whole.

42. In relation to the second issue, it seems to us that if the works on the garage could properly be called an “alteration” of a protected building Note (10) should not apply in this case. That was because (i) that Note referred only to the “construction” of a building and not to the demolition and construction which would constitute the alteration, (ii) Note (10) provides a general rule whereas the effect of Note (2) is specific to garages, and the specific should prevail over the general; and (iii) such treatment would be broadly consistent with the treatment of garages which are ancillary to a house.

43. As a result we concluded that if (1) the old garage had been constructed at the time of the 1980s works and (2) the 1980s works were a “substantial reconstruction” for the purposes of Group 6 (see Note (5), the works to the garage in 2010 would fall within Item 2. We appreciate that this interpretation is not without practical difficulties as the VAT treatment of works in (say) 2010 would effectively be dependent on something which may have occurred decades before, possibly even before the introduction of VAT. It would not therefore have occurred to the person constructing a garage at that time that full documentary records would need to be retained to enable the (possibly subsequent) owner to satisfy the conditions of Note 2 should the garage be altered at some non-specific future time. But the same issue arises in relation to whether a garage was constructed at the same time as the construction of the house and the difficulties do not dissuade us from the interpretation set out in paragraphs 27-30 above.

44. We directed that the Appellant could produce further evidence of the 1980s works, and that HMRC should have the opportunity to comment on anything so provided.

45. The Appellant provided copies of the listed building consents and planning applications made in relation to the property from 1959 and a copy of a letter from Lilly Lewarne Practice Limited, Chartered Architects, setting out their opinion on the nature and timing of the 1980s works.

46. The planning record shows that in 1988 listed building consent was sought, and planning permission application was made, for each of two sets of works:

> (1) "Demolition of existing outbuildings and erection of enclosed recreation area to incorporate swimming pool, jacuzzi, sauna and exercise area" (the "recreation area works");
>
> (2) "Demolition of existing garage, pumphouse, workshop and outside toilet and erection of new triple garage".

47. The first set of applications was made in February and the second in March. Lilly Lewarne say that the use of the same architects with the same project references, the same applicant, evidence of the use of similar materials, and the contemporaneous building control approval all indicate that these applications, although made separately, were part of the same project. We accept this conclusion.

48. Lilly Lewarne also conclude that the first part of the project, the demolitions and erection of a recreation area, constituted a substantial reconstruction (and alteration) of Killiganoon Manor. The new garage was, they say, therefore constructed at the same time as that reconstruction.

49. However, whether or not the works were a substantial reconstruction is a question of law to be determined by the tribunal rather than a matter of fact to which the opinion of experts would be relevant.

50. In his submissions in response, Mr Priest suggests that the meaning of 'substantial reconstruction' is affected by the provisions of Note (4) to Group 6 Sch 8. As he points out, this Note was amended by FA 2012 in relation to supplies made after 1 October 2012. The supplies at issue in this appeal were made in and before the period ending 31 August 2012, and accordingly their treatment is determined by the terms of that Note before the alteration. Before the alteration the note read:

> "(4) For the purposes of item 1, a protected building shall not be regarded as substantially reconstructed unless the reconstruction is such that at least one of the following conditions is fulfilled when the reconstruction is completed:
>
> (a) that, of the works carried out to effect the reconstruction, at least three fifths, measured by reference to cost, are of such a nature that the supply of services (other than excluded services), materials and other items to carry out the works would, if supplied by a taxable person, be within item 2 or item 3 of this Group; and
>
> (b) that the reconstructed building incorporates no more of the original building (that is to say, the building as it was before the reconstruction began) than the external walls, together with other external features of architectural or historic interest;
>
> And in paragraph (a) above "excluded services" means the services of an architect, surveyor or other person acting as a consultant or in a supervisory capacity.".

51. Mr Priest accepts that the old garage was constructed in the 1980s as part of the works for which consent was required and obtained but says that these works were not a substantial reconstruction as defined within Group 6. He says that there is no evidence that 3/5th of the works then undertaken were approved alterations and that the applications contain no indication that all that remained of the old building after the 1980s works were the walls and special features.

52. The problem with this argument lies in the opening words of Note (6): "For the purposes of item 1". The issue in this appeal is whether the supplies fall within item 2. The specific limitation of Note (6) to Item 1 means that it cannot have been intended to apply also for the purposes of item 2.

53. But Mr Priest also presses his case by reference to the nature of the works described in the planning permission applications. He says:

> (1) that the "Demolition of existing outbuildings and erection of enclosed recreation area to incorporate swimming pool, jacuzzi, sauna and exercise area", although it might well be an extensive approved alteration to Killiganoon Manor, did not involve any reconstruction of Killiganoon manor itself; and
>
> (2) that the "Demolition of existing garage, pumphouse, workshop and outside toilet and erection of new triple garage" likewise involved no reconstruction of Killiganoon manor.

54. "Reconstruction" he says must involve the reinstatement in some way of something which was there before; the addition of an extension, no matter how large, is not a reinstatement. He cites the decision in *Cheltenham Ladies College* in which the tribunal said at [50] that "Construction of new extensions as part of the project are not works of reconstruction (as this was not building something which was there before)"

55. We agree with Mr Priest. In order for there to be a substantial reconstruction, there must be a *re*construction: something must be taken away and then put back. It does not seem to us that the works described in that part of the project represented by the first set of planning applications (for the recreation area) involves any reconstruction of Killiganoon manor. It involved the demolition of outbuildings and their replacement, but appeared to leave the dwelling unaffected. And even though the attachment of the new area to Killiganoon manor itself may well have substantially altered the aspect and amenity of the house, it was not a reconstruction of the house.

56. We accept that the demolition of the garage and the building of the triple garage could be described as the reconstruction of the garage, but the garage was not part of Killigoon manor and simply lay within its curtilage.

57. We therefore conclude that the building of the garage was not part of a 1980s substantial reconstruction and accordingly that the 2010 works did not fall within Item 2.

Apportionment.

58. The replacement garage included a log store. If we had accepted Mr Moores' argument that the 2010 reconstruction meant that the garage was part of the protected building, we would have directed some apportionment of the supply between the log store and the garage. That would have been because only the garages would have been drawn into the "protected building" by Note (2) and the log store would not have been. Thus Item 2 could apply only to the works on the reconstruction of the garage.

59. The same reasoning would not have applied if the old garage was already, by virtue of the 1980s reconstruction, part of the protected building. The replacement of the garage by a garage and a log store would have been an alteration of the protected building and would have fallen within Item 2. In this context we observe that the log store would be occupied with the house; had it been a space which would not have been so occupied, it would have been necessary to consider whether the works were truly an alteration of a building designed to remain a dwelling, rather than an addition to such a building.

Conclusion

60. We dismiss the appeal.

Rights of Appeal

61. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 6 November 2014