[2016] UKFTT 0620 (TC)

TC05356

Appeal number: TC/2015/03449

VAT – zero- rating –whether garden wall part of building designed as a dwelling-whether building designed as a dwelling being constructed- VATA 1994 schedule 8 group 5 Note 2(d)-requirement for statutory planning consent- time when Note 2(d) must be satisfied-retrospective planning permission granted after the date of supply.

FIRST-TIER TRIBUNAL
TAX CHAMBER

CAVENDISH GREEN LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER
DR CAROLINE SMALL

Sitting in public at Fox Court, London on 20 May 2016

Mr Christiaan Zwart, Counsel for the Appellant

Mr Amadul Qureshi, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. The question in this case is whether the supply constituted by the sale of a development site in the St George's Hill Estate in Weybridge, Surry is to be zero-rated for VAT purposes.

2. Specifically, it is an appeal against a Notice of Assessment in the sum of £12,851.98 issued against the Appellant for the VAT period ending November 2012. The Appellant had claimed input tax of this amount on their VAT return for the period. HMRC took the view that the deduction was not due, and issued the assessment on 29 April 2015. The Appellants appealed on 28 May 2015.

3. The case raises two important issues. First, could the Appellant be said to be "constructing a building designed as a dwelling" when, at the time of sale, the only part of the development which had been constructed was a garden wall.

4. Secondly, if that was the case, was the condition in Note 2(d) to Group 5 in Schedule 8 Value Added Tax Act 1994 (Note 2(d)) satisfied. That is, could it be said that "statutory planning consent has been granted in respect of that dwelling and its construction…has been carried out in accordance with that consent"?

5. The second issue was not argued at the hearing, but in accordance with Directions made after the hearing, the parties made written submissions on the point.

The facts

6. The Appellant is a development company and had carried out other developments on the St George's Hill Estate. It acquired a property on the estate known as "Glenburn" with a view to developing a large house on the site on a speculative basis.

7. St George's Hill was developed in the early 20th century as a high quality residential estate. The St George's Hill, Weybridge, Estate Act 1990 contains provisions which are intended to maintain the quality and amenity of the area. It provides for the establishment of the St George's Hill Residents Association Limited (the Association) and it confers powers on the Association, in addition to those which the local authority has under the planning legislation, to control development on the estate.

8. Residents are obliged to seek the Association's prior written approval before carrying out development at their property and are statutorily obliged to comply with the provisions of the 1990 Act. The Association issued planning guidelines in respect of its powers under the 1990 Act on 17 January 2006 which covered, among other things, the distance of a property from the site boundary. Paragraph 3.7.2 provides "In cases where the Plot Ratio is under 15% [which was the case here], the

Association may, at its discretion, reduce the distance from the completed building to the plot boundary to a minimum of 3.66 metres.

9. The Glenburn property acquired by the Appellant (Old Glenburn) was semi-detached. That is, it was attached to another house, "Bray Lodge". The Appellant wished to demolish Old Glenburn and to construct a new, detached, five bedroom house with a triple garage and staff flat on the site. Under the terms of the Association guidelines, that would mean that the new Glenburn property would have to be at least 3.66 metres from the boundary with Bray Lodge.

10. On 1 September 2011 Igloo Developments (South) Limited (Igloo) applied for planning permission to demolish Old Glenburn and construct the new, detached house on the site. Igloo were the main contractors to the Appellant in relation to the development and the two companies were under common control.

11. On 25 November 2011, one Clemantine Shipp, who had contracted to purchase Glenburn, and the owners of Bray Lodge entered into an agreement (conditional on the grant of planning permission) by which the owner of Glenburn would:

- Demolish Old Glenburn
- Make good the exposed gable end of Bray Lodge
- Cede a strip of land 3.6 metres wide to the owners of Bray Lodge (to maintain the minimum distance to the boundary required by the Association) and
- Build a new boundary wall between the two properties.

12. The Association raised no objection to the planning application.

13. On 30 November 2011, Elmbridge Borough Council granted planning permission (the first permission) for the development.

14. The Appellant completed the purchase of Glenburn for £2,050,000 on 24 January 2012.

15. We heard witness evidence from Mr Chris Pettie, a director of the Appellant and Igloo about the construction works and we also considered an extensive bundle of documents provided by the parties.

16. Over the winter of 2011/12, Old Glenburn and Bray Lodge were separated, the demolition being carried out very carefully in order to salvage the bricks from Old Glenburn which were to be used in the new boundary wall. The gable end of Bray Lodge was made good.

17. An email from Marbank Construction Limited (Marbank), which was the Appellant's building contractor, dated 8 December 2014 stated that "whilst I cannot find photographs to demonstrate the fact, I have established that the foundations and brickwork on Glenburn were commenced at the end of February 2012".

18. Mr Pettie gave evidence that the construction of the gable wall at Bray Lodge and the work on the boundary wall were proceeding at the same time, all under the

first permission. The foundations were dug and the footings poured. An Initial Notice was given to the local authority on 9 February 2012. This is a notice of commencement of works which would allow the building control authorities to inspect the works, for example to check that the foundations were adequate.

19. The Appellant's original plan was to develop Glenburn on a speculative basis. However, about this time, a Mr Anstead approached the Appellant with a view to buying the property for his own occupation. Mr Anstead wanted a different house from that which was described in the first permission. In particular, he did not want the staff flat, but he did want an integral swimming pool, a basement garage and a large and imposing boundary wall between Glenburn and Bray Lodge.

20. On 8 March 2012 the Appellant entered into a contract for the sale of Glenburn with Mr Anstead for £4.5 million. The contract contains some contradictory provisions. It defines a term "Building" as meaning "the dwellinghouse and garaging now in the course of construction by the *Buyer* on the Property following the completion of this purchase" (emphasis added). There does not appear to be a further reference to "Building". Clause 14(a) of the contract obliges the Seller (the Appellant) to "commence and complete the demolition of the existing building on the site so that the site is left vacant and empty." We do not place great weight on these provisions in determining the actual state of construction on the land at the relevant time.

21. The "Property" which was the subject of the sale was the Glenburn site, excluding the 3.6 metre strip which was to become part of Bray Lodge. The Seller was required to perform the Agreement of 25 November 2011 concerning the separation of Glenburn and Bray Lodge and the construction of the new boundary wall. That Agreement was amended by an Addendum to the Party Wall Agreement dated April 2012. The copy we saw was unsigned.

22. Importantly, the contract was conditional on the Appellant obtaining a new planning permission allowing the house to be built according to Mr Anstead's specification. The application was submitted on 23 March 2012 and planning permission was granted on 28 May 2012 (the second permission). The sale to Mr Anstead was completed on 31 May 2012.

23. In the meantime, the "enabling works" i.e. the demolition of Glenburn, making good of the gable wall of Bray Lodge and the building of the boundary wall continued as, so the Appellant submitted, these works were required under both the first permission and the second permission. Mr Pettie gave evidence, and we accept, that if the second permission had not been granted, the Appellant would simply have continued with their original plan to build the house in accordance with the first permission.

24. Both permissions referred to the building of garden walls, and the accompanying plans showed the positions of the boundary wall, but the details were matters to be agreed at a later date. Condition 5 of the second permission (condition 5) stated "No development shall take place until full details of both hard and soft landscaping works have been submitted to and approved in writing by the Borough

Council and these works shall be carried out as approved….This scheme shall include indications of all …walls…".

25. The boundary wall (the wall) as required by Mr Anstead was a substantial affair. The Appellant engaged a structural engineer to advise on the planning and design of the wall, its construction and integrity. More bricks were needed in the construction of the wall than could be salvaged from the whole of Old Glenburn. An invoice dated 21 March 2012 shows the delivery of nearly 6,500 additional bricks which were needed to construct the wall. Marbank's invoice dated 19 April 2012, for work valued to 29 March 2012 shows the "Garden Wall" as being 0% complete. That is, at that date, work on constructing the wall had not yet started.

26. The wall was a party wall , but was constructed on the land belonging to Glenburn. The foundations for the wall were over one metre deep. The wall itself was 600mm wide at the base. The land levels were different on the Glenburn and Bray Lodge sides of the wall so that on the Bray Lodge side it was 2.8 metres high and on the Glenburn side it extended 3.188 metres above the foundations.

27. Work on the wall proceeded whilst the planning application was being considered. On 13 June 2012, Marbank submitted an invoice to Igloo valued to 1 June 2012, The invoice included "variations" which were detailed on a schedule. The schedule showed that the "Garden Wall" valued to 1 June 2012 was "100% complete". Mr Pettie's evidence also indicated that the wall was complete by the time of the sale.

28. We find as a fact that the wall had been completed, on the Glenburn land as at 31 May 2012, the time of completion of the sale to Mr Anstead.

29. It was subsequently considered that the height of the wall meant that it needed an express planning permission of its own. A retrospective application was submitted on 9 July 2012 which was granted, with prospective effect on 30 August 2012. The Application stated that the building of the wall commenced on 28 May 2012 and was completed on 4 July 2012. The Appellant produced an email dated 13 May 2016 from the agent who submitted the application which explained the discrepancy. The agent candidly admitted "When we submitted the retrospective application for the boundary at Glenburn/Bray Lodge we opted for putting down May as our start date rather than February so that we didn't look like we had started so soon on the site". In other words, as Mr Pettie acknowledged, the later date was stated in the application in order to make it appear that the Appellant had applied for planning permission immediately after the wall was completed in the hope that the local authority would be more sympathetic. This does not affect our finding that the wall was, in fact, complete by 31 May 2012.

30. Mr Anstead employed a different contractor to construct his new house, but there was a period of overlap with Marbank and Marbank submitted its final invoice on 5 September 2012. The new contractor took over from Marbank, completing the property in July 2015.

31. On the basis that the sale of Glenburn constituted a zero rated supply for VAT purposes, the Appellant claimed £12,851.98 input tax in their return to the end of November 2012. HMRC took the view that the building of the wall was part of the demolition of Old Glenburn and not part of the construction of the new house. On this basis, it took the view that the sale constituted an exempt supply of land, so the input tax could not be claimed.

32. HMRC issued a Notice Of Assessment in the sum of £12,851.98 on 29 April 2015 which was appealed by the Appellant on 28 May 2015.

The law

33. Section 30(2) Value Added Tax Act 1994 (VATA) provides for a supply of goods or services to be zero rated if they are of a description specified in Schedule 8 VATA.

34. Group 5 in Schedule 8, headed " Construction of Buildings Etc." provides so far as relevant, that a supply of the following description is zero rated:

"1 The first grant by a person—

(a) constructing a building—

(i) designed as a dwelling or number of dwellings; or

(ii) intended for use solely for a relevant residential or a relevant charitable purpose;

…

of a major interest in, or in any part of, the building, dwelling or its site."

35. Each of the Groups in Schedule 8 is supplemented by Notes. Schedule 96(9) VATA provides " *Schedules 7A, 8 and 9 shall be interpreted in accordance with the notes contained in those Schedules"*. So the Notes are for interpretation only.

36. The Notes to Group 5 include the following:

"(2) A building is designed as 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 term of any covenant, statutory planning consent or similar provision; and

(d) statutory planning consent has been granted in respect of that dwelling and its construction or conversion has been carried out in accordance with that consent."

37. The grant of a major interest includes an assignment.

38. It is common ground that the Appellant was the "person" doing the "constructing".

39. The first issue is whether what was being constructed was a "building" for the purposes of Group 5. The second issue is whether, if the Appellant was constructing a "building" it was a building which was "designed as a dwelling" by virtue of complying with the conditions set out in the Notes to Group 5 and, in particular, Note 2(d).

40. *Onus and standard of proof*

41. The onus to show that there was a building designed as a dwelling in the course of construction at the time of the sale falls upon the Appellant.

42. The standard of proof is the ordinary civil standard, on the balance of probabilities.

The first issue: was the Appellant constructing a "Building"

The Appellant's submissions

43. The law requires that a description in VATA be given a "fair" and not restricted meaning (per the Court of Appeal *in Insurance wide services v HMRC* [2010] STC 1572). The definition of "building" contained in the Shorter Oxford English Dictionary: "a thing which is built; a structure; an edifice;; a permanent fixed thing built for occupation; as a house…" is a fair meaning.

44. A "building" can, in accordance with the Interpretation Act 1980, be interpreted to mean two or more discrete buildings (*Catchpole v HMRC* [2012] UKFTT 309 (TC).

45. A "building" can therefore include a structure such as the substantial wall in the present case.

46. A course of construction is a continuum over a period of time. It follows that, at the start of that continuum, a building may be constructed which is not itself part of

the house accommodation, but which can still be regarded as part of the "building designed as a dwelling".

47. The construction of the wall was part of the overall construction of the new dwelling..

48. Work had commenced above the level of the foundations.

49. Accordingly, because there was a building-a structure (the wall)-standing on the land before it was actually supplied, the land was not land simpliciter, but instead was "the first grant by a person constructing a building designed as a dwelling of a major interest in , or in part of, the building, dwelling or its site", so falling within Group 5 and being eligible for zero rating.

50. *The respondent's submissions*

51. The work on the wall was remedial work.

52. The construction of the wall did not constitute the start of the construction of a building. The word "building" must be given its ordinary natural meaning and at the time of the sale there was nothing on the land that was recognizably a building under construction. The works had not passed beyond being preparatory works at that date.

53. The house accommodation could only be constructed once the wall was completed. It was a condition of the contract with Mr Anstead that the wall must be completed. Under the Party Wall Agreement the owner of Glenburn was not permitted to commence the construction of the new dwellinghouse until the "works" including the construction of new boundaries had been completed.

54. Even if the construction of the wall was deemed to be the start of the construction of the new building, the retrospective application for planning permission relating to the wall stated that the work commenced on 28 May 2012.

55. Given that completion of the sale took place three days after the grant of the second permission, it was unlikely that construction of the new house had commenced above ground level, as it was necessary to dig out a basement.

56. As Mr Anstead had selected another contractor to build the house, it was unlikely that Marbank would have carried out any work on the house.

57. Accordingly, the construction of the building had not started at the time of sale, so that the sale was one of land within Schedule 9 Group 1 VATA and was exempt from VAT. The input tax was not therefore recoverable.

Discussion

58. Mr Qureshi drew our attention to HMRC's guidance on zero rating set out in its VAT Construction Manual at paragraph 02220. This states that *"It is important that what is being constructed is a building and not some other structure….The word*

building is not defined in the legislation. In the absence of a definition, the word should be given its natural meaning. This means that a building is a structure fixed to the ground that at its basic consists of walls (or, an alternative, such as an arrangement of columns) supporting a roof that encloses a volume of space."

59. This definition is derived from the case of *Upper Don Walk Trust* (VTD 19476) although the Manual states that in HMRC's view, only a structure with a roof can be a building.

60. Paragraph 03550 of the Manual goes on to consider when a building is "being constructed". It states "*It is accepted that a building is being constructed when work has progressed above foundation level. This is usually when walls begin to be constructed upon the foundations….Simply digging and concreting foundations is not sufficient."*

61. Both parties drew our attention to a number of cases, some of which were said by each to support their case. Most of these were the decisions of the First Tier Tribunal or the VAT Tribunal which are persuasive, but not binding on us. We will consider them briefly.

62. In *Catchpole v HMRC Commissioners* [2012] UKFTT 309 (TC), the Tribunal held, in the context of Note 2 to Group 5 of Schedule 8 VATA (Note 2), that a single dwelling might consist of two buildings and that the term "building" could include more than one building.

63. Mr Zwart relied on the case of *Keith Lamming* [2009] UKFTT 44(TC) as authority for the proposition that the time to consider whether a building is to be zero rated is the time of completion. That was correct in that case, as completion was the date of the supply. We will return to the timing question in connection with the second issue below.

64. In *Cameron New Homes Limited* LON/01/49 the land in question was a cleared, prepared site. The vehicular access had been altered and a new path constructed. Excavations had been made for the foundations but no more. There was nothing above ground. The Tribunal found that in order for there to be a building under construction, there had to be more than merely preparatory work. In that case, the works *were* merely preparatory and the sale could not be zero rated. Mr Zwart pointed out that in *Cameron New Homes*, the foundations had been dug, but no concrete had been poured and there was nothing above ground. In the present case, preparatory works had also been carried out, but he was not relying on the pouring of the footings at the end of February 2012. He sought to rely on the construction of the wall after that, which was very clearly above ground and was more than a preparation; it was the first stage in the continuum of building a house designed as a dwelling.

65. In *Stapenhill Developments Limited v Commissioners of Customs and Excise* [1984] VATTR 1the appellant commenced work on the foundations for a block of dwellings but before the work had progressed very far the excavations were badly damaged in a storm and the work was abandoned. The Tribunal held that civil

engineering works were not "buildings". The Tribunal further found that the expression "person constructing a building" required that a building must be seen to be under construction on the land before a builder was entitled to zero rate a supply of the land, although it did not require a completed building to be on the land. The appellant in that case sought to rely only on a hole dug for the foundations of a two storey block of three terraced dwellings. The Tribunal said *"We think that the honest answer to any inquirer who wanted to know what the hole was for would have been: Well we were digging foundations for some houses but they were in the wrong place and we have abandoned them"* and on this basis found that there was no building in the course of construction. Mr Zwart submitted that civil engineering works require some public element, which was not present in relation to the wall in the present case. In *Stapenhill* there was no evidence of any building at all in contrast to this case where there was a substantial construction above foundation level.

66. In *Permacross Limited* 13251 the appellant carried out some ground works consisting merely of site levelling, but did not install any foundations or undertake any construction work. The Tribunal held that "building " must be given its ordinary meaning and that *"…anyone looking at the plots, after the appellant had carried out the various works…would accept that there was no building upon them.*" Again, Mr Zwart sought to distinguish Cavendish Green's case on the basis that the Appellant *had* installed foundations and *had* undertaken substantial construction work.

67. These cases provide guidance on what will *not* constitute a "building in the course of construction" and we agree with Mr Zwart that the works carried out in the present case go beyond merely preparatory works. The cases cited are less helpful in determining what *does* constitute a building.

68. The use of the present tense word "constructing" in the expression "person constructing a building" makes it clear that the person need not supply a completed building. A partially completed building will suffice, but there must be something which answers the description of a building.

69. It is also clear that a "building" can comprise more than one building.

70. In order to fall within item 1 of Group 5, such a building must be "designed as a dwelling". It was not suggested that the other alternative applied; that the building was intended for use solely for a relevant residential or a relevant charitable purpose.

71. For the present, we do not consider the effect of Note 2 on the question whether a building is designed as a dwelling.

72. HMRC's case may be summarised as saying that the wall was not a building designed as a dwelling, or indeed a building at all, and that the relevant building which was designed as a dwelling was the house and the construction of the house had not progressed beyond the foundations. Accordingly, consistent with the various cases, the house could not be a "building in the course of construction".

73. We agree with both parties that the expression "building" must be given its ordinary meaning and we agree with Mr Zwart that the ordinary meaning of building, giving it a fair meaning, can include a structure.

74. We have found that, at the date of sale, 31 May 2012, the wall had been completed. The discrepancy between the evidence of the invoices and the date stated in the retrospective planning application as the date when the works commenced was explained at the hearing by Mr Pettie and we accept that explanation.

75. The wall was clearly a structure above the ground, and a substantial one at that. We find that the wall was capable of being a building. The question is whether it is capable of being a "building designed as a dwelling".

76. As Mr Zwart submitted, construction is a continuum. At one end, it starts with the preparation of the site. Then the foundations must be dug out and the footings poured. Then the building can begin and one reaches the other end of the continuum when the building is complete and fitted out and ready for occupation.

77. The construction which was to be carried out at Glenburn was the erection of a substantial house, surrounded by landscaped gardens and a handsome boundary wall. Before the house could be built, the Appellant had to demolish Old Glenburn, make good the gable wall of Bray Lodge and build the boundary wall. The demolition, works on Bray Lodge, clearing of the Glenburn site and pouring the footings were all part of the preparatory activities.

78. The building of the wall was not preparatory, it was the first stage on the continuum of construction which consisted of the erection of a building. Moreover, it was the first stage of constructing the new Glenburn. We agree with the finding in *Catchpole* that "building" can include more than one building. So the expression "building designed as a dwelling" can include "buildings designed as a dwelling". We consider that "dwelling" in this context can fairly be interpreted to mean a house together with the other buildings on the site which are an integral part of the property as a whole. A person buying a "dwelling" would be surprised to be told that only the house was included and that the separate garage, swimming pool or garden walls were not part and parcel of his purchase.

79. In *Permacross* and in *Stapenhill*, the Tribunals asked whether a hypothetical observer would look at the site and say that there was a building upon it. In those cases, the answer would be "no". A hypothetical observer in this case who walked past the site on 31 May 2012 would note that there was a building on the site-the wall-and if he had asked the workmen "what are you building here?", the answer would have been "a big house".

80. We conclude that the wall was a building, that it was part of the dwelling being constructed on the Glenburn site and accordingly on 31 May 2012, as the time of the supply for VAT purposes, the Appellant was a "person constructing a building designed as a dwelling".

81. ***The second issue: was the building "designed as a dwelling" within Item 1 of Group 5?***

82. In addressing the first issue, we have considered whether the Appellant was "constructing a building". The second issue is whether, applying the interpretive provisions of Note 2, it was constructing a building "designed as a dwelling".

83. Note 2 provides that "A building is designed as a dwelling…where, in relation to [the] dwelling the following conditions are satisfied…". There are four conditions and it is accepted that conditions (a), (b) and (c) are satisfied. The second issue concerns condition (d) which requires that "statutory planning consent has been granted in respect of that dwelling and its construction…has been carried out in accordance with that consent".

84. *Planning law considerations*

85. Under section 55(1) Town and Country Planning Act 1990 (TCPA), *""development" means the carrying out of building…operations in, on , over or under land…"*. By section 56(1) TCPA, development consisting of the carrying out of operations is taken to be initiated *"at the time when those operations are begun"*. Section 57(1) TCPA provides *"…planning permission is required for the carrying out of any development of land"*.

86. Planning permission may be granted expressly by a local authority in accordance with section 70 TCPA.

87. Alternatively, the Secretary of State may provide by a Development Order for planning permission to be granted in respect of any class of development under sections 59 and 60 TCPA. The Town and Country Planning (General Permitted Development) Order 1995 (the 1995 Order) grants planning permission for certain specified classes of development.

88. Article 3(1) of the1995 Order provides:

"(1) Subject to the provisions of this Order and regulations 60 to 63 of the Conservation (Natural Habitats, &c) Regulations 1994 (general development orders), planning permission is hereby granted for the classes of development described as permitted development in Schedule 2."

89. Part 2 of Schedule 2 of the 1995 Order permits "Minor Operations". Class A of Part 2 covers the following:

"Permitted development

A The erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure.

Development not permitted

A.1 Development is not permitted by Class A if—

(a) the height of any gate, fence, wall or means of enclosure erected or constructed adjacent to a highway used by vehicular traffic would, after the carrying out of the development, exceed one metre above ground level;

(b) the height of any other gate, fence, wall or means of enclosure erected or constructed would exceed two metres above ground level;

(c) the height of any gate, fence, wall or other means of enclosure maintained, improved or altered would, as a result of the development, exceed its former height or the height referred to in sub-paragraph (a) or (b) as the height appropriate to it if erected or constructed, whichever is the greater; or

(d) it would involve development within the curtilage of, or to a gate, fence, wall or other means of enclosure surrounding, a listed building."

90. *The Appellant's submissions*

91. Note 2(d) is an interpretive provision and is subordinate to Item 1(a)(i). Item 1(a) does not require a completed building. Note 2(d) does so require as it requires that the construction "has been" carried out. The condition in Item 1(a)(i) cannot be required by Note 2(d) to be satisfied only by a particular single planning consent subsisting before completion.

92. At all relevant times, there was a planning permission, whether express or deemed in force which enured for the benefit of the land and permitted the building of the wall.

93. Initially, the development was permitted by the 1995 Order, Schedule 2, Part 2, Class A (Class A) and this applied at the time of the sale. It was also permitted by the subsequent satisfaction of condition 5 of the 28 May 2012 planning permission and ultimately, it was permitted by the express planning permission granted retrospectively in August 2012.

94. One has to apply Note 2(d) at the time when the construction of the building designed as a dwelling was actually completed in July 2015, and one has to look back, and see whether, at the time of completion, the dwelling has been constructed in accordance with **a** statutory planning consent.

95. There may have been a number of successive consents enabling construction during the continuum of construction, but Note 2(d) is satisfied if, as at the time of completion, it can be said that construction has been carried out in accordance with **some** consent.

96. *The Respondent's submissions*

97. The wall was not permitted by the statutory consent contained in Class A because the Appellant always intended that the wall would be more than 2 metres in height.

98. There was no express planning permission in force at the time of the sale.

99. A retrospective planning consent affects the VAT supply only from the date it is issued. As the express planning permission was not in existence when the construction of the wall started the zero rate cannot apply to any supply before the date that planning permission was granted.

100. Note 2(d) is drafted in the past tense. It states:

"*statutory planning consent* ***has been granted*** *in respect of that dwelling and its construction…****has been carried out in accordance with that consent***" (emphasis added by HMRC).

101. HMRC submit that one must apply Note 2(d) at the time of the supply, in this case the sale, and that a subsequent planning consent cannot retrospectively validate works carried out before the supply without consent.

102. *Discussion*

103. The Appellant accepts that there was no express planning consent in force on 31 May 2012 and that the express permission granted in August 2012 was prospective only and validated the existence of the wall only from the date it was granted and for the future. Section 73A(3)(a) Town and Country Planning Act 1990 provides for planning permission to be granted which has effect from the date on which the development was carried out, but that is not in point here and we doubt that it would have made any difference in any event.

104. The first question therefore is whether the building of the wall was a permitted development under Class A of the 1995 Order.

105. HMRC contend that the wall falls within the exception to the permission granted by Class A in that the height of the wall "erected or constructed would exceed two metres above ground level". They argue that when the Appellant commenced construction of the wall, it was designed in a way which meant that it *would* exceed two metres in height once completed, and therefore it could not benefit from deemed statutory permission.

106. The Appellant argued that intention in the planning sphere is irrelevant. The Class A test in an objective one and only requires that, at the relevant time, the wall is in fact less than two metres high, or at least is not significantly in excess of two metres. Further, unless and until it *is* significantly in excess of that height, its construction is permitted by Class A which is a statutory planning consent as required by Note 2(d),

107. In support of the objective nature of the test, the Appellant cited *Riordan Communications Limited v South Bucks District Council* (2001) 81 P. & C.R. 8 where the judge said:

"the test was an objective test and…the objective test is satisfied by the court first considering whether the work had been done in accordance with the relevant planning permission…there can be no justification…for the imposition of an ill-defined requirement that some operation should be carried out with some particular intention."

108. However, Riordan was dealing with a different issue. This was a planning case and the question was whether development in accordance with a planning permission had commenced within the time limit imposed by the permission itself. The company had carried out preliminary work within the time limit, but work then ceased as it was considering whether to apply to vary the permission, which it did, but then withdrew the application. It resumed the work under the original consent some years later and the issue was whether the original consent had lapsed, or whether the development under that consent had "commenced" within the time limit. The Council took the view that in order for the development to have "commenced" the developer had to intend to complete the work as a whole. As noted above, the court held that there was no need for such an intention and that the test as to whether a development had commenced was an objective one.

109. The *Riordan* case cannot be taken as authority for a general proposition that intention is never relevant in the planning sphere. It is necessary to look at the words of the legislation itself.

110. By paragraph A.1 of Part 2 of Schedule 2 to the 1995 Order, development is not permitted by Class A if *"the height of any other …wall…erected or to be constructed would exceed two metres above ground level"*. That provision must be read in the context of the paragraph as a whole in order to arrive at a proper construction. The whole paragraph is as follows:

A.1 Development is not permitted by Class A if—

(a) the height of any gate, fence, wall or means of enclosure erected or constructed adjacent to a highway used by vehicular traffic would, after the carrying out of the development, exceed one metre above ground level;

(b) the height of any other gate, fence, wall or means of enclosure erected or constructed would exceed two metres above ground level;

(c) the height of any gate, fence, wall or other means of enclosure maintained, improved or altered would, as a result of the development, exceed its former height or the height referred to in sub-paragraph (a) or (b) as the height appropriate to it if erected or constructed, whichever is the greater; or

(d) it would involve development within the curtilage of, or to a gate, fence, wall or other means of enclosure surrounding, a listed building."

111. Under sub-paragraph (d) *any* development connected with a listed building is prohibited.

112. Sub-paragraph (a) relates to a wall adjacent to a highway which "would *after the carrying out of the development,* exceed one metre" in height. Sub-paragraph (b) relates to "any *other* wall..[which] would exceed two metres" in height, whilst (c) relates to a wall which "would *as a result of the development*, exceed its former height or the height referred to in sub-paragraph (a) or (b)…". (Emphasis added).

113. Sub-paragraphs (a) and (c) are clearly looking to the future from the time the construction of the wall commences. They explicitly refer to the position after the development has taken place and prohibit the development from the outset if the plan, at that point, is that the wall "would", once completed, exceed the permitted height. Although sub-paragraph (b) does not explicitly refer to the position after the development has been carried out, it applies to "any *other* wall" which refers back to sub-paragraph (a) and the natural reading of those two sub-paragraphs taken together is that the words "after the carrying out of the development" qualify "other" walls as well as those adjacent to the highway.

114. It follows that if a wall is designed to exceed two metres in height when completed, it cannot benefit from Class A permission. This is entirely in keeping with the scheme of the planning legislation, which is intended to require developers to obtain express planning consent if they intend to carry out development other than those works which are specifically allowed without an express consent.

115. It was stated at the hearing that it was Mr Anstead who required such a high and substantial wall. We heard much evidence that this was no ordinary wall. A structural engineer was needed to advise on its design and construction. It had deep foundations and it used more bricks than the whole of the Old Glenburn house. The contract with Mr Anstead was entered into on 8 March 2012. The additional bricks for the wall were delivered on 21 March and the revised planning application (which did not give details of the design of the wall) was submitted on 23 March. The invoice submitted by Marbank on 19 April 2012 for work to 29 March showed the "garden wall" as "0% completed". That is to say, construction had not started at that point. It may

reasonably be inferred from this timeline that when construction of the wall began, it was intended that it would, when that construction was completed, exceed two metres in height and accordingly it was not permitted by Class A.

116. Mr Zwart sought to argue that the construction of the wall was covered by Class A unless and until the height of the wall materially exceeded two metres and he submitted that there was no evidence that the wall was over two metres at the date of sale. This is somewhat disingenuous as, at the hearing, he sought to persuade us, and did persuade us, that the wall was fully completed at the time of sale, i.e. at that time, it had reached its full height of over two metres.

117. Accordingly, we do not consider that the erection of the wall was at any time permitted by Class A, If that is wrong and it was so permitted at the outset, we find that the height of the wall materially exceeded two metres at 31 May 2012 and so it was not permitted under Class A at that point.

118. Mr Zwart next argued that the second planning permission also gave consent for the wall, even though the detail was subject to approval by the Council. The second permission was granted before the date of sale. It was subject to condition 5 which stated *"No development shall take place until full details of both hard and soft landscaping works have been submitted to and approved in writing by the Borough Council... .This scheme shall include indications of all…walls."*

119. On 14 March 2013 the council confirmed discharge of the condition relating to materials, but said *"the landscaping plan does not show details for the…height for the side brick wall. Thus condition 5 (landscaping) cannot be discharged."*

120. Condition 5 was ultimately discharged and in any event, the express planning permission for the wall was granted 30 August 2012, but as the Appellant agreed, with prospective effect only.

121. Mr Zwart submitted that the second planning permission, which was undeniably granted before the date of supply and which envisaged the construction of walls was sufficient to constitute the required consent for Note 2(d), even though the detail of the walls was subject to further approval. He relied on the case of *R (on the application of Hart Aggregates Limited) v Hartlepool BC* [2005] EWHC 840 (Admin) as authority for the proposition that a landscaping condition is a matter of detail and even where it is cast in condition precedent terms, it does not operate to render reliance on a planning permission unlawful in the absence of an approval. He said that condition 5 related only to "details" and so non-compliance with it could not render implementation of the second permission unlawful and unable subsequently to be relied upon.

122. With respect, the *Hart Aggregates* case was dealing with a very different matter. As with *Riordan*, it was a planning case concerned with whether a planning consent had been implemented. In *Hart Aggregates*, a planning consent in relation to the working of a quarry was subject to a condition that a restoration scheme for worked out areas was agreed before extraction commenced. No scheme was agreed, but the

quarry was worked for more than 30 years, when it was contended that the original permission had lapsed because the condition had not been complied with.

123. Sullivan J held that there had, on the facts, been no breach of the condition. In any event, the permission did not prohibit extraction unless the condition was complied with, so that the quarrying had been carried out with planning permission, even though there had been a breach of a condition. Although the condition could be regarded as a condition precedent, it could not be regarded as vitiating the whole consent. This would only be the case "*where a condition expressly prohibited any development before a particular requirement had been met.*"

124. In this case, condition 5 of the second permission *did* prohibit development until the detail of the walls had been approved. The consent permitted the building of the house which was ultimately constructed, but at the date of the supply, the only "building" which was above ground level was the wall and at that time, the second permission cannot be said to have authorised the wall which was in existence because it expressly prohibited the development until the detail had been approved and the detail had not been approved.

125. We do not therefore consider that the second permission authorised the building of the wall as at 31 May 2012.

126. As noted, the Appellant accepted that the express permission granted in August 2012 was prospective only and so could not be regarded as applying at the date of supply.

127. The Appellant contended that a development may at different times be permitted by a number of overlapping planning consents. Mr Zwart referred to the case of *Pilkington v Secretary of State for the Environment and Others* (1973) 26 P & CR 508 where the Court of Appeal held that a landowner could apply for as many different planning permissions as he wished and could implement whichever of them he wanted. However, the landowner cannot implement more than one permission to the extent they are inconsistent with each other. We agree that it follows that, to the extent that a particular element of the development is permitted by all the consents, that development is permitted at all times when there is a consent if force, even if one supersedes and replaces another.

128. However, for the reasons set out above, we consider that there was no planning permission which permitted the building of the wall in place on 31 May 2012. We agree that by the time the whole development was completed in July 2015, the whole of the development was covered by valid planning consents, the house as a whole being permitted by the second permission and the wall being authorised, with effect from 30 August 2012 by the specific planning permission.

129. Which brings us to the critical question which is, at what date must Note 2(d) be satisfied?

130. The Respondents submit that the test for zero rating must be satisfied at the time of supply and in accordance with section 6 VATA that is the time of the "grant" referred to in item 1(a) i.e. 31 May 2012.

131. Item 1(a) permits zero rating in relation *to "the first grant by a person (a) constructing a building (i) designed as a dwelling; or (ii) intended for use solely for a relevant residential or relevant charitable purpose…of a major interest in …the building, dwelling or site"*.

132. The Notes are, by section 96(9) VATA an aid to interpretation of the Items only.

133. Note 1 states that "grant" includes as assignment, so in the present case the relevant grant is the sale to Mr Anstead.

134. Note 2 applies to determine what is meant by "designed as a dwelling". It provides *that "a building is designed as a dwelling where the following conditions are satisfied- …(d) statutory planning consent has been granted in respect of that dwelling and its construction… has been carried out in accordance with that consent"*.

135. HMRC argue that Note 2(d) is expressed in the past tense. It requires that planning permission *has been* granted in respect of the particular dwelling which is being constructed by the person making the grant in question. Further, at the time of the grant, the construction *has been* carried out carried out in accordance with that consent. They contend that the wording of Note 2(d) does not contemplate that the condition can be satisfied by a subsequent application for retrospective consent.

136. The case of *Mr A E and Mrs J M Harris* LON/20040185 concerned the interpretation on Note 2(c) of Group 5 of Schedule 8 VATA which provided that a building was "designed as a dwelling" where the separate use or disposal of the dwelling is not prohibited by the terms of any statutory planning consent. In that case, the initial planning permission provided that the new building should not be used as a separate unit of accommodation. The building was completed as a separate unit of accommodation in April 2002, In September 2003, the planning permission was amended to provide that the building could be so used. The Tribunal decided that condition 2(c) *"has to be satisfied at the time of the completion of the building* [which was the relevant time for determining the VAT status in this case] *and not at any later time."*

137. HMRC found further support for their case in *Northside Management Limited* [2012] UKFTT 647 (TC) which also concerned note 2 The Appellant sought to argue that where there was no planning consent at the relevant VAT point, this could be cured by a retrospective planning consent, which enabled the Tribunal to review the circumstances at the hearing date and take account of supervening developments in determining whether the Note 2 conditions were satisfied.

138. In response, the Tribunal stated:

"This dispute involves the basic structural pattern of VAT. Put simply, the charge to VAT arises in the event of a taxable supply being made, and the date of that supply is the date when liability is determined. Here, in our view, the supply was made in about October 2005 when the Leases were granted. It would follow that that is the date when liability arises, and critically that is when the categorisation of the supply for tax purposes should be made. It is in our view strained and fanciful to suggest, as Mr Zwart does, that that date can be varied and the nature of the supply changed subsequently by the unilateral act of the taxpayer. Mr Zwart seeks to show that the wording of Notes 2 and 13 of Item no 1 contemplates the categorisation of the supply now and by reference to the current circumstances prevailing. That argument must, in our view, be flawed: it would enable (as here) a tax planning exercise to be pursued ex post facto, to the substantial benefit of the taxpayer. While supervening legal developments can affect a tax liability, supervening factual changes such as a retrospective variation of planning permission should not. If the assessment cannot be challenged as at the date when it is made, that must surely be resolutive of the matter. Retrospective changes of facts and circumstances would not alter that, we consider."

139. As HMRC and Mr Zwart acknowledged, both *Harris* and *Northside* are First-tier Tribunal decisions and as such are persuasive, but not binding, on us.

140. Mr Zwart argued that *Harris* has to be read in the light of *Lamming* where it said that Note 2(d) could be satisfied at the time of completion of the construction if there was a planning consent at that time. However, the comment in *Lamming* was *obiter* and, in any event, the relevant time of supply in that case was the time of completion. He also submitted that *Northside* was not in point as it did not analyse the relationship between the various statutory provisions.

141. Mr Zwart highlighted the "chronological tension" between section 6 VATA and the terms of Item 1(a)(i) on the one hand and Note 2(d) on the other hand. Section 6 VATA provides that in the present case, the time of supply of the land for VAT purposes is the time of the sale to Mr Anstead. Item 1(a)(i) is phrased in the present tense: zero rating applies to a grant by a person "constructing a building (i) designed as a dwelling". "Constructing" implies an ongoing process. There is no need for a completed building. Note 2(d) is phrased in the past tense and says that in interpreting what constitutes a building designed as a dwelling, it is a condition that planning consent *has been* granted for the dwelling and its construction *has been carried out* in accordance with that consent.

142. Mr Zwart contends that this requires Note 2(d) to be applied at the conclusion of construction process and that the construction must be underpinned throughout by *some* particular consent even if there have been a series of consents each of which replaces the other. He argues that it is only possible to apply Note 2(d) at the point where the dwelling construction has been "carried out" i.e. concluded so that where there is a prior supply, the Note "must accommodate/admit of a potential undischarged or inchoate planning consent whose terms await full execution at the prior date."

143. The Appellant further contends that Item 1(a) is wider than Note 2(d) in that Item 1(a) encompasses a "building", a "building designed as a dwelling" (which is different from a building) and a "site", but Note 2 encompasses exclusively a building designed as a dwelling. Note 2(d) cannot apply more broadly than its terms so that Item 1(a) can be satisfied if there exists at 31 May 2012 statutory planning consent for a building designed as a dwelling, that building has a site, and there is a supply of the land that includes the site and the consent, even where, at the relevant date, the building designed as a dwelling was still coming out of the ground.

144. Item 1(a) applies to a building "(i) designed as a dwelling" but also to a building "(ii) intended for use solely for a relevant residential or a relevant charitable purpose". The expression "building" cannot therefore be considered as a disembodied term to which Note 2(d) cannot apply. In this context, it has to be read as a composite term; a "building designed as a dwelling" and this is what Note 2(d) applies to. Similarly, the reference in Item 1(a) to a site has to be read as a site of a building designed as a dwelling. Note 2(d) is not, in our view, satisfied where the "building" i.e. the wall is above the ground but has no planning consent, but the "dwelling" i.e. the house which does have a planning consent is still coming out of the ground.

145. Mr Zwart made detailed and complex submissions analysing the language of the statutory terms in order to conclude that one must apply Note 2(d) with hindsight at the end of the construction process and determine whether, at that time, the construction which is then completed was authorised by some planning consent.

146. We have carefully considered Mr Zwart's analysis together with his other submissions and those of HMRC. We have concluded that we can reconcile the apparent dissonance between Item 1(a) and Note 2(d) in a way which does not strain the language of the legislation and which is consistent with the scheme of the VATA.

147. Section 30(2) VATA zero rates a supply of goods or services where the supply is of a description for the time being specified in Schedule 8. In the present case, the time of supply is the time of the sale ie 31 May 2012.

148. Item 1(a) applies where there is the supply of a building designed as a dwelling which is in the course of construction. There does not, accordingly need to be a completed building at the time of the supply, but in accordance with the authorities, there must be some part of the building designed as a dwelling which is above the foundations.

149. In order for a building to be "designed as a dwelling" it must satisfy all the conditions of Note 2 including Note 2(d). That requires that a statutory planning consent must have been granted in respect of the dwelling which is under construction and its (that is the dwelling's) construction has been carried out in accordance with that consent. Although this condition is indeed looking backwards into the past, it makes perfect sense to look backwards from the time of the grant. At the time of the grant, there must be a valid statutory planning consent which covers the dwelling being constructed, whether that is a deemed consent under the 1995 Order or an

express consent. In addition, the construction of the dwelling, insofar as it has been carried out to the date of the grant must be in accordance with that consent.

150. We do not construe Note 2(d) to mean that that, where a building which is in the course of construction is supplied, one must apply Note 2(d) retrospectively once the building has been finally completed so that if, at that date, there is some planning permission in place, granted after the date of supply, the original supply can be zero rated. Not only does this construction place a strain the language of the Act, it places an even greater strain on common sense and the whole structure of the VAT regime. VAT is charged, or not, at the date of supply and the status of the supply must be established at that time. It cannot be right that events happening after that time, maybe many years later, such as obtaining a retrospective planning consent, can affect the VAT treatment. That treatment must be established once and for all at the time of supply and supervening events cannot change it. If it were otherwise, there would be no certainty, either for HMRC or for the taxpayer as to what VAT liabilities or entitlements were, possibly until years after the event.

151. *Decision*

152. In considering what is comprised in a "building designed as a dwelling" one can look at the entirety of the buildings and constructions which are an integral part of the dwelling as a whole. This can include a boundary wall. So if, at the date of the grant, a garden wall which is an integral part of the overall design has been built above the foundations, it can be said that there is a building designed as a dwelling in the course of construction, even if the construction of the house part of the dwelling has not yet commenced.

153. However, in order for there to be a "building designed as a dwelling" for the purpose of Item 1(a) there must be a planning consent in respect of that dwelling at the time of the grant and its construction must, so far as it has progressed at the time of the grant, be in accordance with that consent.

154. In the present case, the part of the dwelling which was above the foundations at the time of the supply was the wall. Although the second permission had been granted, it did not cover the dwelling which incorporated the wall which was in existence at that time, as condition 5 had not yet been discharged. If it were argued that the "dwelling" excluded the wall then there was no building being constructed at the time of supply as construction of the house had not yet begun. So there was no express planning consent in respect of the wall at the time of supply. Nor, for the reasons set out above was the construction of the wall permitted by Class A. There was accordingly no valid planning consent in respect of the wall until the express consent was granted in August 2012 and that cannot affect the status of the supply for VAT purposes on 31 May 2012.

155. For these reasons, we conclude that Note 2(d), and therefore the conditions for zero rating of the supply of Glenburn, were not satisfied. Accordingly, we dismiss the appeal.

156. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 5 September 2016