



TC04132

Appeal number: TC/2013/04594

VAT –zero rating- preliminary issue – was property used for a relevant residential purpose under VATA 1994 schedule 8 group 5 items 2(a) notes 4 (b) or 4(g) ? – Yes.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TGH (CONSTRUCTION) LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ALISON MCKENNA

Sitting in public at The Old Bakery, Norwich on 18 September 2014

Peter Hore of Indirect Tax Services Limited for the Appellant

Mr A Ridley of HMRC for the Respondents

DECISION

1. This decision is my ruling on the question of whether the property known as
5 Holme Terrace is used for a “relevant residential purpose” under VATA Schedule 8,
group 5, item 2(a).

2. On 20 May 2014, Judge Berner directed that this matter be determined as a
preliminary issue. There are remaining issues between the parties, which were stayed
pending resolution of the preliminary issue. The parties are invited to agree and
10 submit directions for the hearing of the remaining issues or, if no agreement is
reached, to seek the Tribunal’s further directions within 28 days of the date appearing
below. The parties are also encouraged to consider asking the Tribunal to hear any
remaining issues in relation to this appeal at the same time as hearing the other
outstanding appeal relating to this construction project.

15 3. The hearing of the preliminary issue took place on 18 September 2014, when I
heard witness evidence from Ms Kent of HMRC and from Mr Pellatt on behalf of the
Appellant. I am grateful to both parties’ representatives for the production of their
respective bundles of documentary evidence, their written skeleton arguments and
their clear oral submissions at the hearing.

20 *Factual Background*

4. The Appellant company is a wholly-owned subsidiary of the charity known as
The Great Hospital (registered charity number 211953). The Appellant is not itself a
charity. The Great Hospital charity was established in 1249 to provide relief for the
25 poor and needy of the City of Norwich. The charity’s objects have been amended by
Schemes of the Charity Commission so that its current beneficiaries are persons in
need who are men over the age of 65 and women over the age of 60 who are resident
in Norwich. The charity provides accommodation for over 100 residents.

5. The Appellant was incorporated in 2009. In 2011, it entered into a design and
build contract with the charity in respect of the construction of new buildings on land
30 belonging to the charity. Holme Terrace, which is a two-storey, self-contained
building, was constructed on the site of some demolished cottages owned by the
charity and comprises eighteen self-contained flats for occupation by elderly
licensees, who are offered accommodation by the charity on the basis that they are
persons who are “in need” within the terms of its charitable objects. The first resident
35 moved into Holme Terrace in 2012.

6. The Appellant claimed that Holme Terrace was used for a “*relevant residential
purpose*” under VATA 1994 schedule 8 group 5 items 2(a) notes 4 (b) or 4(g). After
a lengthy correspondence, HMRC issued a decision on 12 June 2013 to the effect that
Home Terrace is a building designed as a number of dwellings under VATA schedule
40 8 group 5 item 2 (a) note 2. Although this meant that the Holme Terrace construction
was zero-rated for VAT purposes, HMRC’s decision had implications for the VAT
treatment of the site as a whole and the Appellant lodged a Notice of Appeal with the

Tribunal on 11 July 2013. The dispute between the parties is narrowly focussed upon the correct interpretation of “*providing personal care for persons in need of personal care*” in note 4 (b) and of the word “*institution*” in note 4 (g).

The Law

5 7. The relevant law is to be found in VATA 1994 section 30, which applies zero-rating for VAT purposes to certain types of supply which are set out in thematic groups in Schedule 8 to that Act. Group 5 concerns the construction of buildings.

8. Item 2(a) of Group 5 relates to

The supply in the course of the construction of—
10 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

9. The items in Schedule 8 group 5 are affected by number of “Notes”, which are an aid to interpretation. The relevant Notes for the purposes of this ruling are notes 2
15 and 4:

Note 2:

(2) *A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied—*

- 20 (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;*
25 *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.*

Note 4:

- 30 (4) *Use for a relevant residential purpose means use as—*
(a) *a home or other institution providing residential accommodation for children;*
(b) *a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of*
35 *old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder;*
(c) *a hospice;*
(d) *residential accommodation for students or school pupils;*
(e) *residential accommodation for members of any of the armed forces;*

(f) a monastery, nunnery or similar establishment; or

(g) an institution which is the sole or main residence of at least 90 per cent. of its residents, except use as a hospital, prison or similar institution or an hotel, inn or similar establishment.

5 10. The parties' representatives referred me to a number of previous decisions of the courts and tribunals in which the relevant law has been addressed. As I explained to them at the hearing, decisions of the First-tier Tribunal and its predecessor tribunal do not set a precedent and I am not bound by them in making this ruling. However, I have referred to some of them to illustrate certain points in reaching my conclusions
10 below.

11. HMRC additionally relied upon its own published guidance, which states that HMRC regards an institution as a place where a collection of people live together under rules set by a third party and which must be self-sufficient in providing for the needs of its residents. HMRC's published guidance also does not bind me in making
15 my decision, and I note that in parts it relies upon first instance authorities which do not establish legal precedent.

The Appellant's Case

12. The Appellant's case is that the Holme Terrace construction fell within the definition of "*relevant residential purpose*" in item 2(a) of group 5 because it is a
20 *home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of old age or disablement* under note 4 (b) or because it is *an institution which is the sole or main residence of at least 90 per cent. of its residents* under note 4 (g).

13. The Tribunal heard evidence from Kevin Pellatt, who is a director of the
25 Appellant company and Master of The Great Hospital. He also filed a helpful witness statement. Mr Pellatt described the process by which residents are offered accommodation at Holme Terrace, as follows: prospective residents must be assessed by the charity's care manager to determine their care needs. If accepted, the applicant is placed on a register to await suitable accommodation becoming available. Mr
30 Pellatt stated that, once a resident moves in, the expectation on both sides is that the resident will have a home at Holme Terrace for the rest of their life and the charity tries to provide this. He also stated that the charity is a member of the Almshouses' Association.

14. Mr Pellatt commented that residents are granted a licence to occupy their flats
35 only, so they have no security of tenure at Holme Terrace. He said that residents usually give up more secure accommodation elsewhere in order to move into the environment that Holme Terrace offers them, with its range of supportive services. Each resident must agree to follow the rules, for example, they may not have overnight visitors in their flats (although there is a guest flat available for visiting
40 family and friends), they must notify the charity of their next of kin details (and keep them up to date) and must notify the staff if they are to be away overnight. Residents are not permitted to make any alterations to the flats, or to change the locks. The flats

are decorated and maintained by the charity. Formal letters are exchanged with prospective residents setting out the basis of their proposed occupation and they are given a “Residents’ Handbook” setting out the various rules, a copy of which was produced for the Tribunal.

5 15. Mr Pellatt described the services offered to residents of Holme Terrace. Some
of these services are included in their licence fee and some are available for an
additional charge. For example, all residents may use the emergency maintenance
service and may call out a member of the charity’s care team, who are on site 24
10 hours a day, for no extra charge. A fully-functioning kitchen is provided so residents
may cook meals for themselves but they may choose to have their meals delivered to
them in their flats for a fee. As the flats do not have washing machines (and residents
are not allowed to install them) residents are entitled to put a small number of items
into the free laundry service operated by staff each week. Mr Pellatt explained that
15 residents can submit 7 items to the laundry service per week free of charge, and then
either pay a fee for additional items to be laundered or use the on-site launderette by
themselves. He said that the residents tend to use the laundry service for heavier
items such as bedding and to use the launderette for smaller items such as clothes.
The items for the laundry service are collected from the resident’s flat and delivered
back when clean, as part of the free services provided to residents.

20 16. Mr Pellatt explained that each resident’s flat has a shower only, but that there
are communal bathrooms with facilities to assist residents in using the bath. Mr Pellatt
explained that staff will check up on the residents if they haven’t seen them out and
about, but otherwise do not intrude unless it is necessary to inspect the flat for some
reason. The charity provides a call button in each flat so that residents can ask on-site
25 staff for assistance day or night, a doctor’s surgery where an NHS GP holds regular
surgeries, the ability to opt in to group insurance policies, a mobility scooter store and
facilities for charging the batteries, free parking, a prescription collection service,
newspaper delivery, a chiropodist clinic, a hairdressing salon, a shop, and the ability
to cash cheques. He explained that short-term respite care is provided so that if, for
30 example, a resident is unable to care for themselves after a spell in hospital, they can
have one week’s care free of charge, including the use of a bedroom with food
provided, staff to assist them with washing, use of the toilet and so on. If a resident
requires care for longer than one week then it must be paid for separately. Mr Pellatt
explained that residents who require a level of care on an on-going basis, over and
35 above that which he had described, must pay for it. He explained that domicilliary
care packages are available through the charity or from another care provider if the
individual resident prefers. He said that as the charity is not licensed to provide
residential care by the Care Quality Commission, it can offer no more than 13 hours a
week of care to any resident.

40 17. Mr Pellatt explained that the residents of Holme Terrace may come and go as
they wish but that, for security reasons, access to Holme Terrace is by key pad entry
during the day and by use of an electronic key fob at night. Visitors can be buzzed in
by a resident or by a member of the care team. He also explained that about 24% of
the residents receive formal care through a care package but that the rest live
45 independently in the supportive milieu provided by the charity. He added that care

needs may change over time as the resident ages. In answer to questions from Mr Ridley he explained that there is no element of compulsion in respect of the residents' daily activities at Holme Terrace. The communal lounge provides facilities for the residents to meet and play card games or listen to music on a purely voluntary basis.

5 Mr Pellatt told the Tribunal that the charity aims to look after its residents in the way that a caring son or daughter would care for elderly parents.

18. Mr Ridley also asked Mr Pellatt about the laundry at Holme Terrace, which had been the focus of some correspondence between the parties. Mr Pellatt confirmed that the industrial laundry located at Holme Terrace provides laundry services to all

10 residents of The Great Hospital, not just to those resident at Holme Terrace, but added that only staff could access the laundry room and operate the machinery for health and safety reasons.

HMRC's Case

19. HMRC's case was that Holme Terrace is not an "*institution*" in its own right for

15 the purposes of notes 4 (b) or 4 (g) and that it does not provide "*personal care*" for the purposes of note 4 (b). There was no dispute about the remaining criteria in the Notes.

20. The Tribunal heard evidence from Phillipa Kent, who was the author of the decision under appeal. She also submitted a helpful witness statement, setting out the

20 history of the case and her views about it. HMRC did not rely on any factual evidence of its own. Ms Kent told the Tribunal that she had taken policy advice before reaching her decision on this case.

21. Ms Kent helpfully explained that she did not disagree with Mr Pellatt's evidence. She explained her view that Holme Terrace is not a self-sufficient unit as

25 the laundry services for residents of the other units are provided from Holme Terrace, and that in HMRC's view this arrangement precluded Holme Terrace from satisfying the definition of "*an institution*". Furthermore, she explained that she understood the term "*personal care*" in the legislation to refer to services such as feeding and washing, so that the services which Mr Pellatt had described as being provided to

30 residents at Holme Terrace did not constitute "*personal care*" for the purposes of the legislation. She accepted that some residents do receive such care but she said that, as they have to pay for it under a separate contract, Holme Terrace falls outside the statutory scheme. Mr Hoare had no questions for Ms Kent.

Submissions

22. Mr Ridley referred me to the decision of the First-tier Tribunal (Tax Chamber) in *Cordery Build Limited v HMRC* [2012] UKFTT 384 (TC), in which it was held that

35 the Appellant did not satisfy the definition of "*institution*" as the requisite element of organisation of the residents was not present and also that "*personal care*" was not provided. Mr Hore sought to distinguish the decision in *Cordery*, pointing out that in

40 that case there were no on-site care staff or infrastructure and that the emergency cord connected to an off-site call centre, the residents in that case did their own laundry

and cooking, and were granted a tenancy of their bedsitting room rather than a licence. As noted above, I am not bound by the decision in *Cordery* but I agree with Mr Hore that the care environment provided to residents in that case was qualitatively different in nature from that provided at Holme Terrace.

5 23. Mr Ridley referred me to a decision of the VAT Tribunal in *St Andrews Property Management Limited v HMRC*, in which it was held that the construction of a secure care facility for young people with learning difficulties and challenging behaviour did constitute an “institution” for the purposes of this legislation. In that case, the Tribunal noted the specialist care setting, the requirement for staff to be in
10 close proximity to residents at all times, and that the residents were detained under the Mental Health Act so could not leave voluntarily. Mr Ridley’s submission was that an “institution” does not provide activities which are purely voluntary and does not allow residents to come and go as they please. He also submitted that the “personal care” provided in an “institution” must be mandatory, and a condition of residence,
15 and did not include services that could be refused or bought in from another provider. Once again, I am not bound by the decision in *St Andrews* but I note that the distinctive needs of its client group differ fundamentally from the needs of the residents of Holme Terrace.

24. Mr Hore also referred me to the decision of the VAT Tribunal in *Hospital of St John and St Elizabeth v HMRC* in which it was accepted that the facility was an
20 “institution” in circumstances where it provided elderly residents with dementia with “non-clinical support services, therapy and general medical back-up together with the overall maintenance and security provision of the unit”. Mr Hore submitted that HMRC’s concept of an “institution” as one which necessarily restricted the comings
25 and goings of its residents or compels them to participate in certain activities is not one required by the VAT legislation and, moreover, is out-moded. He pointed out that the residents at Holme Terrace have human rights.

25. HMRC’s case was also that Holme Terrace is not an institution in its own right but merely a building which is part of the larger institution of the charity. It relied on
30 the example of the laundry which is located at Holme Terrace but in which the laundry of residents from TGH facilities other than Holme Terrace is washed, as an example of this difficulty. On this point, Mr Hore referred me to the VAT Tribunal’s decision in *Wallis Limited v HMRC* in which a mental health unit which was part of a larger facility was held to be an “institution” for the purposes of the legislation. He
35 submitted that this approach had been adopted in the *St Andrews* case also. He also referred me to *Hoylelake Cottage Hospital Charitable Trust v HMRC* [2011] UKFTT 48 (TC), in which the First-tier Tribunal held that a nursing home qualified for zero-rating under schedule 8 group 5 notwithstanding the fact that kitchen and laundry services were initially provided to the residents from separate facilities on the hospital
40 site. Mr Hore acknowledged that HMRC’s guidance relied on the concept of an “institution” as being one that is self-sufficient, but submitted that this concept was not in fact required by the primary legislation or by any binding legal authority.

26. With regard to the question of “personal care”, I note that some Tribunal decisions have included a definition of this term imported from other legislation, as it

is not defined in VATA. HMRC relied on the concept of “*personal care*” adopted by the Department for Work and Pensions, namely attention required in connection with bodily functions. Mr Hore referred me to the decision in *HMRC v Fenwood Developments Limited* [2005] EWHC 2954 (Ch) in which, on appeal from a decision of the VAT Tribunal concerning Schedule 8, group 5 of VATA, the Chancellor of the High Court upheld the Tribunal’s decision that the institution provided personal care within the meaning of note 4 (b) by providing a regime which allowed its residents to live “*as normally as possible*”. The Tribunal had found at [51] that the main purpose of the facility for women with enduring mental health problems “*was to take care of its residents and make life more comfortable for them rather than to treat them for their various conditions by the exercise of professional skill*” and, he submitted, the High Court had endorsed this approach in upholding the Tribunal’s decision.

27. In reliance upon this authority, Mr Hore submitted that the new model of care, which Holme Terrace had adopted, provides assistance with daily living on a continuum of care basis, so that the varying needs of the ageing client group can be met over a period of time. He emphasised that Holme Terrace residents move from more secure accommodation in order to access this flexible range of care and in order to live more independently for longer within that setting. He urged the Tribunal to be cautious about adopting a definition of “*personal care*” which was developed for another legislative context and in order to address other issues, for example an entitlement to social security benefits. He suggested that a flexible definition of “*personal care*” which meets the needs of the particular client group should be preferred. From the point of view of the residents of Holme Terrace, he argued, personal care is exactly what is provided.

25 *Conclusion*

28. Firstly, I entirely accept Mr Ridley’s submission that TGH’s membership of the Almshouses’ Association does not automatically qualify it to claim the zero-rating applicable in relation to a relevant residential purpose. I take into account the charitable nature of the organisation running Holme Terrace and its membership of the Almshouses Association, but I consider that this preliminary issue must be decided on the basis of all the evidence and that no single factor can tip the scales in either direction.

29. Secondly, I note that VATA does not define the key concepts of “*an institution*” or “*personal care*” and it seems to me that this legislative approach is designed to allow for the ordinary meanings of those terms to be applied, taking into account the flexibility of interpretation required in the assessment of the applicable care regime for different client groups. The degree of organisation and compulsion required in a residential setting for, say, elderly persons obviously differs from that required by teenagers with challenging behaviour, but they may both take place in what are commonly understood to be “*institutions*”. It also seems obvious that the level of personal care provided to some client groups will necessarily differ from those provided for others. For these reasons, I did not find HMRC’s reliance upon the indicia of an “*institution*” or a definition of “*personal care*” which had been applied by previous tribunals with regard to the needs of entirely different client groups to be

helpful. I have taken a different approach, which is to consider whether the arrangements at Holme Terrace meet the definitions of “*an institution*” and whether Holme Terrace provides “*personal care*” to its residents from the perspective of the care needs of its particular client group, who are in need of a type of care appropriate for them due to their age.

“*An Institution*”

30. Having considered all the evidence carefully, I am satisfied that, for the purposes of both notes 4 (b) and 4(g), the Appellant has shown that Home Terrace is an “*institution*”. I make this finding for the following reasons. The residents of Holme Terrace have a great deal of autonomy (as is their right) but that autonomy exists within a framework of rules and regulations which they must agree to adopt and abide by. They could be made to leave Holme Terrace if they do not adhere to the rules, as they have no occupational rights. When they take up residence it is at the invitation of the charity, having been assessed as in need according to the charity’s governing Scheme. As the residents of Holme Terrace are merely licensees, the charity may (and, indeed does at times) move them to a different flat within the building; they may not have overnight guests at their flats; they may not decorate or make alterations to their flats; they must inform staff if they are to be away overnight; they must submit to inspections and works provided by the charity. I consider that these are all features more consistent with a life lived in an “*institution*” than they are with a completely autonomous life lived in a bought or rented flat and over which the resident has legal rights and sole control.

31. I find that the degree of compulsion or control necessary (or indeed permitted) for the residents of Holme Terrace as a client group is minimal and that the flexible test of whether an “*institution*” exists under VATA does not require there to be any element of compulsion in their daily lives if compulsion is not a feature of their care needs. Mr Ridley’s cross examination of Mr Pellatt proceeded on the basis that, unless residents were compelled to participate in card games in the communal lounge, they could not be said to be living in an institution. I reject this approach. Taking instead the approach of assessing the degree of organisation required in respect of the relevant client group, it seems to me that Holme Terrace has the relevant features of an “*institution*” for the purposes of VATA in view of the overall organisational framework for its residents which I have already referred to.

32. As described by Mr Pellatt, I find that Holme Terrace provides a supportive milieu in which residents are enabled to live as normally as possible for as long as possible but where they are able to access a higher degree of care if and when their needs increase. This philosophy of care is facilitated by the framework of rules and regulations which provides the mechanism by which the charity may exercise ultimate control over key aspects of the residents’ lives if required. To my mind, this arrangement means that the residents of Holme Terrace live in an “*institution*”.

33. Finally on this point, it does not seem to me that there is any binding legal requirement for an “*institution*” to be self-sufficient. In any event, it is illogical for HMRC to argue that Holme Terrace is not self-sufficient on the basis that it contains a

laundry room which takes in items from residents other than those at Holme Terrace. If self-sufficiency is a relevant test (which I doubt) then surely it is those organisations which export their laundry to Holme Terrace which might be said to fail it, rather than Holme Terrace itself?

5 “*Personal Care*”

34. Turning to the definition of “*personal care*” and having considered the decisions in *Fenwood* carefully, I find I am not persuaded that the High Court expressly approved the Tribunal’s definition of “*personal care*” as “*taking care*” of its needy residents, as submitted by Mr Hore. The focus of the appeal in that case was
10 the question of whether the Tribunal had been wrong to find that the facility was not a hospital or a prison or similar institution and, whilst the Chancellor may well have made it clear if he had disagreed with the Tribunal’s approach on the “*personal care*” point, he did not actually make any comment on it. I do not, therefore, accept Mr Hore’s contention that there is a relevant High Court authority on these legislative
15 provisions by which I am bound, although I have found the approach of the Tribunal and the High Court in *Fenwood* of assistance, not least because it tends to support my view that the definition of “*personal care*” in VATA is one that bears the words’ ordinary meaning, taking into account that the type of care provided will be flexible, depending on the care needs of the relevant client group.

20 35. Notwithstanding (as I find) the absence of any binding authority on the point, I am satisfied that Holme Terrace does provide its residents with “*personal care*” for the purposes of note 4 (b). I make this finding in view of the wide range of services described by Mr Pellatt and referred to above. I am satisfied that the services provided by the charity for free are designed to address the particular care needs of
25 the incoming residents of Holme Terrace, so that there is a match between the two elements of the test in note 4 (b), namely the provision of personal care to persons in need of that personal care by reason of their old age. Some of these services may at times involve feeding and washing a resident (for example when respite care is required) but others involve the provision of a supportive milieu designed to allow for
30 maximum independence, for example the call button, site security and maintenance, and laundry services. I note that the charity may only provide accommodation to persons in need and that the individual care needs of prospective residents at Holme Terrace are assessed by the care manager so that it is ensured they may be met. I reject HMRC’s argument that it is necessary to import a rigid definition of “*personal
35 care*” from other sources into VATA and find that the “*personal care*” provided at Holme Terrace is of a kind which is carefully calibrated for its particular residents and that it meets the flexible definition of the term which is found in VATA.

36. For all these reasons, I decide the preliminary issue in favour of the Appellant. As noted at paragraph [2] above, the parties must contact the Tribunal within 28 days
40 in order for it to direct how best to determine any remaining disputed issues between them.

37. 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.

10

**ALISON MCKENNA
TRIBUNAL JUDGE**

RELEASE DATE: 13 November 2014