[2016] UKFTT 052 (TC)

TC04851

Appeal number: TC/2013/4594

VALUE ADDED TAX – zero rating - construction of a garage and workshop – accepted as constructed at the same time as a relevant residential building – whether "used together as a unit solely for relevant residential purposes" – yes – appeal ALLOWED

FIRST-TIER TRIBUNAL
TAX CHAMBER

TGH (COMMERCIAL) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE AMANDA BROWN
HELEN MYERSCOUGH

Sitting in public at The Old Bakery, 115 Queens Road, Norwich, NG1 3PL on 10 December 2015

Peter Hore of Indirect Tax Services Limited, representative for the Appellant.

David Wilson, Officer of HM Revenue and Customs for the Respondents.

DECISION

1. This appeal concerns a claim by the Appellant that certain works undertaken by it should properly be subject to Value Added Tax at the zero rate pursuant to section 30 and item 2(a) to Group 5 Schedule 8 Value Added Tax Act 1994 ("VATA") as a consequence of the application of Note (5).

2. The works in question were the construction of a workshop, garage and store (together referred to as the "Workshop") at the site of The Great Hospital on Bishopsgate in Norwich.

3. The Appellant is a wholly owned subsidiary of the charity known as The Great Hospital (registered charity number 211953) ("TGH"). TGH was established in 1249 to provide relief for the poor and needy of the City of Norwich. Pursuant to amended objects the Charity now provides affordable residential accommodation to persons in need who are over the age of 65 in the case of men and 60 in the case of women.

4. The Appellant was incorporated in 2009 as TGH (Construction) Ltd and is not a charity. In 2011 it entered into a design and build contract with TGH. Pursuant to that contract the Appellant undertook to:

(1) demolish the existing garages and construct a car park and the Workshop;

(2) demolish Holme Cottages and, in their place construct a two story, self-contained building, known as Holme Terrace, and comprising eighteen self-contained flats for occupation by elderly licensees;

(3) construct an extension to a building known as Prior Court, such extension comprising 6 self-contained flats;

(4) construct a community hall.

Procedural background

5. Initially there were a significant number of matters on which the parties were in dispute as regards the liability to VAT of various aspects of the works referred to above. On 20 May 2014, Judge Berner directed that a question concerning whether Holme Terrace was a building used for "a relevant residential purpose" be determined as a preliminary issue.

6. At a hearing on 18 September 2014, Judge McKenna considered evidence and submission as to whether Holme Terrace was a building meeting the criteria set out in Note 4 to Group 5 Schedule 8 VATA namely whether it was:

(1) A home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of old age, disablement … (Note 4(b)) and/or

(2) An institution which is the sole or main residence of at least 90 per cent of its residents … (Note 4(g))

7. Judge McKenna determined (see TGH (Construction) Ltd [2014] UKFTT 1039) that the key concepts of "*an institution*" and "*personal care*" were intended by the legislature to be given their ordinary meanings which required a flexibility of interpretation by reference to the care needs of the relevant client group (in the present case those of old age).

8. She found that Holme Terrace was an "institution" because, whilst the residents enjoyed a great deal of autonomy that autonomy existed within a framework of rules and regulations which they must agree to adopt and abide by. Further, as the residents were licensees they could be asked to leave at any time and could be moved from flat to flat within the various premises on the site. There are restrictions on the use to be made by the residents of the flats. On the basis of these factors Judge McKenna considered that the features were consistent with life in an institution. She also held that there was no requirement within the context of the use of "institution" to require there to be compulsion or control over the residents.

9. Of potential relevance to the matters under present consideration, in the context of what was to be considered an institution the Respondents had submitted that Holme Terrace was not self-sufficient because the laundry in Holme Terrace supported the other buildings. Judge McKenna concluded that self-sufficiency was unlikely to be a relevant test in determining whether the property was an institution but considered that given that the laundry was within Holme Terrace it could not be considered to lack self-sufficiency but rather that it was the other buildings that would be considered to lack self-sufficiency.

10. Judge McKenna also concluded, by reference to the evidence, that Holme Terrace did offer its residents personal care as the range of services offered to residents for free were designed to address the particular care needs of the residents.

11. On this basis the tribunal concluded the preliminary issue in the Appellant's favour holding that Holme Terrace was a building used for a relevant residential purpose, meeting the requirements both of being an institution providing residential accommodation with personal care (Note 4(b)) and an institution which is the sole or main residence of 90 percent of its residents (Note 4(g)).

12. During the course of the dispute the Respondents accepted that the works undertaken in relation to Prior Court were also zero rated as a supply in the course of construction of a building designed as a number of dwellings. The Appellant accepted that the works to Prior Court were not eligible to be zero rated as the construction of a relevant residential building because these works amounted to an enlargement or extension to Prior Court.

13. As regards the car park the parties agreed to an apportionment of costs as between standard rated and zero rated. The Respondents accepted that spaces created for use with Holme Terrace should be zero rated. The Appellant accepted that as the car park itself could not be considered as a "building" the provisions of Note 5 could

not apply and the works regarding the car park could not therefore be zero rated in their entirety. An apportionment as between the zero rated and standard rated works was agreed.

14. With regard to the community hall again an apportionment was agreed with 18% of the construction costs being treated as standard rated by reference to the use of a defined area as a shop and the remainder of the building being used as a village/community hall thereby eligible to be zero rated pursuant to Item 2 Group 5 Schedule 8 and Note 6 as used for a relevant charitable purpose.

15. In a Joint Statement of Outstanding issues the parties set out:

(1) Issue 1 – the Appellant asserts that Note 5 Group 5 Schedule 8 VATA provides that the construction of the [Workshop] constructed at the same time and on the same site as Holme Terrace and other construction should be zero rated. The [Workshop] [is] used together with Holme Terrace and separately with Prior Court, both of which are used solely for a relevant residential purpose. The Appellant asserts that Note 5 provides that the supply is zero rated where the ancillary buildings are used with the main building or buildings, used solely for a relevant residential purpose, and does not lay down the requirement that the ancillary buildings be solely used in conjunction with the main relevant residential purpose building or buildings.

(2) Issue 1 – the Respondents disagree. The Respondents' view based on the known facts, is that the [Workshop] cannot satisfy Note 5 because [it is] not used together as a unit with Home Terrace and the newly constructed relevant residential purpose building. It is advised that the [Workshop] [is] used together as a unit with all the residential property on the site in Bishopgate and, as these were not constructed at the same time, do not comply with the requirement of Note 5 that the building are intended to be used together as a unit solely for a relevant residential purpose.

(3) Other matters were referred to in the Joint Statement but these had been resolved before tribunal.

Factual findings

16. The Tribunal had received witness statements from Kevin Pellatt, a director of the Appellant, and Philippa Kent an Officer of the Respondents. Oral testimony was taken from only Mr Pellatt. There was however, little dispute between the parties.

17. As indicated above, the Appellant was established as TGH (Construction) Ltd on 13 May 2009 with a view to becoming the main contractor for works to be undertaken at the site of The Great Hospital. The works had been originally conceived in 2004 but as a consequence of protracted negotiation with English Heritage had not gained planning permission until January 2009. The Appellant began the tender process and appointed sub-contractors on 17 November 2011.

18. The works identified in paragraph 4 above were undertaken in distinct and largely contiguous phases. Works in fact began on 25 April 2011 before the contract was formally signed. All works were complete by 17 January 2014.

19. TGH has its origins in a charity founded in 1249 by Walter Suffield. The Great Hospital buildings are historically significant. The first beneficiaries of the original foundation were aged priests, poor scholars and sick and hungry paupers. It received Papal confirmation from Pope Alexander IV on 15 October 1257. It is one of the few such hospitals to have survived the reformation and it retains its collection of mediaeval records. Such records having been admitted to the UNESCO 2011 UK Memory.

20. The current objects of the charity are "the provisions and maintenance in the City of Norwich of The Parish Church of St Helen and of the alms houses known as the Great Hospital founded in accordance with the benevolent designs of King Edward the Sixth" which continues the wide ranging provisions of care to the old, poor and sick.

21. On the site of the Great Hospital are 15 buildings. The Tribunal understands that 9 of these buildings are used to provide residential accommodation and associated facilities. The other buildings are understood to be of historic interest and house the historic records. Tours are offered and the buildings are available for use for conference facilities etc. Income to TGH from activities other than the provisions of residential accommodation and care in 2014 represented approximately 0.5% of total income the remainder being generated by licencing to residents.

22. The admissions policy for residence at the Great Hospital requires that the individuals are over 60 in the case of women and over 65 in the case of men, resident in Norwich.

23. The accommodation units available on the site provide a mixture of single and double accommodation for in excess of 100 residents in a range of buildings constructed from the 15th Century through to Holme Terrace constructed in 2013. The accommodation offered is described on TGH's website as sheltered/supported housing and housing with extra care facilities.

24. The Tribunal understands that each of the modern units provides the resident with the facilities and space for independent living including sleeping, showering and cooking. In addition the buildings have additional communal facilities including bathrooms, social space, and laundry. All the residential accommodation is adapted for use by the elderly.

25. TGH offers residents full maintenance and upkeep of the properties together with a range of services consistent with the occupation of accommodation by the elderly including a retained GP, visiting chiropodist, hairdresser, emergency 24 hour access to a care team and social activities.

26. In addition TGH offers domiciliary care of up to 13 hours per week to the residents. TGH is registered with the Quality Care Commission but does not provide full time long term domiciliary care or nursing care.

27. The resident's agreement with TGH is identical in whichever building they are resident. Some buildings are less suitable than others for the more elderly or infirm largely due to access to the buildings themselves, i.e. some paths are more uneven than others. They have access to the same facilities and the same services. Mr Pellatt confirmed this in his evidence and was not subject to cross examination on it.

28. As indicated above Judge McKenna concluded that the accommodation at Holme Terrace was used for a relevant residential purpose. On the basis of the evidence available to the Tribunal it is therefore clear that all buildings which house residents on the site are *used* for a relevant residential purpose.

29. The dispute concerns the construction of the Workshop. The building in question is a single story building. The workshop area houses tools, a small rest area for the staff, a kitchen and a shower. The garage area houses the maintenance van used by the staff in their duties. There is also a wheelie bin store.

30. Prior to the construction of the disputed building the workshop had been housed in the lower floor of one of the historic buildings the upper floor of which is the Eagle Ward one of the historical and architectural treasures of the Great Hospital. It was considered inappropriate for housing the workshop.

31. The Workshop is used by maintenance staff. There are 7 staff including one caretaker, one odd job man, one general hand, one carpenter and three painters and decorators. These staff maintain the residences. Admission to the building is restricted to Mr Pellatt and the maintenance staff and facilities manager of TGH for health and safety reasons.

32. Mr Pellatt's witness statement provides that the Workshop is "used for the maintenance staff who are solely engaged in maintaining the buildings on our site". In oral testimony he stated that the maintenance staff were used solely in connection with maintenance of the residential buildings though they did offer wider services to the residents for instance clearing paths of snow; helping residents move their belongings when they were being relocated between flats as necessary. He described them as an extension to the care team providing a safe environment for the residents. The Appellant's submissions, as set out below were that the "predominant purpose" of the maintenance workers was to provide services to support the residential properties. None of the evidence on the activities of the maintenance staff was the subject of cross-examination by the Respondents. In a question put by the Tribunal Member concerning the potential use of the Workshop in connection with the non-residential buildings Mr Pellatt confirmed that all maintenance of the historic buildings was undertaken by specialist contractors and not the maintenance staff. The Respondents were given the opportunity to question Mr Pellatt after the question from the Tribunal Member but did not do so.

33. As regards the activities of the maintenance staff the Tribunal accepts that the staff are predominantly employed for the purposes of maintaining the residential properties which will include the wider outdoor or more manual labour aspects of ensuring the comfort and wellbeing of the residents. The Tribunal also accepts the evidence that for the vast majority of any work required to be undertaken in connection with the non-residential historic buildings the very nature of the works would require specialist contractors. However, the Tribunal also considers that it is highly likely that minor maintenance tasks may well be undertaken in connection with the historic buildings e.g. changing a lightbulb or other works to the more modern parts of the estate i.e. the community hall. Based on the evidence as it was presented and in particular by reference to the unchallenged oral testimony, the Tribunal considers that such activity would not be likely to represent in excess of 5% of the time of the maintenance team.

Relevant legal provisions

34. By virtue of section 30 and Item 2 Group 5 Schedule 8 VATA the supply in the course of construction of a building intended for use solely for a relevant residential purpose is zero rated.

35. Note (5) provides:

> "Where a number of buildings are:
>
> (a) constructed at the same time and on the same site; and
>
> (b) are intended to be used together as a unit solely for a relevant residential purpose;
>
> then each of those buildings, to the extent that it would not be so required but for this Note, are to be treated as intended for use solely for a relevant residential purpose."

Submissions of the parties

36. The Appellant contended that the approach to be taken by the Tribunal was to answer seven questions:

(1) Is there more than one building being constructed?

(2) Were the buildings in question "*constructed*"?

(3) Were the buildings constructed on the same site?

(4) Were the buildings constructed at the same time?

(5) Will at least one of the buildings be used for a relevant residential purpose?

(6) Are the buildings intended to be used together as a unit?

(7) Will the buildings be used "*as a unit **solely***" for a relevant residential purpose?

Is there more than one building being constructed?

37. The Appellant referenced the Planning Permission, the tender acceptance, the Design and Build Contract and the Construction Contract the works undertaken were phased as set out in paragraph 3 above in support of its conclusion that there was more than one building being constructed. The Respondents accepted that the first question was answered in the affirmative.

Were the buildings in question "constructed"?

38. The Appellant drew the Tribunal's attention to the provisions of Note 16(b) to Group 5 which sets out a partial definition of "construction". Excluded from the definition of construction is the conversion, reconstruction or alteration of an existing building; any enlargement of or extension to, an existing building except to the extent that a new dwelling or dwellings are created; and the construction of an annex (unless certain criteria are met). In the Appellant's view all of the works undertaken and identified (other than the demolition of the old garage and Holme Cottages) represented works of construction. The Tribunal did not understand the Respondents to assert otherwise.

Were the buildings constructed on the same site?

39. The parties were agreed that all buildings were constructed on the site of TGH.

Were the buildings constructed at the same time?

40. The parties were agreed that the buildings were constructed at the same time, with the consequence that the provisions of Note 5(a) were agreed by the parties to have been met.

Will at least one of the buildings be used for a relevant residential purpose?

41. The Appellant submitted that the preliminary judgment of Judge McKenna concluded that Holme Terrace was a building used for a relevant residential purpose.

42. However, the Appellant also submitted that the works undertaken in relation to Prior Court were also capable of being viewed as used for a relevant residential purpose. The Tribunal was referred to correspondence in which the Respondents stated that the extension to Prior Court had been zero rated by virtue of the creation of new dwellings and thus could not be considered to, at the same time, qualify for zero rating as used for relevant residential purpose. Subsequent to that correspondence the Respondents issued Information Sheet 02/14 which announced a change in their policy from that date accepting that the supply of construction services could be eligible to be zero rated either on the basis that building was designed as a dwelling or used for a relevant residential purpose.

43. The Respondents made no formal submission in response to the Appellants assertion that the works to Prior Court were also eligible to be zero rated as the construction of relevant residential purpose buildings. It was also not obvious to the

Tribunal that the matter had ever been addressed in correspondence between the parties. However, given the conclusions reached as set out in paragraph 60 – 90 below it is a matter that does not need to be resolved.

Are the buildings intended to be used together as a unit?

44. The Appellant contended that by reference to the evidence of Mr Pellatt the predominant purpose of the maintenance workers was to maintain the residential buildings and to ensure a safe environment for the residents. By their submissions the Appellant sought to draw an analogy between the use of the Workshop and the other accommodation provided to domiciliary care staff as an inherent part of the support infrastructure for residents. Thereby, in the Appellant's submission, the buildings in question were used together with the relevant residential buildings and in particular with Holme Terrace.

45. The Appellant drew the Tribunal's attention to the provisions of HMRC's guidance VCONST02320 and to HMRC's acceptance that an administration block constructed at the same time as a residential care home would qualify for zero rating.

46. Reliance was placed by the Appellant on the etymology of the word "unit" as indicating that all that was required by reference to the word "unit" was that the buildings be used "as one".

47. The Appellant relied on the FTT judgment in the matter of *Hoylake Cottage Hospital Trust [2011] UKFTT 48* in support of its argument that the Workshop was used "as one" with Holme Terrace provided that it could be shown that its use was connected to the use of Holme Terrace and that it formed an integral part of the residential accommodation offered to the residents.

48. By reference to the judgment in *St Andrew's Property Management Ltd [20499]* the Appellant contended that the focus for the Tribunal had to be the use to which the building in question was put in the context of a relevant residential purpose. The Appellant emphasised that the tribunal in that case at paragraph 27 had concluded that "it would be absurd to allow zero rating for a home built in one building but not for what would essentially be the same home where it happened to be in two buildings".

49. The Tribunal's attention was also drawn to the judgment in *Mark Catchpole [2012] UKFTT 309*. The Appellant sought to emphasise the conclusions of that tribunal that the rationale for Note 5 was explicitly to extend the zero rating provision to include buildings that were not individually used for a relevant residential purpose but which were, together with others, so used. At paragraph 35 of that judgment the tribunal states "whilst one or some individually might not be used for a relevant residential purpose, the buildings as a whole 'are intended to be used as a unit solely for relevant residential purposes'". At paragraph 38 the tribunal continued "The boiler house in isolation would plainly fail the test, and this thus has to be addressed by Note 5 which deems the building, the boiler house, to be 'used solely for a relevant residential purpose' … Note 5 must therefore go further, and attribute the purpose of the buildings as a whole to each building, so that each can then satisfy the … test".

50. The Appellant contended that the cases referred to illustrated that where properties are constructed at the same time and some fail the test of being used for a relevant residential purpose, then provided that the 'failing' buildings are used to support a building being constructed that does not fail the test or together they contribute to being used for relevant residential purposes, the supply of them should be zero rated.

51. In this regard the Appellant also sought comfort for its approach by reference to the provisions of Item 2 to Group 7 to Schedule 7A VATA. Schedule 7A is the reduced rate schedule and provides for the reduce rate of VAT to apply to residential renovations and alterations. Item 2(2) permits the reduce rate to apply where a building, when last lived in, formed part of a "relevant residential unit" with the consequence that even where the building itself was not used for a relevant residential purpose (defined identically to the provisions of Note 4 Group 5 Schedule 8) it could nonetheless qualify for the reduced rate on renovation. Relevant residential unit is defined in Item 2(3) as a building which is one of a number of buildings on the same site which are "used together as a unit for a relevant residential purpose". This provision, so it was contended, permitted a conclusion that the sole focus of attention should be on the relationship between the Workshop and Holme Terrace and the existence of the other buildings was irrelevant.

52. The issue was reframed as "whether the building which does not itself qualify as being used for a relevant residential purpose (in our case the Workshop) will be used together with a building that is or will be used for a relevant residential purpose". Reliant upon the Respondents' acceptance that all the residential buildings on the site and serviced by the maintenance staff were used for a relevant residential purpose the Appellant considered the Workshop clearly met this test.

*Will the buildings be used "as a unit **solely** for a relevant residential purpose"?*

53. In this regard the Appellant contends that any construction, whether on a bare site or otherwise, where there is at least one building being constructed at the same time which will be used with it for a relevant residential purpose should benefit from Note 5.

54. In the Appellant's submission, as the buildings under consideration in Note 5 will never be for use solely for a relevant residential purpose on their own, the language of Note 5 where it refers to "solely for a relevant residential purpose" cannot relate to the building under consideration but to the buildings more widely. In the Appellant's contention what Note 5 requires is that it is the use of the "unit" comprising Holme Terrace and the Workshop that must be used solely for a relevant residential purpose which in turn placed the emphasis on the use of Holme Terrace. Provided that Holme Terrace was to be used solely for a relevant residential purpose and that the Workshop was to be used together with (in connection with and as an integral part of) Holme Terrace the relevant test would be met. As Judge McKenna had already ruled that Holme Terrance was a building constructed solely for use for a relevant residential purpose this appeal should be resolved in its favour.

55. The Appellant rejected strongly the assertion by the Respondents that there was a presumption that the Workshop must be used solely with Holme Terrace in order to qualify for zero rating. The Appellant contended that if it were appropriate to look at the use of the Workshop by reference to wider site it was then important to consider what that site was used for and whether the site met the test for relevant residential purpose. In the Appellant's submission and by reference to the income derived by TGH the use of the site as a whole qualified as solely relevant residential purpose by virtue of it meeting the Respondents' de minimis test.

56. The Respondents served a skeleton argument but made no substantive response to the arguments presented to the Tribunal on the more contentious issues identified as questions 6 – 7 in paragraph 36 above and addressed in paras 44 – 52 and 53 – 55 above respectively.

57. By their skeleton argument the Respondents' case was that Workshop does not satisfy Note (5) as it is only partly, not solely, used for Holme Terrace which is the relevant residential purpose building alongside which it was constructed.

58. The Respondents accept that the Workshop is used in connection with other buildings that are used solely for a relevant residential purpose but that unless it is used exclusively in connection with Holme Terrace it cannot meet the Note 5 test as it is only Holme Terrance that was constructed at the same time as the Workshop. Without that exclusivity of use the Respondents contend that the Workshop and Holmes Terrace are not "used together ***as a unit solely*** for a relevant residential purpose".

59. The purpose of the provisions of Note 5 were, in the Respondents' submission to limit zero rating to the construction of a number of buildings which together met the relevant residential purpose test. It was emphasised that the construction of a new building to support existing relevant residential buildings did not qualify for zero rating. Accordingly, to be given its intended meaning "together as a unit" must be construed as together and exclusively with the other buildings which were constructed at the same time and on the same site.

Discussion

60. As a starting point the Tribunal has sought to determine the legislative intent for Note 5. The provisions of what is now Group 5 to Schedule 8 VATA were introduced by paragraph 1 to Schedule 3 of the Finance Act 1989 and in consequence of infraction proceedings successfully bought by the European Commission and the subject of the ECJ judgement in 1988 (*Commission v United Kingdom [1988] STC 251*). Prior to 1989 the UK had permitted all construction to qualify for zero rating.

61. By its judgment the ECJ evaluated:

> "35. The Commission challenges the zero-rating of all the items in Group 8 with the exception of housing constructed by local authorities. With regard to the housing sector, the Commission argues that the indiscriminate application of a zero-rate to the whole sector, regardless of the nature of the dwellings

concerned, is contrary to the first criterion laid down in the last indent of art 17 inasmuch as it is disproportionate in relation to the objectives of the United Kingdom's social policy in housing matters. With regard to commercial and industrial buildings and to community and civil engineering works the Commission considers that any benefit to the final consumer is too remote to meet the second criterion laid down in the last indent of art I7.

36. With regard to buildings intended for housing, the Commission's arguments cannot be upheld. The measures adopted by the United Kingdom in order to implement its social policy in housing matters, that is to say facilitating home ownership for the whole population, fall within the purview of 'social reasons' for the purposes of the last indent of art 17 of the Second Directive.

37. By applying a zero rate to the activities comprised in Group 8 with regard to housing constructed both by local authorities and by the private sector, the United Kingdom has not, therefore, contravened the last indent of art 17 of the Second Directive.

38. However, activities included in Group 8 in relation to the construction of industrial and commercial buildings and to community and civil engineering works cannot be considered to be for the benefit of the final consumer.

39. It follows that the United Kingdom has failed to fulfil its obligations, as alleged by the Commission, in so far as it applies a zero-rate to services in relation to the construction of industrial and commercial buildings and to community and civil engineering works."

62. There are no explanatory notes to the 1989 Finance Act however, the rational for the changes must be assumed to have been to ensure European compliance of the zero rating provisions, i.e. to limit the construction zero rating to activities with a defined social reason. The provisions implemented in 1989, which include what is now Note 5 limited zero rating for construction to buildings designed as a dwelling or number of dwellings (determined by reference to design) and buildings used for a relevant residential purpose or relevant charitable purpose (determined by reference to use and thereby requiring a certificate of use).

63. That eligibility for zero rating as relevant residential purpose is tethered to use of the building and not to design or any other factor is supported by the change of use provisions set out in Part 2 to Schedule 10 VATA.

64. However, the zero rating provisions relate to the construction of buildings and, as explicitly provided in Note 16(b) do not include "any enlargement of, or extension to, an existing building".

65. HMRC's policy in this area is set out in Public Notice 708 and Manual VCONST, as "updated" by Information Sheet 02/14.

66. As regards the provisions of Note 5 paragraph 14.6.4 of Public Notice 708 states:

"A building containing living accommodation is not 'residential accommodation' unless the building contains sleeping accommodation. For example, if the only living accommodation in a building is a dining hall then that is not 'residential accommodation'.

However, a dining hall that is to be constructed at the same time as another building (or buildings) containing sleeping accommodation with the intention that they are to be used together to provide living accommodation, is 'residential accommodation'.

If a building contains both bedrooms and a dining hall then both parts are 'residential accommodation'.

However, the dining hall must be intended for use in conjunction with the sleeping accommodation in that building. Use by persons sleeping in other buildings prevents the dining hall from being 'residential accommodation' unless all the buildings involved were constructed together and were intended to be used collectively as living accommodation. To fall within the zero-rate, all of the buildings must be intended to be used together solely (95% or more) by residents living in the accommodation, their guests and those who look after the building."

67. The relevant provisions of the Respondents' Manual provides:

VCONST15120 – "If a building is not, in itself, used for a 'relevant residential purpose', you must also consider whether it is used, together with other buildings, as a unit for a 'relevant residential purpose'. Note 5 to Group 5 applies to the reduced rate in the same way that it applies to the zero rate."

VCONST02320 – "The construction of a building intended for use solely for a relevant residential purpose is zero-rated.

There is also a special rule that treats each building in a complex of buildings as intended for use for relevant residential purpose even though it is not intended to be so used. This treatment is subject to the following conditions being satisfied:

- the buildings must be intended for use together as a unit solely for a relevant residential purpose
- they must be constructed on the same site, that is have a fairly close geographical relationship
- they must be constructed at the same time, that is either together or immediately following each other.

The relevant law is the Value Added Tax Act 1994, Schedule 8, Group 5, Note 5.

For example, if a residential care home is constructed as a series of buildings and one of those buildings is an administration block, that block will also qualify for zero-rating even though it is not itself intended for use solely for a relevant residential purpose."

68. Information Sheet 02/14 is explicitly stated to update the relevant sections of the Public Notice and VCONST. In this regard it states:

"Additional facilities.

Some student accommodation and other residential developments may sometimes include facilities such as a dining hall or laundry in a separate building. Note 5 of Group 5 to Schedule 8 of the VAT Act 1994 allows such a building to be zero rated where they are constructed at the same time as the residential accommodation and are intended to be used with it. To fall within the zero rate, all of the buildings must be intended to be used together solely (95% or more) by residents living in the accommodation ….

Assuming the student accommodation was eligible to be zero rated under both Notes 2 and 4 the construction of the dining hall or laundry could only be zero rated under Note 5 if the building was eligible to be zero rated under Note 4"

69. In a world post Information Sheet 02/14 it is not precisely clear what the Respondents' policy vis a vis additional buildings is. Notice 708 is clear that where a building which is not of itself intended for use for a relevant residential purpose is used in conjunction both with a building being constructed that is relevant residential but also with other previously constructed relevant residential purpose buildings the

additional non relevant residential purpose building is not eligible to be zero rated by virtue of Note 5.

70. The provisions of VCONST are, in the Tribunal's view, more ambiguous in that the explanation given does not extend to a situation where the building to be considered under Note 5 is used together with other previously constructed relevant residential purpose buildings. The Information Sheet, which explicitly varies the Notice and Manuals, is not clear.

71. In the case of *St Andrew's Property Management Limited (decision 20499)* the Respondents contended that for the purposes of Note 4 a home or institution was to be interpreted in an organisational sense. Their argument was supported, so they contended, by reference Note 5 which, in their view, provided for zero rating of multiple buildings which together operated as a home or institution. Whilst the tribunal in that case rejected the Respondents' submissions on the correct interpretation of Note 4 it stated (at paragraph 27) "It would be absurd to allow zero rating for a home built in one building but not for what would essentially be the same home where it happened to be in two or more buildings. The need for Note 5 can therefore be equally well taken to indicate, or at least recognise, that the focus is on the building and not the organisational structure of its owner or operator and it is there only to avoid the absurdity we have just mentioned".

72. Perusal of the correspondence between the parties indicates that the parties would agree:

(1) If the Workshop had been used exclusively with Holme Terrace it would have been eligible to be zero rated pursuant to Note 5.

(2) If the Workshop had been constructed on its own for use with the previously constructed buildings on the site it would not have been eligible to be zero rated.

73. The parties are also agreed that the provisions of Note 5(a) are met i.e. the Workshop and Holme Terrace are both buildings constructed at the same time and on the same site.

74. It also appears that the parties were agreed that the Workshop serviced Holme Terrace and therefore the buildings were "used together".

75. Finally it was agreed that all of the residential buildings on the site were used for a relevant residential purpose when so ever they were constructed.

76. As set out in paragraph 33 above the Tribunal has determined that the Workshop is used exclusively by the maintenance staff whose predominant purpose is to service and maintain the relevant residential buildings. Any activities undertaken for the benefit of the wider site including the historic buildings being essentially de minimis.

77. The dispute for resolution by this Tribunal centres on the meaning of "as a unit solely".

78. The Respondents contends that "as a unit" requires that the Workshop be used exclusively to service Holme Terrace. The Appellant contends that provided that the Workshop is used in conjunction with Holme Terrace it is used as a unit with it.

79. At the hearing of the preliminary issue in this case there was evidence and argument concerning the laundry which was constructed within Holme Terrace but which serviced the other relevant residential buildings. The Respondents contended that Holme Terrace lacked "self-sufficiency". Judge McKenna questioned the requirement for self-sufficiency in any event but determined that vis a vis the laundry Holme Terrace was self-sufficient, if there was any lack of self-sufficiency it was of the other buildings. As outlined at paragraphs 9 - 11 above Judge McKenna determined that Holme Terrace was a building used for a relevant residential purpose this being despite the clear evidence and argument that part of the building was used in connection with the other residential buildings.

80. It is therefore reasonable to conclude that had the Workshop been an integral part of Holme Terrace like the laundry, even if used in connection with the other residential buildings then applying precisely the same logic as that applied by Judge McKenna the works associated with it would have been eligible to be zero rated.

81. The Tribunal respectfully agrees with the position taken by the tribunal in *St Andrew's Property Management* that it would be absurd to conclude that if the Workshop had been built as an integral part of Holme Terrace it would have been eligible to be zero rated despite it, like the laundry, being used in connection with and for the purposes of the other residential buildings, to then conclude that it should not also be zero rated when housed in a separate building which was constructed at the same time as Holme Terrace. As tribunal Chairman Barlow noted, that seems to be the very purpose of Note 5.

82. However, that does call into question why the legislature used the language "used together as a unit" rather than merely "used together".

83. There is no question that Holme Terrace and the Workshop are used together. Without the Workshop there is nowhere on site to house the necessary equipment to properly maintain the residential buildings and thereby continue to provide the safe environment for the vulnerable residents. In that sense Holme Terrace is incomplete without the Workshop.

84. At the preliminary hearing the Respondents argued that in order to qualify for zero rating as an institution the building in question must be self-sufficient. Judge McKenna did not rule explicitly on the need for self-sufficiency. In this Tribunal's view self-sufficiency clearly does play a role by virtue of the combined effect of Notes 5 and 16(b). Taken together, and by reference to the intended purpose of the legislation (to provide for zero rating for the defined social purpose of providing residential accommodation, in this case for the elderly) it is apparent that in order to qualify for zero rating the buildings which are constructed at the same time and on the same site must together be sufficient to provide relevant residential accommodation even if individually they are not. If some critical feature inherent in the provision of

relevant residential accommodation had been provided from a pre-existing building then the buildings being constructed would properly be considered to be an extension or enlargement of an existing relevant residential building (and excluded from zero rating by virtue of note 16(b)).

85. However, where a number of buildings are constructed at the same time and on the same site and together they are capable of self-sufficiently providing relevant residential accommodation those buildings are used together as a unit. If it were envisaged that Bishopgate had been a bare site Holme Terrace coupled with the Workshop would be a relevant residential development constructed and used as a unit precisely as envisaged in Note 5 as articulated previously by the tribunals. The fact that those buildings which together as a separate unit may also provide accommodation of use to and supporting an existing building does not, in the Tribunal's view prevent them being a unit as between themselves.

86. If the Workshop were not used in connection with Holme Terrace at all but had merely been constructed at the same time as Holmes Terrace and each of the new buildings had provided facilities for the purposes of the site residences more generally they would be buildings that were used together but not as a unit. Take as an example Holme Terrace is constructed with its own warden facilities and the laundry; at the same time additional warden facilities were constructed to house the residential care staff for the other buildings. In that circumstance both the additional warden facilities in the separate building and the laundry in Holme Terrace would be "used together" but would not be "used together as a unit" as in that example Holme Terrace would have no necessity for the warden facilities.

87. The Tribunal considered the argument put by the Appellant as to the assurance provided by the definition in Note 2(3) to Group 7, Schedule 7A VATA. The provisions of Group 7 to Schedule 7A apply the reduced rate to, inter alia, supplies of renovation or alteration to qualifying buildings including relevant residential buildings. In this regard Note 2(3) extends the scope of the reduced rate to the renovation or alteration of buildings which are treated as relevant residential because they were buildings used together as a unit for relevant residential purposes (though to be noted not solely for relevant residential purposes). The Tribunal derives no real assistance from the provisions of Note 2(3) or more widely from the provisions of Group 7 to Schedule 7A in reaching its decision on the meaning of "together as a unit". However, given that the phrase "together as a unit" appears in both Note 2(3) and Note 4A(2) to that Group the Tribunal reflected on whether its conclusions on the correct interpretation to be applied made sense in those provisions and were satisfied that they did.

88. On the basis that Workshop and Holme Terrace are "used together as a unit" are they used "solely" for a relevant residential purpose? It is clear, as indicated above, that relevant residential purpose is determined purely by reference to the use to which the buildings are put. The change of use provisions in Schedule 10 confirm that it is physical use that is relevant. By virtue of Note 5 if the use of each of the buildings which are constructed at the same time and on the same site when taken together with the others is for one of the purposes identified in Note 4 (in this case as a home or

institution providing personal care and/or as the sole or main residence of 90% of its occupants) it will be deemed to be used for a relevant residential purpose.

89. On the evidence it is clear that the Workshop is used in a way which is an integral part of offering safe and suitable living accommodation for the elderly. It is accepted by both parties that TGH's activities vis a vis the site at Bishopgate is solely relevant residential (because the income received from other activities is below the 5% de minimis level). The Tribunal has concluded that the activities of the maintenance staff in connection with non-residential accommodation too are de minimis. As a consequence of these factors the Tribunal concludes that all use of the Workshop is deemed by virtue of the provisions of Note 5 to be intended for use solely for a relevant residential purpose.

90. To cross check its conclusion the Tribunal went back to social purpose of zero rating for relevant residential buildings. Could it be said that having concluded that zero rating was appropriate that there had been some unwarranted extension to the scope of the zero rate? The answer was no. The Workshop safely houses that which is required to maintain a suitable environment in which vulnerable individuals are provided with accommodation and domiciliary care. All the residential buildings on the site are used for a relevant residential purpose whether or not they benefited from zero rating at the time of their construction. Whilst that of itself is clearly not enough to justify zero rating the Appellant was able to take advantage of the fact that it was building new residential accommodation at the same time, that accommodation would need maintaining and the Workshop provided the building from which to provide the necessary maintenance, zero rating was therefore justified.

Decision

91. For the reasons set out in paragraphs 60 - 90 the Tribunal concludes that the works associated with the construction of the Workshop are liable to VAT at the zero rate by virtue of Note 5 to Group 5 Schedule 8 VATA and the appeal is allowed.

92. 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.

AMANDA BROWN

TRIBUNAL JUDGE
RELEASE DATE: 1 FEBRUARY 2016