[2016] UKFTT 601 (TC)

TC05337

Appeal number: TC/2013/00369
TC/2014/05172

VALUE ADDED TAX – listed buildings – whether services were zero-rated on the basis that they were supplied in the course of an approved alteration of a protected building within item 2, Group 6, Sch. 8, VATA – held they were – appeal TC/2014/05172 allowed – whether HMRC's strike-out application in appeal TC/2013/00369 under rule 8(2)(a) of the FTT's Procedure Rules succeeded, on the basis that there was no jurisdiction to hear an appeal against a letter which contained no appealable decision – held the strike-out application succeeded – appeal TC/2013/00369 dismissed – the appellant's application for a costs order against HMRC in appeal TC/2013/00369 on the grounds of alleged unreasonable conduct dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERT MORFEE **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC
MR JOHN COLES

Sitting in public at Bristol on 4 May 2106

The Appellant in person

Mrs Jane Ashworth, HM Revenue and Customs, for the Respondents

DECISION

1. The substantive issue between the Appellant, Mr Morfee, and the Respondents ("HMRC") is whether or not certain works carried out to the roof of a listed outbuilding (sometimes referred to as a carriage house) in the curtilage of Mr Morfee's house were the subject of a supply in the course of an approved alteration of a protected building, which should have been zero-rated pursuant to item 2 of Group 6 of Schedule 8, Value Added Tax Act 1994 ("VATA"). However the litigation between Mr Morfee and HMRC in relation to this matter has taken an unusual course.

2. Mr Morfee appealed to this Tribunal by a notice of appeal dated 3 January 2013. That notice stated that the decisions appealed against were dated 19 July 2012 and 11 December 2012. The letter from HMRC to Mr Morfee dated 19 July 2012, which is referred to in the notice of appeal, relates only to the supply of an underfloor heating kit to be installed in a listed building. The dispute between the parties relating to that supply has been resolved. The letter from HMRC to Mr Morfee dated 11 December 2012, also referred to in the notice of appeal, relates both to the supply of the underfloor heating kit and to the supply of services carried out by Ableson Roofing Ltd. ("Ableson"), being the works carried out to the roof of the outbuilding to which we referred in paragraph 1 above. The VAT liability relative to the roofing works had been raised by Mr Morfee with HMRC in a letter dated 16 October 2012.

3. It was stated in HMRC's letter to Mr Morfee dated 11 December 2012 in relation to an earlier letter from Officer David Connelly (VAT Written Enquiries Officer) dated 2 July 2012 – which only dealt with the supply of the underfloor heating kit – that the letter dated 2 July 2012 did constitute a decision which could be appealed against to this Tribunal. This was a reversal of what Officer Connelly had stated in relation to the letter dated 2 July 2012 (which was also written by him) in his subsequent letter to Mr Morfee dated 19 July 2012.

4. Mr Morfee's appeal, initiated by his notice of appeal dated 3 January 2013, was given the Tribunal reference TC/2103/00369. HMRC, by a notice dated 22 March 2013, applied for that appeal to be struck out on the basis that the letters dated 2 July 2012, 19 July 2012 and 11 December 2012 from HMRC to Mr Morfee did not contain any decision as to the VAT chargeable on the supply of any goods or services and that there was 'therefore no decision made by [HMRC] which is open to appeal under section 83(1)(b) [VATA], nor any other subsection of section 83'. It was stated in the application that where, in their letter dated 11 December 2012, HMRC 'appear to state that their earlier letter of 2 July 2012 does contain an appealable decision', that was an error.

5. Appeal TC/2013/00369 came before this Tribunal (Judge Rachel Short and Mr Ian Perry) at a hearing in Bristol on 21 March 2014. A summary decision was issued by the Tribunal on 31 March 2014 – which we have not seen – which struck out the appeal under rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FtT (TC) Rules") on the basis that there had been no appealable

decision in respect of which the Tribunal had jurisdiction and contained the direction that:

> 'Mr Morfee should, within 30 days of the release of this decision, provide HMRC with a detailed written description of the roofing work done at his barn conversion and the reason why he considers that the supply of this work should be zero rated. Within 30 days of receipt of Mr Morfee's written description, HMRC should provide Mr Morfee with a written decision setting out their view of the correct VAT treatment of the supply of the roofing works, including a statement of Mr Morfee's rights to appeal against this decision and any relevant time limits.'

6. On 27 June 2014, the Tribunal (Judge Short) released a full decision referring to its view that this was a case where matters of procedure had been allowed to obscure the real point in issue and that there was some doubt whether appeal TC/2013/00369 had been properly brought and whether HMRC's letter dated 11 December 2012 constituted a decision against which Mr Morfee had a right of appeal. The course adopted by the Tribunal – striking out appeal TC/2013/00369 and making the Direction set out above – was, according to the full decision, adopted 'in order to bring this issue to an effective conclusion with least cost to all parties'. The full decision also referred to the costs application made by Mr Morfee in relation to appeal TC/2013/00369. The Tribunal stated:

> 'The Tribunal does not consider that HMRC have acted unreasonably in their response to Mr Morfee's actions to date. If a substantive appeal is brought before the Tribunal in respect of the VAT treatment of the roofing works provided to Mr Morfee, any request for costs should take account of the costs of this hearing.'

7. On 3 July 2014 – in a letter which we have not seen – Mr Morfee wrote to the Tribunal disagreeing with some of the Tribunal's conclusions and '[inviting] the tribunal to reconsider its findings of fact and its overall conclusion'. That letter was treated by this Tribunal (this time, Judge Peter Kempster) as an application for the Tribunal's decision to be set aside.

8. In a Decision Notice, dated 6 November 2014, issued by Judge Kempster, the Decision released on 27 June 2014 was set aside because Judge Kempster considered that the Tribunal had determined the strike out application before it without a proper consideration of the contesting submissions.

9. In the meantime, Mr Morfee had complied with Judge Short's Direction and HMRC (Officer Shapi Masendu) wrote to him on 13 May 2014 acknowledging his correspondence about the roofing works to the carriage house in the grounds of his property and giving a decision that those works were not approved alterations for the purposes of Group 6, Schedule 8, VATA and were therefore properly standard rated. This decision was confirmed following a statutory review by HMRC (Officer Jim Muir) in a letter to Mr Morfee dated 18 August 2014.

10. Mr Morfee was initially reluctant to make a fresh appeal, and, in a letter to HMRC dated 19 May 2014, invited HMRC to 'agree to my current appeal [TC/2013/00369] going forward'. However, in view of the strike-out of appeal TC/2013/00369 (which had not yet been set aside), HMRC wrote on 23 May 2014 stating that they could not agree to that appeal going forward.

11. By a notice of appeal dated 15 September 2014, Mr Morfee appealed against HMRC's decision of 13 May 2014, confirmed on review in HMRC's letter dated 18 August 2014, stating that the new appeal (to which the Tribunal reference TC/2014/05172 was given) was 'lodged to preserve my position pending my appeal against the decision of 21 March 2014 striking out appeal no. TC/2013/00369'.

12. Judge Kempster, in his Decision Notice, dated 6 November 2014, directed that both appeals TC/2013/00369 and TC/2014/05172 should be consolidated, and case managed and heard together under Tribunal reference TC/2014/05172.

13. These are the circumstances in which the consolidated appeals came before us for hearing on 4 May 2016. The issue of whether the works carried out to the roof of the listed outbuilding in the curtilage of Mr Morfee's house were the subject of a supply in the course of an approved alteration of a protected building which should have been zero-rated pursuant to item 2 of Group 6 of Schedule 8, VATA undoubtedly falls for decision under appeal TC/2014/05172. We do, however, have to consider the strike-out application originally made by HMRC by their application of 22 March 2013, because Mr Morfee, as he was entitled to do, raised before us for our decision his application for an order in respect of his costs of appeal TC/2013/00369 – being the 'proceedings' in respect of which an order might be made under rule 10(1)(b) of the FtT (TC) Rules.

14. We proceed to consider these two issues in turn.

First issue: TC/2014/05172 – Were the roofing works the subject of a supply which should have been zero-rated under item 2, Group 6, Schedule 8, VATA?

15. Zero-rating under item 2, Group 6, Schedule 8, VATA (which was generally repealed by the Finance Act 2012 in relation to supplies made on or after 1 October 2015) was provided for in relation to:

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

16. In the interpretation of item 2, Notes 6 and 9 to Group 6, Schedule 8, VATA are relevant. They provided (so far as relevant):

> '(6) "Approved alteration" means-
>
> …

(c) … works of alteration which may not, or but for the existence of a Crown interest or Duchy interest could not, be carried out unless authorised under, or under any provision of –

(i) Part I of the Planning (Listed Buildings and Conservation Areas) Act 1990,

…

and for which, except in the case of a Crown interest or a Duchy interest, consent has been obtained under any provision of that Part, but does not include any works of repair or maintenance, or any incidental alteration to the fabric of a building which results from the carrying out of repairs, or of maintenance work.'

and

'(9) Where a service is supplied in part in relation to an approved alteration of a building, and in part for other purposes, an apportionment may be made to determine the extent to which the supply is to be treated as falling within item 2.'

17. Consent under the Planning (Listed Buildings and Conservation Area) Act 1990 was granted by South Somerset District Council on 9 November in relation to 'Internal and external works to the carriage house, a building listed by association.' at Wearne House, Langport, Somerset.

18. The main issue between Mr Morfee and HMRC under this head is whether or not the works to the roof of the carriage house come within the exception to the relevant definition of 'approved alteration' covering 'any works of repair or maintenance, or any incidental alteration to the fabric of a building which results from the carrying out of repairs, or of maintenance work'. There is also an issue, if we are with HMRC that the works carried out constituted a service supplied to any extent in relation to works of repair or maintenance, or any incidental alteration to the fabric of a building which results from the carrying out of repairs, or of maintenance work, as to whether or not they also constituted a service supplied in relation to an approved alteration of a building and, if so, whether an apportionment should be made pursuant to Note (9), Group 6, Schedule 8, VATA.

Facts relevant to this issue

19. We received a Witness Statement made by Joseph James Bradley, a builder who has known Mr Morfee and his wife for many years. He carried out works on the conversion of part of the outbuilding into habitable living accommodation for Mr and Mrs Morfee's son, including part of the work on the roof. He states in his Witness Statement that Ablesons of Long Sutton, who carried out the works which are the subject of this appeal, were not working as his sub-contractors. He states that '[Mr and Mrs Morfee] engaged tradesmen separately, although it is fair to say that [Mr Bradley] had overall control and was effectively the owners' representative as well as the main contractor'. Mr Bradley attached a series of photographs to his Witness

Statement. The Witness Statement was agreed by HMRC and we found the attached photographs very useful in understanding the detail of the works carried out.

20. We also heard oral evidence from Mr Morfee, who was cross-examined by Mrs Ashworth.

21. From the evidence we find facts as follows.

22. The works for which listed buildings consent was obtained were adaptation of two portions of an outbuilding which was formerly a store, and probably had been a stable, into living accommodation. The building had, and still has, rough stone walls and a roof, the main part of which was covered with slates, and the smaller part of which was tiled. Mr Bradley states that 'in essence, we used roughly half the building'.

23. Mr Bradley states that the works involved replacing everything except the external walls.

24. We record the relevant parts of his Statement:

> 'The floor consisted of flagstones which we lifted. We dug down about one foot and laid an insulated concrete pad. On top of that we laid fibre screen, underfloor heating and finished oak flooring on top. At the northern end where the kitchen was going to be, we laid stone tiles. We built a staircase to the sleeping accommodation.
>
> The walls were pointed up to a metre from the ground, were battened off and insulation was added, a membrane and plasterboard. We made an installed completely new windows with steel lintels in place of the original wooden lintels.
>
> To get into the sleeping accommodation, it was necessary to lower an internal wall between the northern section of the outbuilding and the middle section. That necessitated new floor joists for the new mezzanine floor. To support the roof it was necessary to have an engineer design a roof truss with steel supports. The drawing was undertaken by Brian Jones and we installed the new truss.
>
> The rest of the roofing work was undertaken by Ablesons of Long Sutton … They installed a new velux light and replaced the slates. Some of the old slates could be re-used, but there were many new slates. Even the new slates were, of course, reclaimed, this being a listed building, the external appearance had to be maintained.
>
> A built-in kitchen was installed, supplied by Howdens. There was a shower room with fittings and a stone tiled floor with underfloor heating. The property was plumbed, there was a foul water drain laid, water and electricity supplies installed with internal plumbing for hot and cold running water, all to modern standards. The works were regularly inspected by the District Council's building inspector.

The outside walls were pointed. New guttering was installed to match the old cast iron guttering, which had been removed. We re-used some of the old guttering, but there were new downpipes.

… In short, there was very little of the original building that remained. All that remained were the outside walls and most, but not all, of the internal wall between what we called the barn and the carriage house which lay immediately to the south.

… It would be unrealistic to look at the roof in isolation. The roofing work was an integral part of the provision of this new living accommodation. If, however, you choose to look at the roofing in isolation, it was, in essence, a new roof with newly designed trusses, one of which was completely different from what had gone before, and a new velux light. … I am confident that none of the old trusses were re-used as trusses. We did use some of the wood from the old trusses to make fake lintels for the windows. We cut up some of them to make fake wooden lintels to make the place look a little more "antique".

After consulting my accountant, I zero rated the work I had done. I was advised this was correct since I considered the work an alteration with listed building consent. HMRC have not queried that.'

25. Brian Jones, mentioned in Mr Bradley's Statement, was a structural engineer instructed to advise on the works. His design calculations and details, dated October 2011, were in evidence, including plans, which show the adapted premises to be rectangular in shape, with an internal wall dividing approximately three-quarters of the space from one quarter. That internal wall had previously formed part of the roof support. It was lowered and a specially designed roof-truss with steel supports (steel restraint straps) was installed to bear the load of the roof at that point. This was done to provide sleeping accommodation on the mezzanine level. Below the sleeping accommodation was a garden store, not part of the living accommodation.

26. The roof as adapted was not a reproduction of the original roof. A chimney was installed (there had been no chimney before) and the new roof light (a velux window) was installed in a different place to where the old (smaller) roof light had been. However the tile roof to the smaller part of the accommodation was unchanged. What was changed was the larger slated roof.

27. We were told by Mr Morfee (and he was not challenged on this) that there was a shower room on the ground floor of the L shaped extension. This was accommodation outside (but adjoining) the rectangular space featuring in Mr Brian Jones's plans. It was (is) part of a longer structure with a tiled roof and significantly lower roof line to the space with the slated and tiled roof to which we have referred earlier.

28. The quotation from Ableson referencing the 'roof works' addressed to Mrs Morfee and dated 1 July 2011 was in evidence. It read as follows:

'Ref: Roof Works

Supply and erect scaffolding to barn front and rear elevation to gain access to roof.

Strip existing slates, double roman tiles, ridge tiles and battens.

Dismantle existing timber on slated section of roof and rebuild with 2 softwood trusses constructed with 250mm x 200mm timbers with 1 collar each with half joints and 200mm x 100mm purlins on steel hangers with 100mm x 50mm soft wood rafters.

Supply and fix eaves trays, breather membrane and 25 x 50 treated battens fixed with galvanised nails.

Re-fix all good salvaged slates any replacement slates needed will be charged at £1.80 each.

Re-fix all good double roman tiles and replacement tiles needed will be charged at £1.50 each.

Bed existing ridge tiles in sand and cement mix - any replacement ridge tiles needed will be charged at £6.00 each.

Fix lead flashings at abutment of slate roof and tiled roof.

Finish off lower level roof adjoining main barn.

Dismantle scaffolding.

Clear site of all waste.

Full public liability insurance carried at all times.

Total price £8,167.00 + VAT @ 20.0%.'

29. Mr Morfee told us (and, again, he was not challenged on this) that the roof above the shower room (under the 'lower level roof adjoining main barn' referred to in Ableson's quotation) was insulated, but he was not clear what works were actually done to it. He was willing to concede an element of repair work to the roof above the shower room.

The submissions on this issue

30. Mr Morfee submitted that the roofing works carried out by Ableson were alterations and not works of repair or maintenance because they were carried out as part of the conversion of the outbuilding into living accommodation. He contended that every aspect of the building had been altered except the external walls. He cited the decision of the House of Lords in *ACT Construction Ltd v Customs and Excise Commissioners* [1982] STC 25. In that decision, the House of Lords unanimously upheld the decision of the Court of Appeal (Lord Denning MR, Brandon and Ackner LJJ), upholding Drake J, that, for the purposes of the zero-rating provisions then in

force in connection with construction of buildings (item 2, Schedule 4, Finance Act 1972 as amended) works of underpinning, involving the construction of a foundation additional to but separate from the original foundation of a number of buildings were works of alteration, not repairs or maintenance. Lord Roskill, with whom the other Law Lords agreed, said, in a passage on which Mr Morfee especially relied:

> 'My Lords, on the central question, I find the reasoning in the judgment of Brandon LJ compelling. Brandon LJ said:
>
> "In the present case the work done was not done to any existing part of a building; it was entirely new work. It involved a radical and fundamental alteration to the construction of the building as it had been before. It involved an extension of the existing building in a downward direction. Such work in my view is not capable of coming within the expression "maintenance" in the ordinary and natural meaning of that word. It is conceded that, if that is right, then the work was work of alteration within the meaning of that expression in Item 2 of Group 8 and is accordingly zero-rated."'

31. Mr Morfee also cited the decision of the VAT and Duties Tribunal (Chairman: Mr David Demack) in the appeal of *Don Starr* (Decision No. 19176). In that appeal, works entailing the removal of a gutter and a drainpipe from a three-storey listed dwelling house, the removal of some roof slates above an oriel bay window, the changing of the roofline above the window by altering the roof pitch, and the adding of an extra layer of slates, were held to be works of alteration rather than repair or maintenance. The Tribunal summed up their decision saying (***ibid.*** [15]): 'The structure of the House was altered as a result of the roof of the oriel bay being changed'.

32. He also cited the decision of the VAT and Duties tribunal (Chairman: Mr Michael Tildesley OBE) in the appeal of *Chamelon Mirrors Limited* (Decision No. 20640). In that case, the issue was whether a supply involving the fitting of slab mirrors in listed buildings in Newcastle was properly zero-rated under Group 6, Schedule 8, VATA. On the question of whether or not the installation of slab mirrors could properly be described as an alteration, HMRC contended that they could not, because they were not 'substantial' and amounted to redecoration, rather than alteration. The Tribunal considered that HMRC's approach was flawed in that they had considered the appellant's supplies in isolation, rather than in the context of the development of the properties concerned as a whole – the operative words of item 2 of Group 6, Schedule 8, VATA being whether the supplies were made *in the course of an approved alteration of a protected building* (original emphasis). The Tribunal cited, and followed, dicta of Moses J (as he then was) in *Customs and Excise Commissioners v Morrish* [1998] STC 954, as follows:

> '… *Parochial Church Council of St Luke v Customs and Excise Commissioners* [1982] STC 856 … is authority for the following propositions. (1) The question will primarily depend upon what is happening to the building as a whole … (2) The tax treatment of items of work undertaken, which might be described as integral to the whole of a larger project will follow the tax treatment of that

larger project; thus if rooms are redecorated in the course of alteration of an existing building, that redecoration will form part of the alteration.'

33. Mr Morfee's submission was that HMRC had accepted that the (main) works carried out by Mr Bradley had been zero-rated alterations (Mr Bradley's Statement confirmed this). That being the position, the roofing works carried out by Ableson were works carried out by supplies made in the course of an approved alteration of a protected building and so were eligible to be zero-rated. He accepted that HMRC's case in relation to the works to the tiled roofs was stronger than their case in relation to the slated roof, but he resisted an apportionment pursuant to Note (9), Group 6, Schedule 8, VATA.

34. He contended that the Tribunal should particularly consider what the purpose of the works was – and that purpose was the provision of a roof to a new dwelling, which was designed in a different way to the old roof of the building. The old roof could not have served as a roof for living accommodation. It was a misuse of language to say that the works were works of repair or maintenance – they were the installation of a new, insulated, roof.

35. Mrs Ashworth submitted that the roofing work undertaken by Ableson was not an alteration of the building concerned. It had not altered the building's character – before the works were carried out, the roof was slated and tiled with a roof light and after the works had been carried out it was still slated and tiled with a roof light, albeit the roof light was of a marginally different size. The shape of the roof eaves was unchanged. The works were works of repair or maintenance – the building had been in need of extensive repair before it could be converted into living accommodation. The alteration in the size of the roof light (the installation of the velux window) was incidental to the work of repair or maintenance.

36. She submitted that 'alteration' and 'repair or maintenance' of a building are not mutually exclusive concepts. There can be an overlap, and where a piece of work both alters and repairs or maintains a building it is not an 'approved alteration' for the purposes of the legislation and cannot be zero-rated. Advancing a point made in HMRC's Notice 708 (Building and construction) she submitted that an alteration involves the changing of the fabric of a building in a meaningful way. She contended that the roofing works carried out by Ableson had not altered the character of the building. She drew a distinction between the work carried out by Mr Bradley in lowering the height of the internal wall (which was an alteration appropriately zero-rated) and the work carried out by Ableson, which involved fitting the new roof light, rebuilding two softwood roof trusses and refixing slates, tiles, ridge tiles and batons (which were standard-rated works of repair or maintenance).

37. Mrs Ashworth did not distinguish in her submissions between works of repair and works of maintenance and did not suggest which of these categories was the one into which the works carried out by Ableson fell. She submitted that any alterations (such as the installation of insulation and the fitting of the new roof light) should be regarded as incidental to the main works of repair or maintenance.

38. She cited the decision of the VAT and Duties Tribunal (Chairman: Mr Michael Johnson) in the appeal of *Logmoor Limited* (Decision 14733). In that case, work carried out to a listed building, including the 'replacement of the roof' was considered in the context of the legislation applying at the time, which zero-rated supplies in the course of an approved alteration of a protected building. The whole of the roof of the building concerned was stripped, re-timbered, re-felted and re-tiled, but so as to retain the external appearance of the old roof, including the shape of the dormers. The Tribunal recorded that the ceiling joints [*sic*] were insulated and the chimneys were faithfully recreated. It concluded that 'in essence the existing roof was replaced with a modern roof, with flashings, leaded valley gutters and ventilation tiles conforming to modern-day regulations'. It held that these works to the roof of the building amounted to 'repair or maintenance' for relevant purposes, being the substitution for the existing roof of a roof of like function and appearance, not so as to amount to an alteration but rather a preservation of the structure. Mr Morfee argued that we should not follow this decision which he said was inconsistent with more recent cases.

39. She also cited the decision of this Tribunal in the appeal of *E L Flood & Sons Partnership* [2012] UKFTT 47 (TC) (Judge Nowlan, sitting with Mr Andrew Perrin), which concerned the question whether plastering services supplied by a sub-contractor to a firm of builders undertaking work on a listed building were properly zero-rated or not. The services in issue were services of re-plastering ceilings of bedrooms in their 'original form of laths and lime plaster' – a specialist ornamental plastering service. Allowing the appeal, the Tribunal found that the fabric of the ceiling had been changed from plasterboard to lath and lime plaster as required by the local authority, which it found was a 'very material change to the fabric of the building' and held constituted an alteration. The Tribunal considered whether the alteration was simply a repair, so as to be disqualified from ranking as an 'approved alteration'. It recognised that the ceiling in question needed repairing but considered it significant that the services supplied resulted not from the need to repair the ceiling but from the local authority's insistence that, at four or five times the costs, the original integrity of the building should be reinstated. The Tribunal held that the change in fabric from plasterboard to lath and lime plaster was not an incidental alteration resulting from the carrying out of repairs or maintenance work.

40. Mrs Ashworth also cited the decision of this Tribunal (Judge Lady Mitting) in the appeal of *GGN Builders Ltd* [2010] UKFTT 184. In that case extensive refurbishment and renovation works had been carried out to the listed building in question and HMRC had accepted that certain aspects of the work (other than those which were the subject of the appeal) were properly zero-rated. The issue in the appeal was whether the works related to the roof of the building ought to be zero-rated. The entire roof covering (felt and slates) was removed, but leaving the timber framework in place. On re-roofing, a modern insulation system was incorporated where there had been no insulation before. The Tribunal held on the evidence before it that the inherent character of the work was that of repair and maintenance, and dismissed the appeal for that reason.

41. Mrs Ashworth did not answer Mr Morfee's point that the structure of the roof of the building in issue in this appeal had been changed to allow for the lowering of the internal wall and the installation of the mezzanine floor.

Discussion and decision on this issue

42. The legislation we have to apply speaks of 'the supply, *in the course of an approved alteration of a protected building*, of any services …' (our emphasis). The question we have to answer is: were the roofing services supplied by Ableson in the course of an approved alteration of the protected building?

43. At this point we have to address the main point of the argument advanced by Mr Morfee, that the roofing works were carried out as part of the whole project of conversion of the outbuilding to living accommodation which HMRC had accepted, in relation to the work carried out by Mr Bradley, was an approved alteration, and not repair or maintenance.

44. If the services comprising the roofing works, which were actually carried out by Ableson, had instead been supplied by Mr Bradley as main contractor – perhaps using Ableson as sub-contractor – it would have been easier to reach the conclusion that they were supplied in the course of an approved alteration of a protected building. But we consider that the legislation does not require a different approach to be taken where some services are supplied by a main contractor and other services are directly supplied by another contractor.

45. The first issue to be decided is whether there was an approved alteration of the building involving the roofing works, so that it could be said that the roofing works constituted a supply made in the course of an approved alteration to the protected building.

46. Was there an alteration to the construction of the building? What was happening to the building as a whole? The listed buildings consent covered both internal and external works to the carriage house. The internal works carried out included excavation and laying an insulated concrete pad with fibre screen underfloor heating and oak flooring on top. This was clearly a work of alteration on the authority of *ACT Construction*. The internal works also included the construction of a staircase and the installation of a new mezzanine floor for the sleeping accommodation – also clearly works of alteration. New windows were installed. Where they replaced old windows they might be regarded as repairs, where they did not replace old windows, they were alterations. We note that the listed building consent made reference to 'the windows hereby permitted [being] recessed in the wall to match the form of existing windows'. A built-in kitchen was installed. This was an alteration. The installation of a shower room with fittings and a stone tiled floor with underfloor heating was also an alteration. The lowering of the internal wall to accommodate the new mezzanine floor was an alteration and has been accepted to be such by HMRC. The installation of plumbing, including the laying of a foul water drain, and the installation of electricity were all alterations.

47. Apart from the replacement of existing windows, the installation of new guttering to match the old cast iron guttering was probably a repair.

48. Assuming for the moment that the roofing work carried out by Ableson was a repair (it could hardly be a work of maintenance, since the old roof was replaced), nevertheless the whole project – what was happening to the building as a whole – was clearly in our view a work of alteration, and the roofing work was an integral part of the project, not a separate, subsidiary operation. The fabric of the carriage house was very substantially altered.

49. It seems to us therefore, adopting the approach of Moses J in *Morrish*, where he cited the earlier case of *Parochial Church Council of St Luke*[1], that whether the roofing work carried out by Ableson, looked at on its own, was an alteration or a repair, is irrelevant to our decision. It was clearly work carried out 'in the course of an approved alteration of a protected building'. As we have found that the roofing work was integral to the whole of the larger project, its tax treatment should follow the tax treatment of the larger project. It is analogous to the works of redecoration mentioned by Moses J in the passage from *Morrish* cited above.

50. Is the larger project – the internal and external works to the carriage house covered by the listed buildings consent – an approved alteration within the meaning of Note (6) to Group 6, Schedule 8, VATA, or is it excluded from being such because it includes works of repair? (It is plain that the alterations involved are not incidental alterations to the fabric of the building resulting from the carrying out of repairs.)

51. We consider that the natural construction of Note 6(c), Group 6, Schedule 8, VATA is that the larger project is an approved alteration within its meaning. The exclusion of works of repair or maintenance and incidental alterations resulting from the carrying out of repairs, or maintenance work, is not intended, in our judgment, to cause the dissection of works which, as a whole, can properly be regarded as works of alteration, to exclude the elements of them which are works of repair or maintenance or incidental alterations. Instead, the exclusion is a means of denying the status of approved alteration to works, looked at as a whole, if, looked at as a whole, they are works of repair or maintenance or incidental alterations rather than, in reality, works of alteration. That exclusion therefore, is not, in our judgment, engaged on the facts of this case.

52. Our approach follows that of the VAT and Duties Tribunal in *Chamelon Mirrors*.

53. The error in HMRC's approach, as we see it, is that they construe the legislation as requiring services to be both works of alteration of a protected building (and not works of repair or maintenance) and also made in the course of an approved alteration

[1] It is to be noted that both in *Morrish* and in *Parochial Church Council of St Luke*, the Court was construing VAT zero-rating provision relative to a supply in the course of an approved alteration of a protected building, where the legislation provided that 'alteration' did not include repair or maintenance.

of the building. This is discernible from paragraph 9.1.2 (The basic conditions for zero-rating approved alterations to protected buildings) in Notice 798 (November 2011 edition). In our judgment, item 2, read together with Note (6), Group 6, Schedule 8, VATA provides for the zero-rating of any services other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity, which are supplied in the course of an approved alteration of a protected building, where the status of being an approved alteration is determined by examining, as a whole, the works for which listed building consent is required (and obtained).

54. It follows that, in our judgment, all the services supplied by Ableson ought properly to be zero-rated.

55. There is no requirement for an apportionment pursuant to Note (9), Group 6, Schedule 8, VATA, because no part of the services supplied by Ableson were supplied otherwise than 'in relation to an approved alteration of a building'. The 'purposes' for which all the services were supplied were the purposes of the approved alteration of the carriage house.

56. We accept that if it were correct (which we consider it is not) to look at the services supplied by Ableson on their own, and not in the context of the alterations approved by the listed buildings consent, then those services would, to some extent, represent works of repair, and to some extent they would represent alterations. They would represent alterations to the extent that they relate to the new roof structure required by the lowering of the internal wall and the installation of the mezzanine floor. Otherwise, they would represent works of repair, because to that extent they did not alter the structure of the building (cf. *Don Starr*).

57. We mention that *Don Starr*, *Logmoor* and *E L Flood* all concerned works which were carried out in isolation and were properly considered in isolation. That was not the position on the facts in this case. We respectfully decline to follow the Tribunal in *GGN Builders*, which considered the works related to the roof of the building in isolation from the other extensive refurbishment and renovation works which had been carried out and as to which HMRC had accepted that certain aspects were properly zero-rated.

58. For the reasons given above, we allow Mr Morfee's appeal reference TC/2014/05172.

Second issue: TC/2013/00369 – Mr Morfee's application for an order in respect of his costs of that appeal.

59. Appeal TC/2013/00369 was an appeal allocated to the Standard Case category and therefore, pursuant to rule 10(1)(b) of the FtT (TC) Rules, the Tribunal may only make an order in respect of costs if it considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings.

60. Mr Morfee's case is that we should make an order in respect of costs in his favour because HMRC has acted unreasonably in conducting the proceedings, in

particular in applying for the appeal to be struck out. His case is that his appeal (TC/2013/00369) was against a matter in respect of which an appeal lies under section 83(1)(b) VATA.

61. Mrs Ashworth, for HMRC, resists Mr Morfee's application on the basis that HMRC's application to strike out the appeal was well founded on the basis that the letter from HMRC to Mr Morfee dated 11 December 2012 (which is the only one of the letters mentioned in Mr Morfee's notice of appeal in appeal TC/2013/00369 which makes any reference to the roofing works) does not contain a decision as to the VAT chargeable on the supply of any goods or services, and therefore could not be the subject of an appeal under section 83(1)(b) VATA, as claimed by Mr Morfee, or any other subsection of section 83 VATA.

62. Section 83(1)(b) VATA is in the following terms, so far as relevant to this case:

> '(1) Subject to section 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters-
>
> …
>
> (b) the VAT chargeable on the supply of any goods or services …'

63. Section 83(2) VATA provides:

> '(2) In the following provisions of this Part, a reference to a decision with respect to which an appeal under this section lies, or has been made, includes any matter listed in subsection (1) whether or not described there as a decision.'

64. Section 83G VATA deals with the bringing of appeals, and in particular with the time limit for bringing an appeal. Its provisions are not relevant to Mr Morfee's application, but Mrs Ashworth points out that the time limit provided for by section 83G(1)(a) is framed in terms of a 'decision' to which the appeal relates.

65. Section 84 VATA deals with further provisions relating to appeals. Its provisions are irrelevant to Mr Morfee's application, but it is worth noting that section 84(3) refers *inter alia* to cases 'where the appeal is against a decision with respect to any of the matters mentioned in section 83(1)(b) …'.

66. We were referred to the decision of the Upper Tribunal (Lord Tyre) in ***HMRC v Earlsferry Thistle Golf Club*** [2014] UKUT 0250 (TCC), which is binding on us. At paragraph 20 of its decision, the Upper Tribunal said:

> 'The present appeal bears to be brought under section 83(1)(b) which, as I have noted provides for an appeal to be made to the FTT with respect to "the VAT chargeable on the supply of any goods and services". The difficulty for ET [the appellant], in my opinion, is that HMRC's letter of 6 December 2011 contains no decision on the substantive issue of whether VAT was chargeable on the fees paid by ET to GC [the payee of the fees in relation to which ET sought to raise an issue of chargeability to VAT]. HMRC declined to deal with ET's claim on

the ground that it should have been directed to GC. As the letter does not bear to convey any decision by HMRC as to whether VAT was properly chargeable on supplies of services by GC to ET, there is in my opinion no basis in law for an appeal under section 83(1)(b).'

67. *Earlsferry Thistle Golf Club* therefore appears to us to be binding authority to the effect that an appeal cannot be brought under section 83(1)(b) VATA in the abstract to put in issue a 'matter' consisting of the VAT chargeable on the supply of any goods or services. It is necessary, therefore, to examine the letter dated 11 December 2012 sent by HMRC to Mr Morfee to ascertain whether it contained a relevant decision, relating to the roofing works, which would found an appeal under section 83(1)(b) VATA.

68. The relevant part of that letter is as follows:

'You have also asked for confirmation of the liability of roof repairs as part of the barn conversion. You believe the work qualifies for zero rating as an approved alteration to a listed building.

Unfortunately, I must reiterate the advice contained in Mr Connelly's letter of 2 July 2012 that it is the supplier's responsibility to ensure the correct rate of VAT is applied to their services. Any ruling that we may issue can only be relied upon by the recipient, hence a ruling issued to a customer cannot be relied upon by the supplier. We will only issue a ruling in cases of genuine uncertainty – for example where the specific point is not covered by our published guidance.

In this instance, I believe we have comprehensive guidance relating to alterations, repair and maintenance to listed buildings. Public Notice 708, section 9, sub-paragraph 9.3.1 gives an explanation of what is considered to be works of repair and maintenance and sub-paragraph 9.3.2 gives examples of repair or maintenance work and alterations. I have also enclosed a copy of our internal guidance VCONST09700 – Alterations and repair or maintenance – case law and agreements: roofs, this lists notable tribunal decisions that have a direct bearing on the liability of the work undertaken.

I would invite you to consider the above guidance, and, if you find that there is any point you are still unsure of, please write to me again explaining which part is unclear, so that I may provide you with clarification of how it applies to the supplies you are receiving.

HMRC operate a two tier complaints process and I have enclosed our Complaints fact sheet which fully explains the process. This letter represents a response at the tier 1 level; however, if you are still unhappy, you may ask us to look at it again for you. A different complaints handler will take a fresh look at the complaint and give you a final response. Once we give you that response, HMRC's complaints procedure is complete and you can ask the Adjudicator to look into your complaint.

> If you have any further queries regarding this matter, please contact us quoting our reference number. If you have future VAT questions that our online guidance cannot answer we recommend you email us via our secure online form …'

69. It is clear that this letter does not contain a decision on the VAT chargeable on the supplies of services made by Ableson to Mr Morfee. It is sent by a Complaints Officer and envisages that any dispute arising between HMRC and Mr Morfee would ultimately be dealt with by the Adjudicator rather than the Tribunal. Thus the Complaints Officer is addressing an issue of possible maladministration on HMRC's part, not any issue of VAT liability.

70. Mr Morfee submitted that in essence the letter constituted a decision to do nothing or to support Ableson's approach to the VAT liability on their services "right or wrong". We do not agree. The letter is addressing a different point – Mr Morfee had asked for a ruling on the VAT liability on supplies made by Ableson. HMRC were advising him that such a ruling would not be given, because it could only be relied upon by the recipient and, further, HMRC would only issue a ruling in a case of genuine uncertainty which they did not regard the present case to be.

71. Following *Earlsferry Thistle Golf Club*, we hold that there is no basis in law for an appeal by Mr Morfee to this Tribunal grounded on HMRC's letter to him dated 11 December 2012. We therefore strike out appeal TC/2013/00369 pursuant to 8(2)(a) of the FtT (TC) Rules as we hold that we have no jurisdiction in relation to the proceedings constituted by that appeal.

72. In these circumstances, there is no arguable case that HMRC has acted unreasonably in defending or conducting the proceedings constituted by appeal TC/2013/00369 and we dismiss Mr Morfee's application for an order in respect of costs of those proceedings under rule 10(1)(b) of the FtT (TC) Rules.

Further appeals

73. 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.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 22 AUGUST 2016