[2016] UKFTT 0827 (TC)

TC05552

Appeal number: TC/2015/00479

VALUE ADDED TAX –- Reduced rate Schedule 7A VATA – supplies of insulation for roofs Note 1(a) Group 2 – whether appellant's Solid Roof System for conservatories a single supply: yes – nature of that single supply: supply of insulation system involving tiling of roof – whether supply insulation for roofs: yes – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

WETHERALDS CONSTRUCTION LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at City Exchange, Leeds on 4 October 2016

Tim Brown (instructed by Hallmark Solicitors) for the Appellant

Ann Sinclair, Presenting Officer, for the Respondents

DECISION

1. This was an appeal by Wetheralds Construction Ltd ("the appellant" or "Wetheralds") against a decision of Her Majesty's Revenue and Customs ("HMRC") that VAT should be charged on certain supplies at the standard rate rather than at the reduced rate of 5%.

2. The decision was made on 10 July 2014 in a letter in which HMRC gave a "ruling" that where a supply is of a roof, either a complete replacement or the addition of tiling to the existing roof, the whole supply must be charged at the standard rate.

3. By implication that ruling required the appellant to account for tax at the standard rate on the supply of its "Solid Roof System", a system for insulating conservatories which involved supplying a tiled roof.

4. There was also apparently before me a decision of HMRC dated 22 June 2016 that a supply by the appellants of a previous system not involving a tiled roof should also be standard-rated as from the date of the letter. This was a late change of heart by HMRC as they had previously ruled that the supply of this system fell to be charged at the reduced rate of 5%. I had to consider whether there was in fact an appeal against this decision that I could consider.

5. The straightforward issue in this hearing was whether what the appellant supplied to its customers was "insulation for … roofs" so that the supplies attracted a reduced rate of VAT.

The evidence

6. I had a bundle of documents which contained the correspondence between the parties. It also contained advertising and marketing materials, a blank sample invoice and quotation, technical information about the systems the appellant supplies and a photograph of the installation of insulation in a conservatory roof.

7. I had witness statements from three people.

8. Mr Mark Pavis, a director of the appellant, put his witness statement in evidence and was cross-examined by Ms Sinclair for HMRC and re-examined by Mr Brown for the appellant.

9. Ms Jane Kettlewell and Mr Gary Agar, officers of HMRC, also put their statements in evidence and they were cross-examined by Mr Brown.

10. I have no reason to doubt the honesty and credibility of any of these witnesses and I accept their evidence.

11. I also had an expert report by Mr Simon Hay. He was cross-examined on his report by Ms Sinclair and I deal with this later.

Facts

The undisputed facts: a chronology

12. I first set out those facts which were entirely undisputed. They are taken from the witness statements of Mr Pavis, Ms Kettlewell and Mr Agar.

13. The appellant was registered for VAT from 4 February 2008. Its business activities then were said to be "carpentry, masonry, plastering and groundworks".

14. Until roughly the end of 2013 the appellant worked for one customer (Roof Revive Ltd). That work consisted of the supply of insulation to the roof area of a conservatory, after which a plasterboard ceiling was fitted and skimmed to hide the insulation. No further decoration of the ceiling was carried out.

15. Following the entering into administration of that company in early 2014, the appellant began selling conservatory insulation directly to end users. There was one major difference between its new directly sold system (which it calls the "Solid Roof System") and the system used by Roof Revive Ltd ("the Ceiling System") which the appellant had continued to supply on its own account after the collapse of Roof Revive Ltd. The difference was that:

> (1) in the Solid Roof System, the exterior of the roof is covered by heat reflective plastic tiles which give the impression of a tiled roof
>
> (2) in the Ceiling System, a heat reflective film layer is put on the existing glass or polycarbonate panels on the roof.

16. The Ceiling System had been accepted by HMRC as liable to VAT only at the 5% rate.

17. On 7 May 2014 Ms Jane Kettlewell, an officer of HMRC employed on VAT assurance work, visited the appellant's accountants, HPH Chartered Accountants ("HPH"), to check the company's records following their filing of the VAT return for the period ending 28 February 2014 which showed a repayment due.

18. After taking advice from Mr Gary Agar, a more senior and specialist officer, she sought further information about the appellant's activities. She explained to Mr Pavis on 9 May 2014 that there were a number of other companies in the appellant's position and that HMRC were awaiting the outcome of their appeal to the Upper Tribunal from the decision of the First-tier Tribunal in *Pinevale Ltd v HMRC* [2012] UKFTT 606 (TC) ("*Pinevale FTT*").

19. She also informed Mr Pavis that it was HMRC's view that the addition of roof tiles made the supply of the Solid Roof System one of a roof and therefore the whole job should be standard-rated.

20. On 23 May 2014 HPH gave more information about the new system.

21. Following advice from Mr Agar and after taking into account the information on the company's website to which Mr Agar directed her; the final outcome of the *Pinevale* case [issued on 7 May 2014 as [2014] UKUT 202 (TC) ("*Pinevale UT*")] and VAT Notice 708/6, she issued a letter on 10 July 2014 in which she told the appellants that regardless of whether the existing (polycarbonate or glass) roof remains, the addition of tiles onto the conservatory represented a significant alteration to the roof so that the roof became the dominant supply and the insulation an ancillary supply. This statement was followed by a ruling.

22. Correspondence between (primarily) Mr Agar and HPH culminated in a letter from Mr Agar of 5 December 2014 in which, among other things, he extended the deadline for making an appeal or requesting a review originally set out in Ms Kettlewell's decision letter of 10 July 2014. An appeal was made to the Tribunal on 8 January 2015. There followed lengthy procedural wrangling including a case management hearing.

23. On 22 June 2016 HMRC (Ms Kettlewell) issued a decision that the Ceiling System should also be standard-rated for the future. No mention was made in that letter of appeal or review rights. And there is nothing in the papers I have seen to show that there was a request for a review or notification of an appeal to the Tribunal. However HMRC filed an amended Statement of Case on 30 June 2016, and this briefly argued that the Ceiling System should be standard-rated, but made no mention of any appeal against Ms Kettlewell's decision of 22 June 2016. I should add for completeness that the appellant had applied to amend its grounds of appeal in 2015, and its application was finally admitted at the case management hearing on 13 May 2016, ie before Ms Kettlewell's decision, so the application to amend the grounds could not have been a follow up to an appeal against that decision and indeed was not.

The undisputed facts: the patent application

24. The appellant applied on 25 August 2015 for a patent for the Solid Roof System. That patent is pending. The application states among other things (the paragraphs that follow are in the order they appear in the application but are not necessarily contiguous):

> (1) The invention relates to a roofing assembly for a conservatory to improve the thermal insulation of the conservatory. The invention further relates to a method of providing an insulated roof for a conservatory, and to a conservatory roof conversion kit for mounting to an existing conservatory glazing bar framework.
>
> (2) In countries with cold or dark winters [I take judicial notice of the fact that this is generally the case in the United Kingdom], a conservatory can become uncomfortably cold. Similarly, without adequate ventilation due predominantly to the glass roof, a conservatory can become uncomfortably hot when exposed to prolonged sunshine [I also take judicial notice that this does sometimes happen in the United Kingdom].

(3) Installation of insulation into a conservatory to improve the thermal retention during the winter and/or to reduce heat build up during the summer suffers from several problems. Firstly the aesthetic appearance of the conservatory is significantly diminished by the presence of insulation, particularly from the outside looking inwards, as the insulation will be visible. Furthermore insulation, if installed into the roof of the conservatory, can place too great a strain on the glazing bars of the roof, which can result in a catastrophic collapse of the roof if overburdened.

(4) It is therefore an object of the present invention to provide a roofing assembly for a conservatory to allow a thermally insulated roof to be provided, without the need for the complete dismantling of an existing conservatory roof.

(5) By providing a method by which a glazed roof of a conservatory can be replaced with an insulated roofing assembly, the utility of a conservatory can be beneficially improved.

(6) The mounting of a lightweight structure to the existing glazing bars provides a secondary framework to allow a standard roof to be installed without significantly increasing the overall weight of the conservatory roof, limiting the load on the glazing bars. This results in an improved external appearance of the conservatory.

(7) A kit, allowing an installer to readily convert a conservatory roof into an insulated roofing assembly, beneficially allows for the conservatory to be quickly changed into a year round habitable dwelling. In the United Kingdom at least there are strict building regulations regarding the conversion of a conservatory from having a glazed roof to having a solid one. Traditionally the installation of solid roof has meant that that a conservatory ceases to be deemed as being of lightweight construction and therefore becomes subject to more stringent building regulations regarding the installation of the roof.

(8) Lightweight here refers to a secondary roofing structure which can be supported by the existing glazing roof bars of the conservatory.

(9) The roofing assembly comprises the roof glazing bars of the conservatory acting as the primary roofing structure in addition to a plurality of joists which are mountable to the roof glazing bars to form the secondary roofing structure. A roof covering is also provided as part of the roofing assembly in addition to at least one insulation layer.

25. A flowchart at the end of the application shows the stages of the work required to install the system:

(1) Expose glazing bars of conservatory roof

(2) Provide lightweight roof structure

(3) Mount lightweight roof structure to exposed bars of conservatory room

(4) Mount roof covering to lightweight roofing structure

(5) Provide insulation layer mounted to lightweight roofing structure or glazing bars

(6) Mount battens to underside of roof glazing bars and mount further insulation layer thereto.

26. There was no challenge to anything in this application and I find as a fact the matters set out in it. I mention only that while the patent application and the flowchart indicate that external tiling is part of the system and is shown on the diagrams in the application, the references to a plasterboard ceiling suggest it as optional and it is not shown in the flowchart and diagrams.

The undisputed facts: the LABC certificate

27. The Solid Roof System is registered with the LABC. LABC stands for Local Authority Building Control and is a not-for-profit organisation which represents all local authority building control teams in England and Wales.

28. The certificate for "Wetheralds Ltd – Edwardian Roof" describes the system as the Wetheralds Insulated Roof System and is said to be a "solid roof insulation system which replaces existing translucent panes or panels of a domestic conservatory …, whilst retaining the existing aluminium profiles, ties and other structural components to the roof. This roof system achieves a u-value of 0.18W/m_2K when installed …"

29. The Conditions of Certificate state that "the Registered Detail relates to the reroofing of existing conservatory … roofs" and that there is a need to "[e]nsure existing rainwater goods are retained, if none exist these should be provided."

30. The effect of the Certificate is that LABC consider the system will meet the functional requirements of the Building Regulations including as to conservation of fuel and power.

31. There was no challenge to anything in this certificate and I find as a fact the matters set out in it.

The undisputed facts: the advertising and marketing material

32. The advertising and marketing material provided to us (taken from the appellant's website) shows the following:

> "Transform your conservatory
>
> … into an allround habitable room with a Wetheralds Insulated Roof System adding value to your property. Enjoy the benefit of reduced energy costs. Up to 90% warmer in winter and 70% cooler in summer.
>
> Wetheralds specialise in conservatory roofing systems."

and

> "Solid Roof System

> A Wetheralds Solid Roof system replaces your existing polycarbonate or glass conservatory with a quality, bespoke and fully insulated, tiled roof. …
>
> Your new roof incorporates high quality materials and is fully guaranteed for 10 years. Wetheralds use modern, lightweight tiles that come in a range of styles and colour-ways to complement the natural beauty of your home. Wetheralds also install either a vented soffit or fascia, critical in preventing condensation."

33. A brochure from the appellant starts:

> "Is your conservatory like an igloo in the winter and an oven in the summer? Then Wetheralds have the solution… We can transform your conservatory into a comfortable all year living environment with our solid roof insulation system.
>
> Wetheralds Solid Roof System replaces the existing polycarbonate or glass roof with a tailor made roof system using light weight tiles."

34. I find as a fact that this was the material available to customers and the public generally and that the statements in it are correct as to what the appellant seeks to provide for the customer and what the customer can expect. I do not of course vouch for the claims as to the improvement in thermal efficiency.

Mr Pavis's evidence

35. In his witness statement Mr Pavis explained that in 2008 he moved from general construction work including private house building and extensions into doing the internal part of conservatory works for Roof Revive Ltd.

36. When that company went out of business he started undertaking all of the conservatory insulation works.

37. He enhanced and developed the insulation to improve quality and efficiency in a process that took about 12 months including patent application time.

38. Wetheralds markets their solution to the limitations on use of a conservatory to periods when it is neither too hot nor too cold as an insulation solution providing thermal stability and they aim to provide year-round usage in respect of an existing conservatory.

39. He stressed that Wetheralds do not sell replacement conservatory roofs or replacement roofs of any kind or carry out roof repairs. Their customers have perfectly serviceable conservatory roofs, and to replace them like for like would be very much cheaper than installing the Wetheralds system. Their customers are not seeking, and they have never been asked for, roof replacements. Nor do they supply new conservatories with their system installed in it.

40. This is because their system is designed to be attached to an existing conservatory roof. Wetheralds require there to be an existing roof and its structure or the system cannot be installed.

41. In examination-in-chief he stressed that the patent was for how the Solid Roof System connects to the existing roof.

42. The recognition by LABC was of the fact that the system met standards of insulation and thermal efficiency within current Building Regulations. He pointed out that LABC specifically state that the "*existing roof structure* of the conservatory is *retained*" [Mr Pavis's emphasis] and thus not replaced. Because there is an existing roof structure it means that there is a method of fixing that allowed Wetheralds system to be tested and approved by LABC.

43. The system also protects the insulation material from damage. In direct sunlight the temperature of such material in direct sunlight can reach 200°C and at that temperature the material will crinkle and deteriorate. The Ceiling System developed by Roof Revive Ltd suffered from these problems and they had to add additional protection to the insulation material.

44. The main difference between the Solid Roof System and the Ceiling (Roof Revive) System is that the former has twice the amount of insulation material. The insulation is attached to the underside of the existing roof frame (the glazing bars) using wooden battens. The only thing taken away is the covering (polycarbonate or glass) which is replaced by a plastic tile like covering. The Ceiling System has a plastic protective film attached to the outer roof to protect the insulation. Both systems have plasterboard attached to the underside of the insulation and are finished with a plastic skim.

45. In examination-in-chief Mr Pavis said that most customers go for the Solid Roof System, although the Ceiling System is cheaper. It is, he said, a part fix.

46. In cross-examination Ms Sinclair asked Mr Pavis about whether they install lighting. He said that there was a cable for electric light included but many customers do not use it. Sometimes they put lights in.

47. Ms Sinclair put it to Mr Pavis that the company's advertising included terms like "replace" and "new roof" and "conversion". He answered that this was "advertising" talk. There was a conversion, from an insulated partly unusable conservatory to a fully insulated year round usable conservatory.

48. I find as fact the matters set out in above as Mr Pavis's evidence. I should add here that the account in §§35 to 44 summarises paragraphs 3 to 18 of Mr Pavis's witness statement. I am ignoring paragraphs 19 to 61 of that statement as they are essentially argument, including rebuttal of HMRC's case as it was when the statement was made and an account of counsel's (not Mr Brown's) opinion for Roof Revive Ltd.

Mr Hay's expert evidence: introductory

49. Before I set out his evidence and give my findings from it, I need to remind myself of a number of issues that arise where expert evidence is adduced:

(1) Under Rule 15(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) ("Tribunal Rules") the Tribunal may admit evidence that would not be admissible in a civil trial.

(2) There are no Tribunal Rules that relate to expert evidence, but the Civil Procedure Rules ("CPR") contain a part (Part 35) and a Practice Direction ("PD") which deal with expert evidence.

(3) It is the general practice of this Tribunal to require expert evidence to be given in accordance with the provisions of CPR 35 and the PD (see *Chandarmal & others v HMRC* [2012] UKFTT 188 (TC) (Judge Barbara Mosedale) ("*Chandarmal*") at [12] to [14] .

(4) That practice requires that generally the permission of the Tribunal to admit the evidence is required and a number of formalities must be observed (*Chandarmal* at [13]).

(5) In particular CPR 35.1 requires the judge to decide whether the expert evidence in question is necessary for the resolution of the decision in the case (see *the RBS Rights Issue Litigation* [2015] EWHC 3433 (Ch) (per Hildyard J) at [11] and [16] to [21].

(6) Where both parties put forward an expert report the parties should be encouraged to produce a joint report with, if necessary an account of those areas where there remain differences (CPR 35.12 and PD 9.1).

(7) Expert witnesses owe a duty to the court (and therefore to the Tribunal) to be independent, and that duty overrides any duty to their profession or the interest of the client, and they should produce a statement acknowledging this (CPR 35.3 and PD 2.1).

(8) The evidence for which permission is required is opinion evidence. Factual evidence given by an expert needs no permission (except possibly in Scotland – see *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 at [41])

(9) Expert witnesses may be best placed to give factual evidence which because of its specialised nature needs some expertise to make it accessible to a Tribunal (see *Darby Properties Ltd & another v Lloyds Bank plc* [2016] EWHC 2494 (Ch) (Master Matthews) at [44]).

(10) The one matter on which an expert (or any) witness may not give an opinion is the law of the jurisdiction (however recondite) in which the case is heard (in this case England and Wales, but as the relevant forbidden law is tax law, effectively it means the United Kingdom)

(11) It would usually be a disproportionately costly exercise to seek to apply a blue pencil to parts of an expert's evidence which strayed outside what was properly expert evidence: the function of a judge in such a case is to give appropriate weight (which may be no weight at all) to some or all of the evidence.

50. In this case the expert report of Mr Hay was admitted in a case management decision of this Tribunal (Judge Heidi Poon) on 13 May 2016. Thus point (5) in §49 is not a decision for me.

51. As HMRC did not seek to produce their own expert, point (6) in §49 is not relevant. But in my view the fact that there is expert evidence from only one side means that I need to be the more astute in ensuring that the evidence of the expert is indeed independent.

Mr Hay's expert evidence: credentials and instructions

52. Mr Simon Hay RIBA, FCIArb, AMAE, MIMS, principal of Building Expertise Ltd, gave the expert evidence on behalf of the appellant. His report, produced in accordance with CPR 35, stated that he was an architect who specialised in the external envelope of buildings. He has particular expertise in roofing, as he had for nine years been Company Architect of Eternit UK, the largest suppliers of slates and roof tiles in the UK. He is a contributor to technical journals and a lecturer at university higher degree courses.

53. Mr Hay's instructions given to him by Hallmark Solicitors (as described in his report) required him to:

> (1) Review the documents listed in Appendix 3 and the appellant's Roof Insulation System
>
> (2) Report to the appellant of your opinion in relation to those matters referred to "in Sections B and C above" and in Counsel's Opinion dated 23 November 2015.

The Appendix 3 documents in (1) were brochures and technical information from the appellant, the patent application and the LABC documents as well as Counsel's Opinion relating to Roof Revive Ltd.

What the matters referred to in (2) as "Sections B and C" are is not known to me (I assume they are Sections in the instructions which I do not have). I do have the Counsel's Opinion dated 23 November 2015.

54. The report continues by stating that Mr Hay was asked specifically to report on:

> (1) "In the absence of a definition of a roof in the VAT Act 1994, what is a roof or, more accurately, when does an existing roof cease to be one?" This question was to be answered in the context of two paragraphs of the Roof Revive opinion.
>
> (2) "If by leaving the roof spars and other structural elements in situ, does it [sc what is left] remain a roof?"

55. The two paragraphs of Counsel's 2015 opinion simply state that the counsel giving that opinion (not Mr Brown) was of the firm view that the Roof Revive system fell within Group 2 Schedule 7A and that the case should be appealed to this Tribunal, though he added that he hoped that HMRC would, on reading the opinion, withdraw

with good grace. I can only read the instructions on this matter as seeking to, at the least, suggest what answer the expert should reach rather than leaving it to his independent judgment.

56. It also seems to me from, particularly, the specific issue in §54(1) that the expert witness was being asked to give his opinion on the law. If there was a definition of roof in the Value Added Tax Act 1994 ("VATA") then his opinion would not be needed or sought. There isn't so he is in fact being asked to say what the word "roof" in Note 1(a) in Group 2 Schedule 7A VATA means.

57. I was tending to the view that I should just say that in view of the matters I have set out above I would give no weight to any of Mr Hay's evidence. But I have decided that it would be better, in order to deal with the case fairly and justly, for me to consider each of Mr Hay's conclusions on its merits, and I now turn to his report.

Mr Hay's expert evidence: the report

58. The report states that it will address seven questions and two documents. These are:

(1) What is the purpose of the full conservatory installation?

(2) What is technically required to perform the works?

(3) What do building regulations sections A & C contribute to the analysis?

(4) What does BS 5534:2014+A1 015 Slating and Tiling require?

(5) Is the marketing information of Wetheralds accepted as an industry standard and does it have any authority.

(6) Is there a difference between the Wetheralds system and the Pinevale system in a previous case?

(7) The roof is, or is not, the supply of energy saving materials?

(8) LABC Certificate No: EW544A

(9) Patent Application no. 1515072.5 Wetheralds Construction Ltd.

59. My summary of Mr Hay's answers to the seven questions is:

(1) The function of the installation is to make a conservatory usable throughout the year.

(2) Lightweight foil insulation is installed, and because the insulation is not attractive unless an internal ceiling is installed.

Covering with batten and felts is required to support the plastic slates. This is to protect the installation foil from UV degradation, wind damage and precipitation. It is not possible to install the foil as a finished external facing. The slates are laid over felt to provide a ventilated cavity to prevent condensation and water falling into the room. The void adds to the

insulation effect. Because the slates change the roof profile new rainwater goods (eg gutters, downpipes) are required.

(3) Paragraphs 4.1 to 4.7 of Section 4 "Roof Covering" of what is said to be A1/2 of the Building Regulations are reproduced. The report refers specifically to paragraph 4.3 to show that there is no significant increase in weight (defined at paragraph 4.4 as a 15% increase) through the installation of the system. Mr Hay's concludes from this that "the covering does not alter the roof". He adds that "the roof is defined in these binding regulations as the structure not the covering", and that Wetheralds do not alter the roof structure.

Paragraphs 6.1 to 6.9 of Section 6 "Roofs" from what is said to be Part C of the Building Regulations is reproduced. The report refers specifically to paragraph 6.4(b) "Any roof will meet the requirement [to protect a building from precipitation] if: … (b) it has overlapping dry joints, is impervious or weather resisting, and is backed with material which will direct precipitation which enters the roof towards the outer face (as with roofing felt)." I should recite paragraph 6.3:

> "Roofing can be designed to protect a building from precipitation either by holding the precipitation at the face of the roof or by stopping it penetrating beyond the back of the roofing system."

His conclusion from this document is that the Wetheralds roof conforms with paragraph 6.4(b) and is required to do so. The application of insulating film cannot be considered in isolation but can only be installed as part of a system.

(4) The BS Standard is the authoritative BS for the roof. It sets standards for underlay. Mr Hay's view is that underlay is an essential part of the roof covering but is only stable for 3 months protection. Therefore slates and felt are only required to protect the function of the foil.

(5) The marketing information on the site has no status and cannot be relied on by HMRC as an authority.

(6) The Pinevale system is a roof tile system. The Wetheralds system is the supply of insulation foil with required additional components in order to make the insulation perform and be fit for purpose. "They clearly are separate issues".

(7) The roof was not the supply of energy saving materials.

60. As to the LABC certificate, Mr Hay stresses the certificate which notes that "[t]he thermal insulation performance of this system should be considered in the context of the contribution made to the overall performance of the roof structure". Mr Hay says that "the insulation is therefore noted as being part of a system not a standalone product".

61. And in relation to the patent application Mr Hay highlighted Clause 10:

> "It is therefore an object of the present invention to provide a roofing assembly for a conservatory to allow a thermally insulated roof to be provided, without the need for the complete dismantling of an existing conservatory roof."

Mr Hay adds: "The existing roof structure is thus retained."

62. In response to Ms Sinclair in cross-examination, Mr Hay agreed he had no qualifications in VAT or accountancy, though he added that he was the CEO of a trade association and so is familiar with accounts.

63. He agreed that in paragraph 5.2.5 of his report he had used the word "replaced".

Mr Hay's expert evidence: my conclusions from the report

64. In dealing with Mr Hay's report I have considered in particular whether what he is doing is giving evidence of fact, and if that is so whether the evidence, being the evidence of an expert in the field, adds anything to other factual evidence, particularly that of Mr Pavis. I have also considered whether he is giving evidence on the law of the United Kingdom.

65. I also add that I have had some difficulty in deciding what some of his answers to the questions he poses himself mean and what their relevance to the case is. I now consider the answers to the seven questions and the responses to the two other matters.

66. As to the question and answer in §58(1) and §59(1), the answer is also Mr Pavis's evidence and is reflected in the marketing material and the patent applications and LABC certificate. I accept it from Mr Pavis as evidence of fact and I do not see that Mr Hay's conclusion is drawn from any body of specialist material that needs an expert to explain. I give it little weight by comparison with Mr Pavis's evidence.

67. Had he gone on to say that in his expert opinion it achieves what it is intended to achieve and explained why, then I would have given such evidence much more weight, though it may not have been particularly relevant to the question of law I have to decide.

68. As to the question and answer in §58(2) and §59(2), I cannot see this as other than a purely factual matter. Either the system is installed in a particular way or it is not. Mr Pavis's evidence and the patent application make it perfectly clear how the system is installed, and Mr Hay's evidence adds nothing to those items of evidence.

69. Turning now to the question and answer in §58(3) and §59(3), it seems to me this is Mr Hay's response to his instructions which, as I have pointed out, seem to be asking Mr Hay to provide a definition of the word "roof" in Note 1(a) Group 2 Schedule 7A VATA, and an opinion of when a roof ceases to be one. It is within the scope of Mr Hay's expertise as an architect specialising in building envelopes to give an opinion on the second question. As to the first it is within Mr Hay's competence as an expert to give evidence of what the word "roof" means to an architect, surveyor or

builder, but this would be expert factual evidence. If Mr Hay's explanation of what a roof is in the specialist world in which he is an expert is one I find properly to be found or inferred from the materials he cites, then I would accept it as evidence of fact. But whether his definition is also what "roof" means in VATA is a question of law which I will decide.

70. Mr Hay's answer is in §59(3) second paragraph and is he says based on what is in the Building Regulations. If that was in fact so then it would appear to be an opinion on the law of the jurisdiction in which I am sitting, as the Building Regulations are contained in a statutory instrument, the Building Regulations 2010 (SI 2010/2214). My initial view was reinforced by Mr Hay's reference to "binding regulations" in §59(3), as a statutory instrument is legally binding on those within its scope.

71. But the documents which Mr Hay shows in his report are not in SI 2010/2214. The nearest thing to the documents that I can see in the Building Regulations is the list of requirements to be observed when carrying out building works that is given in Schedule 1 to those regulations. This Schedule contains Parts A and C, of which Part A concerns "Structure" and Part C "Site preparation and resistance to contaminants and moisture". But those Parts A and C are not, it seems to me, the documents from which Mr Hay quotes sections and on which he bases his answer.

72. The Explanatory Note ("EN") to the Building Regulations 2010 is of assistance though. It includes:

> "The Building Act 1984 gives the Secretary of State power to approve and issue documents containing practical guidance with respect to the requirements contained in these Regulations. The following publications, originally approved for the purposes of the 2000 Regulations, are approved for the purposes of these Regulations.
>
> - Approved Document A – Structure: 2004 edition incorporating 2004 amendments
> - …
> - Approved Document C – Site preparation and resistance to contaminants and moisture: 2004 edition
> - …
>
> It is intended that these approvals will be subject to amendments to be contained in a forthcoming publication "Amendments 2010 to the Approved Documents". The Approved Documents and amendments are or will be published by NBS, part of RIBA Enterprises Ltd and will be available on the Department's website www.communities.gov.uk or from RIBA Bookshops Mail Order, 15 Bonhill Street, London EC2P 2EA (email address: sales@ribabookshops.com)."

73. Mr Hay refers in his report at 5.3 to "Approved Document A"; to "Part C from the Building Regulations" and to "Approved Document C", having asked himself the question "What do building regulations sections A and C contribute to the analysis". As the EN suggests, these documents are available online and I have downloaded them (from www.planningportal.co.uk now), to find that the parts Mr Hay has quoted

are in them. What Approved Document A appears to be is guidance on paragraph A1 of Schedule 1 to the Building Regulations and Document C appears to be guidance on paragraph C1 of that Schedule to those regulations.

74. I note that the Secretary of State is given power in the Building Act 1984 to approve and issue documents with guidance in them. That power is in s 6 of that Act, but more importantly s 7 says:

> **Compliance or non-compliance with approved documents**.
>
> (1) A failure on the part of a person to comply with an approved document does not of itself render him liable to any civil or criminal proceedings; but if, in any proceedings whether civil or criminal, it is alleged that a person has at any time contravened a provision of building regulations—
>
> (a) a failure to comply with a document that at that time was approved for the purposes of that provision may be relied upon as tending to establish liability, and
>
> (b) proof of compliance with such a document may be relied on as tending to negative liability
>
> …"

75. The absence of sanctions, coupled with the fact that they are issued under the auspices of the Secretary of State as guidance, means that in my view the Approved Documents are not legislation, even tertiary legislation, but are akin to the Highway Code and other Codes of Practice. It is therefore open to Mr Hay to give evidence about what they are generally taken to mean to intended readers.

76. But first I need to return to Schedule 1 to the Building Regulations as it is that Schedule which the Approved Documents are giving guidance on.

77. Paragraph A1 concerns loading to buildings generally and does not mention roofs.

78. Paragraph C2 says:

> "**Resistance to moisture**
>
> C2. The walls, floor and roof of the building shall adequately protect the buildings and people from harmful effects caused by---
>
> (a) …
>
> (b) precipitation including wind-driven spray;
>
> (c) interstitial and surface condensation …
>
> (d) …"

"Roof" is not defined in this paragraph or the Schedule or indeed anywhere in the Building Regulations.

79. Other paragraphs of the Schedule however do refer to roofs. Paragraph B4(2) (External Fire Spread) says that "the roof of the building shall adequately resist the spread of fire over the roof and from one building to another …". Paragraph H3(1) says "adequate provision shall be made for rainwater to be carried from the roof of the building". There are Approved Documents dealing with these sub-paragraphs.

80. I add here that the appellant (or more realistically his solicitors) was running a strong risk in not doing the research (or, if done, not informing the Tribunal of the outcome) which I have had to do unaided (as set out in §§70 to 79) to find out what the status of the documents is, that is that they are not "binding" law on which Mr Hay's evidence would be inadmissible. Had I not done that work I may well have come to the conclusion that Mr Hay was, as his Report and the instructions imply, giving an opinion on the law of the United Kingdom, which was not within his competence.

81. I now consider whether in fact the conclusion Mr Hay draws is a correct inference from the documents. I also consider whether his conclusions are affected by the fact that he did not refer to all the Approved Documents that relate to those Parts of Schedule 1 to the Building Regulations that refer to "roofs".

82. I start with his conclusion that "the roof is defined in these binding regulations [*sic*] as the structure not the covering" which he takes from Section 4 of Approved Document A.

83. The section is headed "Roof coverings" and it seems to me that this is important enough for me to quote it in full (the italicised words are my emphasis):

> "**Materials**
>
> **4.1** All materials used to cover *roofs*, excluding windows of glass in residential buildings with *roof pitches* of not less than 15°, shall be capable of safely withstanding the concentrated imposed loads upon *roofs* specified in BS EN 1991-1- 1:2002 with its UK National Annex. Transparent or translucent *covering materials for roofs* not accessible except for normal maintenance and repair are excluded from the requirement to carry the concentrated imposed load *upon roofs* if they are non-fragile or are otherwise suitably protected against collapse.
>
> **Re-covering of roofs**
>
> **4.2** The *re-covering of roofs* is commonly undertaken to extend the useful life of buildings. *Roof structures* may be required to carry underdrawing or insulation provided at a time later than their initial construction. This section provides guidance on determining whether such *work to a roof* constitutes a material alteration under the Building Regulations.
>
> **4.3** Where the work involves a significant change in the applied loading the structural *integrity of the roof structure* and the supporting structure should be checked to ensure that upon completion of the work the building is not less compliant with Requirement A1 than the original building.

4.4 A significant change in *roof loading* is when the loading upon the roof is increased by more than 15%. Consideration might also be given to whether the *roof covering* being replaced is the original as-built covering.

4.5 Where such checking of the existing *roof structure* indicates that the construction is unable to sustain any proposed increase in loading (e.g. due to overstressed members or unacceptable deflection leading to ponding), appropriate strengthening work or replacement of *roofing members* should be undertaken. This is classified as a material alteration.

4.6 In carrying out the checks mentioned in paragraph **4.3** an increase of stress in a structural member arising from increased loading does not necessarily indicate that the *roof structure* is less compliant than *the original roof* provided an adequate factor of safety is maintained.

4.7 Where work will significantly decrease the *roof dead loading*, the *roof structure* and its anchorage to the supporting structure should be checked to ensure that an adequate factor of safety is maintained against *uplift of the roof* under imposed wind loading."

84. Paragraph 4.1 supports Mr Hay's view in so far as "material to cover roofs" including slates and tiles (and thus the items that the appellant uses to cover the structure, being in the case of a conservatory the glazing bars) is differentiated from the roof structure, which in that paragraph must be what is being referred to as the "roof". Paragraphs 4.2 to 4.5 do not themselves refer to "roof" by itself. In paragraph 4.6 "the original roof" must I think also refer to the "roof structure".

85. My only doubt is in paragraph 4.7 where the document talks of the "uplift of the roof" by wind. What is uplifted by wind is surely the roof covering, the tiles, slates etc.

86. In the paragraph of his report relating to Section 4 of Approved Document A Mr Hay also says that Wetheralds do not alter the roof structure. They do not, on Mr Pavis's evidence, dismantle the roof structure: they add to it by reinforcing the glazing bars with wooden pieces, but I agree they do not alter the way the structure is formed or put together.

87. I turn now to Section 6 of Document C. Again I consider I should quote the parts Mr Hay quoted in full (with the italicised words again being my emphasis):

"6.1 This section gives guidance for three situations:

a. *roofs* exposed to precipitation from the outside (see paragraphs 6.3 to 6.9);

b. the risk of interstitial condensation *in roofs* (see paragraphs 6.10 to 6.13);

c. the risk of condensation or mould growth on *the internal surface of roofs* (see paragraph 6.14).

6.2 *Roofs* should:

a. resist the penetration of precipitation to the inside of the building; and

b. not be damaged by precipitation and not carry precipitation to any part of the building which would be damaged by it;

c. be designed and constructed so that their structural and thermal performance are not adversely affected by interstitial condensation.

ROOFS (RESISTANCE TO MOISTURE FROM THE OUTSIDE)

6.3 *Roofing* can be designed to protect a building from precipitation either by holding the precipitation *at the face of the roof* or by stopping it from penetrating *beyond the back of the roofing system.*

6.4 Any *roof* will meet the requirement if:

a. it is jointless or has sealed joints, and is impervious to moisture (so that moisture will not enter the *roofing system*); or

b. it has overlapping dry joints, is impervious or weather resisting, and is backed by a material which will direct precipitation which *enters the roof towards the outer face* (as with roofing felt).

6.5 Some materials can deteriorate rapidly without special care and they should only be used as *the weather-resisting part of a roof* if certain conditions are met The *weather-resisting part of a roofing system* does not include paint nor does it include any coating, surfacing or rendering which will not itself provide all the weather resistance.

6.6 *Roofing systems* may be:

a. impervious including metal, plastic and bituminous products; or

b. weather resisting including natural stone or slate, cement based products, fired clay and wood; or

c. moisture resisting including bituminous and plastic products lapped at the joints, if used as a sheet material, and permeable to water vapour unless there is a ventilated space directly behind the material; or

d. jointless materials and sealed joints, which would allow for structural and thermal movement.

…

6.8 Each sheet, tile and *section of roof* should be fixed in an appropriate manner. Guidance as to appropriate fixing methods is given in BS 8000-6:1990."

88. It seems to me that paragraphs 6.1, 6.2, 6.4, 6.5 and 6.8 are referring, by using the word "roof", only to the roof covering. The roof structure is not exposed to precipitation from outside. I add that if I were construing paragraph C2 of Schedule 1 to the Building Regulations I would say that "roof" there also meant the roof covering.

89. "Roofing" in paragraph 6.3 also refers to the covering and is the word I would have expected to be used throughout these documents if "roof" means only the structure.

90. Paragraph 6.6 introduces a new phrase "roofing systems" and that also seems to refer to the covering. It is consistent with the use of "roofing" in paragraph 6.3.

91. I cannot from this section draw the conclusion that in the world of the Building Regulations "roof" can *only* mean the "roof structure", ie the rafters, purlins, struts ties and joists. In fact it plainly doesn't: it also covers at various points the covering or roofing (system).

92. It is not to me surprising to find that in a document about the structure of buildings and in a section headed "structure" that references to a roof are for the most part to the roof structure; or that in a part of a document concerned with the effects of moisture on a building that references to a roof mainly refer to the roof covering which is that part of a roof primarily designed to repel moisture.

93. In other words the meaning of a simple English word is coloured by the context in which it is used. English words are for the most part polysemic, and they are also subject to being used elliptically. A person may use a word such as "roof" to another person where both understand that it is only the covering or only the structure or both or even a more metaphorical concept that is being referred to. Where those two person are architects or surveyors or builders then the usage shown in the Approved Documents will be in their minds and they will not notice ambiguities or internal contradictions in the documents that a more pedantic but less well-informed person such as a judge or Parliamentary Counsel might.

94. Thus Mr Hay's conclusions in this section of his report do not seem to me to be borne out by the documents he uses to demonstrate the conclusions. It is simply not the case that as his report says "the roof is defined in these [documents] as the structure not the covering".

95. In these circumstances I do not need to dwell on Documents B and H or to mention paragraphs 6.9 to 6.14 of section 6 of Documents C. I add only paragraph 14.1 of Part B4 (External fire spread) of Document B:

> "Introduction
>
> **14.1** The provisions in this section limit the use, near a boundary, of *roof coverings* which will not give adequate protection against the spread of fire over them. The term *roof covering* is used to describe constructions which may consist of one or more layers of material, but *does not refer to the roof structure as a whole*. The provisions in this Section are principally concerned with the performance *of roofs* when exposed to fire from the outside. (Again the emphasis is mine)

96. "The roof structure as a whole" would seem to me to include the roof covering, though of course I must take into account that this is not a statute. But the "performance of roofs" here clearly refers only to the performance of the covering.

97. Still on Approved Document C and Mr Hay's conclusions on this section, I accept as his expert opinion his conclusion in the last paragraph of §59(3) that the Wetheralds roof conforms with paragraph 6.4(b) of Document C and that it is required to do so. I do not though understand what he is intending to say when he says that the application of the foil cannot be considered in isolation. Considered in relation to what? The Building Regulations?

98. As to the question and answer in §58(4) and §59(4), I accept this as expert evidence of fact. I consider its relevance to the question I have to decide below.

99. As to the question and answer in §58(5) and §59(5) Mr Hay is answering a question which does not require his expertise to answer. Nor I would have thought was it a question that needed asking.

100. In the question and answer in §58(6) and §59(6) Mr Hay is asked to compare Wetheralds' system with that used by Pinevale Ltd. The relevance of the question is that *Pinevale UT* is a binding authority on me. I assume that Mr Hay's information about their system came from *Pinevale FTT*, where the facts are set out in paragraph 4 of Sir Stephen Oliver's decision. I just about accept his answer as expert evidence of fact, but again the significance of the difference is one for me in coming to my decision.

101. The question in §58(7) seems to me to be dangerously close to asking Mr Hay for his view of the law I have to apply, and I disregard his answer in §59(7).

102. In addition to the seven questions Mr Hay asked himself, he gives his opinion on the LABC Certificate and the Patent. Mr Hay in his comments is stating facts and Mr Pavis is in as good if not better position to give evidence on these matters.

Mr Hay's expert evidence: summary of my conclusions

103. The only expert opinion evidence that Mr Hay has given is that in the last paragraph of §59(3) (see §97), and I accept his opinion on the question he was asked.

104. There is expert factual evidence in relation to §59(3) which I deal with in §§70 to 96. I do not accept this evidence and I find as a fact that "roof" does not have a single meaning in the documents referred to.

105. There is expert factual evidence in relation to §59(4) and 59(6) which I accept and I find what is said as fact.

106. There is factual evidence in relation to §59(1) and (2) which does not go beyond Mr Pavis's evidence. I accept all this evidence, and find it as fact, but I prefer to rely on Mr Pavis's evidence as the "man on the spot" and himself clearly expert in his field.

107. I do not accept the evidence in §59(5) and §59(7).

Mr Hay's expert evidence: final observation

108.I should say here that though I have not accepted some of Mr Hay's evidence or do not, in some cases, give what I have accepted a great deal of weight, I do not cast any doubt on his competence or qualifications to give expert evidence. I do not think he has been at all helped by his instructions and I continue to harbour substantial doubts about whether his evidence passes the threshold in CPR 35.1 (but that is water under the bridge, of course).

The HMRC witnesses: Ms Jane Kettlewell

109.Ms Kettlewell's evidence was a narrative of the work she carried out and the correspondence she had with the appellant (Mr Pavis in particular) and their advisers. She referred to the fact that she sought Mr Agar's advice before issuing her decision on 10 July 2014.

110.In cross-examination Ms Kettlewell agreed that Wetheralds does not advertise any construction services.

111.She was also asked, given that she had only now decided the Ceiling System should be reduced-rated, what the difference was between that system and the Solid Roof System. She said that the approach to the Solid Roof System emerged from discussions with Policy colleagues.

112.Asked whether she had done anything about the other companies in the same position as Wetheralds (as Mr Pavis had informed her) she said that she hadn't.

113.She considered that there was a significant alteration in the conservatory. She was asked if she was aware that the roof frames and rafters were retained: in answer she said that she thought the roof tiles were added on top of the existing polycarbonate or glass panels.

114.In re-examination she confirmed that there was one invoice per customer and one amount per invoice.

115.I find as fact that which Ms Kettlewell's evidence relates about the course of the dealings between her and the appellant and her own state of knowledge about the appellant's system.

The HMRC witnesses: Mr Gary Agar

116.Mr Agar's evidence referred to Ms Kettlewell's request to him, as a VAT Consultant within HMRC, to authorise a repayment of VAT to the appellant. He said that his examination of the company's website led him to the view that the service provided was the replacement of an old conservatory roof with a new roof with insulating properties.

117.The vast bulk of his evidence consists of his swapping arguments with HPH, in particular about the effect of the *Pinevale UT* decision on the appellant's activities. It

is relevant to note that in his letter of 5 December 2014 to HPH he extended the deadline previously given by Ms Kettlewell in her decision letter of 10 July 2014 for appealing or requesting a review by 30 days from the date of his letter.

118. Mr Agar was also asked by Mr Brown about the other companies mentioned by Mr Pavis. He said a number of rulings had been given.

119. He was asked if he was aware that the aluminium bars were not replaced. He said that he was not: from the website he formed the opinion that the whole roof was replaced.

120. Mr Brown asked him about a passage in his statement where he said that "[h]e did not consider it necessary to consider what the customer is expecting to receive as a supply because this is subjective and therefore it is not possible to say with any certainly whether a customer wants insulation more or less than the look of a new tiled conservatory". He stood by this statement and added that he was aware of the restrictive nature of Schedule 7A VATA (reduced-rating) and of the *Pinevale UT* decision.

121. I find as fact that which Mr Agar's evidence relates about the course of the dealings between him and the appellant and his own state of knowledge about the appellant's system. Statements made by Mr Agar as to the legal consequences of the matters he discussed with the appellant's representatives and his views on the matters in §§116 and 120 are the matters which I have to decide and Mr Agar's views are irrelevant as evidence.

Conclusions on the facts

122. I find from all the facts which I have set out above and from those opinions of Mr Hay which I accept as expert factual or opinion evidence that what the appellant provides to its customers in return for consideration is a system to make a conservatory far more useable and liveable in for a much longer time in the year.

123. I also find as a fact from that evidence that what a customer wants from the appellant is a fully insulated conservatory and not a replacement roof. They also want an insulation system that is durable (given the additional cost compared with a simple replacement) and is aesthetically pleasing (or at least not displeasing) inside and outside.

124. The provision of the system has a number of components. Mindful of the need not to analyse the supply in minute detail I find the components to be (1) the supply of insulating material together with the wooden structure to which it is attached; (2)(a) (in the Solid Roof System) the supply of roofing tiles (with battens and felt) required to cover the insulation material; (2)(b) the supply of film to existing polycarbonate or glass sheets (Ceiling System); (3) the supply of a skimmed plasterboard ceiling, with sometimes electric cable and light fittings and (4) the supply of soffits and rainwater goods.

125.The supply of the Solid Roof System is made up of components (1), (2a), (3) and (4) while the Ceiling System is made up of components (1), (2b) and (3).

The law

126.Section 29A VATA says:

"**29A Reduced rate**

(1) VAT charged on—

(a) any supply that is of a description for the time being specified in Schedule 7A, or

(b) any equivalent acquisition or importation,

shall be charged at the rate of 5 per cent."

127.The relevant group in Schedule 7A is Group 2:

"**Group 2**

Installation of energy-saving materials

Item No.

1 Supplies of services of installing energy-saving materials in residential accommodation.

2 Supplies of energy-saving materials by a person who installs those materials in residential accommodation.

NOTES:

Meaning of "energy-saving materials"

1 For the purposes of this Group "energy-saving materials" means any of the following—

(a) insulation for walls, floors, ceilings, roofs or lofts or for water tanks, pipes or other plumbing fittings;

(b) draught stripping for windows and doors;

(c) central heating system controls (including thermostatic radiator valves);

(d) hot water system controls;

(e) solar panels;

(f) wind turbines;

(g) water turbines;

(h) ground source heat pumps.

(i) air source heat pumps;

(j) micro combined heat and power units;

(k) boilers designed to be fuelled solely by wood, straw or similar vegetal matter."

128.A large number of authorities was included in the parties' lists. Of them only the following appeared in both skeletons:

(1) *Pinevale UT*

(2) Case C-349/96 *Card Protection Plan Ltd v Commissioners of Customs and Excise* [1999] ECR I-9973 [1999] STC 270 ("*CPP*")

(3) Case C-41/04 *Levob Verzekeringen v Staatssecretaris van Financiën* [2005] ECR I-9433, [2006] STC 766 ("*Levob*").

129.HMRC also referred to *Pinevale FTT* and (1) *Beco Products Ltd* (2) *BAG Building Contractors Ltd* (VAT Tribunal Decision 18638) ("*Beco*")

130.Mr Brown referred to a number of (mainly European) cases in support of certain general propositions which I do not need to mention by name as I accept the propositions (and HMRC did not dispute them).

Submissions

131.I set these out in outline only here. Further detail of the parties' submissions can be found in the relevant discussion section below.

The appellant

132.For the appellant Mr Brown submitted that:

(1) There was a single supply by the appellants of each system

(2) That supply was of insulation for roofs of conservatories and falls to be reduced-rated

(3) *Pinevale UT* is to be distinguished

(4) In the alternative, if there are two supplies the consideration should be apportioned between them on the basis of cost.

133.For HMRC Ms Sinclair argued that:

(1) There was a single supply by the appellants of each system

(2) That supply was of a roof for a conservatory or a ceiling in a conservatory, and both fall to be standard-rated

(3) *Pinevale UT* is applicable to the appellant

(4) No alternative argument was put forward.

Discussion

Procedural issues about the appeal

134.I deal first with some procedural issues. Ms Kettlewell's decision set out in her letter of 10 July 2014 did not *offer* a review (as s 83A VATA requires). It informed

the appellant that it could appeal to the Tribunal or request a review within 30 days, neither of which was done.

135.I do not know the reason, but it could be related to the fact that the wording of the decision letter might have been thought not to be applicable to the appellant. It said:

> "Where the supply is of a roof, either a complete replacement or the addition of tiling to the existing roof, the whole supply must be charged VAT at the standard rate."

136. It would to my mind have been a legitimate response to assume that this was not what the appellant was doing. Alternatively it might have been thought that the appellant could wait until assessments were made. But there is no reference to any assessments in the papers.

137.Mr Agar however purported to extend the time limit for an appeal or review of Ms Kettlewell's decision. It is difficult to see what the legal basis for this was, unless one takes the view that he was withdrawing Ms Kettlewell's decision and making one of his own, but there is nothing in his letter that suggests that was what he was doing or attempting to do. As the appellant did appeal to the Tribunal, albeit a few days late, following Mr Agar's letter, and HMRC took no point on either the late appeal or the failure to appeal or seek a review in time of Ms Kettlewell's decision, neither shall I. But it is odd.

138.More mysterious however is the Tribunal's jurisdiction in relation to the decision of 22 June 2016 about the Ceiling System. There is no appeal that I can see against that decision. The appeal where the grounds were amended is the appeal of 8 January 2015 against Ms Kettlewell decision in 2014 and the application to amend was initially made in 2015. I cannot see how the grounds of that appeal can be amended to cover a completely different decision.

139.I have considered the substantive arguments on the Ceiling System, though as I have made clear, I am not however in a position to give a decision on the Ceiling System. What I will do is indicate what my decision would have been had there been a valid appeal against the decision brought to the Tribunal. I would expect HMRC and the appellant to abide by this indication, but I cannot bind them.

The approach to be taken

140.Mr Brown put forward a number of propositions taken from the case law of the Court of Justice of the European Union or its predecessor, the European Court of Justice, that I should take into account. They are:

> (1) For VAT purposes every supply must normally be regarded as separate and distinct, but where there are several elements the question is whether there is a single supply or several.
>
> (2) A supply must be treated as a single supply where two or more elements are so closely linked that they form objectively a single

indivisible economic supply which it would be artificial to split (citing *Levob*)

(3) That is also the case where two or more supplies constitute a principal supply and the others are ancillary. An ancillary supply is one that does not constitute for customers an end in itself but a better means of enjoying the principal supply (citing *CPP*)

(4) To answer the question, single supply or several supplies, the characteristic elements of the transaction must be examined (*Levob*)

(5) It is from the view of the customer that the essential features are determined.

(6) Regard must be had to the qualitative and not merely quantitative importance of the components of supply.

(7) A single charge is not determinative, nor is the fact that a general description may be given to the totality of services

(8) All the circumstances must be taken into account.

141. He also argued that provisions such as s 29A VATA fall to be interpreted strictly but not restrictively.

142. I am content to accept all these propositions, but with one important caveat. Propositions (2) and (3) are, it seems to me, to a substantial degree, alternatives. There has been much discussion, judicially and extra-judicially, on the differences between the *CPP* approach and the *Levob* approach. I find a recent decision of this Tribunal, *OISE Ltd v HMRC* [2016] UKFTT 749 (TC) ("*OISE*") (Judge Nicholas Paines QC, who appeared for the Commissioners of Customs and Excise in *CPP*) both illuminating and clear. The relevant passages are these:

> "240. … In *CPP* the Court held
>
> '27. It must be borne in mind that the question of the extent of a transaction is of particular importance, for VAT purposes, both for identifying the place where the services are provided and for applying the rate of tax or, as in the present case, the exemption provisions in the Sixth Directive. In addition, having regard to the diversity of commercial operations, it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases.
>
> 28. However, as the Court held in Case C-231/94 *Faaborg-Gelting Linien v Finanzamt Flensburg* [1996] ECR I-2395, paragraphs 12 to 14, concerning the classification of restaurant transactions, where the transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in which that transaction takes place.
>
> 29. In this respect, taking into account, first, that it follows from Article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic

point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.

30. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (Joined Cases C-308/96 and C-94/97 *Commissioners of Customs and Excise v Madgett and Baldwin* [1998] ECR I-6229, paragraph 24).

.....

32. The answer to the first two questions must therefore be that it is for the national court to determine, in the light of the above criteria, whether transactions such as those performed by CPP are to be regarded for VAT purposes as comprising two independent supplies, namely an exempt insurance supply and a taxable card registration service, or whether one of those two supplies is the principal supply to which the other is ancillary, so that it receives the same tax treatment as the principal supply.'

241. The test for determining whether one element of a supply is ancillary to another is thus whether it "constitutes for customers" an aim in itself or a means of better enjoying the principal service" (paragraph 30); the customer to be considered is "a typical consumer" of the supply in question (paragraph 29).'

FDR

242. My attention was also drawn to *Customs and Excise Commrs. v FDR Ltd* [2000] STC 672. In that case FDR performed a complicated series of inter-connected functions for banks in relation to credit cards which, again, would if viewed in isolation be variously taxable and exempt. The particular feature of Laws LJ's judgment in that case (with which the other members of the Court concurred) was that it articulated the distinction between *CPP*-type cases in which there is a principal element of the supply to which other elements are ancillary and those in which there is "a congeries of supplies" which without being in a relationship of principal and ancillary "are integral to each other or 'indissociable'". To a considerable extent, the judgment anticipated the later CJEU decision in *Levob*: as can be seen from paragraphs 21 and 22 of the *Levob* judgment, the reasoning in *CPP* had focussed on a supply in which elements could be classified as principal and ancillary; *Levob* gave prominence to the concept of elements being "so closely linked that they form, objectively, a single, indivisible economic supply". Such supplies give rise to a further problem: whereas a supply consisting of principal and ancillary elements will receive the tax treatment appropriate to the principal elements (and *CPP* gave no guidance on what to do if the principal elements did not

all receive the same tax treatment if taken in isolation), where the elements in a single supply do not stand in the relationship of principal and ancillary some other means of determining the overall tax treatment must be found. Laws LJ expressed the matter as follows:

> '53 ... I am sure with very great respect that Lord Millett did not intend, in the first four sentences of the passage I have just cited [in *C & E Commrs. v Wellington Private Hospital Ltd* [1997] STC 445 at 462], to indicate that in every case where multiple supplies properly fall to be treated as a single supply for fiscal purposes there is always a *single* or *unitary* dominant supply to which all the other supplies in question are then regarded as ancillary. That, certainly, is one case; but there may be others where the single supply that is arrived at for VAT purposes consists, not in one supply to which others are ancillary, but in a bundle of supplies none of which predominates over the others; the single supply may, as it were, be an apex or a table-top. There is thus a difference between what is "ancillary" and what is "integral": several supplies may be "integral" to one another, with none predominating - the table-top - and this I think is the situation contemplated by the phrase "physically and economically dissociable", quoted by Lord Millett and appearing in some of the Court of Justice jurisprudence, and by Lord Nolan's expression "the true and substantial nature of the consideration given for the payment"....
>
> 54 While I hope these observations are helpful I think there is some danger of over-elaboration and needless complexity in this field. We are not here concerned with deep legal principle, but with the articulation of a fair and reasonable approach to those cases where there is a question how should the consideration given by a supplier for his reward be categorised for the purposes of VAT, when there are multiple acts of supply involved. The simpler it is the better, so long as it is kept consistent with the doing of justice. With respect I apprehend (but I by no means propose to lay down any rule) that where this sort of issue arises, the first question to be asked may be couched as Lord Nolan put it: what is "the true and substantial nature of the consideration given for the payment". That will identify the apex or the table-top. The second question will be whether there are other supplies which are ancillary to the core.
>
> 55 But there is, I think, one further complication. Where the core supply is on the table-top model - a congeries of supplies which are integral to each other or "indissociable" - it may not be self-evident from the description of the core supply at which the court or tribunal arrives what its tax treatment should be. In that case, it will be necessary to look again at the elements which comprise the core, and arrive at a decision on the facts whether, numerically if nothing else, the taxable or exempt elements predominate. Necessarily no such difficulty arises where the core supply is on the apex model.'

Levob

243. Case C-41/04 *Levob Verzekeringen v Staatssecretaris van Financiën* [2005] ECR I-9433, [2006] STC 766 concerned the supply

by a US company to a Dutch company (Levob) of software - supplied on discs that were delivered to Levob in the USA - together with the service of customising that software to Levob's requirements. The discs and the customisation were charged for separately. The issue was whether VAT was payable on the whole amount or only the fee for customisation. This in turn depended on whether there were one or two supplies and, if one supply, whether it was of goods or of services. That affected whether the supplies were to be treated as made in the EU, and thus taxable.

244. The Court both repeated its reasoning in *CPP* and extended it to cover cases other than those of principal and ancillary supplies. It reasoned as follows:

> '21 ... the Court has held that there is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal supply, whilst one or more elements are to be regarded, by contrast, as ancillary supplies which share the tax treatment of the principal supply (*CPP*, cited above, paragraph 30, and Case C-34/99 *Primback* [2001] ECR I-3833, paragraph 45).
>
> 22 The same is true where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.'

245. The Court went to find that it would be artificial to split Levob's transaction into separate supplies of "software which, as it stood, was nevertheless of no use for the purposes of its economic activity, and only subsequently the customisation, which alone made that software useful to it" (paragraph 24). Turning to the question, on which its tax treatment depended, of whether the supply was of goods or a service, the Court reasoned as follows:

> '27 Secondly, with regard to the question whether such a single complex supply is to be classified as a supply of services, it is vital to identify the predominant elements of that supply (see, inter alia, *Faaborg-Gelting Linien*, paragraph 14).
>
> 28 Apart from the importance of the customisation of the basic software to make it useful for the professional activities of the purchaser, the extent, duration and cost of that customisation are also relevant elements in that regard.
>
> 29 On the basis of these different criteria, the Gerechtshof te Amsterdam correctly concluded that there was a single supply of services within the meaning of Article 6(1) of the Sixth Directive, since those criteria in fact lead to the conclusion that, far from being minor or ancillary, such customisation predominates because of its decisive importance in enabling the purchaser to use the software customised to its specific requirements which it is purchasing.
>
> 30 Having regard to all these elements, the answer to Question 1(a) and (b) must be that:
>
> - Article 2(1) of the Sixth Directive must be interpreted as meaning that where two or more elements or acts supplied by

a taxable person to a customer, being a typical consumer, are so closely linked that they form objectively, from an economic point of view, a whole transaction, which it would be artificial to split, all those elements or acts constitute a single supply for purposes of the application of VAT;

- this is true of a transaction by which a taxable person supplies to a consumer standard software previously developed, put on the market and recorded on a carrier and subsequently customises that software to that purchaser's specific requirements, even where separate prices are paid;

- Article 6(1) of the Sixth Directive must be interpreted as meaning that such a single supply is to be classified as a 'supply of services' where it is apparent that the customisation in question is neither minor nor ancillary but, on the contrary, predominates; such is the case in particular where in the light of factors such as its extent, cost or duration the customisation is of decisive importance in enabling the purchaser to use the customised software.'"

143. What I take from this is that it must be determined whether the case is a *CPP* one (an "apex" case) or a *Levob* one ("a table-top case"). This is important not so much for determining whether there is a single supply, as if the case is either an apex one or a table-top one, the answer is that there is a single supply, but for determining what the characteristics of that single supply are.

The Solid Roof System: is there a single supply?

144.Both parties urged me to find that there was a single supply (an overarching supply as the jargon has it).

145.The appellant argued that, based on the criteria which it had set out and listed in §140, there was a single supply. The single supply is the supply of energy-saving materials, not of a new roof that has energy saving properties. The tiling was in the appellant's view ancillary to the supply of insulation.

146.This then is a *CPP* "apex" argument.

147.HMRC accepts the propositions from *CPP* and *Levob* cited by the appellant. They seem to rely primarily on *CPP*, as they argue that the insulation is ancillary to the supply of a roof, and that it would be artificial to separate out the insulation as a separate supply. They also suggest that the "two elements", which I take to be the insulation and the tiled roof, are integral, and although they do not say what they are integral to, I assume it is to each other.

148.However of those two elements, the predominant one is the supply of a roof rather than the insulation, as the customer wants a roof and the insulation is a bonus and thus ancillary.

149. The use of "integral" suggests a *Levob*-type argument: it can be seen from the extract of the FTT decision in *OISE* at [242] in §142 that the word was used in the judgment of Laws LJ in *FDR*, anticipating, as Judge Paines QC says, *Levob*. The word is not used anywhere in the *Levob* judgment itself. But it does not seem to me that a case can be at one and the same time an apex case and a table-top case.

150.In view of these submissions I have examined the facts to see if there are any elements that are plainly ancillary, and if there are, whether the result of so treating those elements is the emergence of a single dominant element. I remind myself that a supply is "ancillary" where it "constitutes for customers" an aim in itself or a means of better enjoying the principal service (*OISE* at [241], taken from *CPP* at [30].

151.I have no hesitation in saying that the creation of a plasterboard ceiling is not an aim in itself for a customer. It is a means by which the customers can better enjoy the supply of the Solid Roof System, by being more aesthetically pleasing than having to view the insulation quilt and the framework holding it in position and to which it is attached. Element (3) (see §124) is therefore ancillary.

152.I take the same view of element (4), the soffits and rainwater goods. They are needed only because the installation of the tiled roof covering alters the profile of the roof and makes it necessary to have new items. A costumer is not seeking to have such items fitted and would probably prefer not to have to pay for them.

153.That still leaves two elements, (1) the insulation and its framework and (2) the tiles with their battens and felt. I reject immediately the suggestion by HMRC that element (1) is ancillary to element (2). Insulation is precisely what the customer wants, as is proved by the evidence of Mr Pavis and the advertising and marketing material.

154.But although I have found it a much less easy task, I have also come to the conclusion that the roof tiling is *not* ancillary to the insulation. This is because the patent application, the LABC certificate and above all Wetheralds' own name for their system, Solid Roof System, shows that the tiling is not merely a method of better enjoying the principal service of insulation. It is to my mind an integral part of what customers want and what the appellant supplies.

155.Since there is no apex, I now have to consider *Levob* to see how I must decide what the single supply is, where as here "two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split."

156.The answer from Laws LJ in *FDR* was that it will "be necessary to look again at the elements which comprise the core, and arrive at a decision on the facts whether, numerically if nothing else, the taxable or exempt elements predominate. Necessarily no such difficulty arises where the core supply is on the apex model."

157.In *Levob* itself the CJEU said at [30]:

> "Article 6(1) of the Sixth Directive must be interpreted as meaning that such a single supply is to be classified as a 'supply of services' where it is apparent that the customisation [of software also supplied] in question [in that case] is neither minor nor ancillary but, on the contrary, predominates; such is the case in particular where in the light of factors such as its extent, cost or duration the customisation is of decisive importance in enabling the purchaser to use the customised software."

158. I need therefore to consider whether either element in the table top predominates. It is clear to me that one does, and that is the insulation and its framework. Again from Mr Pavis's evidence and the material supplied, as well as from the evidence included in the patent application and the LABC certificate, what a customer wants from Wetheralds above all is a conservatory that is usable throughout the year, is neither too hot nor too cold. The roof tiling is both aesthetically pleasing and protective (and so not ancillary) but it is the minor element in the table-top.

159. I find therefore that there is a single supply of insulation materials with their supporting framework and the other elements that make it both more pleasing to look at and more durable.

The Solid Roof System: what is the nature of the single supply for VAT? Does Pinevale UT *apply?*

160. The question here is whether the single supply that I have found that the appellant makes falls within the scope of Note 1(a) to Group 2 of Schedule 7A VATA, that is whether the supply is of "insulation for … roofs …".

161. The appellant says that a typical consumer enters into a contract with the appellant to obtain an insulated conservatory. The external works (inside and outside) are necessary from a protective and aesthetic viewpoint respectively. The single supply is therefore a supply of insulation for a conservatory and falls within Schedule 7A.

162. HMRC say that there is a single supply of construction services. In the Solid Roof System case the customer is seeking a roof, and the supply of the insulating material is not a separate supply.

163. The question posed in §160 is one that has been addressed by the Upper Tribunal ("UT") (David Richards J, as he then was) in *Pinevale UT*.

164. Before considering what was decided in *Pinevale UT* and what consequences if any it has for this case, it is necessary to fully appreciate the decision of the UT to set out some of the decision of Sir Stephen Oliver QC in *Pinevale FTT*:

> "**The Products**
>
> 4. The principal Product, the Insupolycarbonate Roofing Panel, consists of polycarbonate materials comprising four or more cells. Polycarbonate does not have the structural rigidity for use on its own as a panel; the Product is therefore manufactured as a cellular structure and designed to fit into an aluminium frame. The frame holds cells

with thicknesses of either 25mm or 35mm. The thicker the panel the higher is the insulation performance. The insulation panels are designed to admit daylight into the conservatory. A "thermal break" consisting of opaque insulating material may be attached to the aluminium framework structure to reduce heat loss due to conduction.

…

The services provided by Pinevale

12. Mr Anderson said that the conservatories with which Pinevale dealt would have been extensions of existing houses that have been in place and used for several years. The procedure starts with a meeting at which Pinevale's representative and the client discuss the available methods of insulating both to keep heat in during the winter and to maintain cooler temperatures during the summer. The solution may be the replacement of faulty components such as glazing bars, crests or valleys, failed panels or sealed units. The replaced panels may be Insu high performance polycarbonate light weight insulation or glass-sealed units. Where the conservatory requires a complete new roof structure and the existing eaves beam is sufficiently strong, then the entire roof can be replaced or the style or shape of the roof can be changed. The solution may simply be the insertion of radiation reflector strips into the existing cellular structure.

…

Is the relevant Product "insulation for… roofs?"

…

25. HMRC are, in my view, adopting too constrained a meaning of "insulation for" when they seek to exclude the situation where the whole roof structure is replaced or where individual panels are. It is in my view, significant that HMRC have identified no form of energy-saving material that is ordinarily attached to an existing but energy-inefficient roof. I accept that a second layer of glass (when installed to create a double glazed roof) may function as energy saving, but the glass itself is not energy saving material.

26. The evidence summarised above shows that Pinevale's market for the Product is customers who want to have the Product installed in the construction or repair of roofing insulated with energy-saving materials. The Product is designed for no other purpose. Those points further indicate that the Product is "insulation for roofs". That expression can fairly be read as covering insulation where the Product functions as the roof and thereby keeps the inside of the conservatory wind and watertight. It is just as much "insulation for roofs" as where it is supplied to be attached to an existing roof of a building."

165. In the UT, David Richards J said:

"4. The roof panels in issue are used to form the roof of a conservatory, either (as Pinevale considered desirable for achieving maximum effect) replacing or constituting the entire roof, or replacing parts of an existing roof. Their purpose is to achieve much higher

levels of insulation than would be the case with a conventional conservatory roof, including a double-glazed roof.

…

8. HMRC's case before the FtT, and on this appeal, is that the panels are not "insulation for roofs" but are the roof itself. So, if an entire existing roof is replaced, the panels constitute the new roof, not just insulation for a roof. Likewise, the replacement of individual panels with Pinevale's panels was the supply of new roof panels, not the supply of insulation for a roof.

…

17. There is a distinction between Note 1(a), which specifies insulation "for walls, floor, ceilings, roofs or lofts or for water tanks, pipes or other plumbing fittings" and paragraphs (c) to (j) which specify particular products such as central heating system controls or solar panels. A material which is insulation for a roof is not the same thing as the roof itself. It presupposes that there is a roof to which the insulating material is applied. If the intention had been to apply the reduced rate of VAT to energy-efficient roofs or walls, this could have been specified, just as more generally building materials are specified in schedule 8. The same point can be made in respect of water tanks. It is not energy-efficient water tanks, such as those which incorporate insulation as part of their construction, which attract the reduced rate of VAT, but insulation for water tanks. Again it presupposes that there is a water tank to which an insulating material is attached or applied.

18. In [25] of its Decision, the Tribunal considered it to be significant that HMRC had not identified any form of energy-saving material that is ordinarily attached to an existing but energy-inefficient roof. While HMRC's representative at the hearing before the F-tT did not have the information to deal with this point, it is in fact clear that there are many such products available generally in the market.

19. The error, in my judgment, made by the Tribunal was to construe "insulation for roofs" as extending to the roof itself when it has energy-saving properties, rather than being confined to insulating materials attached or applied to a roof."

166. HMRC submit that *Pinevale UT* is relevant as the appellant's Solid Roof System has been designed to replace the existing polycarbonate or glass roof. HMRC say that *Pinevale UT* makes it clear that there is a distinction between insulation material for a roof (which is reduced rated) and the roof itself. This case is similar to *Pinevale UT* in that instead of the polycarbonate panels that formed a new roof for Pinevale, the appellant supplies tiles that also form a new roof.

167.The supply also includes the installation of plasterboard, tiles, new fascia, soffits and downpipes as well as skimming of the plasterboard. They cite *Beco* in support

168.It is accepted by the appellant that Group 2 Schedule 7A does not extend to the supply of a new roof that has energy saving properties. Roofs are not defined in VATA. They say that leaving the roof spars and other structural elements in place the appellant is not supplying a new roof.

169. It is the structure of a roof that gives it its essential characteristics; roof coverings come and go, as, say the appellant, is made clear in the unchallenged expert opinion of Mr Hay, who pointed out that the relevant part of the Building Regulations [*in fact of course the Approved Documents*] referred to the re-covering of roofs (ie re-covering the structure). Mr Agar was unaware that the roof spars remained in place when he advised Ms Kettlewell about her decision.

170. I am bound by the decision of the UT. Even if I wasn't I would follow it, as it is clear to me that in his decision David Richards J was giving Note 1(a) a strict but not restrictive construction. It might have been argued that, had there not been products other than those of Pinevale on the market, as Sir Stephen Oliver accepted, the decision of the UT would have been restrictive. But as the UT points out at [18] this is not so, as the appellant's products show.

171.The UT's decision is one of straightforward construction of the actual words of the paragraph of the note, words which, as the UT points out, contain the preposition "for". It is this preposition which makes the difference. "For" in this context denotes that item 1, usually a noun phrase or an adjective, is an appropriate thing to be used in conjunction with, or in relation to, item 2, usually a noun. If that is so, then Item 1 cannot be, or be part of, Item 2.

172.The appellant, primarily through Mr Hay's evidence, was clearly seeking to argue that *Pinevale UT* did not apply because the UT did not use roof in its correct sense, not having had the benefit of expert opinion about what the word "roof" does mean to an architect, namely the roof structure.

173.It is obvious to me that the UT was using the word "roof" in the sense of the covering, the roofing, because that is what the Pinevale product was, it was the roof covering. But he also says at [19] that the reason Sir Stephen Oliver went wrong was that he did not confine the subject of Note 1(a) to "insulating materials attached or applied to a roof", matters which David Richards J says are the paragraph's meaning.

174.But this approach does not mean that the structure in the appellant's sense is not also part of the roof Had there been such things as insulating rafters and so on they would not have qualified either because they were part of the roof. It is not a question of the UT looking at the wrong part of the roof when it seeks a meaning – it distinguishes the roof as a whole, structure and covering, from what is applied to the roof or to just the covering or (less likely) just the structure.

175. That being so, it is also clear to me that the insulation assembly of the appellant *is* "insulation for roofs". As I have said, it doesn't matter whether "roof" in Note 1(a) means the roof covering or the roof structure or both – it depends on the method of installation, how they are in the UT's words "attached or applied" to a roof. The appellants insulation is attached or applied to the structure being the glazing bars.

176.It is not attached, as I have understood it, to the roof covering, the tiles or to the batten and felt underneath them. But even if it had been it would still have been insulation for roofs, and distinguishable from the Pinevale product which was an

insulated roof covering, and so one of the things that insulation had to be attached or applied, not the insulation itself. It is for this reason that I have not needed to rely on Mr Hay's opinion on the meaning of a roof as being the roof structure (and of course I have not accepted his interpretation of the Approved Documents).

177. Before setting out my conclusion I should say something more about the decision in *Pinevale FTT*. The relevant point was mentioned at [11] and [12] of *Pinevale UT* thus:

> "11. The F-tT identified the relevant legal questions at[18] as being:
>
> > "The question of law is whether Pinevale's supplies are of, or relate to, energy- saving materials that are "insulation for....roofs". The supplies have to satisfy a single composite test that has two separate ingredients. First, can the relevant Product properly be classed as an energy-saving material? That is the overriding attribute that it must possess whatever the purpose or use to which it is designed to be put. The second test, relevant to the present issue, relates to the purpose or use for which the material is supplied. That test is whether the relevant material is "insulation for ... roofs?" Failure of either test disqualifies the supply from the reduced rate of VAT."
>
> 12. As to the first question posed by the Tribunal, it was satisfied on the evidence that the panels were energy-saving."

178. A not insignificant part of the evidence in this case, particularly that of Mr Pavis and to some extent Mr Hay, was devoted to demonstrating the energy-saving properties of the appellant's system. *Pinevale UT* did not directly address the question whether Sir Stephen's two part approach to Note 1 of Group 2 Schedule 7A VATA was right. In my view it is not. Note 1 is to my mind simply a definition of those "energy-saving materials" that qualify for the reduced rate. As the UT pointed out at [17], paragraphs (c) to (j) of Note 1 simply list particular items without any prepositional qualification. It cannot be the case that they must all somehow be tested to see if they are "really" energy-saving. In paragraphs (1)(a) and (b) Parliament is also to my mind assuming that all insulation is energy-saving and the only question for the Tribunal is whether it is "for" the structures listed.

179. I should also add that HMRC raised the case of *Beco*. That case is not of assistance to me (or them). It also involved a *CPP* argument which the VAT & Duties Tribunal resolved in the Commissioners' favour on the basis of the facts presented to it. The Tribunal stressed that different fact patterns might give different answers.

180. My conclusion then is that since the entire supply by the appellant of the Solid Roof System is a single supply, and it is a single supply of insulation for roofs, it follows that that entire supply falls to be reduced-rated.

181. As a result the appellant's alternative argument (which was put forward on the basis that I had found that there were two supplies, the insulation and the roofing) that I should apportion the elements by reference to cost does not need to be addressed,

and I do not address it. I do not in any event consider that I would have had adequate materials on which to consider the issue.

182. I also found myself wondering why HMRC had not raised the line of cases that includes Case C-251/05 *Talacre Beach Caravan Sales Ltd v Commissioners of Customs and Excise* [2006] I-6269 in order to suggest that even if one applies a *CPP* or *Levob* approach and that yields a single supply, that supply may nevertheless be split so as to carve out a standard rate element from an exempt or reduced-rated supply in order not to unjustifiably extend the exemption. But they didn't.

The Ceiling System: my thoughts

183. As I have explained above there has been no appeal against HMRC's decision of 22 June 2016 on the Ceiling System.

184. Had there been and had the appeal been before me I would have unhesitatingly found that the ceiling element of the system was ancillary to the insulation assembly, as was the insulation film, and so on the basis of *CPP* there was a single supply of insulation for roofs.

Decision

185. The appeal in relation to the Solid Roof System is allowed.

186. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 4 OCTOBER 2016