[2019] UKFTT 180 (TC)

TC07030

Appeal number: TC/2017/04403

VALUE ADDED TAX – zero rating – listed building damaged by fire and rebuilt to higher specifications – whether certain works to the roof, rewiring and doors were alterations and neither repairs nor incidental to repairs: held, yes for the most part – additional items held to be zero rated where appellant accepted HMRC's erroneous requirements had not been met – appeal upheld in part.

FIRST-TIER TRIBUNAL
TAX CHAMBER

CUBE CONSTRUCTION (SOUTHERN) LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Civil & Family Justice Centre, Bristol on 11 January 2019

Mr Alan Spiller, Managing Director, for the Appellant

Ms Farah Chaumoo, litigator, HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal by Cube Construction (Southern) Ltd ('the appellant") against the decision of the respondents ("HMRC") to make five assessment to VAT to collect tax which HMRC say the appellant under declared by wrongly zero rating construction works carried out by it. The periods are 06/11, 09/11, 12/11, 05/12 and 05/14.

Evidence

2. I had two substantial bundles of documents, one prepared by HMRC in accordance with directions issued by the Tribunal. Mr Spiller also prepare his own bundle as he as not satisfied with some aspects of the HMRC prepared one. Mr Spiller's bundle had the advantage that the photographs were in colour.

3. I had witness statements and oral evidence from Mr Spiller and from Martha Thompson and Tina Blair, officers of HMRC. They were credible and obviously truthful witnesses and I accept their evidence in full. But so far as it amounted to opinion I discount that part of it.

Facts

4. From the evidence of Mr Spiller I find the following facts concerning the work done by the appellant.

The cottage

5. Lydeard Down Cottage ("the cottage"), the building on which the works were carried out, is a listed longhouse, constructed of masonry and cob (a traditional earth plaster used in the west of England) and had a traditional thatched roof. At the time of the fire it was owned and occupied as a private residence by Mr and Mrs Heather.

6. In 2010 the cottage suffered extensive fire damage.

The tendering

7. Tenders were invited by a firm of chartered surveyors acting on behalf of the owners (and their insurers) and the formal tender documents consisted of a specification, schedule of works and associated drawings.

8. The specification, dated October 2010 is headed "Reinstatement following fire damage". In an outline of the "repair work required" it said that:

> "The property has suffered severe fire and smoke damage throughout, with the entire roof, and the majority of the internal structural timber perishing. The scope of remedial work comprises all that is required to fully reinstate the subject property to its pre-fire condition."

9. As to the external condition the specifications said (with minor changes to punctuation etc) that:

(1) The structural condition of the external walls appears to be generally sound to all elevations.

(2) The entire roof construction is beyond repair and shall (*sic*) need to be taken down, carted away from site and reconstructed.

(3) One of the chimney stacks appears to be in a sound condition from initial visual inspection, although it is suffering from smoke damage, and does require rebuilding in similar materials. However further investigation is required to substantiate this, whilst the remaining stack has suffered damage and will require rebuilding.

(4) The remaining pitched roof construction to the utility room appears to have only minor smoke damage.

(5) The external walls to the property need thoroughly cleaning down to remove all traces of fire and smoke damage and require subsequent redecorating.

10. As to the specifications for the internal work, I have concentrated on the two areas that were the subject of dispute before the tribunal, the electrics and the doors.

(1) All internal doors, localised joinery, architraves, door linings and skirtings are to be taken out and renewed to match existing.

(2) Services are to be tested and repaired/renewed as required throughout the property, which includes electrics ….

11. There is an interpretation section which includes:

"repair": execute remedial work to designated products. Make secure sound and neat. Excludes redecoration and/or replacement.

12. Section 1.10 of the specifications refers to "Extra Works, Variation and omissions" and says that the surveyor reserves the right to omit or change any part of the works.

13. The appellant tendered for the work and was appointed as main contractor.

Planning

14. Application was made to Taunton Deane Borough Council ("the council") for Listed Building Consent to the works under the Planning (Listed Buildings and Conservation Areas) Act 1990. On 10 February 2011 the council granted consent to the proposal described in the consent as "Reinstatement works after extensive fire damage at Lydeard Down Cottage, Lydeard St Lawrence".

15. The development permitted was to be carried out in accordance with the approved plans which were listed, and no other existing feature or structure than those for which consent is given was to be removed, interfered with or adapted without a further consent approval.

16. The development was approved by the council after reading the case officer's report and recommendation.

17. In the report the proposal was described as "Re-instatement works and minor alterations after extensive fire damage to Grade II listed cottage". As to the suitability of the proposed reinstatement works the officer said:

> "The loss of the roof and most of the first floor has given the opportunity to put in a new roof structure with enhanced fire protection on the Dorset model. Externally the chimney heights would be raised to 1.8m."

18. As to the alterations these involved differences from the "pre-fire configuration" in that a porch was replaced by a window, a new first floor window is to be put in, a staircase is to be removed with replanning of the floor layout. That involved changing the shape of rooms to accommodate a corridor.

19. The bundle from Mr Spiller contains an email from Mrs Heather to him of 7 August 2011. The matters covered include:

(1) Internal Doors: she says that an internal door is not required from the kitchen to the family room, nor between the playroom and the study corridor. Therefore there will be only a half glazed door into the study and a ledge and brace into the dining room.

(2) Lighting: she asks for various wall lights to be installed.

Discussions about VAT

20. At the start of the works there was, says Mr Spiller, dialogue between HMRC and both the appellant and the chartered surveyors (in their capacity as both project surveyors and architects and as contract administrator). An email chain exhibited by Mr Spiller shows:

(1) 10 June 2011 @1643: From Mr Spiller to Karl Martin at the surveyors

Mr Spiller said he had spent the last hour having a detailed discussion with HMRC concerning VAT:

> "The good news is that they have agreed/confirmed to me that they are comfortable for the entirety of the scheme to be zero rated under reference CJE10461."

He added that he was aware that they had already issued an invoice which did include VAT, and asked if he needed to reissue it.

(2) 10 June 2011 @18:26: Reply from Karl Martin:

> "Alan, Many thanks for the assistance much appreciated."

(3) 14 March 2011 @1019: From Karl Martin to Nigel Pratt, Planning Officer (Conservation) for the council.

This asked if Mr Pratt could help by saying from his perspective as a listed building officer what works would be classed as renewal or repair so they could approach "Inland Revenue" accordingly.

(4) 14 March 2011 @1052: Reply from Nigel Pratt.

His view was that if the local authority had requested an application for Listed Building Consent then the works would fall outside of "repair' and be classed as an "alteration" and the VAT would be zero. In this case however there is also some element of repair. He did not have time to go through the specification to assess what was regarded as alteration but his view was that certainly the new work including re-roofing, new windows doors, internal fittings, new partitions etc would all fall into the alteration category. He added:

> "We don't really have a role in this side of things so you might need to contact HMRC direct."

(5) 15 June 2011 @13.21: Karl Martin to Nigel Pratt.

> "We are working on the above scheme and have been informed by HMRC that if we get confirmation from yourselves, namely Listed Building, that the works are 'Approved' works then there will be no VAT on the whole of the scheme. With this in mind, please could we have your confirmation that this is the case and the works are 'approved'.
>
> It appears that if we are compliant with listed building approval, which we are, then this should be the case."

(6) 15 June 2011 @13.30: Nigel Pratt in reply:

> "I have attached a copy of the decision notice that shows that consent was granted. This ought to be sufficient."

(7) 15 June 2011 @13.34: Karl Martin to Alan Spiller:

> "Confirmation from listed building that the works are approved. Therefore no VAT!"

The VAT enquiry

21. On 27 August 2014 Miss L Yard in HMRC's Local Compliance (Small & Medium Enterprises) in Taunton wrote to the appellant about the VAT return for 05/14 as it was a repayment claim. She asked for various records, including invoices for sales, if any sales were zero or reduced rated together with "any supporting evidence as to the VAT liability used (*sic*) (ie planning permission)".

22. On 13 October 2014 Ms Thomson visited the appellant and on 17 October wrote to them saying she had queried three jobs where VAT had not been charged at the standard rate including Lydeard Down Cottage ("LDC"). She asked what work was carried out and why they believed zero rating was applicable. In particular she wanted to know what was on the sites originally, how much of the original buildings were kept and what was built by the appellant, to be supported by documentary evidence including photos, planning permission or documents from surveyors/architects (though she added that they had already produced architect's plans for the projects). Ms Thomson exhibited no notes of the meeting.

23. On 8 December 2014 Ms Thompson said she had had no reply and she would be obliged to raise assessments on VAT due at the standard rate on the jobs, and that

any assessments would be liable to penalties. Various factsheets on penalties were issued.

24. On 12 January 2015 Mr Spiller replied and in relation to LDC said that he had personally liaised with HMRC on or around 10 June 2011 and he quoted the reference given to him (as stated in his email to Karl Martin - §20(1)).

25. Ms Thomson obviously met Mr Spiller at his offices on 22 January 2015 as he wrote to her on 2 February about it. Ms Thomson exhibited no notes of the meeting. Mr Spiller referred to the fact that Ms Thomson had been unable to find a record of what the reference number referred to and she had asked for further information which he gave, including photos.

26. On 5 February 2015 Ms Thomson wrote a letter which must have crossed with Mr Spiller's of 2 February. She said:

> "In your letter [of 12 January] you gave a reference number which you explained referred to a telephone call with HMRC however, I will need you to confirm specifically under which part of Public Notice 708 (Buildings and Construction) or the legislation the company has applied to zero rate to this supply and your reasoning behind the decision."

27. She also wanted a breakdown of the invoices and said that if the appellant was unable to provide sufficient evidence to support the treatment she would need to make adjustments for VAT.

28. On 23 February she said that, in the absence of being told why the supply relating to LDC was zero-rated, she assumed its was because the supply was of the construction of a new dwelling. She said that "as per section 3.2 of VAT Notice 708" (no legislation was quoted) certain criteria (*sic*) needed to be met. The first was that the new construction is built from scratch and before the works any pre-existing building is demolished completely to ground level. The second was that the new building made use of no more than a single façade (or double façade on a corner site) of a pre-existing building, where the façade is retained as part of the planning permission. The works on LDC, she said, did not appear to meet these criteria.

29. She explained that she had gone to the council who told her that all four walls were retained and no consent was granted to demolish them, although localised repair and rebuilding was required. She was now obliged to raise an assessment, and needed the invoice to calculate it. If she needed to use a "Schedule 36 notice" (a statutory request for information) it would affect the reductions she could make to any penalty chargeable in relation to "this error". The appellant was also given the opportunity to confess to other errors in zero rating.

30. On 2 April 2015 she issued a notice under Schedule 36 Finance Act 2008 for the invoices issued to the customer for reinstatement of LDC and a "Sage" transaction list showing the same things.

31. On 20 April 2015 Mr Spiller responded to the effect that the zero rating was under what was discussed at the time as "zero rating approved alterations to protected buildings" and he repeated the reference number he had been given. He enclosed the invoices.

32. On 14 May 2015, over three weeks later, Ms Thomson issued notices of assessment for four accounting periods (excluding 05/14) on the basis that the supply of construction services in relation to LDC had been wrongly zero rated. The assessments totalled £39,098.

33. On 28 May 2015 Ms Thomson replied to Mr Spiller's letter of 20 April. She asserted that the supply does not qualify for zero rating. Therefore she needed to consider penalties and to establish why the incorrect rate of VAT was applied.

34. She referred to Mr Spiller's letter of 2 February 2015 in which she said he had told her that "only one wall remained intact and all others were completely rebuilt". She said that construction of a dwelling where no more than one wall remained could be considered for zero rating, but the council had told her that all four walls of the building were substantially intact following the fire and permission had not been given to demolish them.

35. She also said that she had done some digging into records of calls to HMRC's National Advice Service and there was one in which HMRC had referred to section 9 of Notice 708. That did, she said, refer to alterations to listed buildings as the appellant had said in his letter of 20 April 2015. But she said that the Notice states that "Alterations carried out for the purposes of repair or maintenance or any incidental alterations resulting from works of repair and maintenance were always standard rated even if carried out on a listed building." The work on LDC, she asserted, constituted repairs rather than alterations, and so if the Notice had been consulted the appellant ought to have known that zero rating was not appropriate.

36. Because of her concerns about the lack of absolute precision about which part of the legislation Mr Spiller was justifying having zero rated the work on LDC, and because his account of the state of the building differed from that of the council's planning officer, she considered the appellant's behaviour was deliberate and asked him to provide any relevant factors for her consideration.

37. On 29 May 2015 Ms Thomson issued a letter about 05/14 saying that the credit in the VAT return had been cancelled and VAT of £32,126.84 was thereby assessed.

38. On 31 July 2015 Mrs Tina Blair, who had succeeded Ms Thomson, wrote to Mr Spiller in response to a letter of his of 5 June 2015 which is not in the bundle. She gave more information about the phone call that Ms Thomson had dug up. It was on 5 April 2011 and was from Nicola Donovan[1]. No transcript was available but a note showed that Nicola Donovan was referred to section 9 of Notice 708. She therefore had no

[1] There is nothing in the bundles or the oral evidence that explains who Nicola Donovan was.

alternative but to uphold Ms Thomson's assessment (singular is hers). She, like Ms Thomson before her, offered a review or an appeal to the Tribunal as alternatives.

39. On 13 November 2015 Centurion VAT Specialists in the person of Mr Andrew Norris wrote to HMRC on behalf of the appellant asking for a "reconsideration" of all decisions notified to the appellant. He accepted that the time for a "reconsideration" had passed but asked for an out of time "review" because HMRC had not considered the information given to them fairly or correctly and Mr Spiller had been engaged independently in preparing a detailed response but realised he needed specialist help. Centurion had then gone through all the papers with him to be satisfied that the works could be zero rated.

40. Mr Norris then set out why he thought HMRC were at fault, principally in assuming that the works were not alterations but repairs. He set out his preliminary view of which works were alterations, listing eight types.

41. On 3 December 2015 Diane Eaton of HMRC's VAT Written Enquiries Team wrote to the appellant about a different listed building, Parsons Farm, which the appellant had also zero rated. Centurion replied on 17 December 2015[2].

42. On 11 February 2016 Mr D Farnfield of HMRC Disputes Resolution Appeals and Reviews gave the conclusion of his review into the LDC decisions, which was to uphold them. He agreed with Ms Thomson's reasons for her decision and assessments that the works were to an existing building and so zero rating under Group 5 Schedule 8 VATA could not apply.

43. But he also turned to the appellant's contentions about listed building alterations, as he said (correctly) that he could not see that Ms Thomson had addressed them. He said that they should be addressed and that if it was decided that the works were ineligible under Group 6 (listed buildings) as well, the appellant would have the right to have that decision reviewed. The case was then referred back to Mrs Blair.

44. On 4 March 2016 Mrs Blair wrote to the appellant, without copying the letter to Centurion despite there being a 64-8 in place, to seek further information within 14 days.

45. On 8 June 2016 Centurion replied and included the specification documents and the detailed final account summary in Excel file format. Mr Norris added that significant variations arose during the course of the work and the final account summary was a complete list of what was finally included in the contract. He gave the date of the contract, 5 April 2011 and said that his client had told him that all the works carried out were subject to the listed building consent.

46. On 4 July 2016 Mrs Blair replied to Centurion. She set out the conditions for zero rating under Group 6 and said that based on the information provided she had

[2] I do not know why this correspondence was included.

reviewed the work undertaken on LDC. It appeared to be replacing existing fire damaged parts of the cottage and making good existing parts. She said:

> "It was still not clear if listed building consent was required: it may have had the consent but that did not mean the consent was necessary for the work to be completed."

She therefore upheld the assessment and penalty.

47. On 3 August 2016 Centurion accepted the offer of a review Mrs Blair had made. They gave four pages of reasons why nine parts of the works qualified. Mr Norris annotated the final account between alterations on the one hand and repairs and maintenance on the other and came to the conclusion that 11% of the works were VATable. Based on a VAT assessment of £47,752 this meant that £42,499 was over-assessed and asked for that amount together with interest, surcharges and penalties be removed from the VAT account.

48. The review request was acknowledged by the Review Team in Southampton on 26 September who gave the completion date for a review of 30 October 2016.

49. But before then Mrs Blair wrote to the appellant, on 26 October 2016, responding about the various works areas described by Centurion. She accepted that the "new window and removal of porch" could be zero rated, as well as increasing chimney height, new tanking system, replanning of floor layout and removal of one staircase, but only if these were "included on the listed building consent". But the "new roof" was not in her view a major alteration; rewiring did not included altering "in meaningful way" and so was a replacement and as for the new doors "listed building consent would not be required" and (or perhaps "so" – there is no conjunction, only a comma) "these are replacements and standard rated".

50. On 6 December 2016 Centurion responded with four pages of reasoning on these points, and though they thought it premature, they responded to HMRC's request for revised figures. They asked for ADR if HMRC were not satisfied.

51. On 16 December Mrs Blair replied. As to the new roof, she agreed it had been altered but the alterations were incidental to the provision of a new roof. She seemed to say that the alterations she had in mind were the fire proofing of the thatched roof.

52. She agreed that resiting and addition of sockets is zero rated but general upgrading of wiring is not. Chasing out new channels is alteration. (Six weeks earlier the alteration element of the rewiring was not "meaningful" and so none could be zero rated).

53. As to doors, change of material (softwood to oak) was not an alteration unless for reasons unconnected with repair or maintenance or unless the doors were of different dimensions or in a different place.

54. On 2 March 2017 Centurion emailed HMRC about her letter of 16 December 2016. He queried whether what she said was a reconsideration of his letter of 6

December was done by her or by a review officer acting independently as they had requested (and, he could have said, as had been acknowledged by the review team in Southampton on 26 September). If it was Mrs Blair they wanted an independent review.

55. On 15 March 2017 the Southampton review team manager wrote to Centurion referring to the request for a review of Mrs Blair's decision. This letter accepted Centurion's request even though it was out of time(!).

56. On 28 April 2017 the conclusion letter was sent. It upheld Mrs Blair's decision about the roof, the wiring and the doors.

57. On 23 May 2017 the appellant gave notice of appeal to the Tribunal against the review decision of 28 April 2017.

The law

58. Group 6 of Schedule 8 as it stood at the time the contract was entered into and so far as relevant to the contract in this case said:

> "Group 6—Protected buildings
>
> Item No
>
> …
>
> 2 The supply, in the course of an approved alteration of a protected building, of any services other than the services of an architect, surveyor or any person acting as consultant or in a supervisory capacity.
>
> 3 The supply of building materials to a person to whom the supplier is supplying services within item 2 of this Group which include the incorporation of the materials into the building (or its site) in question.
>
> NOTES
>
> (1) "Protected building" means a building which is designed to remain as … a dwelling … (as defined in Note (2) below) … after the … alteration and which … is—
>
> (a) a listed building, within the meaning of—
>
> (i) the Planning (Listed Buildings and Conservation Areas) Act 1990; …
>
> …
>
> (2) A building is designed to remain as … a dwelling … where in relation to [the] dwelling the following conditions are satisfied—
>
> (a) the dwelling consists of self-contained living accommodation;
>
> (b) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;
>
> (c) the separate use, or disposal of the dwelling is not prohibited by the terms of any covenant, statutory planning consent or similar provision,

and includes a garage (occupied together with a dwelling) either constructed at the same time as the building or where the building has been substantially reconstructed at the same time as that reconstruction.

(3) Notes … (22) to (24) of Group 5 apply in relation to this Group as they apply in relation to that Group but subject to any appropriate modifications.

…

(6) "Approved alteration" means--

…

(c) … works of alteration which may not … be carried out unless authorised under, or under any provision of—

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

…

and for which … consent has been obtained under any provision of that Part,

but does not include any works of repair or maintenance, or any incidental alteration to the fabric of a building which results from the carrying out of repairs, or maintenance work.

…

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

(10) For the purposes of item 2 the construction of a building separate from, but in the curtilage of, a protected building does not constitute an alteration of the protected building.

(11) Item 2 does not include the supply of services described in paragraph 1(1) or 5(4) of Schedule 4."

59. Paragraph 3 Schedule 26 FA 2012 amended Group 6 by omitting Items 2 and 3 (the relevant items in this case). By paragraph 7(1) and (3) of that Schedule:

"(1) Subject to sub-paragraphs (2) and (3), the amendments made by this Schedule come into force on 1 October 2012.

…

(3) Paragraph 3(2) to (6) comes into force, in relation to relevant supplies, on 1 October 2015."

60. The relevance to this case is that at least one invoice was issued after 1 October 2012. It may therefore be necessary to consider what "relevant supplies" are and that is set out in paragraph 7(4) to (10).

(4) A supply is "relevant" if it is—

(a) a supply of any services, other than excluded services, which is made—

(i) in the course of an approved alteration of a protected building, and

(ii) pursuant to a written contract entered into, or a relevant consent applied for, before 21 March 2012, or

(b) a supply of building materials which is made—

(i) to a person to whom the supplier is supplying services within paragraph (a) which include the incorporation of the materials into the building (or its site) in question, and

(ii) pursuant to a written contract entered into, or a relevant consent applied for, before 21 March 2012.

(5) In relation to supplies made on or after 1 October 2012 but before 1 October 2015, Group 6 has effect as if, for the purposes of item 1 of that Group, a protected building were also regarded as substantially reconstructed if sub-paragraph (6) or (7) applies.

(6) This sub-paragraph applies if at least three-fifths of the works carried out to effect the reconstruction (measured by reference to cost) are of such a nature that the supply of services (other than excluded services), materials and other items to carry out the works would, if supplied by a taxable person, be relevant supplies.

(7) This sub-paragraph applies if—

(a) at least 10% (measured by reference to cost) of the reconstruction of the protected building was completed before 21 March 2012, and

(b) at least three-fifths of the works carried out to effect the reconstruction (measured by reference to cost) are of such a nature that the supply of services (other than excluded services), materials and other items to carry out the works would, if supplied by a taxable person, be relevant supplies but for the requirement for a written contract to have been entered into or relevant consent to have been applied for before that date.

(8) For the purposes of sub-paragraph (4), works carried out that are not within the scope of the written contract entered into, or the relevant consent applied for, as it stood immediately before 21 March 2012, are not a supply made pursuant to that contract or relevant consent.

(9) In this paragraph—

"relevant consent" means—

…

(b) ... consent under any provision of—

(i) Part 1 of the Planning (Listed Buildings and Conservation Areas) Act 1990,

….

> (10) The Notes of Group 6 apply in relation to this paragraph as they apply in relation to that Group, except that in applying Notes (9), (10) and (11), references to item 2 are to be read as references to sub-paragraph (4) of this paragraph.

61. Finally I mention that in a laudable effort to ensure that I had a version of Group 6 that applied before the FA 2012 amendments, given that the version in the bundles was the version after amendment by that Act, on the day of the hearing Ms Chaumoo supplied a print of Group 6 Schedule 8 VATA as it was originally enacted, ie before the FA 2012 amendments. Unfortunately this was not the version in force in 2011 because almost immediately after enactment a revised Group 6 was substituted for the original by SI 1995/283 with some minor but important differences.

HMRC's submissions

62. In their statement of case and skeleton HMRC identify the issues as being whether three items of works met the conditions to qualify for zero rating in accordance with Groups "5 and/or 6" Schedule 8 VATA, namely:

(1) Works relating to the new roof.

(2) Re-wiring works (in part).

(3) Installation of new internal doors.

63. HMRC accept that the works fall within the scope of the transitional provisions as they are satisfied that listed building consent was obtained from the council on 10 February 2011. They did not argue that paragraph 7(5) Schedule 26 FA 2012 was engaged, despite one of the invoices being dated after 2012.

64. In relation to the three items, HMRC say that "alteration" and "repair and maintenance" are not mutually exclusive concepts, so that where "a piece of work" both alters and repairs or maintains a building, the works cannot be zero-rated[3].

65. Alteration, they say, is not defined in VAT law so they rely on a passage in the speech of Lord Diplock in *Commissioners of Customs and Excise v Viva Gas Appliances Ltd* (HL) [1983] STC 819, [1984] 1 All ER 112 ("*Viva Gas*"):

> "I can see no ground on which the meaning of the ordinary English word 'alteration' qualified by the adjectival phrase 'of any building' should be construed as excluding any work on the fabric of the building except that which is so slight or trivial as to attract the application of the de minimis rule."

[3] This seems to overlook Note (9) to Group 6.

66. Whether the de minimis rule applies is to be decided[4] by considering the effect of the work on the building, rather than the cost of, or the effort required to, carry out the work.

67. HMRC's submissions to the Tribunal are:

(1) HMRC have not seen any requirement to alter the material of the doors (oak as opposed to softwood), only that the new door material had "to be agreed.[5]" A new sentence starts:

> "Which we cannot see as being agreed as part of the approved alterations agreed and therefore we argue that the doors (*sic)* are not an approved alteration."

(2) As to the new roof, while it is of a safer, better specification, it is not an alteration to the fabric of the building. Thus it is a replacement and so is repair and maintenance.

(3) The rewiring so far as not involving a new outlet/supply is an upgrade and akin to repair and maintenance.

68. Finally HMRC say that if the Tribunal were to find that the works are alterations, it should consider the case of *Windflower Housing Association* [1995] STC 860 ("*Windflower*") where it was held that if an alteration is an integral part of wider works of repair or maintenance, it should be viewed as repair or maintenance.

The appellant's submissions

69. Mr Spiller had produced his own skeleton.

70. As to what was in dispute in the appeals he pointed out that HMRC had started by applying the 20% standard rate to the entire project, but over a period of three years the matters in dispute had reduced to the roof (£55,164), rewiring (£9,860) and doors (£2,340). These works were approved alterations of a listed building carried out prior to 1 October 2012, and so chargeable at 0% as defined in Notice 708.

71. As to whether the works in dispute passed the "approved alterations" test he refers to the email chain (see §20).

72. The works carried out were a small silver lining for the owners who had had a devastating event happen to them, in that they were able to completely remodel the layout of the interior of the property to suit their requirements. This included:

(1) revising the kitchen layout.

(2) altering the communal layout by removal of one staircase so producing larger living space downstairs and additional bedroom space upstairs.

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[4] The statement of case says "When deciding whether work is 'de minimis' *you* should consider the effect of the work on the building …". I was not sure if this was addressed to me rather unconventionally, or was a copy and paste from some internal guidance where "you" is a VAT case worker.

[5] By whom is not said.

(3) revising the layout of the all bedrooms.

(4) incorporating an additional bathroom ensuite.

73. The roof had changes which required approval of alterations including:

(1) Revised profile of roof which necessitated alterations to the gable end walls.

(2) Revised roof construction so as to accord with structural engineers' calculations.

(3) Increase in size of roof timbers.

(4) Increasing the size and profile of roof timbers.

(5) Revising fixing methods incorporating stainless steel threaded bar and epoxy resin.

(6) Revised A-frame truss design using engineered oak sections. In oral evidence Mr Spiller explained that after the works the roof was internally open to the top instead of there being a ceiling to the first floor.

(7) Dorset model fire barrier being integrated (for the thatched roof).

(8) Incorporation of tanalised roofing battens, modern vapour check barriers and breather membranes.

(9) Installation of "water reed" thatching.

74. On the rewiring, because the internal layout had been significantly altered, the associated electrical services (lighting and power supply) would similarly alter to reflect the revised layout of the building and the expectations of modern day living. These included:

(1) Additional power points.

(2) Additional lighting.

(3) Integration of new downlighters.

(4) New extractor fans.

(5) Revised consumer unit location.

(6) Upgraded earthing.

(7) Enhanced audio-visual cabling (TVs, PCs etc).

75. If the works merely mirrored a like for like replacement, listed building consent would not have been required.

76. As to the doors, there were changes in the numbers, style, location and size and in the associated ironmongery.

77. Accordingly there is no doubt that:

(1) The building was listed.

(2) Any changes in respect of the reinstatement required listed building consent approval.

(3) This was granted and confirmed by the council officers.

(4) That fulfilled HMRC's requirements about zero rating the works.

78. Mr Spiller pointed out that the value of the three disputed items was about £67,000, the vast majority being the roof. HMRC are therefore admitting that £246,000 worth of works can be zero rated. He says that this shows that they fulfilled the "3/5ths criteria" proposed by HMRC.

79. He also refers to Notice 708 which provided that a project could be zero rated where a building is reconstructed from a shell. This was the case here as the photographs show.

80. He also explained why the appellant was not negligent in the process adopted in assessing the validity of VAT due or in respect of its conclusion that 0% VAT was due.

81. He also made observations about HMRC's case and sought to rebut their points on the works in more detail.

Discussion

The mystery of the 05/14 assessment(s)

82. I am in something of a quandary as to what I need to do whatever the result of this (or these) appeals. Even if I were to find on behalf of the appellant there are at least two matters arising. Do I simply cancel all the assessments or does one of the elements of the 05/14 assessment stand? And what do I do about the credit in the 05/14 return that was cancelled?

83. I need therefore to at least find out what HMRC were seeking to do by making the 05/14 assessment. The assessments for the other periods are straightforward. For them HMRC have assessed to VAT the difference between the invoice value (which shows 0% VAT) and the net value (after reducing the invoice value by 1/6th). The assumption I make is that for the period concerned there was a return with VAT due.

84. A schedule in the bundle created by Ms Thomson showing how she calculated the VAT in this way is dated 11 May 2015 and includes the VAT she said was due for 05/14 based on the figures in the "final" invoice which was issued in that period. But the assessments notified on 14 May 2015 did not include one for 05/14.

85. On 29 May 2015 Ms Thomson told the appellant that the VAT due on sales shown on the 05/14 return was £34,765.62 but the correct figure should be £79,718.42 an increase of £44,952.80. But the VAT on the 11 May schedule for the period is £8,650.63, a difference of £36,302.17.

86. She also said in the 29 May letter that the "Net VAT" (Box 5) was increased from £12,825.96 to £32,126.84, an increase of £19,300.88. This reflects that the input tax credited on the return was £21,939.66 and the amount adjustment was £47,591.58.

87. The explanation given by Ms Thomson was that the return was incorrect for two reasons: one was the LDC invoice which should have been standard rated and the other was:

> "You incorrectly made an adjustment to the output tax in this period in order to reclaim VAT charged on interim invoices issued to customers. This error was explained in more detail in my letters [plural] of 17 October 2014."

88. After the boxes showing the adjustments she added that:

> "as a result of our check you are not entitled to a VAT credit for this period, so no credit will be applied to your account. Instead there is now an amount of VAT due. Because of this I have made an assessment under section 73 of the VAT Act 1994 for the VAT due, which is £32,126.84".

89. There is indeed more than one 17 October 2014 letter. One of them refers to a visit to the business to verify the VAT repayment claimed by the company for 05/14. In the letter Ms Thomson says that she understood that the appellant had reclaimed VAT accounted for on interim invoices where the customer had not yet paid, on the grounds that Mr Spiller had been advised that it was not necessary to account for VAT on applications for payments if money is not received.

90. She said that as the appellant was invoice accounting for VAT, the VAT was due on issue of the invoice. They could however make claims for bad debt relief if the conditions were met, but do not seem entitled to in relation to 05/14. The VAT due before the adjustment proposed in Box 1 was £71,068. "This", she said, will mean that there is a net amount payable by the company for the period of £23,476.

91. Another letter of 17 October 2014 contains the same figures as on the 29 May 2015 letter and says that the VAT due is £23,476.48 and that the letter is the notice of assessment. There is no trace of any response whether by way of appeal or otherwise, so I assume it is final and was paid.

92. Returning then to the 29 May letter this gives as an explanation for the non-LDC amount the grounds given in the letter of 17 October 2014 about reclaiming VAT on interim invoices. But then after setting out the same figures as in the 17 October letter which must all relate to the invoicing issue, Ms Thomson says the letter is a notice of an assessment she has made under s 73 VATA for the VAT due of £32,126.84. In other words the figures for the return entries are the same but the VAT has gone up by £8,650.63, the figure for the final invoice on LDC.

93. I cannot understand why £23,746.84 has been assessed twice. No VAT655 is in the bundle which might explain. Then on 13 November 2015 Centurion VAT asked for a review of the assessment dated 29 May 2015. It seems to me that whatever the outcome of this appeal I should cancel the assessment of May 2014 as to £23,476.48, as it was previously assessed in October 2014.

94. A further issue is the fact that the first invoice issued by the appellant on 18 May 2011 did charge VAT at 20% of £5,328.43. Even if I find for HMRC on the three issues in this appeal, many more items have been accepted by HMRC as properly zero-rated. It seems very unlikely that any of the first invoice would relate to rewiring and doors. It might conceivably relate to the roof, but assuming that it does all relate to zero-rateable works, can I give effect to that decision and require repayment of the VAT on that first invoice? As the assessment for 06/11 is under appeal I consider I can.

Matters irrelevant to this appeal: careless conduct

95. I now deal with some issues raised by Mr Spiller to explain why my decision does not taken them into account.

96. He submits that his conduct was not careless. That might be relevant if there were penalty assessments under appeal to the Tribunal. From the bundle I cannot see any such assessments and HMRC's statement of case makes no mention of them. Thus I am in no position to make any decision. But I do address HMRC's conduct concerning penalties in this case later.

Matters I cannot deal with: the assurances to Mr Spiller

97. Throughout the correspondence and meetings with HMRC, Mr Spiller has made a great deal of the fact that he spoke to HMRC about the project and got the "all clear" for zero-rating. He referred repeatedly to a reference number he had been given by HMRC. I accept as a fact that he did speak to HMRC and got a reference number. I cannot find what was said by HMRC in any calls but I do find that Mr Spiller believed he had been given the all clear by HMRC. He also made many attempts to get HMRC to research the call and to provide him if possible with a transcript or notes. I have to say that I find it surprising that with the reference Mr Spiller gave them they could not trace the call, and I am not convinced that the call they said was with the appellant was the call Mr Spiller was referring to.

98. But unfortunately for Mr Spiller, even if I had seen convincing evidence that he was told that the project would qualify for zero rating by someone in HMRC, that would not assist him in this appeal. What he would be able to argue for would be that he had a legitimate expectation that he could properly zero rate the project. If HMRC did not feel honour bound to follow a ruling of that sort, the only remedy would have been by way of judicial review.

Matters irrelevant to this appeal: the 3/5ths rule

99. Mr Spiller also refers in his skeleton to the "3/5^{ths} rule" and says he met it. I can see nothing in the correspondence which suggest that HMRC have raised the applicability of this rule, so it may be that either Centurion VAT have mentioned it to Mr Spiller or that his researches into Group 6 and the VAT rules for listed buildings have unearthed it.

100. The "three-fifths" rule is a reference to paragraph 7(6) and (7)(b) Schedule 26 FA 2012 and is part of the transitional provisions following the repeal of items 2 and 3 in Group 6. The transitional provisions provide a cut-off date of 1 October 2015 (three years after the repeal came into force generally) for "relevant services" provided after

1 October 2012. These are (paragraph 7(4)) services falling within item 2 supplied in the course of an approved alteration of a protected building pursuant to a written contract entered into, or a relevant consent applied for, before 21 March 2012.

101. What paragraph 7(5) then does is to deem relevant services (those supplied after 1 October 2012 under consent given before 21 March 2012) as having been provided in the course of a protected building being substantially reconstructed for the purposes of item 1 of Group 6, the only remaining item. I pause here to note that the deeming in this sub-paragraph must carry the consequence that the person concerned is deemed to be making a grant of a major interest in the building (which in real life they would not be) as that is the case covered by item 1.

102. The deeming is subject to the person meeting one of the two conditions in sub-paragraphs (6) and (7), both of which have a three-fifths rule. I go no further into the seemingly impenetrable thickets of those sub-paragraphs (paragraph (6) in particular seems to include deeming upon deeming such that I would be in serious danger of my imagination boggling[6]) again because HMRC have not suggested in their statement of case or skeleton that the appellant did not meet the conditions in the transitional provisions or even if they were relevant.

Matters irrelevant to this appeal: Group 5

103. I also need to discuss a theme of HMRC's arguments throughout the investigation of the claim ending up with Ms Chaumoo's skeleton, and that is the applicability of Group 5 of Schedule 8 to this appeal.

104. The story starts with Ms Thomson's letter to Mr Spiller of 5 February 2015. She had been asking Mr Spiller to tell her his reasoning for applying a zero rate to LDC. In this letter she specifically asked for the part of VAT Notice 708 or the legislation he was relying on.

105. In her letter of 23 February 2015 she said that from the description in Mr Spiller's letter of 2 February (which had crossed with hers of 5 February) he was suggesting it was the construction of a new building designed as a dwelling. She then went on to point out that "as per Section 3.2 of Public Notice 708" where there was an existing building it had to be demolished to ground level, or[7] demolished leaving only one façade retained because of a requirement of planning consent.

106. She referred to photographs Mr Spiller had sent her which she said did not show that the building was demolished to ground level with the exception of one façade. I

[6] See the injunction to judges in the speech of Lord Asquith of Bishopstone in *East End Dwellings Co. Ltd. v. Finsbury Borough Council* [1952] AC 109, at pages 132-3 not to allow one's imagination to boggle faced with the consequences of a deeming provision.

[7] The "or" is mine. Ms Thomson had it seemed to me in her letter misinterpreted what the VAT Notice would have said about Notes (16) and (18) to Group 5 which is what this is about and presented the total demolition case and the one façade case as two separate conditions (or, in her words, criteria) which both had to be met..

agree the photographs showed what she said they did, because cross walls were still in place to an extent. Ms Thomson then said that she had approached the council who had told her that all four walls were substantially intact and that consent was not granted to demolish to ground level.

107. This view of hers was the sole ground she had put forward for raising the assessments, which she did on 14 May 2015. I am also quite clear that the works carried out by the appellant did not meet the requirements of Group 5 Schedule 8, but I am also clear that Mr Spiller had never suggested that they did.

108. What Ms Thomson ignored when making the assessments are the following matters:

(1) In his letter of 12 January 2015 Mr Spiller sent in his photographs of LDC saying they were of the initial fire damage and the reconstructed *listed* building.

(2) In his letter of 2 February 2015 Mr Spiller referred to LDC as a grade two *listed* longhouse.

(3) On 20 April 2015 Mr Spiller referred to being told that what HMRC told him in 2011 was that the issue was zero rating of "approved alterations to *protected* buildings".

109. After the assessments Ms Thomson wrote about penalties and in this she addressed the Group 6 issue for the first time and dismissed the suggestion that any of the work qualified.

110. The review letter of 11 February 2016 goes into Group 5 at length and then says that the works do not qualify under that Group. After this, Group 5 disappears from consideration until the issue of the statement of case on 27 March 2018 where it appears in paragraph 2 under the heading "Points at Issue", in paragraph 3 "Legislation", in paragraph 8.1 "Matters in dispute" and paragraph 12 "Outcome". Ms Chaumoo's skeleton faithfully reflects the statement of case. Group 5 also appears in the bundle of authorities. It appears there with the wrong version of Group 6, that which reflected the legislation as it stood at the date of hearing. It crossed my mind that because of this use of the wrong version it may have been assumed that somehow Group 5 was indeed relevant, but it does seem rather unlikely.

111. In my view that statement of case is a misleading document. It should not have mentioned Group 5 at all. Fortunately Mr Spiller does not address Group 5, possibly because he was confident that it was not in issue, but it could have led a litigant in person particularly to worry unnecessarily and do unnecessary research into it. It could have led a represented litigant having to request further and better particulars about HMRC's case and taking other steps which would have inevitably have increased costs.

The actual issues

112. After that preamble I turn to the actual issues in the case. I start by considering the matters which HMRC have accepted are alterations and which are not excluded as also being, or being incidental to, repair or maintenance.

(1) *Increasing chimney heights*. Detail of what was involved in this was in a comprehensive letter from Centurion of 3 August 2016. The letter said that the chimney heights were raised to 1.8m and as the chimneys were an integral part of the roof, these works taken with the creation of a fire barrier in the roof made it clear that a major change in the roof's structure had taken place.

(2) *Removal of one staircase*.

(3) *Replanning of floor layout*. This changed the size and shape of the rooms and new partitions were installed.

(4) *New window*. This was in the first floor and put in where no existing window had been.

(5) *Removal of porch*.

(6) In addition HMRC denied zero rating to a *new tanking system*. This was installed on the ground floor and Centurion said that the floor has been changed in a meaningful way.

113. It should be noted that Mrs Blair put conditions on her acceptance of these items:

(1) She agreed it was an alteration providing the work was required by and was granted listed building consent.

(2) She denied zero rating on the basis that while an undoubted alteration she had seen no evidence that listed building consent was required and given.

(3) This would qualify "subject to listed building consent".

(4) This "would have required" listed building consent and so is zero rated, ie no conditions.

(5) No conditions.

(6) This would have qualified provided it was "on the listed building consent."

114. Centurion's responses of 6 December went through each of the items:

(1) This was included in the listed building consent.

(2) This was included in the listed building consent[8].

(3) This was included in the listed building consent.

(4) Not covered as accepted on a "would have" basis.

(5) Not covered as accepted unconditionally.

(6) Accepted that it did not qualify but only because the consent letter and report did not refer to it.

115. I have struggled to discern the logic behind the variation in the wording of the conditions. Note (6) of Group 6 requires only that consent has been given, as consent could not be given for works forbidden. Why say that some work, undoubtedly an alteration, could be zero rated if it was granted consent (showing that she did not know

[8] Mrs Blair could not have read it properly

whether it had) but the staircase removal did not qualify *because* she had not seen evidence of consent. And how did she know that the new window and the removal of the porch had been given consent, so that she did not need any evidence, but did for other works?

116. In particular, though, I think HMRC were wrong about the tanking and that Centurion VAT should not have accepted that zero-rating did not apply to it. HMRC's approach to the six matters in §112 is akin to that taken by them in *Henrietta Pearson v HMRC* [2013] UKFTT 332 (TC) (Judge Colin Bishopp and Mr Richard Thomas – ie the present judge then sitting as a member) about which the Tribunal commented:

> "15. That Note *[(2)(d) of group 5*] imposes two requirements: that planning consent has been obtained; and that it has been complied with. Plainly the first part of the requirement is satisfied; the question is whether the divergence between the approved plans, or at least the second of them, and the finished building offends the second. Quite what is meant by the phrase "in accordance with that consent", in this context, is unclear. At one extreme it could require HMRC and, on appeal, this tribunal to decide whether the consent has been complied with in every detail. At the other it could mean no more than that the consent allows for development broadly equivalent to that undertaken, rather than for something different such as, for example, the conversion of the existing building into a shop.
>
> …
>
> 18. We do not need to decide precisely where in the spectrum we identify in para 15 above the line should be drawn. It is sufficient to say that we have concluded that it is not a necessary requirement that HMRC or the tribunal should be satisfied that any requisite consent has been complied with in every particular. We reach that conclusion from the proposition that it is not the province of HMRC or this tribunal to police the planning rules. Whether the finished building complies with the conditions imposed by the planning authority must be a matter for that authority, and it is not for us to usurp its function. It will be apparent from what has gone before that it is difficult to resist the conclusion that the planning authority in this case has not insisted on strict compliance with the approved plans. But in the absence of any adverse action by it—and there was no evidence of any such action in this case—it is, in our view, proper for the tribunal to proceed on the footing that the work was lawful (as s 35(1)(b) requires) and that there was sufficient compliance with the planning consent to satisfy Note (2)(d). We distinguish this case from *Kear* on the basis that, there, the disregard of the planning consent was almost complete; here, there has been compliance with the spirit, even if not the strict letter, of the consent."

117. In this case we think Mrs Blair was, unintentionally, usurping the function of the council as planning authority. The fact that the tanking was not mentioned in the case officer's recommendations is I think neither here nor there. The primary relevant document was the consent and the plans referred to in it. If the tanking was not specifically mentioned in the plans, but was something that was found to be required later, but was not something about which the council took enforcement action then it

was an approved alteration. We cannot see exactly how much was involved in this and we leave it to the parties to decide the amount and to adjust the relevant assessments.

118. But consent or no, what is clear is that HMRC did not object to any of these matters, including the tanking, counting as alterations and as not excluded by Note (6) on the grounds that they were either repair or maintenance or were alterations incidental to the carrying out of repairs.

119. In considering the three works in dispute I bear in mind that I am bound by the decision in *Viva Gas* and, so far as it is consistent with *Viva Gas*, by *Windflower*. In *Viva Gas* Lord Diplock said:

> "I can see no ground on which the meaning of the ordinary English word 'alteration' qualified by the adjectival phrase 'of any building' should be construed as excluding any work on the fabric of the building except that which is so slight or trivial as to attract the application of the *de minimis* rule."

120. Mr Spiller's evidence before the Tribunal was that the roof had a different profile with a steeper pitch that necessitated alterations to the gable end walls, had a fire protection barrier where there was none before because the clients wanted to see the eaves from inside, there was new steelwork, new trusses and the tie bars were higher up and the roof timbers were increased in number size and profile.

121. In my view that was an alteration to the fabric of the building which was not so slight and trivial as to attract the *de minimis* rule. This rule was glossed by HMRC in their submissions and correspondence as not being a meaningful alteration. I do not think it is necessary to decided whether "not meaningful" captures all but not more of Lord Diplock's formulation, because faced with a choice I cannot see why I should not follow Lord Diplock.

122. The change in profile necessitating changes to the gable ends, the additional timbers and changes to the height of the tie bars are obvious alterations to the fabric of the building.

123. HMRC say that because what was done was repairs to the roof it cannot be an alteration. This is an argument that Note (6) excludes from zero rating what is in Lord Diplock's terms an alteration.

124. This exercise in deciding if the works were repairs or maintenance has an air of unreality about it, as the old roof collapsed in the fire and the remains had to be removed. There was essentially nothing left to repair or maintain. But I need to be wary about concluding on that basis that there were no repairs here. In *Parochial Church Council of St Luke's Exeter v Commissioners of Customs and Excise* [1982] STC 856 ("*St Luke's*"), Woolf J (as he then was) dealt with a claim to zero rate works undertaken following a disastrous fire at the church. At 861j Woolf J said:

> "Next, it was in issue before me as to whether or not it was proper to have regard to the state of the church before the fire. It was argued on behalf of the commissioners that this was not permissible. I understand

> the reason for this submission. It is what is being done to what remains after the fire which must amount to the construction, alteration or demolition. However, while it is primarily the state of affairs which exists at the time the works commence to which regard must be had, where what is under consideration is whether what is being done is works of repair or maintenance, it is also necessary to have regard to the church's condition prior to the fire. It is only by having regard to what previously existed that it is possible to say whether something different from what previously existed is being produced."

125. The evidence from Mr Spiller is that before the fire the building was in good repair and had been renovated within the previous 10 years. The planning officer's report says that the fire had given the clients the opportunity to put in a new roof structure with enhanced fire protection. While there may well have been an argument that if the new roof was a like for like replacement but with modern materials that could be properly treated as repairs even if the old building's roof was not in a state of disrepair, I do not need to make a decision on that because it was not this case, where even on the assumption that the comparison is with the pre-fire building, the amount of actual alterations does take the work out of the "repair" category, and that work is not merely incidental to repair work.

126. HMRC though deploy *Windflower* for support for the proposition that if an alteration is an integral part of wider works of repair or maintenance it should be viewed as repairs or maintenance. In that case which is about what is now Group 6 and a listed building the roof leaked extensively. The works were the provision of a new roof structure. In his decision Ognall J set out eight salient findings of fact by the Tribunal (I have reformatted them to make them easier to read):

> "(1) The overall objective was to produce a roof which was efficient and watertight in place of one which was, in a 200-year-old property, insufficient and badly leaking all over.
>
> (2) Removal of the whole of the lead roof was essential for the purposes of the work.
>
> (3) Modern techniques and materials dictated that instead of one single flat sheet of lead, as had hitherto been the case, it was necessary to have a number of smaller lead covered bays.
>
> (4) That, in its turn, necessitated certain alterations to the drips and a pipe therefrom. This was to ensure better run-off and collection of water from the new roof.
>
> (5) To facilitate the same objective the parapet gutter was raised, at its maximum, by some four inches. This was to improve water drainage and reduce the likelihood of flooding.
>
> (6) The slates were comprehensively removed and replaced mutatis mutandis. It is to be noted that where new slates were necessary they were out of eyeshot, but even had they been visible to the ordinary onlooker, that alteration could not be definitive of whether that aspect of the work was any more than repair or maintenance. …

(7) The raised roof plane was undertaken with an eye to the future, when it seems the owners of the property were minded to create more residential accommodation within the attic space.

(8) This particular work is described by the tribunal in these words,

(a) 'while work was proceeding on the slated pitches opportunity was taken to adapt them for future development.'

(b) The pitches were raised by one inch to allow for the minimal degree of thermal insulation required by local building controls.

(c) This was the cheapest and most expedient method of anticipating possible future needs because the slate had to be removed, in any event, as part of the necessary reroofing."

127. Ognall J had decided that the Tribunal had applied the wrong test so that he could remake the decision. In doing so he said:

"I have already set out what I consider to be the eight salient aspects of the findings of fact. I describe them as salient because I believe that they are the aspects of the findings which throw proper illumination on the necessary proper conclusion. One feature only of those findings is, to my mind, to a degree equivocal in the inferences to be drawn from it as to the true character of the work in question. That is the raising of the roof plane. The commissioners realistically accept that, looked at in isolation, those works could not be regarded as works of repair or maintenance, but my attention is drawn to those features of it that I have identified under (8)(a) to (c) of the salient features of the findings. I have been referred to the decision of Woolf J (as he then was) in *Parochial Church Council of St Luke v Customs and Excise Comrs* [1982] STC 856. From the terms of that judgment I derive the proposition that if a work of alteration is, viewing the operation as a whole, an integral part of wider works of repair or maintenance, then it should fall to be treated likewise. In the judgment of the learned judge there appears the following passage (at 861):

'A house could be divided into flats. The work required to divide the property would be zero-rated. If the roof of the property did not require alteration but, at the same time as the work was going on it was thought desirable to overhaul the roof, this would be work of repair or maintenance, and therefore it would not be zero-rated. The work on the roof would have to be distinguished from the work inside the building. Again, as part of the division of the property, rooms which had previously existed would have to be redecorated. As long as this was an integral part of the alterations, the redecoration would be treated in the same way as the alteration, even though, if the rooms had been redecorated otherwise than in the course of the alterations, the work would have been standard-rated.'

As I understand the effect of those words, they are designed to reflect the test of 'integrality' which forms the basis of this submission on behalf of the commissioners. It seems to me that, having regard to the context in which this particular task was undertaken, the only sensible view is that it was indeed an integral part of the remainder of the work

> which, in my judgment, was work of repair or maintenance. Moreover, I am entitled to conclude that a raising of a roof pitch by one inch, whatever the work entailed in achieving that objective, amounts in the ultimate to no more than de minimis when answering the question: is it an alteration over and above the repair or maintenance?
>
> Apart from the elevated roof pitch, the remainder of the work done was, I believe, work of repair or maintenance and admitted of no other proper conclusion. I put it to Mr Tallon, in the course of his helpful arguments, that the concept of 'maintenance' reflects a task designed by the owner or occupier to minimise, for as long as possible, the need for, and future scale and cost of further attention to the fabric of the building, and he agreed with that definition. It seems to me that that is precisely what was undertaken and achieved here. In so far as there were any differences in the ultimate physical feature of the roof, they were either de minimis, or dictated exclusively by the nature and use of modern building materials in the exercise of proper repair and maintenance."

128. It is clear from this decision that it does indeed expressly support the proposition put forward by HMRC. But it still depends on the facts whether the proposition applies. As Mr Spiller said in his closing submissions, in *Windflower* the only alteration identified was the raising of the roof pitch by one inch and the case involved substantial repairs to the leaking roof. The case is no more than an application of *Viva Gas* (although perhaps surprisingly that case was not cited) and on the facts would now be a case where the "incidental" rule in Note (6) would apply[9]. The facts in this case are very different – the differences in the ultimate physical feature of the roof were neither de minimis or dictated exclusively by the nature and use of modern materials.

129. I therefore consider that all the roof works should be zero rated.

130. Turning to the rewiring there were clearly alterations, as HMRC have agreed, where new outlets or supplies have been installed. In my view the extent of what was newly supplied and the amount of reconfiguration of rooms makes it rather artificial to split the costs up, but having had regard to the evidence of Mr Spiller I would make an apportionment under Note (9) that 75% of the work was zero rated, so that the standard rated element was £2,465.

131. As to the doors the changes to them described by Mr Spiller were extensive and in my view are such that there were alterations to the fabric of the building which were not de minimis or incidental to any repairs or maintenance. They meet Mrs Blair's conditions (see §53) are therefore zero rated.

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[9] What is not clear is whether the parties or the judge were aware that in February of the same year as that in which the case was heard (which was in June 1995) SI 1996/283 had introduced the "incidental" part of Note (6), the Explanatory Note for which said:

> "New Note (6) also brings a greater degree of certainty to the borderline between repairs that are standard-rated and approved alterations which qualify for zero-rating."

Observations

132. As I have noted, Mr Spiller came to the Tribunal ready to argue that he had not been careless in making a claim to zero rating. There are two reasons why that was not necessary. Firstly as far as I can tell HMRC have not raised any penalties on the appellant, and none were in issue in the appeal. Secondly showing he was not careless would not have been enough, because what Ms Thomson was accusing him of was tantamount to fraud. I asked Ms Thomson why she had done that, but she seemed totally bemused by the question.

133. She made the accusation in her letter of 28 May 2015. Her grounds for thinking that there was "deliberate inaccuracy" in the returns were:

> (1) Mr Spiller had told her that only one wall remained intact and all others were completely rebuilt, but this had been disputed by the planning officer. His description differed significantly from Mr Spiller's, and she was concerned about this discrepancy.
>
> (2) Mr Spiller had been told by the National Advice Service to look at section 9 of Notice 708 which was about listed buildings and from which he quoted in his letter of 20 April 2015. But she had said that the work on LDC was repairs rather than alterations, and had Mr Spiller consulted the VAT Notice he would have realised that zero rating was not appropriate.
>
> (3) The company would be expected to produce a consistent and sound explanation for its decision to zero rate, but he had not "confirmed absolutely" under which part of the legislation he had zero rated.
>
> (4) He had not produced his own notes of his calls with HMRC in 2011.

134. From these matters, and only these, Ms Thomson came to the conclusion that there may have been a knowing attempt to deceive HMRC about the reasons why the appellant zero rated the supplies on LDC. Such an allegation could not possibly have been justified by the matters listed in §133. That is bad enough, but then silence. What was Mr Spiller to think when nothing further was said? It may be that HMRC are awaiting the outcome of this case before deciding to raise penalties: I hope not.

135. Once the review officer had made it clear that Ms Thomson had given no consideration at all to the claim by Mr Spiller that zero rating arose under Group 6 so he could not review her decision, HMRC should have withdrawn the threat of penalties or, if not then, when they accepted as they did that at least 75% of the works were properly zero rated.

136. Finally I wish to thank Mr Spiller for his careful preparation of his case and his presentation as a litigant in person. I did not have to make allowances for that at all.

137. **Decision**

138. The assessment for 06/11 is reduced by deducting an amount of output tax of £23,746.84, if that amount has in fact been assessed twice (see §93). The output tax for 06/11 is reduced by £5,328.43 (see §94).

139. The standard rated element of the rewiring is reduced from £9,680 to £2,465.

140. The amount charged for tanking and associated work is zero-rated.

141. The decision at §139 is to be given effect to in the periods applicable and the and the decision at §139 is to be given effect to in the amount and periods applicable. If the parties are unable to agree the matter should be referred back to the Tribunal.

142. 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: 07 MARCH 2019