[2020] UKFTT 0506 (TC)

TC07976

Appeal number: TC/2018/05002

VALUE ADDED TAX - reduced rate supply - energy saving materials - whether appellant's roof insulation system a supply of insulation in roofs within VATA 1994 Schedule 7A Group 2 - no - appeal dismissed

FIRST-TIER TRIBUNAL

TAX

CONSERVATORY ROOFING SYSTEMS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER DAVID BATTEN

Full Video Hearing on 30 July 2020

Mr Tim Brown, Counsel, for the Appellant

Mr Ross Kernohan, Litigation Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. Conservatory Roofing UK Limited ('the appellant') appeals against HMRC's decision to treat insulated roofing which it supplies, as standard rated for Value Added Tax ('VAT') purposes and therefore reduce the appellant's VAT Credit claim for the 01/18 period to nil and issue an assessment for £13,457.96.

2. The question to be determined by the Tribunal is the classification of the appellant's supply for VAT purposes. That is, whether the supply by the appellant was "insulation for...roofs" within the meaning of Note 1(a) of Group 2 to Schedule 7A.

Background

3. The appellant has been registered for VAT since 1 May 2017 under the VAT Registration Number 280 4400 31, and this remains extant.

4. The appellant describes itself as "a company that specialises in enhancing and insulating existing roofs. Its selling point is that customers will be able to use their conservatory all-year round because of the insulating properties of its products".

5. The appellant says that in around 80% of cases it does not remove existing poly-carbonate roof panels or the roof spars. Instead, a new external light-weight roof tile system is secured to the outside, whilst on the inside, insulating material is provided, and plasterboard is applied to a bespoke timber frame ready for the application of decorative finishes and the insertion of LED downlights.

6. In the remaining 20% of cases, roof panels are removed because they are too heavy to safely leave in-situ. Otherwise, no alteration is made to the existing conservatory roof structure.

7. On 7 February 2018, the appellant submitted a VAT Return detailing an input tax claim for £15,618.86 for the 01/18 period, based on the assertion that approximately 90% of its sales were reduced rate (5%).

8. On 12 March 2018, HMRC conducted a visit to the appellant's premises to assess whether such a claim was accurate. Following the visit, HMRC came to the conclusion that the service the appellant provided was a 'replacement roof', which was chargeable at the standard rate of 20% VAT, rather than an 'installation of insulation' which would have been chargeable at the reduced rate of 5% VAT.

9. On 16 March 2018 HMRC informed the appellant of their conclusions and that as a result, the input tax repayment they had claimed for the 01/08 period would be reduced to nil and an assessment would be raised based on standard rated supplies.

10. On 5 April 2018 the appellant's agent replied to HMRC disputing the decision. He referred to the First-tier Tribunal decision of *Wetheralds Construction Ltd* [2016] UKFTT 827 (TC) 05552 and requested a reconsideration of the decision. [The *Wetheralds* decision was reversed on HMRC's appeal to the Upper Tribunal, released on 8 May 2018].

11. HMRC replied re-affirming their decision on 13 April 2018.

12. On 1 May 2018 HMRC issued an assessment of the appellant's VAT liability for the 01/18 period of £13,457.96.

13. On 2 July 2018 following a review request from the appellant, HMRC upheld their decision.

14. On 27 July 2018 the appellant lodged a Notice of Appeal with the Tribunal.

15. On 4 September 2018 the dispute was admitted into Alternative Dispute Resolution ('ADR') at the appellant's request.

16. On 14 November 2018 the parties exited ADR having been unable to reach an agreement.

Point at issue

17. Whether the work completed by the appellant should be classified as 'roof replacement' and so charged at 20% VAT or 'installation of insulation for roofs' within the meaning of Note 1(a) of Group 2 to Schedule 7A and charged at 5% VAT.

Burden of Proof

18. The burden of proof is on the appellant to show that the supply should be at the reduced rate of VAT. The standard is the civil standard, on the balance of probabilities.

Legislation

19. The relevant legislation is set out below.

Section 2 VAT Act 1994

2 Rate of VAT

(1) Subject to the following provisions of this section [and to the provisions of section 29A], VAT shall be charged at the rate of [20 per cent] and shall be charged-

(a) on the supply of goods or services, by reference to the value of the supply as determined under this Act; and

Section 29A VAT Act 1994

[29A Reduced rate]

[(1) VAT charged on-

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

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

(3) The Treasury may by order vary Schedule 7A by adding to or deleting from it any description of supply or by varying any description of supply for the time being specified in it.

(4) The power to vary Schedule 7A conferred by subsection (3) above may be exercised so as to describe a supply of goods or services by reference to matters unrelated to the characteristics of the goods or services themselves.

In the case of a supply of goods, those matters include, in particular, the use that has been made of the goods.

Section 96 VAT Act 1994 states:

(9) Schedules 7.Ad 8 and 9 shall be interpreted in accordance with the notes contained in those Schedules; and accordingly the powers conferred by this Act to vary those Schedules include a power to add to, delete or vary those notes.

Group 2 of Schedule 7A to the VAT Act 1994

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;

The appellant's case

20. The appellant's grounds of appeal as stated in its Notice of Appeal dated 27 July 2018 are as follows:

> "The business activity is that specialist energy saving products are fitted to existing conservatory roofing structures. The purpose of the product is to provide insulation in cold weather and keep the conservatory cool in hot weather.
>
> The company invoices customers at the reduced rate 5% as per the law specified in VAT Act 1994 Schedule 7. The component parts and associated costs are invoiced at 20% and this creates repayments VAT returns.
>
> HMRC visited company and issued VAT assessments on the basis that all sales are standard rated 20% and because all work specifically relates to repairing existing roofing or fitting replacement roofing.
>
> HMRC have argued that the work is akin to repairing or renovating roofing in conservatories. The company is aware of the different tax treatments for repair works and invoicing customers with 20% chargeable on the invoices.
>
> However, the specialised products are fitted to the existing roofing structure and we consider the products are specialist energy saving materials and qualify for the reduced rate.
>
> HMRC have misunderstood the exact nature of the works undertaken and the assessment is invalid. Our company's competitors are continuing to charge 5% for similar works undertaken."

21. The courts have consistently held that terms used to specify exemptions are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions should be construed in such a way as to deprive the exemptions of their intended effect (*Haderer* [2007] Case C445/05 para 18).

22. In *Wetheralds Construction Limited v HMRC* [2018] UKUT 173 (TCC), the Upper Tribunal ('UT') considered whether similar, but not identical, construction works qualified as insulation for roofs and therefore for the reduced rate of VAT.

23. Looking at the supply from the viewpoint of a 'typical consumer', the UT held that he would have described the supply as a thermally efficient replacement roof, and not merely as the insulation included within the roof system that had been supplied (at para. 36). The supply in *Wetheralds* was therefore standard-rated.

24. The appellant submits however that the *Wetheralds* supplies can be distinguished from the appellant's supplies where the existing roof structure is left intact; i.e. the roof has not been 'replaced'. In *Wetheralds* the existing roof panels were removed leaving only the spars in place.

25. The objective view of a typical customer, providing he knows that the original structure remains in-situ, will not be that the product is a new roof, but one that provides insulation to the existing roof.

26. The appellant therefore argues that its supplies should qualify for the reduced rate of VAT

HMRC's case

Liability to Standard Rate of VAT

27. Section 29A, Item 1 and 2 of Group 2 of Schedule 7A of the Act are relevant to determine the appeal in that they regulate the availability of the reduced rate of VAT by reference to the installation of energy-saving materials.

28. Note1(a) of Group 2 of Schedule 7A of the Act is the relevant legislation in that it identifies and limits the qualifying criteria of the energy-saving materials to insulation for roofs alone and does not extend to the construction or other amendments of a roofing or ceiling system.

29. The energy-saving materials listed in note 1 Group 2 should not possess any structural function as understood by the reference to the term "*insulation for.... roofs*". By this HMRC understand that the legislation refers to materials that are not something that is subsumed into, or becomes a part of, a conservatory's structure. That is the case whether it becomes indispensable to its structural integrity or supplements it, as happens in this case. With regards to the lightweight tiles, they are an addition to the roof and act as an extra barrier or protective membrane which adds to, and enhances, the roof's external covering and serves as extra protection against the elements. This contrasts with other forms of materials that HMRC recognise as being energy saving materials for the purpose of the legislation, such as insulation that is rolled out in lofts or foam that is used to fill cavity walls. Other than having a function dedicated to insulation, as in the examples provided, energy saving materials will serve no other purpose

30. The appellant stated in its agent's email of 5 April 2018:

"99.9 % of our typical installs are as follows.

- Arrive on site, strip off the plastic coverings from the roof frame exposing the aluminium or wooden frame in place.
- Frame out over the roof frame and screw marine ply to the existing frame to hold the marine ply in shape of the original structure/roof area.
- Install waterproof membrane over the ply and tile with Tapco slate, new fascia and gutters installed and breather vents installed into fascia so the roof breathes.
- Internal ceiling framed out with timber, the void is then insulated with TLX and Kingspan insulation. We leave the polycarbonate sheets in place with the appropriate gaps for air to circulate thus avoiding condensation.
- Ceiling plaster-boarded and plastered, LED down lights fitted.
- If the roof is made from glass in an aluminium frame, we remove the glass sheets only due to the weight issues, the process is exactly the same as the above with the original roof frame left in place.

We have been installing the same way for every job apart from the one install where the roof structure was completely unsafe. We bought a bare bones roof structure and insulated with the same materials as we normally would do, the original frame remaining in place with the timber framing to allow for air gaps/ventilation and the insulation in place."

31. As the appellant says, in most circumstances, the polycarbonate panel roofing is not replaced. What is clear from the description of the work, is that much more is being carried out than the mere installation of energy-saving materials. It extends to work carried out to the structure of the roof both internally and externally. Before and after pictures of work undertaken on a conservatory roof convey the impression that a customer is obtaining a new roof and that impression is reinforced with the message "We are the innovators and specialists in replacing all styles of conservatory roofs with a state of the art lightweight roof inside and out.... transforming the way you use your conservatory." This accurately reflects the nature of the work that is being undertaken by the appellant.

32. The facts in the present matter are very similar to those in *Wetheralds*. The Upper Tribunal's application of the typical consumer test is relevant:

> "In this appeal, we consider that a typical consumer of the Solid Roof System would have described the supply as a thermally efficient replacement roof, and not merely as the insulation included within the System." [Paragraph 36]

33. Similarly, a typical consumer in the present matter would have regarded the supply as a thermally efficient replacement roof, rather than merely new insulation.

34. This contention is furthered by the Upper Tribunal in *Wetheralds* stating that the marketing of a supply is a relevant factor:

> "The marketing material referred to the Solid Roof System as a "replacement insulated tiled roof" and as "your new roof". If these facts had been given proper weight, they would in our view have led to the conclusion that what was supplied was not merely insulation." [Paragraph 33]

35. In the present matter, the marketing material for the appellant includes the following:

- A description of the appellant as "The original conservatory roof replacement company".
- A description of the appellant as "roofing specialists".
- States the benefits of "our bespoke conservatory roof system".
- States that they provide "a new insulated lightweight conservatory roof".

36. Further to this, the "Our Solution" section of the appellant's website states that:

> "Our roof tile system replaces the existing polycarbonate or glass roof and uses a lightweight sectional high-performance composite insulation product to deliver its exceptional results. The system is installed with adequate cross ventilation to prevent condensation or 'sweating' of the structure."

37. Other marketing material from the appellant's website contributes to the impression that what they provide is:

- a "tiled conservatory roofing system".
- a "unique roof remodelling and insulation solution".
- a "new insulated lightweight conservatory roof...".

38. There are extensive works required both internally and externally prior to the application of the insulation material to the underside of the polycarbonate roofing panels. These include the fitting of roofing frames, marine ply, a waterproof membrane, lightweight roofing tiles, new soffits, rainwater goods, the application of plasterboard and electrical installation of lights. This is not the sort of work that would be properly described as one of providing insulation as it is more complex and intricate, even though the effect of the work will be likely to increase the conservatory's thermal efficiency. The relief under the legislation is not for the effect of the work, but whether the supply is confined to the installation of energy saving materials, and nothing more.

39. By the appellant's own admission, every material from both the internal ceiling and the external roof is replaced, except for the bare frame. Often the original polycarbonate panels are also left in place, but drilled to allow for the circulation of air.

40. HMRC submit that the present matter is comparable to that in *Revenue and Customs Commissioners v Pinevale Ltd* [2014] UKUT 204, where the Upper Tribunal said at paragraph 17:

> "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 Sch 8."

41. The same case also states at Paragraph 16 that:

> "Note 1 provides an exhaustive definition of 'energy-saving materials'..."

42. In *Wetheralds* the UT confirmed that the approach taken in *Pinevale* was correct, and that in such cases:

> "The characterisation of a supply should take account of all elements of the supply, while avoiding an unduly detailed dissection of the elements comprised in the supply." [Paragraph 36]

43. As such, rather than dissecting each individual element that the appellant supplied, the supply ought to be looked at as a whole. Though there were clearly individual elements which did incorporate the installation of insulation, as a whole the supply was of a new roofing system.

44. When considering the statutory interpretation of Note 1 (a) J. Berner in *Wetheralds* stated at paragraph 28, (referring to the judgment in *Pinevale)*:

> "While the decision of Richards J as he then was does result in a strict approach to the language of Group 2, which could in some situations result in fine distinctions, in our respectful judgment it does so on a logical and reasoned basis, and should be followed."

45. J Berner went on to say at para 32:

> "In our view, therefore, the scope of the reduced rate for supplies within Note 1(a) is not determined by whether or not the materials are 'attached or applied', but by whether what is supplied is confined to insulation or extends further than that, to a roof or a replacement roof itself."

46. It can be seen that case law establishes the need to determine whether the works in question relate to materials which are installed for the purpose, quite separate from any other purpose, of saving energy. A roof's energy efficiency may be enhanced in different ways but the installation of materials that are not confined to increasing energy does not fall within the scope of the reduced rate. It is likely that the appellant's roofing system leaves its customers' roofs more thermally efficient, thereby making them more amenable to all-year-round use, but the nature of the work, together with the materials used are much more extensive than that for which the reduced rate is intended, by the legislation, to provide. The appellant's solid roof system changes the character of a conservatory roof in a way that just insulating it would not.

Approach to a single complex supply

47. The ruling set out in *Wetheralds* by J Berner is the correct approach in this appeal, but if it is necessary to examine whether there is a single supply containing various elements, J Berner made reference to the analysis of *Mesto Zamberk* in the case of *Metropolitan International Schools* at paragraph 35:

> "[35] Following the FTT decision in this appeal, the Upper Tribunal has recently considered in detail the correct approach to classification of a single supply where the supply contains various elements, in *R & C Commrs v Metropolitan International Schools Ltd* [2017] UKUT 431 (TCC). The decision endorses the approach taken by the CJEU in *Mesto Zamberk v Finanani feciltelstvi v Hradci Kralove* {2014} STC 1703 (Case C-18/12) ("*Mesto*"). The Tribunal's analysis of the authorities concludes as follows, at paragraph 78:
>
> 'On the basis of those authorities we find:
>
> (3) The *Mesto* predominance test should be the primary test to be applied in characterising a supply for VAT purposes.

(2) The principal/ancillary test is an available, though not the primary, test. It is only capable of being applied in cases where it is possible to identify a principal element to which all the other elements are minor or ancillary. In cases where it can apply, it is likely to yield the same result as the predominance test.

(3) The "overarching" test is not clearly established in the ECJ jurisprudence, but as a consideration the point should at least be taken into account in deciding averments of predominance in relation to individual elements, and may well be a useful test in its own right."

48. The relevant paragraphs in *Mesto* from which the above is drawn are as follows:

"[29] In order to determine whether a single complex supply must be categorised as a supply closely linked to sport within the meaning of article 132(1)(m) of the VAT Directive, although that supply also includes elements not having such a link, all the circumstances in which the transaction takes place must be taken into account in order to ascertain its characteristic elements and its predominant elements must be identified (see, to that effect, in particular, *Faaborg-Gelting Linien AIS v Finanzamt Flensburg* (Case C-231/94) (19961 BVC 436, paras. 12 and 14; *Levob Verzekeringen and OV Bank*, para. 27; and *Bog*, para. 61).

[30] It follows from the case-law of the Court that the predominant element must be determined from the point of view of the typical consumer (see, to that effect, in particular, *Levob Verzekeringen* and *OV Bank*, para. 22, and *Everything Everywhere Ltd (formerly T-Mobile (UK) Ltd) v R & C Commrs* (Case C-276/09) 120111 BVC 44, para. 26) and having regard, in an overall assessment, to the qualitative and not merely quantitative importance of the elements falling within the exemption provided for under article 132(1)(m) of the VAT Directive in relation to those not falling within that exemption (see, to that effect, *Bog*, para. 62).

[33] As for the question whether, in the context of such a single complex supply, the predominant element is the opportunity to engage in sporting activities falling within article 132(1)(m) of the VAT Directive or, rather, pure rest and amusement, it is necessary to make that determination, as has been pointed out at paragraph 30 of the present judgment, from the point of view of the typical consumer, who must be determined on the basis of a group of objective factors. In the course of that overall assessment, it is necessary to take account, in particular, of the design of the aquatic park at issue resulting from its objective characteristics, namely the different types of facilities offered, their fitting out, their number and their size compared to the park as a whole."

49. At para 36 of *Wetheralds*, J Berner stated:

"[36] Whichever test or tests is applied, the process should not involve eliminating from consideration of the characterisation elements which are "ancillary", and then making a binary choice between the remaining elements in order to characterise the supply…. The characterisation of a supply should take account of all elements of the supply, while avoiding an unduly detailed dissection of the elements comprised in the supply."

50. Case law has therefore established that when presented with a single complex supply the decision in *Mesto* requires the character of the supply to be established by looking at it through the eyes of the 'typical customer' to determine what she or he has obtained. A typical customer when inviting friends around might take the opportunity to show off the work that has been done to the conservatory. That customer is more likely to say "look at my new conservatory roof" rather than "come and see my newly-insulated roof". It is the changed character of the roof and its visual impact, creating an aesthetic appeal that contrasts with what preceded it. The appellant's website encourages

a customer to buy into that perception, so that while the roof may not be new, and indeed most, if not all of the original will remain in situ, the appearance is that the roof is substantially transformed to such a degree that it has been converted. The product which the appellant supplies is more than just insulation. This approach was considered in *Wetheralds* where on behalf of the Respondent comparison was drawn with the purchase of a motor car. The customer's perception is that it is a car that is being purchased and not something else to be established by "dissecting the vehicle into its many component parts" (para. 36 of the decision).

51. It can be seen therefore that the Upper Tribunal have demonstrated quite clearly that supplies of the kind made by the appellant, being primarily for the purpose of the construction of a new roofing system rather the provision of insulation for an existing one, do not fall to be treated as reduced rated supplies within the meaning of Note 1(a) of Group 2 to Schedule 7A.

Conclusion

52. The facts in the present matter are indeed very similar to those in *Wetheralds*. In correspondence with HMRC the appellant's agent stated that the appellant's roofing system is "almost identical to the supplies made by Wetheralds". The statement was made prior to HMRC's successful appeal to the Upper Tribunal which concluded that a typical consumer of the 'Solid Roof System' provided by Wetheralds would have described the supply as a thermally efficient replacement roof, and not merely as the insulation included within the roof system.

53. We concur with HMRC's reasoning as set out in paragraphs 27-51 above. The supplies made by the appellant in this case extend far beyond installing insulation to a roof. The work is materially, the construction of an entirely new roofing system. The 'specialist energy saving products' which the appellant says are 'fitted to existing conservatory roofing structures' is only one component part of a new roof.

54. The appellant refers to *Mesto* and argues that we should look at the primary or predominant supply, which in its view is the installation of insulation, and classify the product accordingly.

55. In our view there is a single supply. The product supplied by the appellant is essentially a composite insulated roofing system. Although there are several elements to the supply to the customer, they are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.

56. The expressed purpose of the appellant's product is to provide insulation in cold weather and keep the conservatory cool in hot weather. If only insulation material was supplied without the installation of a timber, plaster boarded sub frame and tiles to the roof exterior, that purpose would not be achieved.

57. The majority of materials and services that were provided by the appellant are not covered by the exhaustive list set out by Note 1(a), as they are materials for the construction or reconstruction of a roof, rather than insulation, and cannot therefore be classified as reduced-rate supplies.

58. The scope of reduced rating for supplies within Note 1(a) is not determined by whether or not the materials are "attached to or applied", but by whether what is supplied is confined to insulation or extends further than that, as in this case, to a new roof or replacement roof. The installation of only energy-saving materials with ancillary supplies would of course be reduced rated. An ancillary supply is a supply of goods or services that allows a better means of enjoying the principal supply.

The insulation provided by the appellant is part of and assists with the enjoyment of a new roof and therefore is ancillary.

59. The predominant element must be determined from the point of view of the typical consumer. The marketing material demonstrates that the supply is of a roofing system, to which the insulation is an incidental part. We agree with HMRC that a typical consumer would, on the basis of both the appellant's marketing material and the nature of the finished product, consider that they were receiving a new roofing system.

60. As Judge Berner said in *Wetheralds* at para 31:

> "as *Pinevale* sets out, in interpreting the statutory language the critical question is whether the supply of energy-saving materials is "for" a wall, floor, ceiling etc., or is a more extensive supply, such as the wall, floor, ceiling etc. itself."

61. We have to conclude that the appellant does not make a supply of "insulation for roofs" within the meaning of Note 1(a) of Group 2 Schedule 7A VATA94 and that as such the appellant's supplies cannot be classified as reduced-rated for VAT purposes.

62. The appeal is accordingly dismissed and HMRC's decision to reduce the appellant's VAT Credit claim for the 01/18 period to nil and to issue an assessment for £13,457.96 is upheld.

63. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 21 DECEMBER 2020