

Zero rate building works

Steve Lunn V20981

This appeal was against a decision not to accept the zero rating of the supply of building works under VATA Group 6 Schedule 8 item 2. The appeal was not by the supplier of the services but unusually the recipient of the services Steve Lunn (Lunn) who incurred and suffered the VAT cost on the supplies.

Item 2 provides zero rating to:

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

The new building in question was physically separate to but within the curtilage of an existing Grade II Manor House. The core issue was whether the separate use or disposal was prohibited by the statutory planning consent. There are a number of definitions and conditions contained within the notes to Group 6. Note 2 provides a number of conditions which must be satisfied and includes “(c) which requires that the separate use, or disposal of the dwelling is not prohibited by the terms of any covenant, statutory planning consent or similar provision.”

HMRC contended the terms of the planning did amount to a prohibition of use and/or disposal. Lunn argued restriction does not mean prohibition and cited the Nicholson Tribunal case in which the Chairman criticised HMRC’s incorrect statutory interpretation. HMRC cited a number of cases and especially the Thompson V15834 to support the fact Nicholson was wrongly decided.

Given the lack of binding case law on item 2(c) the Tribunal sought to identify the intention of Parliament for Note 2. The Chairman dismissed HMRC’s contention that Note 2 was intended to “give relief to new housing stock supplied to the open market, and that the line was specifically drawn to deny relief to added accommodation within existing housing stock, including annexes that might be physically separate from existing units but which have to be used in connection with existing units”. The Tribunal concluded that separate use is not prohibited by the terms of the planning and the Note 2(c) is met. HMRC accepted their argument on separate disposal was ‘more difficult to make’ and again the Tribunal found the disposal condition in Note 2(c) was also met and allowed the appeal.

The Tribunal also went on to address the question of costs. Lunn sought costs on an indemnity basis, but these were granted on a standard basis. An interesting point to note was Lunn’s complaint that HMRC refused to confirm whether they received advice as to their chances of success being more or less than 50 percent, citing legal privilege. HMRC’s published litigation

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strategy says litigating where chances of success are below 50 percent will only be justified where there are significant amounts at stake or there is a fundamental point of principle. The Chairman noted this was not within the jurisdiction of the Tribunal but may be an issue for judicial review or investigation by the Parliamentary Commissioner for Administration.

This case demonstrates the complexities of the VAT zero rating legislation. Readers with property VAT queries are advised to refer to VAT Property Solutions which is available free of charge on our website www.4eyesltd.co.uk.

Readers should also be aware that there has been a major change to the Tribunal rules effective from 1 April 2009. For a summary, readers should consult our document archive for 2008.

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