[2017] UKFTT 0674 (TC)

TC06101

Appeal number: TC/2016/06185

VAT – extension or annex - whether construction of a building by a registered charity was an extension to or an annex to an existing building - whether, if an annex, it was capable of functioning independently from the existing building and whether there is a main access to the annex - whether this additional building was simply completion of the original building, so as not to be either an extension or an annex.
Notes 16 and 17 to Group 5, Schedule 8, Value Added Tax Act 1994.

FIRST-TIER TRIBUNAL
TAX CHAMBER

LITTON & THORNER'S COMMUNITY HALL **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q. C.
MR. CHRISTOPHER JENKINS.

Sitting in public at The Magistrates Court, Southampton on 04 August 2017

Mr. Spicer (one of the trustees) for the Appellant.
Mrs Ashworth, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal brought by the trustees of the Litton & Thorner Community Hall ("the trustees") in respect of the contention made by the respondents that VAT in the sum of £5,956 is due and payable in respect of building works undertaken at the Community Hall, referred to in more detail below. The trustees had works undertaken which the builder, C. G. Fry & Son Ltd, treated as zero rated. The respondents took issue with the building company zero rating the work and this led to a demand from the revenue, which in turn, the builders sought to pass on to their customer. The appeal is brought by the trustees because it is with them that the respondents have corresponded in connection with the dispute about whether the works were or were not properly zero rated and it is the trustees who, if the claimed VAT is payable, are the effective paying party.

2. This is a case where we heard evidence from Mr John Firrell who adopted his witness statement dated 8 March 2017 as his evidence in chief and Mr Frederick Spicer who adopted each of his two witness statements, each dated 25 February 2017, as his evidence in chief. Neither witness was cross-examined on the basis that any part of his evidence was untrue, inaccurate or unreliable. Cross-examination was limited to eliciting additional information or points of clarification.

3. We entertain no doubt that each witness, referred to above, was a truthful, reliable and accurate witness of fact. Accordingly, because we take the facts from the evidence given by those two witnesses our findings of fact will not be set out in tabular form. Instead, we will refer to the various relevant facts in this Decision and where we do so, the facts referred to are facts which we are entirely satisfied are true and correct and must therefore represent our findings of fact.

4. We record that at the conclusion of the hearing Mr Spicer relied upon two typescript documents, each headed "Submissions" the first headed "incomplete building" and the second headed "qualifying Annex." We commend the assiduity and care with which each of those impressive submissions was prepared and presented to us. They have been extremely helpful and plainly involved the author in a great deal of research. Mr Spicer has referred to various authorities and has been balanced in referring to those which assist his submissions and any parts thereof which might not assist or which might need to be distinguished.

5. The Litton and Thorner's Community Hall has been a registered charity with the Charity Commission since 31 March 2006. Mr Spicer has been its Treasurer since that time. Mr Firell has been the trust Secretary since that time. He is also the Clerk to the Litton Cheney Parish Council.

6. The village of Litton Cheney in Dorset has a population of about 350 people. It had a village primary school, which was founded in 1691, which, according to OFSTED reports in 2001 and 2007 lacked certain facilities that were thought to be desirable. In particular, it lacked a suitable hall where physical education could take place. The village had never had (at least in living memory) a village hall. The school

building itself, which is detached from the hall to which we will refer below, is owned or operated by the Salisbury Diocesan Board of Education.

7. We do not know precisely how it came about, but subsequent to the OFSTED reports (referred to above) there was collaboration between the Diocesan Board and the villagers with a view to raising funds to build a hall. The proposal was that the hall would be available for the school to use as and when school activities called for such use to be made of it with the hall being available at other times for village use and activities, including use by the Bride Valley Youth Club and a local Scout Group. The project was unsuccessful in obtaining a grant from National Lottery funds.

8. Initial plans were drawn up in June 2008 for a hall to be built. Those plans provided for storage facilities to be made available by way of a dedicated storage room in the north-east corner of the proposed building. The original plan was for the heating system hardware to be housed in a mezzanine space between the stage and the men's toilets.

9. After planning permission had been obtained building work commenced in September 2008, at which time the decision about what type of heating system would be installed, remained outstanding. Litton Cheney is not served with a mains gas supply. Grants were available at that time to those installing ground source or air source heat pumps which were considered to be a "green" heat system option. The trustees considered the options and a decision was taken to install one or more ground source heat pumps to feed the heating system. The trustees do not appear to have appreciated the amount of physical space that the ancillary equipment for such heat pumps would require within the building, but once the space requirement was appreciated it became clear that locating the equipment in the mezzanine space was not an option. Instead, it had to be located in the room designated as a dedicated storage room or, at least, a large part of it.

10. The trustees were concerned that there should be adequate storage space at the hall because those who use the hall would have to co-operate with one another and that, of necessity, meant that equipment used by differing groups would need to be put away and stored when the hall was to be used by others. For example, gym equipment used by the school would have to be cleared away, and stored. If the hall was to have chairs set out for a meeting or performance to take place, in turn, those chairs would have to be put away and stored if the school was then to make further use of the hall for physical education or other activities.

11. The trustees say, and we unreservedly accept, that they resolved that if adequate storage space was to be available it would be necessary to add it onto the east side of the building, which was then in the course of being built. That, however, required two things: (i) planning permission, and (ii) more money. In readiness for adding this storage space to the east side of the building the builders recommended, and the trustees agreed, that a steel joist should be incorporated within the east wall of the hall so as to facilitate the necessary support and access when the envisaged storage facility was added. It was a case of thinking ahead.

12. The delay in being able to proceed to add the needed storage space was temporarily ameliorated by storage drawers being placed underneath the stage. These were very far from being an ideal solution because their depth was such that items had to be dismantled so as to be stored and, for example, chairs had to be laid on their side because the drawers provided inadequate headroom to allow them to be stored upright. The task of putting items into and taking them out of storage was labour-intensive, cumbersome and plainly inconvenient.

13. The hall opened in May 2009. In general terms, it was used by the village school in the daytime, with village activities taking place outside normal school hours. Mr. Firell describes how the merry-go-round of taking items from storage, using them briefly, returning them to storage then had to be undertaken by those employed at the school and by those involved in other activities. It must have been a laborious and unwelcome task for all involved.

14. Money was needed for the additional storage space to be built. Unfortunately, the Christian spirit of the diocese seems to have deserted it, at least temporarily, because it refused to provide any additional funds towards the necessary additional building.

15. The additional, but necessary, planning permission was not sought until September 2011, some two and half years after the hall opened. After the diocese had refused additional funds the good citizens of Litton Cheney set about fundraising to raise another 50% of the additional build costs after it was discovered that the diocese would not stump up its presumptive 50% share. The funds were successfully raised. Between 1 December 2013 and 20 March 2014 the local appeal raised £8,200 to which was added £1,932 because various donations were made under the Gift Aid scheme.

16. The additional necessary planning permission was granted on 29 November 2011. We note that the respondents refer to the description of the development, as set out in the grant of planning permission, as "Extension to form equipment store." We place no store upon the description within the planning permission because it was not critical whether the Planning Authority referred to an "extension" or an "annex" or, for example, "an additional structure". The function of the local planning authority is to decide whether the proposed additional structure should or should not be permitted.

17. The respondents refer to the time between the hall originally opening in May 2009 and the additional building being added, so that it became available for use in 2014. The trustees counter with the argument that they are just that, trustees of a charitable organisation. They are local citizens who give of their time and various skills for the good of the local community. They are not running a commercial organisation, working full-time and/or working with back office support and facilities.

18. The Bundle of Documents made available to us contains photographs showing the external elevations of the hall as originally built. They also depict the addition, whether called an extension or annex, which can be seen at pages 70 and 72. Pages 73 and 74 depict people undertaking the laborious and cumbersome task of storing items,

such as chairs and gym mats into or removing them from the storage drawers. Page 78 is a plan showing the additional building. We hope it will not be thought derogatory if we describe it as along the lines of a lean to, having three external walls with the fourth being a party wall (in the non-technical sense) with the original hall building. Its roofing material and external cladding materials match those of the original hall. It can be accessed from inside the hall through double doors and can also be accessed externally through a different set of double doors.

19. The trustees rely upon section 30 Value Added Tax Act 1994, which provides for zero rating in respect of VAT in designated circumstances. Those circumstances are (primarily) to be found in Schedule 8 to the 1994 Act and, so far as this appeal is concerned, it is Group 5 of Schedule 8 that falls for consideration.

20. This appeal has raised no issue as to whether the hall is or is not used for relevant charitable purposes and, in our judgement, rightly so given the content of paragraph 6 of Group 5 to Schedule 8.

21. The provisions which fall for consideration in this appeal are paragraphs 16 and 17 of Group 5 to Schedule 8. They are as follows:

16. For the purpose of this Group, the construction of a building does not include—

(a) the conversion, reconstruction or alteration of an existing building; or

(b) any enlargement of, or extension to, an existing building except to the extent the enlargement or extension creates an additional dwelling or dwellings; or

(c) subject to Note (17) below, the construction of an annexe to an existing building.

(17) Note 16(c) above shall not apply where the whole or a part of an annexe is intended for use solely for a relevant charitable purpose and—

(a) the annexe is capable of functioning independently from the existing building; and

(b) the only access or where there is more than one means of access, the main access to:

(i) the annexe is not via the existing building; and

(ii) the existing building is not via the annexe.

22. It will be apparent from reading those provisions that the dispute in this appeal falls within a comparatively narrow, but nonetheless difficult, compass. The trustees put their appeal on two separate and distinct bases :

(1) That the additional building was the completion of the original building and neither an extension nor an annex to it. It is their case that the temporal

disconnect between the two building processes must be seen in the factual context which we have set out above, with particular reference to the decision to put in a lintel to allow the building to be completed when additional monies and planning permission were available; alongside the fact that we are dealing with a non-commercial organisation and so things simply could not progress as expeditiously as they might have done if those things were being undertaken by a commercial organisation.

(2) The second basis is that, in any event, the additional building is exempt from VAT by reference to paragraphs 16(c) and 17 of Group 5 to Schedule 8. In other words, it is their case that the additional building is an annex intended for use solely for relevant charitable purposes and it meets the conditions set out in paragraph 17(a) & (b).

23. It is tempting to think that this legislation can be characterised as identifying a distinction without a difference. To the vast majority of people, we venture to think, there would be little if any difference between a building or structure described as an extension and one described as an annex. We have been referred to various authorities where Tribunals or Courts have valiantly tried to discern the relevant distinction despite the fact that Parliament did not see fit to spell out what it considered to be the vital distinction. Nonetheless, the task of Tribunals and Courts is to give effect to legislation and, however unsatisfactorily drafted, to make sense of it and apply it to known factual situations. That often involves making decisions which are capable of falling one side or the other of what can often be a very narrow and indistinct dividing line. We have to undertake that unenvious task.

24. At the conclusion of the hearing we considered this matter and announced our decision that the appeal would be allowed in full. We now give our reasons.

25. We first turn to the issue of whether the additional building could/should be zero rated by reason of paragraphs 16 and 17 of Group 5 to Schedule 8.

26. The respondents' argument is that the additional building is properly to be characterised and seen as an extension and so VAT must be paid by reason of paragraph 16(b). The trustees' case is that the additional building is an annex intended for use solely for the relevant charitable purposes and the conditions in paragraph 17 are met.

27. This brings into sharp focus what, if any, difference exists between an extension and an annex to a building. In Cantrell & Ors v Customs and Excise Commissioners [1999] STC 100 Lightman J identified the applicable two-stage test for determining whether works carried out constitute an enlargement, extension or annexe to an existing building. He commented that it requires an examination and comparison of the building as it was before the works were carried out and the building after the works were completed. In a rather circular comment he said that the question then to be asked is whether the completed works amount to an extension or annexe to the original building. That, course, does not give guidance as to how that question is to be answered. However, he went on to say :

"I must add a few words regarding how the question is to be approached and answered, for this has been the subject of some lack of clarity (if not confusion) in a number of the authorities cited to me and it is the failure to approach and answer the question in this case in the correct way which flaw it. The question is to be asked as at the date of the supply. It is necessary to examine the pre-existing building or buildings and the building or buildings in the course of construction when the supply is made. What is in the course of construction at the date of supply is in any ordinary case (save for example in case of a dramatic change in the plans) the building subsequently constructed. Secondly, the answer must be given after an objective examination of the physical characters (sic, characteristics) of the building or buildings at the two points in time, having regard to similarities and differences in appearance, the layout, the uses for which they are physically capable of being put and the functions which they are physically capable of performing. The terms of planning permissions, the motives behind undertaking the works and the intended or subsequent actual use are irrelevant, save possibly to illuminate the potential for use inherent in the building or buildings."

28. That approach was endorsed by the Vice Chancellor in Cantrell (No. 2) v Customs and Excise Commissioners [2003] All ER (D) 60, who went on to comment that :

"But in the case of an alleged annex the requirement that such a construction should be an adjunct or accessory to another may require some wider enquiry. It is unnecessary to reach any concluded view on that question to decide this case."

29. More recently, the approach has been admirably set out by Judge Edward Sadler in Leyton Sixth Form College [2013] UKFTT 660 (TC) where, at paragraph 84 of his Decision he observed:

"The examination and comparison must be made objectively of the physical characteristics of old Meridian House and new Meridian House having regard to similarities and differences in appearance, layout, and the way the buildings are equipped to function. Since the appellant contends that building C is an annex to old Meridian House, it is appropriate to make a wider enquiry in the course of that examination and comparison so as to reach a conclusion as to whether it has the characteristics of an annex, that is as an adjunct or accessory to the original building in the sense of a supplementary structure. In making that wider enquiry, we consider that it is relevant to consider the way which old Meridian House was used and, more particularly, the way in which new Meridian House was intended to be used (taking present use – there being no evidence to the contrary – as the use intended as at the time of supply).

30. In Abercych Village Association [V20746] the VAT Tribunal held that an additional building might be both an extension and an annex, but that if it was characterised as being both (or each), then zero rating would not apply. We are not persuaded that that is correct, but for reasons which we set out below, we need not determine that issue. Parliament has drawn a distinction between these two attributes and it would be a strange outcome if intended zero rating for an annex could be denied on the basis that it might also be characterised as an extension.

31. When we examine the building as it was prior to the additional building being built our best guide, so far as physical appearance is concerned, must be taken from the photographs to which we have referred above. We are also satisfied that the original building had a lintel placed in its east wall to facilitate the storage facility, which was built later. In terms of physical appearance the additional building, as set out above, looks rather like a lean to, but finished in the same exterior materials as those used in the original building, so as to be architecturally sympathetic with it. The roof of the additional building does not meet or connect with the roof of the original building's roof. If we take an analogy with a domestic situation, the physical appearance is rather like a garage being appended to the side of a house rather than appearing as if the house itself has been extended.

32. In terms of layout the additional building is simply a room in which items can be stored. It can be accessed through double doors from both the original building and externally. We find that neither means of access is given primacy or used more than the other. The respondents argued that the "main" entrance/exit was through the double internal doors, because, it was asserted, they are likely to be used more often than the external double doors. Whether an entrance/exit is the "main" entrance/exit is not simply a matter of the number of times it is used as compared to the number of times that some other entrance/exit is used. For example, most householders would regard the front door of their house as the "main" entrance/exit notwithstanding that, for entirely pragmatic purposes, such householders use the rear or side door more frequently than the front door. Whether an entrance/exit is to be characterised as the "main" entrance or exit is associated with its status rather more than with the number of times that it is used when compared with any other entrance/exit.

33. It is inherently improbable that the additional building could be put to any of the primary uses to which the original building is capable of being put. It has no windows and is entirely dependent upon artificial light. The single sense in which it could possibly be argued that there is a similarity of use is that the original building was envisaged to have self-contained adequate storage facilities and so the use of the additional building, for storage, is, in small measure, similar to that of the original building. We do not consider that to be a fair approach, given that the originally intended storage facility within the original building was plainly an ancillary or incidental use whereas storage is the only realistic use of the additional building. This is a case where the intended and actual use of the additional building illuminates its potential use, inherent in its very construction. We are satisfied that its inherent use does not extend beyond storage.

34. Thus we come down on the side of the dividing line by deciding that the additional building is an annex to the original building. It does not look like or feel like an extension thereto.

35. There can be no doubt that the annex is capable of functioning separately from the original building. It has external double doors which would allow it to be accessed at will. It is to be noted that the test is not whether the building functions independently; we have to look at whether it is capable of functioning independently.

That is, as an independent storage facility. In our judgement, there is no doubt that it is so capable.

36. We then turn to access. On the basis of the evidence that we have heard and accepted the new building has two accesses, each by way of double doors. One set is to/from the original building and the other set is to/from the outside. In our judgement it would be artificial to characterise either of those sets of double doors as the "main access". Each of them, on the evidence, is used at different times, and by different organisations. Whether the storage facility is accessed from within the hall or from outside will depend upon what is stored there from time to time and by whom it is proposed that any such stored materials will be used. In our judgement, each access is of equal importance or status so that neither can properly be characterised as more important than the other and so neither can be characterised as the "main access." Even if the double doors leading directly from the existing building into the additional building were, numerically, used more often than the external doors that is not something that would be decisive. Most householders would, for example, described their front door as the main access notwithstanding that, for pragmatic purposes they may choose to use the back or side door more frequently than the front door. It is in those circumstances that we do not consider it proper to characterise either set of double doors as the "main access". They are of equal status, significance and importance to the differing users of the facilities.

37. The foregoing is sufficient to determine the outcome of this appeal.

38. Nonetheless, given the able way in which this appeal has been argued on both sides we will briefly set out our conclusion in respect of the second argument, that is, that the additional building was, in reality, the completion of the original building. The single factor militating against such a conclusion is the passage of time. The time span for the completion of this building (on the appellant's case) is nothing near that involved in the building of St Paul's Cathedral or the Taj Mahal. Nonetheless, say the respondents, the time gap is such that there is an air of unreality in regarding the additional building as the completion of the original building. They also rely upon the absence of planning permission to build the additional building at the time when the original building was erected.

39. The appellant contends that the original building was not complete if it was not fit for its purpose. We rather struggle with that argument because the building was fit for the purpose of being used as a village hall or school hall, albeit subject to the inconveniences to which we have referred above.

40. The fact that planning permission was not in place is a consideration but, in our judgement, not decisive. This is an aspect of the appeal where we consider the subjective intentions of the trustees to be relevant. We have already indicated that we accept the evidence that by reason of the ground source heat pump equipment having to take up a great deal of the storage space which had originally been dedicated as storage space, the trustees planned for and envisaged adding necessary storage space at a later date, once adequate funds and necessary planning permission were in place. We also accept the evidence that the local diocese was approached twice, in 2012 and

2013, to contribute funds towards the cost of the additional building. It refused on each occasion. The additional planning permission was applied for in September 2011 and granted in November 2011, but the additional work was not commenced until February 2014, with it being completed in April 2014. Thus we have to consider, in the factual context that we have set out above, whether the additional building can and should be regarded as the trustees completing the original building (subject to supplementary planning permission being obtained) or a separate project divorced from and wholly independent of the original building scheme.

41. Again, this involves a fine value judgement based upon the rather unusual facts of this case. On this issue our conclusion was that the additional building can and should be regarded as the completion of the originally planned and envisaged village/school hall, notwithstanding that, from start to finish, it took four and three-quarter years. We are satisfied that that time period is largely explained by the funding issue. It was explained to us that to obtain funds from the Diocesan Board means that applications have to be made within permitted funding application windows (rather like a football transfer window) and then the funding decision is made after a tortuously bureaucratic process has been negotiated. We accept the evidence that this caused substantial delay and that the outcome, being a refusal of funds from the diocese, was both unwelcome and quite unforeseen by the trustees who, we are satisfied, reasonably expected the decision to be otherwise. It is only after the second application was turned down that local fundraising took place, organised by volunteers.

42. The fact that a lintel was placed in the east wall with a view to the building being completed at a time when it was known that additional storage would be required is, in our judgement, an important factor. It is not uncommon for a building to be completed as and when funding becomes available, even though a part built building may, in the meantime, be capable of beneficial use.

43. We turn from the temporal consideration to the functional consideration. We are in no doubt that the additional building assisted or facilitated the original building in functioning in accordance with its originally intended purpose or purposes.

44. We have been guided in our decision by considering the judgement of Jowitt J in Customs and Excise Commissioners v St Mary's Roman Catholic High School [1996] STC 1091 and observe that in that decision the judge identified there being two appropriate tests or considerations, being the temporal and the functional circumstances.

45. Each case turns upon its own facts and we do not consider the temporal disconnect, when viewed in the context set out above, to be sufficient to lead to the conclusion that this was not the completion of the originally intended project or scheme. The original building, with the additional building, now properly fulfils the originally intended use and purpose for this village/school hall. The need for the project to be completed some four years or so later arose from unforeseen circumstances which necessitated a variation in the plans and overall project which,

we are satisfied, is properly to be regarded as completed only as and when the building, providing adequate storage facilities, was completed.

46. For the reasons set out above, the appeal is allowed in full.

47. 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.

GERAINT JONES
TRIBUNAL JUDGE

RELEASE DATE: 11 SEPTEMBER 2017