



[2019] UKFTT 0601 (TC)

TC07384

Appeal number: TC/2018/02996

VALUE ADDED TAX – whether or not construction costs of new building work for church zero-rated – whether or not qualifying annexe – held yes – appeal allowed – construction costs held to be zero-rated

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

IMMANUEL CHURCH

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE PHILIP GILLETT

Sitting in public at Havant Justice Centre on 19 September 2019

Les Howard, of vatadvice.org, for the Appellant

Daniel Hopkins, Officer of HMRC, for the Respondents

DECISION

1. This was an appeal dated 3 April 2018 against a decision of HMRC dated 13 December 2017 which determined that various building work undertaken by Immanuel Church (“The Church”), at 120 Southbourne Road, Bournemouth, BH6 3QJ, did not qualify as an annexe for the purposes of Item 2 of Group 5 Sch 8 Value Added Tax Act 1994, and did not therefore qualify for zero-rating.

FACTS

2. I received witness statements and oral evidence from the Reverend Peter Southcombe, a Minister of the United Reformed Church, working at Immanuel Church, and Damon Green, a director of Bennington Green Ltd and a Chartered Building Surveyor, who acted as project manager regarding the new building works. I found both witnesses to be reliable and credible witnesses and find the following as matters of fact.

3. The initial planning application was made on behalf of The Church by Allen Associates, a firm of architects. They also prepared a Design & Access Statement to support the initial application, and planning approval was granted under a decision notice issued by Bournemouth Borough Council dated 5 June 2014 under reference 7-2014-8688-C.

4. This initial plan provided for the construction of a new extension/annexe on the left-hand side of the existing church building, substantial renovations to the hall at the rear of the church building, and the construction of two flats above the hall for the accommodation of theological students. The building works which are the subject of this appeal only relate to the new extension/annexe constructed on the left-hand side of the church building and not to the renovations to the hall or the construction of the two flats above the hall.

5. Bennington Green Ltd were subsequently appointed on 18 October 2015 to bring a workable and fundable scheme to site. This involved the preparation of tender documents and drawings based on the approved planning drawings.

6. The tender returns received in September 2016 were significantly over The Church’s budget and a process of Value Engineering, ie, cost reduction, followed, in order to reduce the project expenditure to bring it within the available budget.

7. Various changes were therefore made to the original proposal in order to reduce the costs. The key changes were:

(1) The initial plans for the new extension/annexe on the left-hand side of the church included a clerestory on top of the flat roof, which added height and complexity, and therefore cost, to the new building. This was deleted from the revised plans.

- (2) The original ramp access to the church building, which had been removed in the original plans was retained. Prior to this change the only access to the church for wheelchair users would have been via the new building.
- (3) The atrium and lobby at the rear of the church, between the church building and the rear hall building, which contained halls and various store rooms, was to be down-graded from being an integrated part of the building complex to a simple covered corridor, with flagstone flooring and doors at each end. There was to be no heating of this area in the revised plans.
8. A revised planning consent was issued taking into account these variations.
9. It is notable that much of HMRC's Statement of Case refers to aspects of the new building works set out in the initial Design and Access Statement, significant parts of which were superseded by the changes referred to above.
10. An attempt was made to resolve this appeal by way of Alternative Dispute Resolution. A meeting between the parties was held on the site, during the course of construction, but the parties failed to reach agreement.
11. The key features of the buildings which were eventually constructed are:
- (1) A separate extension/annexe was created to the left-hand side of the church and this is used as a self-contained area for a welcome/coffee area and specialist meeting uses. It shares a dog-leg wall with the main church building along one side.
- (2) The new building is built in an entirely different style to the existing church and hall. The existing church and hall were built in utility brick, as was common in such buildings constructed in the early part of the 20th Century. In contrast the new extension/annexe was constructed from dark powder coated aluminium and glass in a very contemporary style. It is single storey with a flat roof. There was a deliberate intention was to create a much more modern external face of the church.
- (3) A covered link roof was constructed between the rear hall and the rear wall of main church to allow protected access for the users from the rear access point to the hall, which is at the rear, on the right-hand side of the church building, ie, the opposite side from the new extension/annexe. This is used for all hall use and as the point of fire escape from the rear hall and both rear flats. It has a flagstone floor and doors at both ends, but is not heated.
- (4) There is a fire escape access from the main church through double doors from the church and into the extension/annexe. These doors can only be operated from the church, by used of a standard fire escape press bar. It cannot be opened from the extension/annexe. Clearly these fire escape doors can be wedged open to permit, for instance, the removal of chairs from the church to the extension/annexe and vice versa, but it is not suitable as an access between the two buildings because they cannot be opened from the extension/annexe, and, being fire doors, are clearly signed as not to be left open.

- (5) A second fire escape was included in the design between the church welcome area, at the front of the church, and the new extension/annexe, but these doors are currently locked closed and have no door furniture which might enable them to be opened, from either side.
 - (6) There are also fire escape doors from the rear of the new extension/annexe which lead into the covered area between the church and the hall building. These can be operated from both sides.
 - (7) The existing church building, the hall and the extension/annexe all have separate main entrances, for both pedestrians and wheelchair users.
 - (8) The floor design achieves an escape route from the rear hall which can safely be used as an exit, in the event of fire, through both the rear covered way and the extension/annexe. This escape route is only to be used for escape purposes in the event of a fire.
 - (9) The extension/annexe is designed to be self-contained and is provided with toilets and canteen facilities for the use of occupiers of the new building. The sanitary facilities include an ambulant disabled WC, a male WC with 2 urinals and 1 cubicle and a female WC with 3 cubicles.
 - (10) The extension/annexe has independent gas and electricity supplies which extend through the new plant room which houses gas and electric entry services. All services extend from this point to serve the extension/annexe.
12. The concept of developing the church began some 15 years ago with the leadership of the church concerned about the mission of the church reaching into the community. The church itself looked austere and unwelcoming so any project needed to address the wooden doors at the front of the church itself.
 13. The Church developed the idea of what they termed Connect 2, the aim of which was to ensure that a cohesive project would be built that enabled as many links as possible into the local community. In 2011 the church commenced a pilot project working with older people and began to identify the need for support for carers as well as those being cared for. The carers themselves identified the need for a place where they could just come and sit with their loved ones without the hassle of having to purchase a coffee, etc, every hour or so. This place also needed to be physically secure, for the protection and safeguarding of those with dementia and other issues.
 14. Connect 2 was also designed to address the need to renovate other parts of the building to ensure that it had a building fit for purpose. The hall had suffered severe fire damage in 1963 and had only been repaired using a “temporary” roof, which had become semi-permanent but was not adequate for the purpose.
 15. The old church front doors were replaced to make the whole building more inviting and these remain the main entrance to the church. Likewise the access to the hall at the rear of the building was made accessible compliant and this remains the main access point to the hall.

16. The church itself has a separate welcome area where refreshments are served to those entering the church to worship and is the main entrance to the church.

17. The primary result of the extension/annexe is a comfortable and welcoming place for people to drop in and sit and chat. Drinks are served to make visitors feel welcome. Further additional activities that had not been envisioned also use this area, such as mental health and youth groups, and groups for autism and dementia.

18. In contrast, the old hall is used for more active events, such as dance and as a sports hall and mothers and toddlers groups. It is therefore a much noisier environment, which would be inappropriate for the activities envisaged for the new extension/annexe.

19. Mr Southcombe estimated that his congregation on Sundays amounted to approximately 100 people, whereas the weekly footfall for the site as a whole was approximately 1,000.

LEGAL FRAMEWORK

20. The requirements for zero-rating of construction services are set out in s30 Value Added Tax Act 1994 (“VATA”) and Group 5 of Schedule 8 to that act.

21. Section 30(1) and (2) of VATA state as follows:-

“30(1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section—

(a) no VAT shall be charged on the supply; but

(b) it shall in all other respects be treated as a taxable supply;

and accordingly the rate at which VAT is treated as charged on the supply shall be nil.

30(2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified.”

22. Item 2 of Group 5 of Schedule 8 states that the following will be treated as zero-rated:

“The supply in the course of the construction of—

(a) a building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose or a relevant charitable purpose; or

(b) any civil engineering work necessary for the development of a permanent park for residential caravans,

of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity.”

23. Note 16 and 17 of Group 5 state:-

“(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.”

24. I was also referred to:

Bryan Thomas Macnamara v HMRC [1999] Lexis Citation 825, Decision 16039

Cantrell v Customs & Excise Commissioners [2000] EWHC Admin 283

Cantrell v Customs & Excise Commissioners (No.2) [2003] STC 486

St Brendan’s Sixth Form College v HMRC [2018] UKFTT 128 (TC)

DISCUSSION

25. As stated above, many of the original concerns of HMRC related to the original Design and Access Statement, parts of which had been superseded by the changes made in order to reduce the costs of the project to more acceptable levels.

26. As a consequence of considering these revisions HMRC accepted that:

(a) the new extension/annexe is capable of functioning independently from the existing building,

(b) the main access to the annexe is not via the existing building, and

(c) the main access to the existing building is not via the annexe.

27. In other words HMRC accepted that the conditions set out in Note 17 are fulfilled.

28. HMRC also accepted that the new extension/annexe is intended for use solely for a relevant charitable purpose.

29. The only point at issue therefore is whether the new building is an annexe to or an enlargement or an extension of the existing buildings for the purposes of the legislation.

30. Guidance on this point has been provided in a number of earlier cases. In *Macnamara* at [13] the Tribunal concluded:

“The scheme of the 1994 code is to exclude from the expression “construction of a building” a series of building works. Note (16) deals with these in descending order of their degree of integration with the existing building. Conversions, reconstructions and alterations of existing buildings, the most closely integrated, are excluded. Enlargements of existing buildings are then excluded, the word “enlargement” connoting structural work producing an overall increase in size or capacity. The word “extension” in relation to an existing building refers, we think, to building work which provides an additional section or wing to that existing building; the degree of integration is one stage less than with enlargements. Then come “annexes” which, as a matter of principle, are also excluded. The term annexe connotes something that is adjoined but either not integrated with the existing building or of tenuous integration. Annexes intended for use solely for relevant charitable purposes are re-instated into the zero rated class by Note (17) only if they are capable of functioning independently from the existing building and if both the main access to the annexe is not via the existing building and the main access to the existing building is not via the annexe. Otherwise all annexes are excluded from zero-rating.”

31. In *Cantrell (No. 2)*, at [17], the Vice Chancellor said:

“An annexe is an adjunct or accessory to something else, such as a document. When used in relation to a building it is referring to a supplementary structure, be it a room, a wing or a separate building.”

32. In *Cantrell* at [4] Lightman J said:

“The two-stage test for determining whether the works carried out constituted an enlargement, extension or annexe to an existing building is well established. It requires an examination and comparison of the building as it was or (if more than one) the buildings as they were before the works were carried out and the building or buildings as they will be after the works are completed; and the question then to be asked is whether the completed works amount to the enlargement of or the extension or the construction of an annexe to the original building. I must however 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 flaws the decision. First 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 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 of the building or buildings at the two points in time, having regard (inter alia) 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 uses are irrelevant, save possibly to illuminate the potential for use inherent in the building or buildings.”

33. The first point to be established following *Cantrell* is that the judgement is to be made at the time of the supply, ie, at the time of the construction. The original Design and Access Statement is therefore of limited use. What matters is the building as it was eventually built, not the original plans.

34. On that basis, the building which was eventually built shared a dog-leg wall with the church building and was connected to the church building by two fire escape doors, one of which was locked closed and could not be opened from either side and the other of which could only be opened from the church side. The fire escape doors were therefore of very limited value as an inter-connection between the new building and the church.

35. The new building was however also connected to the hall at the rear of the church building, by a covered corridor area which runs along the back of the church and the new extension/annexe and along the length of the hall building. This corridor is covered and has doors at both ends, but it has no heating.

36. In *St Brendan's* the new building in question in that case was connected to existing buildings by a covered bridge, at first floor level, which similarly had doors at both ends but no heating. In *St Brendan's* it was held that this was not sufficient to render the new building part of the existing building and that the new building was in fact to be treated as a separate building for the purposes of zero-rating.

37. In this case I come to the same conclusion as regards the linking corridor, in that I find that the existence of this corridor does not render the new building an extension of the hall building. Even if it were considered that this corridor was an effective link to the hall building I do not believe that this would determine the issue as to whether the new building is an extension or an annexe to this hall building.

38. Nevertheless, the new building is undoubtedly linked to the church building because it shares a common wall, a dog-leg wall, along the whole of its length. Does this make it an extension of the existing building or an annexe to that building?

39. Lightman J made it very clear in *Cantrell* that the actual use to which the building is subsequently put is of relatively limited importance. What is important is to consider:

- (1) the similarities and differences in appearance,
- (2) the layout, the uses for which they are physically capable of being put, and
- (3) the functions which they are physically capable of performing.

40. As regards appearance, the new building is of a totally different design. It is modern in style and constructed from dark powder coated aluminium and glass, totally different from the very old-fashioned and austere appearance of the existing church, which is typical of brick built churches from the early part of the 20th Century.

41. As regards its layout, the new building is clearly not suitable for use as a church, although it could perhaps be used for similar purposes to those for which the hall is used, even though it is not in practice so used at present. It is not however directly attached to the hall building, such that it might be regarded as an extension of the hall building, and the only integration with the church building is via the fire escape doors, which can only be operated from the church side. These doors could perhaps be adapted by the fitting of new door furniture such that they could be opened from both sides, but this was not the case at the time of the supply of the building services, which is the point in time at which I am required to carry out the necessary comparisons.

42. It might be asked if the new building could be considered to be an extension of the church building if, for instance, it could be used as a social/coffee area for the congregation following a Sunday service. The church building already has its own coffee/welcome area, at the front of the church, and does not need an additional area of this nature. However, given that the only access between the church building and the new building would be via a single set of fire escape doors that can only be opened from the church side, I do not consider that the new building could satisfactorily be used as an extension to the church building in this manner.

43. It was suggested that the new building might be used by church-goers as an additional toilet facility. The existing church building does contain toilet facilities but it was suggested that the new building might provide additional toilet facilities via the inter-connecting doors. However, although these interconnecting doors might provide a means for church-goers to leave the church to make use of the toilet facilities, they would be unable to re-enter the church other than by exiting the new building via its main entrance and re-entering the church by its main entrance. This does not therefore seem a likely or sensible use of the new building.

44. In *Cantrell (No.2)*, the Vice Chancellor described an annexe as being:

“an adjunct or accessory to something else, such as a document. When used in relation to a building it is referring to a supplementary structure, be it a room, a wing or a separate building.”

45. In my view, having considered the factors set out by Lightman J in *Cantrell*, the new building under consideration in this appeal is a supplementary structure. It is not

an extension to the existing buildings, lacking as it does any ability to be used for any common activities with existing buildings. It is simply too separate from the hall to be used for a common activity and it cannot be used for a common activity with the church because the only connection with the church is via a single set of fire escape doors which can only be opened from the church side.

46. I therefore find that the new building is an annexe for the purposes of Notes 16 and 17 to Group 5 Sch 8 VATA. HMRC has already conceded that the new building fulfils the tests set out in Note 17 (a) and (b) and I therefore find that the new building qualifies for zero-rating as contended by The Church.

DECISION

47. For the above reasons therefore I have decided that this appeal should be ALLOWED.

48. 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.

**PHILIP GILLETT
TRIBUNAL JUDGE**

RELEASE DATE: 24 SEPTEMBER 2019