



TC07828

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/02433

BETWEEN

GREENSPACE (UK) LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE Rachel Short

The hearing took place on 16 July 2020. With the consent of the parties, the form of the hearing was V (video) through the Tribunals' video platform.

A face to face hearing was not held because having considered representations from the parties and the overriding objective, it was decided that the hearing would be conducted remotely, in the interests of fairness and justice.

I directed that the hearing should be in private on the basis that it was not in the public interest during the pandemic to hold a face to face hearing open to the public and that it was in the public interest for the hearing to go ahead remotely which by necessity meant it must be in private.

Hui-Ling McCarthy QC and Edward Hellier of 11 New Square instructed by Mazars LLP solicitors for the Appellant

Ms Harry Jones, video presenting officer and Sandy Mackie Policy Advisor of HM Revenue and Customs' Solicitor's Office for the Respondents

DECISION

INTRODUCTION

1. This is an appeal by Greenspace (UK) Limited (“Greenspace”) against assessments to VAT for the 12/17 to 12/19 periods in respect of its supply of insulated roofing panels to domestic customers in the UK. The total amount of VAT in dispute is £2,581,092.¹
2. HMRC assessed Greenspace to VAT on the basis that its supplies of roofing panels made for the 07/14 to 11/17 VAT periods were standard rated supplies. HMRC issued a decision letter dated 20 December 2017, and confirmed their position on review by a letter dated 28 February 2018. The Appellant appealed to this Tribunal against those assessments on 28 March 2018.
3. Greenspace consider that VAT should be charged on the disputed supplies at the reduced rate of 5% because the supplies of roofing panels are supplies of insulation for roofs which should be treated as the supply of “energy saving materials” under Note 1(a) Group 2 of Schedule 7A Value Added Tax Act 1994 (“VATA 1994”).

PRELIMINARY MATTERS

Joining of cases

4. Greenspace made appeals against HMRC’s assessments for subsequent periods (periods 12/17 to 12/19) in respect of its supplies of insulated roofing panels. These appeals have been consolidated under TC/2018/02433:
 1. By a Direction of 21 November 2018 the cases: TC/2018/03961, TC/2018/04970 and TC/2018/05794 were consolidated under appeal number TC/2018/02433.
 2. By a Direction of 28 June 2019 the cases: TC/2018/06256, TC/2019/00191 and TC/2019/01817 were consolidated under appeal number TC/2018/02433.
 3. By a letter of 24 April 2020 the cases: TC/2019/06370, TC/2020/00549 and TC/2020/1348 were consolidated under appeal number TC/2018/02433.
5. Hardship applications have been accepted by HMRC for each of the appeals consolidated under TC/2018/02433.
6. Appeal number TC/2018/02433 has been designated as a complex appeal.

Issue two - Out of time assessments

7. The original appeal raised issues concerning whether certain assessments for the 07/14 to 11/17 VAT periods made by HMRC were made out of time. HMRC accepted on 17 June 2020 that those assessments were made out of time and therefore the issue referred to by the parties as “ground two” is no longer in dispute.

Addition of 03/19 period

8. At the hearing on 16 July 2020 Greenspace explained that a separate appeal had been made for the 03/19 VAT period on 30 May 2020, designated as TC/2019/01817. There had been some doubt whether that appeal had been received by HMRC and whether it could be treated as having been made in time.

¹ Figures taken from the parties’ skeleton arguments and adding the amount for the 03/19 period.

9. At the hearing HMRC confirmed that, if relevant, they had no objection to the time limit being extended so that the appeal in respect of the 03/19 period could be treated as made in time. However, HMRC pointed out a hardship application had not been accepted in respect of the appeal for this period.

10. HMRC confirmed on 5 August 2020 that they had accepted Greenspace's hardship application for the 03/19 period.

11. I therefore direct that the time limit for the making of the appeal for the 03/19 period be extended so that this appeal is treated as made in time and that this appeal (originally designated as TC/2019/01817) be consolidated with TC/2018/02433.

BACKGROUND FACTS

12. Greenspace is a UK based company whose main business in the UK is the supply of conservatory roof insulation in the form of insulated roof panels.

13. Those panels are made up of a thick layer of "close cell extruded polystyrene foam" with the trade name Styrofoam, manufactured for Greenspace by a company called Thermotec.

14. In addition Greenspace's roof panels are protected with a thin coating of aluminium on the top and bottom of the panel and a final protective powder coating.

15. The process of supplying the roof panels to customers in the UK involves:

- (1) An initial survey by Greenspace and a providing quote to the customer.
- (2) A technical survey with detailed measurements carried out by Greenspace of the customer's requirements.
- (3) Greenspace ordering Styrofoam insulation panels from Thermotec in accordance with the measurements obtained from the technical survey, including the specific depth required to fit within the customer's existing roof framework and with a tongue so the panels can be slotted into that roof framework.
- (4) The protective coating is then added by a separate company, Superior, usually to match the customer's existing roof colour.
- (5) Greenspace then install the shaped and treated roof panels by removing the top caps, end caps and existing roofing panels from the customer's conservatory, slotting the new panels into place and replacing the top caps and end caps. This usually takes only a day to complete.

THE LAW

16. **VATA 1994 s 29A** provides for the reduced rate of VAT at 5% to be charged on "any supply that is of a description for the time being specified in Schedule 7A"

17. **Group 2 Schedule 7A** refers to:

"Group 2 – Installation of energy saving materials

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.

18. **VATA 1994 s 96(9)** provides that Schedule 7A is to be interpreted in accordance with the notes contained in that schedule.

19. **The notes to Schedule 7A** refer to:

“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 AUTHORITIES REFERRED TO

20. I was referred to these authorities

(1) *Revenue & Customs Commissioners v Pinevale Limited* [2014] UKUT 202 (TCC)

(2) *Pinevale Limited v Revenue & Customs Commissioners* [2012] UKFTT 606(TC)

(3) *Revenue & Customs Commissioners v Wetheralds Construction Limited* [2018] UKUT 173 (TCC)

(4) *Wetheralds v Revenue & Customs Commissioners* [2016] UKFTT 827 (TC)

(5) *Beco Products Limited; BAG Building Contractors* [2004] BVC 4100

(6) *Adam Charles Groves v Revenue & Customs Commissioners* [2017] UKFTT 865 (TC)

(7) *Customs & Excise Commissioners v Marchday Holdings Limited* [1997] STC 272

(8) *Coleborne (T) & Sons Ltd v Blond* [1951] 1KB 43

(9) *Expert Witness Institute v Customs & Excise Commissioners* [2002] STC 42

EVIDENCE REFERRED TO:

14. I was provided with physical samples of:

1. A Greenspace roofing panel
2. A cross-section of a Greenspace roofing panel
3. A sample of a “Pinevale type” roofing panel.

21. I was directed to watch some video evidence:

(1) Three promotional videos used for selling Greenspace’s product: an installation video and two advertising videos.

These referred to Greenspace’s roof panels as solid panels intended to replace existing panels and fitting into customers’ existing roof structures. A customer’s glass or polycarbonate panels would be removed and replaced with Greenspace’s moulded panels which could be coated with a weatherproof covering with the customer’s choice of colour.

(2) A “You Tube” video titled “How our Greenspace conservatory roof panels are made” showing the process from

- (a) measuring up for a client’s specific needs,
- (b) cutting and finishing the aluminium covering to size,
- (c) fixing the Styrofoam panel to the aluminium covering,

(d) removing the customer's existing panels and slotting in the new Greenspace panels.

22. I was also provided with:

(1) Photographs of example Greenspace advertising stands.

The printing on the advertising stands stating "transform your conservatory in just one day with insulated conservatory roofing panels".

(2) A sample Greenspace training manual including the statement:

"Our panels are insulated replacements. They replace the existing panels NOT THE ROOF FRAME"

(3) A screenshot of Greenspace website referring to "insulated conservatory roofing panels fitted in just one day".

(4) Example quotes and invoices

Dated April 2017 and July 2017 referring on the invoice to "installation of conservatory roof panels" and referring on the quote to the measurements for the panels, the installation and panel cost with a 5% discount for quantity and a 15% discount for "market survey". The VAT rate on the quote is printed as 20% but struck through to show the rate as 5%.

Greenspace explained that this change in the printed VAT rate was as a result of uncertainty in the industry about the correct VAT rate in the light of HMRC's Business Brief 13/2015 acknowledging that the scope of the UK's reduced rating may have been too wide and to draw customers' attention to this.

(5) A sample blank Greenspace order form headed as "Insulated conservatory roof order form" and referring to "Insulated conservatory roof panels" including details such as:

Tick box options for style of roof and whether Greenspace to arrange building control.

Tick box options for "new frame, new cappings, air vent delete, existing leaks, soil pipe, flue"

(6) Greenspace's standard terms and conditions including statement at section 14 that

"Leaks (existing or post install) cause by sections of the property or conservatory that is not part of the scheduled works overleaf" are not covered by the Greenspace warranty.

(7) Sample flyer adverts, including these statements:

"Our lightweight, insulated roof panels are tailor-made to replace your existing glass or polycarbonate ones, meaning we can fit them in just 1 day" and

"Our lightweight, insulated panels are tailor-made to fit to your existing roof structure. We fit them in less than a day, causing you as little disruption as possible" and

"Our lightweight, insulated panels are an upgrade from the usual glass or polycarbonate. They will give you back a useable conservatory without the need for completely replacing the whole roof"

(8) The Thermotec patent

Granted to Thermotec Roofing Systems Limited and dated 30 March 2016 and referring to “a method of lowering the thermal conductivity of a building roof”.

(9) A diagram showing the elements of a customer’s conservatory roof which were not replaced as part of the Greenspace roof panel replacement process, including:

- (a) Gutters
- (b) Rafter bars
- (c) Jack rafters
- (d) Ridges
- (e) Spider bars
- (f) Finials and crestings.

(10) Sample pictures of conservatory roofs with some or all panels replaced with Greenspace roof panels.

(11) Photograph of mocked up version of roofing material as described in the *Wetheralds* case (created by Mr Jacomb).

(12) A Completion Certificate issued by Torridge District Council with a completion date of 15 January 2020 referring to:

“New solid panels replacing translucent panels within existing conservatory roof”

(13) A Completion Certificate issued by Chichester district council with a completion date of 8 November 2019 referring to:

“New roof structure incorporating solid panels on existing conservatory”

Oral evidence

Evidence of Mr Andrewes, an officer of HMRC

23. The Tribunal was provided with a witness statement from Mr Andrewes dated 12 December 2019. The Appellant confirmed that it did not dispute any of the statements made by Mr Andrewes, whose statement was taken as read. Mr Andrewes was not cross-examined and the statements made in his witness statement were accepted.

24. Mr Andrewes witness statement dealt with HMRC’s process in identifying and assessing Greenspace to additional VAT from the first VAT assurance visit in October 2017, the subsequent correspondence between the parties leading up to Greenspace’s appeal to the Tribunal and a brief overview of HMRC’s arguments about why VAT is due at 20% not 5% on the supplies made.

Evidence of Mr Jacomb, Managing Director of Greenspace

25. Mr Jacomb provided a witness statement dated 5 December 2019 and a supplementary witness statement dated 3 April 2020 both of which were taken as read. Mr Jacomb provided oral evidence to the Tribunal and was cross-examined by Ms Jones.

26. Mr Jacomb explained that “standard” conservatory roofs are made of unplasticised polyvinyl chloride (UPVC), aluminium or wooden frames into which glass or polycarbonate panels are fitted. This provides no insulation or temperature regulation.

27. The roofing panels provided by his company were designed specifically to insulate conservatory roofs. The patent for the Thermotec panels refers to “a method of lowering the thermal conductivity of a building roof”.

28. The Greenspace panels are designed to fit within and better insulate an existing roof, they are designed with a custom built tongue allowing the insulating panels to be slotted into the bars of an existing roof structure.

29. Mr Jacomb said “because the panels are made to measure and because the width and depth of the tongue is tailored to the specifications of the existing structure, Greenspace can simply apply insulation to the existing roof of a conservatory” and described what Greenspace did as simply installing panels within a roof.

30. To fit the Greenspace panels:

- (1) Existing top caps and end caps are lifted from the roof and the existing glass or polycarbonate panels are removed.
- (2) The new roof panels are slotted into place in the existing structure.
- (3) The tops and end caps are replaced.
- (4) Everything else about the roof remains the same; gutters, rafter bars, jack rafters, rafter covers, cap, end caps and cresting.

31. Mr Jacomb also told the Tribunal that

- (1) In his view a “roof” of a conservatory is everything above the line of the windows.
- (2) His customers did not think they had acquired a new roof after the Greenspace panels had been inserted; while the new panels had a new function compared with the old panels (the provision of insulation), the framework of the existing roof remained intact.
- (2) Greenspace’s standard contract terms did not provide customers with a guarantee against leaks or other issues relating to the effectiveness of their roof after the panels had been inserted.
- (3) Some customers replaced only some of their existing panels with the Greenspace panels, but most replaced all of their existing panels with the Greenspace panels.
- (4) The main reasons given by his customers for purchasing the Greenspace panels were linked to the provision of better insulation.
- (5) While Greenspace’s online marketing material did refer to “conservatory roof replacements” this was in order to ensure search engine optimisation and was not intended to provide an accurate description of what Greenspace’s supplies actually were.
- (6) Mr Jacomb referred to a sample of two building regulation Completion Certificates issued by two different local authorities one of which referred to the work to be done as “new solid panels replacing translucent panels within existing conservatory roof” the other, which applied to one of the few occasions on which Greenspace had replaced the whole of a roof to “new roof structure incorporating solid panels on existing conservatory”.

Comparison with Pinevale

32. Mr Jacomb referred to the sample piece of UPVC conservatory roofing material which the Tribunal had been provided with labelled “Pinevale” and explained that he had been informed that this was the roofing material which was the subject of dispute in that case. He explained the main difference between this roofing material and Greenspace’s material:

(1) The Pinevale panels were of uniform thickness and were not tailor made to fit into an existing roof structure. If the panels would not fit within the existing roof structure, the roof structure would have to be changed. He told the Tribunal that he had obtained this information by speaking to a representative at Pinevale (Mr David Anderson).

(2) The Pinevale panels were in his words “external roof covering”, Greenspace’s products were comprised of the top element (the aluminium) which was roof covering, but the main part was insulation and not roof covering.

(3) Unlike the Pinevale panels, the Greenspace panels were opaque.

Comparison with Wetheralds

33. The product supplied in the *Wetheralds* case entailed a far more lengthy and complex installation including a new wooden structure to which the insulation was attached along with other roofing elements, amounting to the provision of a new roof.

AGREED MATTERS

34. The relevant background facts are not in dispute between the parties.

35. The parties also agree that:

(1) The roofing material supplied was supplied to domestic customers.

(2) The supplies in question comprise both the supply of installing the roofing material and the supply of the roofing material itself.

(3) The roofing panels supplied provide substantial insulation for conservatory roofs.

THE ISSUE IN DISPUTE

36. The question for this Tribunal is whether the roofing material supplied by Greenspace to their customers in the UK properly falls within the definition of “insulation for roofs” at Note 1(a) of Group 2, Schedule 7A VATA 1994 and so is eligible for the reduced rate of VAT.

37. The onus of proof is on Greenspace to demonstrate that the roofing material which it has supplied to its customers falls within this definition.

GREENSPACE ARGUMENTS

Approach to interpretation

38. Greenspace accepts that the lower VAT rate for energy-saving material is an exemption and as such its scope has to be interpreted strictly. However, they say there is a difference between a “strict” construction and a “restrictive” construction; HMRC’s approach which excludes the supplies made by Greenspace from the exemption because it includes 2mm of weatherproofing material in addition to insulation is “restrictive”.

39. Greenspace refer to other cases in which HMRC have argued for a less restrictive approach to exemptions, such as in the *Adam Charles Groves* decision, where HMRC treated the demolition of walls as an “entire construction project” [33].

40. Ms McCarthy referred to the *Beco* decision to demonstrate whether the distinction between building and construction projects and providing insulating material should lie; the taxpayer in *Beco* provided insulating blocks but then also filled them with concrete. HMRC accepted on those facts that had the supply been merely of the blocks themselves, that would have fallen within the exemption for energy saving materials.

Comments on *Pinevale*

41. Greenspace says that the decision in *Pinevale* can be distinguished from their case and stress that the only principle established in that Upper Tribunal decision is that there is a distinction between insulation for roofs and the supply of the roof itself, and which category a particular supply falls into is a question of fact and degree.

42. The decision in *Pinevale* does not mean that there is a principle of law that the supply of roof panels must be treated as the supply of a roof and not insulation for a roof; *Pinevale* merely establishes that insulation for roofs does not include the supply of a roof itself with insulating properties.

43. The facts in *Pinevale* (as well as the nature of the product supplied) were different than Greenspace's facts because the supply in *Pinevale* included the supply of other "roof furniture" as well as the insulating panels, in some cases as part of the procedure for replacing the whole roof. Equally, the panels supplied in *Pinevale* did not have the extensive insulating properties which the Greenspace panels have; they were predominantly replacement roof coverage.

44. Similarly, the decision in *Wetheralds*, accepting the approach of the Upper Tribunal in *Pinevale*, identified the relevant question as "whether the supply of energy saving materials is "for" a wall, floor etc or a more extensive supply, such as the wall, floor ceiling itself" [31]. This can give rise to "fine distinctions" and Greenspace's supply is predominantly thick Styrofoam insulation and not the supply of the roof itself.

45. *Wetheralds* can also be distinguished on its facts; the supply made in that case was more extensive, including guttering, rainwater goods and plasterboard ceiling, described as "all the elements comprised in a roof save for the original glazing bars"[30] with marketing material referring to a "fully insulated tiled roof".

Essence of the supply

46. Greenspace provided the Tribunal with samples of its roofing material which it said it comprised of 95% Styrofoam, the insulating material, with a thin aluminium coating. Greenspace argue that the essence of the supply made to their UK customers is of insulation, the thin aluminium coating on the Styrofoam supplied does not detract from this. The patent for the Thermotec panels used by Greenspace makes their purpose clear "a method of lowering the thermal conductivity of a building roof".

47. On that basis the supply made to customers is not, in any meaningful sense, the supply of the roof itself; the customers for this product already have a pre-existing conservatory roof to which the Greenspace roofing panels are applied. The planning consents support this, making it clear that the Greenspace panels are replacing panels within an existing roof.

48. It is clear from the marketing material supplied, that what consumers want and what is being paid for is improved insulation for their existing conservatory, ensuring that the temperature of the conservatory becomes neither too hot nor too cold, not a new roof. The reference in some online marketing material to "conservatory roof replacements" is to ensure search engine optimisation and is not intended to be an accurate description of what is actually being supplied.

49. In some cases (but not the majority of cases), Greenspace supplies replacement panels for only part of the existing roof.

New roof or improved roof

50. Whether what has been supplied is a roof, or something for a roof, is a question of “fact and degree” and should be approached by looking at whether what Greenspace has supplied is a “new” roof or the alteration of an existing roof. The approach of the courts in the *Marchday* should be adopted:

“the scale of alteration may be almost infinite. At one end one could have what would be regarded plainly as de minimis, for example the change of a door handle. At the other there may be virtually nothing left of the original building. Somewhere along that line, it is possible to the original building has ceased to exist, what is being done cannot sensibly or realistically be described as an alteration of it” [279a –b]

51. In applying the “sliding scale” to decide whether what has been supplied is the roof itself, or insulation for the roof, the test of whether something new has been created is relevant; Greenspace’s supplies which are the subject of this appeal have not created a new roof. In the words of the judge in *Coleborne* what has been supplied is “merely a change of dress but not a change of character” [p 47].

52. This approach is supported by the fact that no building or construction work is required to incorporate the Greenspace panels into an existing roof; the new panels are tailor made so that they can be slid into the existing roof framework. The panels are not self-supporting, but are built to slot into place in the existing roof structure with no disturbance to the existing roof structure.

53. Greenspace does in some cases create new roofs for customers, but in those circumstances it charges VAT at the standard rate.

Form vs substance

54. Greenspace point out that it would be perverse that if the Styrofoam insulation had been supplied and applied to the customers’ existing roof panels, it would be treated as energy saving material, but because their supply entails the removal of existing panels and replacing them with insulation plus a thin aluminium weather proofing coating, it is not treated as the supply of energy saving material.

Conclusion

55. By reference to the test stated in *Pinevale* and applied in *Wetheralds*, the supplies made by Greenspace are of insulation for a roof plus installation of the same, not the supply of a roof itself.

HMRC’s ARGUMENTS

Approach to interpretation

56. HMRC say that the reduced rate of VAT provided for “energy saving materials” is a relief from the normal rate of VAT and so should be construed restrictively.

57. Insulation has a specific function that is separate and distinct from materials that can also serve another purpose. When it is combined with other materials, wholly or in part, it does not fall within the relief at Note 1(a) Group 2, Schedule 7A VATA 1994.

58. This is not an overly restrictive approach to the legislation, but is based on the clear words of the exemption. In contrast, Greenspace’s approach would result in extending the exemption to “insulated roof panels” which are not referred to in the legislation.

Comments on *Pinevale*

59. HMRC rely on the statements of the Upper Tribunal in *Pinevale* that there must be a distinction between insulation material for a roof and the roof itself; the reduced rate of VAT can only apply if there is a roof to which insulation will be applied. This is made clear at paragraph [17] to [19] of that decision:

“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 insulation material is applied.” And

“The error, in my judgment, made by the Tribunal was to construe “insulation for roofs” as extending to the roof itself when it has energy-saving properties, rather than being confined to insulating materials attached or applied to a roof”.

60. HMRC rely on the later Upper Tribunal decision in *Wetheralds* to demonstrate that the decision in *Pinevale* is binding and should be followed by this Tribunal:

“[28] As to whether *Pinevale* should be followed, while it is not strictly binding on us, we would follow it unless it was in our judgment obviously wrong. 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”.

Essence of the supply

61. This approach means that any questions concerning the nature of the supply and in particular whether it is a single supply of insulation or a composite supply (by reference to EU law decisions such as *Levob*) are not the correct starting point for the analysis:

“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” [31]

“In our view...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 replacement roof” [32]

62. In this case, while it is accepted that existing struts, glazing bars caps and cresting were left in place so that the Greenspace roofing materials can be slotted in, the roofing materials provided were “roof panels”, similar to those provided in *Pinevale* and those panels form the roof of the conservatory.

New roof or improved roof

63. In HMRC’s view, a conservatory which had only struts and glazing bars could not be described as having a roof; the supply of a new roof is the supply of the roof covering, which in this instance is the roof panels supplied by Greenspace. As made clear by Greenspace’s training manual, its roofing material replaces existing roof panels (either some or all of them), the new panels performing the same function as the old panels, they are building materials not “insulation for roofs”.

64. In removing some or all of their clients’ existing roof panels and replacing them with new roof panels, Greenspace has made a standard rated supply of construction services. The overriding supply by Greenspace is the supply of a new roof, a new roof which contains insulating material. This is, by reference to the test in *Wetheralds* “a more extensive supply” than insulation for a roof.

Form vs substance

65. HMRC accept that the roof panels supplied by Greenspace are not the same as those provided by Pinevale and that, by volume, they are mainly made up of insulating material. However, the function of the roof panels provided by Greenspace is not confined to insulation because they form part of the conservatory roofs themselves; without the roof panels there would be no roof. The Greenspace product adds to, or forms part of the roof, in a structural sense, so it cannot be “energy saving materials”. “Energy saving materials” as envisaged by Note 1(a) should not affect the structure of the building for which they are used.

66. As stated in *Pinevale*:

“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 Schedule 8”[17]

67. And further supported by *Beco*:

“The legislation is not talking about the wall itself. The legislation looks to the materials supplied which will, following installation, form part of the wall, ie part of the final building” [31]

68. An approach which was followed by the Tribunal in *Adam Charles Groves*:

“Parliament has legislated for a reduced rate of VAT to apply to the supply and installation of energy-saving materials not the construction of energy efficient walls. The totality of a new cavity insulated wall undoubtedly improves the thermal efficiency of the PRC house but that is not the test in Note 1(a)” [39]

69. The fact that Greenspace’s customers want to install their roof panels in order to make energy savings is not the determining factor; Greenspace are providing something more than energy saving materials.

Conclusion

70. Greenspace have supplied something which is more than mere insulation, the roofing panels supplied by Greenspace amount to the supply “of the roof itself” and so should be subject to VAT at the standard rate.

FINDINGS OF FACT

71. On the basis of the evidence which I saw and heard I find as a fact that:

(1) Greenspace procured Styrofoam insulation panels manufactured and cut to size by Thermotec. Those insulation panels were coated in a protective coating by another company, Superior.

(2) The resulting tailor made, weatherproofed and insulated roofing panels, were supplied by Greenspace to its customers in the UK.

(3) The roofing panels provided by Greenspace could be slotted into the existing framework of a customer’s roof.

(4) Greenspace did not replace their customers’ existing roof framework when it installed its roofing panels. Elements of the roof were either left in place (the struts and glazing bars) or removed and put back as part of the installation process (the top caps and end caps).

DISCUSSION AND DECISION

Approach to interpretation

72. Schedule 7A VATA 1994 contains exemptions from VAT. Therefore its terms must be interpreted strictly. The parties agreed with this. However, Greenspace suggested that HMRC's approach to applying the exemption to Greenspace's roofing panels went beyond a strict interpretation to the kind of restrictive interpretation which the court warned against in *Expert Witness Institute*:

“The court must recognise that it is for the supplier whose supplies would otherwise be taxable to establish that it comes within the exemption, so that if the court is left in doubt whether a fair interpretation of the words of the exemption covers the supplies in question, the claim to the exemption must be rejected. But the court is not required to reject a claim which does come within a fair interpretation of the words of the exemption because there is another, more restrictive, meaning of the words which would exclude the supplies in question”[17],

73. I have considered whether it is a fair interpretation of the words “insulation for roofs” to include the type of roofing panels supplied by Greenspace. I do not consider that Greenspace's roofing panels fall within a fair interpretation of those words because:

(1) The wording in the legislation is making a clear distinction between something which is “for” a roof and something which “is” a roof. This is supported by the other categories of supply listed in Schedule 7A, all of which are the type of product which are added to an existing structure, rather than being a structure themselves. This is in line with the test as it was formulated and applied in *Pinevale* and *Wetheralds*.

(2) The primary test in the legislation is one of form; is what has been supplied a roof or something for a roof. Greenspace's roof panels are in form roof coverings. Greenspace has provided a supply in the form of a roof.

(3) I accept that the Greenspace panels have a dual function; they provide both a roof covering and insulation. However, in my view the question of whether they have that additional function, of providing insulation, is not relevant.

(4) Any attempt to argue about the “substance” of the supply, or the dual nature of the supply, falls into the error of law which was rejected in *Pinevale* of ignoring the manner in which this legislation categorises the type of supply which can fall within this exemption, which is by reference only to the form of the supply. An approach which was rejected by the Upper Tribunal in *Wetheralds*:

“The FTT erred by considering the application of *Pinevale* to the facts only after determining, on a *CPP/Levob* analysis, that the supply was single supply of insulation. Such an approach begs the very question which must be determined, namely whether the supply was “of insulation for roofs”. [31].

74. I do not agree with Greenspace that excluding their roofing panels from the scope of this exemption is applying an overly restrictive meaning of this exemption by reference to a more restrictive meaning of the words of Schedule 7A: Those words refer to “insulation for roofs” and by definition cannot apply to something which is itself part of a roof.

Comments on *Pinevale*

75. Both parties referred extensively to the FTT and UT decisions in *Pinevale*. The UT decision in *Pinevale* is binding on me. I reject Greenspace's attempt to distinguish *Pinevale* both;

(1) In terms of distinguishing the nature of the supplies made; I accept that what was supplied by Greenspace is not the same in terms of materials and function as what was supplied by *Pinevale*, but in form what has been supplied is the same thing; a form of roof covering, and

(2) In terms of arguing that the predominant purpose of the supply here is different, because the *Pinevale* panels did not provide any insulation whereas the Greenspace panels are by volume 95% insulation. As I have said, and as the Upper Tribunal said in *Pinevale* and *Wetheralds* questions of the predominant purpose of the supply are not the correct starting point:

“The error in my judgment, made by the Ft-T, was to construe ‘insulation for roofs’ as extending to the roof itself when it has energy saving properties, rather than being confined to energy saving materials attached to or applied to a roof” [19] *Pinevale*

“The question of law which fell to be determined by the FTT was not whether the supply by *Wetheralds* was single supply and if so, its nature. The question was whether that supply was “insulation for roofs” within the meaning of Note 1(a) of Group 2 to Schedule 7A” [25] *Wetheralds*

76. I understand that in asking whether what has been supplied in this case fits within the exemption at Group 2 of Schedule 7A it is tempting to start, as the First-tier Tribunal did in *Pinevale*, with an approach which assumes that what has been supplied can be analysed as a something other than a single supply. However, the Upper Tribunal in *Pinevale*, and more clearly in *Wetheralds*, rejected that approach because “it begs the very question which must be determined”.

77. The Upper Tribunal did not explain in any more detail why, in order to avoid this circular logic, the starting point should be the form of the supply as a single supply, with no reference to ancillary or subordinate elements, but was very clear that because what had been supplied could be defined as a roof, it could not be treated as the supply of insulation:

“The old roofing cover was removed and a new roof covering (tiling) was added..... However one defines “roof” we can see no reasoned basis on which that supply was no more than insulation” [31]

78. On that basis the supplies made by Greenspace must also be treated as something which is more than insulation, the supply of a roof rather than something for a roof.

Essence of the supply

79. Greenspace argued that its supply of roofing panels did not amount to a roof or a replacement roof. I do not agree that this is a fair description of what has been supplied by Greenspace.

80. Greenspace attempted to argue that because some elements of the roof were not replaced, the roof panels which it was supplying could not be treated as the supply of “a roof” and particularly stressed that in the (minority) of cases in which the whole of the roof was replaced, they did charge VAT at the full 20% rate.

81. Ms McCarthy referred to authorities which suggested that to decide what had been supplied, and in particular whether something new had been supplied, the correct approach was to look at the position at the start and at the end of the supply and that the question was one of “fact, degree and impression”, referring to the decisions in *Coleborne* and *Marchday*: had a new roof been supplied, or had the old roof simply been improved?

New roof or improved roof

82. I do not agree that Greenspace's supply of roof panels can be treated as anything other than the supply of a new roof (or in cases when only some panels were replaced, part of a roof). This is because:

(1) As HMRC pointed out, the essence of a roof is to protect against the elements. The roofing panels supplied by Greenspace did that. The elements which were not replaced by Greenspace (struts, caps, tops etc) provided only the framework of the roof to which the main roof covering was attached (or slotted in this case). In my view, no reasonable person, looking at what remained when the old panels had been removed and before the Greenspace panels had been added would describe the remaining structure as a roof. Even some of Greenspace's own marketing materials referred to what was being supplied as a "new roof" rather than roofing panels (such as the sample order form which I was shown) while other material referred to what remained before the new roof panels were slotted in as the "roof frame".

(2) Greenspace stressed the speed with which old panels were replaced with new and the fact that no "construction or building" was required to slot the new panels into place. I do not think that the lack of the need to bolt, screw or do anything other than slot panels into place means that a new structure has not been created. No one would suggest that an igloo is not constructed.

(3) Greenspace also relied on the terms of the two planning permissions to support its distinction between a new roof and replacement panels. I am not convinced that these provide strong evidence of the distinction with which the VAT legislation is concerned. I only saw two examples of these planning permits, not a very representative sample, and nor do I think that the wording used on those documents would necessarily have been precisely considered. I accept that of the two permits which I saw, a distinction was made between a complete new roof and the replacement of roof panels, but that does not seem to me to take the argument very far forward from Greenspace's perspective.

(4) Greenspace argued that its customers viewed the main purpose of the roofing panels supplied as to provide insulation rather than a new roof to support their analysis of what had been supplied. This evidence was based on Greenspace's survey, referred to by Mr Jacomb in which they asked customers the reasons why they had purchased Greenspace's roofing panels. As I have already made clear, the problem with this approach is that it assumes that the categories stipulated in Schedule 7A are determined by substance rather than form. The fact that Greenspace's customers chose the Greenspace roofing panels because they provided significant insulation properties does not mean that what Greenspace provided must be limited to the supply of insulation when that insulation was provided in the form of roofing panels making up a roof.

(5) Finally, Greenspace refer to the terms of the Thermotec patent as evidence that the essence of what they have supplied is insulation. It is worth stressing that this patent was for what Thermotec supplied (the Styrofoam panels), not what Greenspace was supplying, which was something more extensive; the addition of a weatherproofing layer so that the Styrofoam panels could be used to replace existing roofing panels.

Form vs substance

83. I accept, as do HMRC, that one purpose of the Greenspace roofing panels is to provide insulation, but that does not determine whether the supply falls within the exemption at Schedule 7A.

84. The critical question is whether the supply is of something which is for a roof, not the supply of a roof itself. No amount of difference in substance, ie that what Greenspace has supplied is 95% insulation (by volume), can alter this approach. That is why any attempt to follow the EU law cases about predominant characterisation of a supply is not helpful here: because they cannot alter the form based nature of this VAT exemption.

85. This is the approach taken in *Beco* referring to Note 1, group 2 Schedule 7A:

“it is speaking of the materials before they become part of the wall, etc. The legislation is not talking about the wall itself. The legislation looks to the materials supplied which will, following installation, form part of the wall” [31]

86. In my view in taking this approach Greenspace is attempting to apply the arguments accepted by the FTT in *Pinevale* looking at the substance of the supply, or the predominant purpose of the supply; an approach which was rejected in both *Pinevale* in the Upper Tribunal and *Wetheralds*. There is no sliding scale here; the question is simple, if what has been provided is a roof, or part of a roof, that supply cannot fall within the definition of energy saving materials “for a roof”. The UT in *Wetheralds* stressed this point:

“However, 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” [31] or

“whether what is supplied is confined to insulation or extends further than that, to a roof or a replacement roof itself” [32]

Perversity of categorisation

87. I agree that it may seem perverse that if Greenspace’s supply had amounting to sticking the Styrofoam insulation blocks manufactured by Thermotec to existing roof panels, they would have obtained a more favourable VAT result, but that is not what Greenspace was supplying (though it may have been what Thermotec was supplying).

88. The authorities accept that questions of categorisation like those arising in respect of the exemptions at Schedule 7A can give rise to “fine distinctions”, but in my view no amount of arguments about the substance of these supplies can push Greenspace’s supplies into this category; the VAT legislation is clear and prescriptive as far as the categorisation of this exemption is concerned.

89. The answer to any perversity in a case like this is to argue for a change in the legislation to include the type of insulated conservatory roof panels which have been supplied by Greenspace, rather than use perversity as the basis for interpreting legislation to override its clear wording.

CONCLUSION

90. For these reasons Greenspace’s appeal is dismissed and HMRC’s assessments for each of the VAT periods in dispute are confirmed.

COSTS

91. This appeal has been designated as complex and Greenspace has not opted out of the costs regime. Costs were not considered as part of the hearing. Any application for costs by either party must be made within 28 days of the date of the release of this decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

92. 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.

**RACHEL SHORT
TRIBUNAL JUDGE**

RELEASE DATE: 27 AUGUST 2020