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Construction (Residential/Charitable)

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The simple position on construction is that brand new buildings may be zero rated if they are residential or are to be used for certain very restricted charitable purposes, but anything that builds on what is there already (and is thus 'old') is positive rated. What could be simpler? Unfortunately, not this issue.

The question is, what is new and what is old? Does the incorporation of any of a pre-existing building mean that the building continues to exist so the zero rate cannot apply, or is it possible to incorporate a small amount as long as the resultant structure is essentially new? Does a change in the use or function of the pre-existing structure make a difference to this?

The VAT legislation makes clear that construction of a building does not include an enlargement, extension, alteration, conversion, or reconstruction of an existing building. It also tells us that a building cannot be deemed to have been removed (such as to make way for a new one) until it is demolished to ground level (leaving aside one relief in specific cases for retaining a façade). All of this appears to suggest that any incorporation of an original structure is likely to preclude zero rating (though taking old rubble and simply using it as building material would not, or should not, have that effect).

But neither the First Tier Tax Tribunal, nor the Upper Tribunal shared this view in the case of *Astral*. They decided that a church that had been partly retained on a site for a new nursing home, and then incorporated into the nursing home structure, did not make the nursing home a conversion or an extension of the original church. This meant that the building was essentially 'new'. Of course, there is 'common sense' in this interpretation. The 'church' had completely lost its function, yet it cannot have meaningfully been thought to have been converted into a nursing home. In this case, the new parts were nearly ten times as great as the retained parts, and the notion of the church being extended or enlarged to form a nursing home was alien to normal reason. The mere fact that the building was not deemed to have been demolished and therefore there was no new building on that account did not change the impression that there had been neither a conversion nor an enlargement.

So, where does this leave us? The outcome is good for the tax payer and gives hope for others in that position. On the other hand it leaves a subjective decision to make in each case. The decision for the tax payer is really in the nature of 'guess what a tribunal would call this project'. Will a tribunal call it a new build or an enlargement? Will HMRC accept each case that seems broadly similar to *Astral*, or will it always challenge them and force the tax payer into expensive litigation? What does this mean about the consistency we all prefer to see in the application of tax on borderline situations?

We can expect a further appeal on the issue, and if that does not resolve it, we may even face a change in the law.

Another important decision in this arena related to the use (as opposed to the structure) of a new building. This was the Upper Tribunal decision in *Longridge*. In order for the construction to be zero rated, the use to which the building was to be put had to be 'non-business'. Since this charity charged fees for its activity, it was not possible to argue that everything was simply given away. That would be a simple way of demonstrating non-business use. But it remains possible to be 'non-business' even where charges are made, following a now fairly long term trend in jurisprudence to the effect that one has to look at other factors than the charging of prices before concluding that there is a business going on. This presents the same essential problem as above, namely that we might struggle to identify the point at which something is either 'business' or 'non-business'.

And this is made yet more difficult by this decision to the effect that the use was 'non-business' even where the charges were made in almost all cases (not based on means, for instance) and the activity (children's water sport tuition) is a pretty ubiquitous and an essentially commercial activity. In most previous cases the charities that were successful met a need that nobody else was meeting, and where it could be shown that the normal competitive ingredients were plainly absent. Other cases related to simple child care. Now we have a precedent that relates to normal, albeit charitable, activity. Yes, they use volunteer labour, and, yes they make a bit of a loss. The capital cost also was met entirely from donations. But that alone would apply in so many cases that we seem to have turned a narrow exception into a normal rule.

This makes life difficult, even though it can save money. Where do we draw the line? If we write to HMRC for guidance they will reject the relief. If we issue a zero rate certificate we may be penalised for false certification. If an adviser is asked for a view, he will need to express ambivalence. It seems that the tribunals will end up having to adjudicate repeatedly, at huge expense to litigants (not least HMRC). The result looks benign but brings with it the dreaded prospect of changed legislation. When that changes, almost everyone (except the Treasury) end up as losers.

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