VAT on communal facilities: not-so-common treatment

Gateley Plc

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VAT is a tricky area at the best of times, and it is set to become more so as a result of Brexit. Jo Symes analyses two similar cases in the past year with different outcomes and offers tips on how to avoid the pitfalls.

Two cases from the First Tier Tax Tribunal this year have shown that even the smallest of factual differences can result in a very different VAT treatment.

St George's Augustinian Care -v- HMRC [2016] UKFTT 0567 (St George's) and *TGH (Commercial) Ltd –v- HMRC* [2016] UKFTT 052 (TGH) both dealt with the VAT treatment of the supply of communal facilities together with the construction of a new building, but resulted in different outcomes.

A tale of two buildings

In St George's the final phase of a development of a retirement village consisted of self-contained apartments together with communal facilities (including a gym and swimming pool). The communal facilities were used by the residents of the building as well as residents of other buildings in the development. The Tribunal determined that the disposal of the communal facilities was not eligible for zero-rating.

On the other hand in TGH the construction of a workshop which was built at the same time as a relevant residential building was accepted by the Tribunal as a zero-rated supply, even though the workshop was used to service other existing relevant residential buildings.

Spot the difference

The difference in treatment seems to stem from the different types of buildings/developments they serve.

The building in St George's was part of the phased development of buildings in a retirement village. The relevant building was the final one to be completed in the development and comprised residential flats, shops and communal leisure facilities. There was no doubt that the supply of the residential units was zero-rated, since it was the first grant by a person constructing a building designed as a dwelling of a major interest in, or any part of, the building, dwelling or its site (in accordance with Group 5, Item 1(a)(i) of Schedule 8 VATA 1994). Equally certain was the standard rated treatment of the shops on the basis that the developer had opted to tax the property under Schedule 10 VATA 1994. The question presented to the Tribunal was whether the supply of the communal facilities ought to be zero-rated or standard rated.

The chief difference in facts seems to be that in St George's the contemporaneous supply was of dwellings whereas in TGH the contemporaneous supply was that of buildings for a relevant residential purpose.

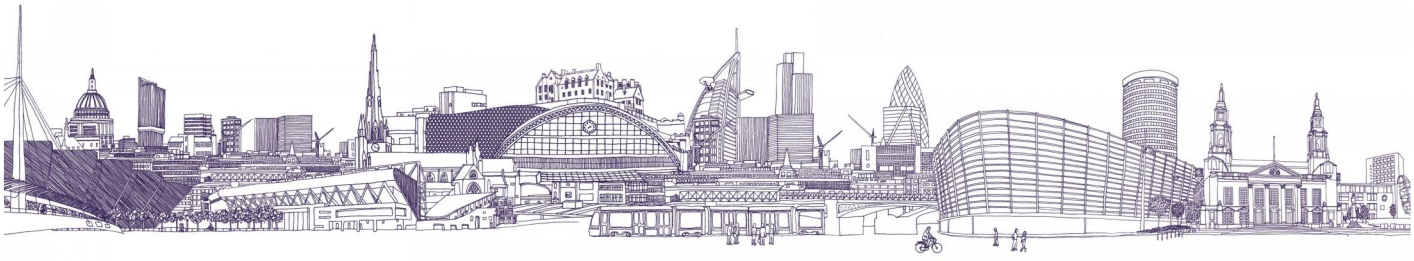
In St George's the communal leisure facilities were for use by the residents of the dwellings contained in the same building but also for use by residents from other already completed phases of the development. As such zero-rating of the communal facilities was denied.

In TGH, the fact that the workshop was used for the maintenance of buildings other than the newly completed relevant residential purpose building did not preclude zero-rating. The Tribunal felt it would have been absurd if zero-rating of the workshop had been available where the workshop had been constructed as part of the new building (that had a relevant residential purpose) but unavailable where the workshop was constructed as a separate building. As such the Tribunal took the view that zero-rating of the supply of the workshop should not be precluded in that case.

Relevant residential purpose

Use for a relevant residential purpose is set out at Note 4, Group 5, Schedule 8 VATA 1994. It provides that use will be for a relevant residential purpose broadly where the building is a home, institution or residential accommodation for children, those in need of care (including by reason of old age, disability or dependence on alcohol or drugs), the armed forces or religious orders.

TGH constructed the building (and the workshop) for the benefit of a charitable organisation providing supported



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living accommodation to elderly people, offering additional care to the residents (but not full time long term nursing care). As such, this met the criteria to be treated as a relevant residential purpose.

Where a number of buildings are constructed at the same time, on the same site and they are intended to be used together as a unit solely for a relevant residential purpose, then those buildings are treated as themselves being used solely for a relevant residential purpose (Note 5, Group 5, Schedule 8, VATA 1994). This was the case in TGH. However, Note 5 does not extend to buildings intended to be used **solely** as dwellings and, as such, the zero-rating was not available in St George's.

Some suggestions

Developers should therefore be aware of the narrow distinction between the two cases. Where possible, developers should seek confirmation with their VAT officer to ensure the correct VAT treatment on disposal, as a building may have initially been designed as a dwelling but intended to be used for a residential purpose and therefore qualify for both treatments (VAT Information Sheet 02/14).

At the time of supply, a building may be classified as both a building with a relevant residential purpose and building designed as a dwelling or number of dwellings (in accordance with Note 2 to Group 5 of Schedule 8 to the VAT Act 1994), provided the building meets both sets of conditions. An example would be the construction of a building containing cluster flats for student accommodation, which are typically designed as single en-suite bedrooms with a kitchen and common area shared by all the occupants. Each of the provisions has different features which are able to be included within the zero-rating. In such cases, the developer is able to choose which provision to rely on in order to maximise zero-rating and related input VAT recovery.

If the commercial position allows, developers constructing multiple dwellings with shared facilities could time the completion in order to ensure zero-rating. Structuring the timetable so that the building with the communal facilities is completed first, so that the residents of that building are the sole users, should ensure zero-rating is available. The completion of subsequent phases where residents may or may not use the already completed facilities should not undermine the VAT treatment of the earlier building, since the supply will already have been made for VAT purposes.

Based on these cases, the position is less clear where the buildings are all completed at the same time. Zero-rating treatment of the communal facilities when supplied with the dwellings in all the completed buildings could be available, but this will depend upon the specific development. In larger developments completing all the phases at the same time is unlikely to be feasible.

If you have any queries in relation to the VAT treatment of your property transaction or construction contract, please speak to a member of Gateley Plc's Tax team.

If you would like to discuss any of the issues raised in this update, please contact:

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