THE VALUATION TRIBUNAL FOR ENGLAND

Non-Domestic Rating appeal; Validity issue; Non-Domestic (Alteration of Lists and Appeals) (England) Regulations 2009 SI 2009/2268; Non-Domestic Rating (Alteration of Lists) and Business Rate Supplements (Transfers to Revenue Accounts) (Amendment etc.) (England) Regulations 2018 SI 2018/1193; Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018 Rail Freight Terminals: Proposals invalid.

RE: Daventry International Rail Freight Terminal, Railport Approach, Dirft, Northampton NN6 7EL

APPEAL NUMBERS: 281033389815/285N10 & 281033389769/285N10

AND: W H Malcolm Celtic Way, Dirft, Northampton NN6 7GW

APPEAL NUMBER: 281033377002/285N10

BETWEEN:	Malcolm Group Limited	Appellant
	and	
	Mrs Joanne Moore (Valuation Officer)	Respondent

BEFORE:	Mr M Heslop-Mullens (Senior Member)
CLERK:	Ms R Muller
HEARING:	Remote Hearing No. 2 on 14 June 2021
APPEARANCE:	Mr P Rabbette, Representative for the Appellant Mr C Jones, Representative for the Respondent

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Summary of decision

1. The proposals were found to be invalid.

Introduction

2. The President of the Valuation Tribunal for England (VTE) is required to make sure arrangements are in place and make such statements and Directions so as to ensure that business before the Tribunal is conducted in accordance with The Local Government Finance Act 1988, Schedule 11, Part 1,

paragraph A17(1) and The Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 and by virtue of Part 2 regulation (5)(arrangement for appeals) and regulation (6)(3)(g) (appeal management powers) the VTE may determine the form of any hearing.

3. Therefore, in pursuance of Regulation (6)(3)(g) the VTE has incorporated “remote hearings” as part of that definition and for the time being as the default option until it is safe to return to normal working. The Tribunal’s Consolidated Practice Statement has been amended to reflect this.

4. I was authorised by the President of the Valuation Tribunal to sit alone as Senior Member for the hearing. This was in accordance with paragraph 9 of the Valuation Tribunal for England’s Tribunal Business Arrangements made by the President pursuant to the Local Government Finance Act 1988, Schedule 11, Part 1, paragraph A17(1).

5. The appeals had been brought in respect of the following: The proposals submitted on 2 April 2019 were made on the grounds that *‘These two assessments should be merged into one assessment with effect from 1 April 2010. The assessments are contiguous within the meaning of the Rating (Non Domestic Properties in Common Occupation) Act 2018.’*

6. Daventry International is a Rail Freight Terminal, which was developed as part of a national network of rail freight terminals to connect with mainland Europe and was opened in July 1997. W H Malcolm is a large distribution warehouse, which incorporates a rail siding and is immediately adjacent and is contiguous with the rail freight terminal.

7. Mr Rabbette appeared on behalf of the Appellant as expert witness. In view of the Upper Tribunal’s judgment in *Gardiner & Theobald LLP v David Jackson (VO)* [2018] UKUT 0253 (LC), his declaration of truth included a statement that he was instructed under a conditional fee arrangement.

8. I accepted this expert witness evidence on the above basis as the appeal was not complex and to do otherwise would be contrary to regulation 3 (Discharge of VTE functions – general) of the Procedure regulations, and was allowable due to the Tribunal’s rules on admissibility of evidence (regulation 17(2)(a) where the Tribunal can admit evidence whether or not it would be admissible in a civil trial). I therefore considered the expert evidence and attached such weight to it as it saw fit.

9. Mr Jones appeared as Advocate only, but was an expert on valuation and legal matters.

10. This is not intended to be an exhaustive record of the proceedings, but the parties can be assured that all of the evidence presented was fully considered by the panel when coming to its decision. Consequently, the absence of a reference to any statement, or item of evidence, should not be construed as it having been overlooked.

Preliminary matter

11. Whilst the proposals were referred to the VTE as appeals against the Valuation Officer's (VO's) refusal to alter the list, the VO had raised the validity of the proposals as a preliminary issue. The substantive issues raised in the appeal can only be dealt with should I find that the proposals were valid.

Arguments and submissions

12. Mr Rabbette, the representative for the Appellant had sought the merger of three entries in the Rating List into a single entry, as follows:

    - Appeal number: 281033389815/285N10 requested a merger effective from 1 September 2015 of Daventry International Rail Freight Terminal (RV £147,000) with W H Malcolm (RV £1,050,000);

    - Appeal number: 281033377002/285N10 requested a merger effective from 1 April 2010 of Daventry International Rail Freight Terminal (RV £147,000) with W H Malcolm (RV £1,050,000);

    - Appeal number: 281033389769/285N10 requested a merger effective from 1 April 2010 of Daventry International Rail Freight Terminal (RV £147,000) with W H Malcolm (RV £1,050,000).

13. It was Mr Rabbette's contention that the opportunity to make his proposals to alter the 2010 Rating List had resulted from the Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018. He believed that the appeal hereditaments met the criteria of one of the additional types of hereditament defined by this amendment to Section 64 of the Local Government Finance Act 1988.

14. Mr Rabbette stated a previous proposal had been submitted on 12 December 2014 by BNP Paribas Real Estate to request a merger in respect of both Daventry International Rail Freight Terminal and W H Malcolm assessments of £277,500 and £1,070,000 with effect from 1 April 2010. However, this proposal had been subsequently withdrawn. Mr Rabbette stated that the reasons as to why the proposal had been withdrawn were unknown.

15. Mr Rabbette considered that both hereditaments meet the criteria of subsection 3ZB, inserted in Section 64 of the Local Government Finance Act 1988 ("LGFA1988 (as amended)") by the Rating (Property in Common Occupation) Act 2018 (the PICO Act).

16. Mr Jones, the representative for the Respondent had provided his statement of case to the Appellant and Tribunal, which contained a copy of the proposals, and his submissions as to why he considered the proposals to be invalid. He stated that the proposals were invalid, as they were not 'relevant proposals'.

Decision and reasons

17. Proposals to merge received on or after 1 April 2015 are limited to an effective date of 1 April 2015, following the amendment to the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 made by the Non-Domestic Rating (Alteration of Lists and Appeals) (England) (Amendment) Regulations SI 2015 No. 424.

18. Following the Supreme Court decision *Woolway v Mazars* [2015] UKSC 53 the Government produced a consultation paper on reinstating the practice of the Valuation Office Agency prior to that decision. This was followed by the introduction of the Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018 which inserted into part 3 of the Local Government Finance Act 1988:

    1. Hereditament occupied or owned by the same person

        (1) In Part 3 of the Local Government Finance Act 1988 (non-domestic rating), in section 64 (hereditaments) after sub-section (3) insert-

        "(3ZA) in relation to England, where –
        (a) Two or more hereditaments (whether in the same building or otherwise) are occupied by the same person,
        (b) The hereditaments meet the contiguity condition (see subsection (3ZC), and
        (c) None of the hereditament is used for a purpose which is wholly different from the purpose for which any of the hereditaments is used; The hereditament shall be treated as one hereditament.

        (3ZB) In relation to England, where –
        (a) Two or more hereditaments (whether in the same building or otherwise) are –
            (i) Owned by the same person, and
            (ii) unoccupied
        (b) the hereditaments-
            (i) ceased to be occupied on the same day, and
            (ii) have each remained unoccupied since that day,
        (c) immediately before that day, the hereditament were, or formed part of, a single hereditament by virtue of subsection (3ZA), and
        (d) the hereditaments meet the contiguity condition) see subsection (3ZC); the hereditaments shall be treated as one hereditament.

        (3ZC) The hereditaments meet the contiguity condition if –
        (a) at least two of the hereditaments are contiguous; and
        (b) where not all of the hereditaments are contiguous with each other-
            (i) one of more of the other hereditaments is contiguous with one or more of the hereditaments falling within paragraph (a) and
            (ii) each of the remaining hereditaments (if any) is contiguous with at least one hereditament that falls within sub-paragraph (i) of this sub-paragraph

(3ZD) for the purpose of subsection (3ZC) two hereditaments are contiguous if –

(a) some or all of a wall, fence or other means of enclosure of one hereditament forms all or part of a wall, fence or other means of enclosure of the other hereditament, or
(b) the hereditaments are on consecutive storeys of a building and some or all of the floor of one hereditament lies directly above all or part of the ceiling of the other hereditament,

and hereditament occupied or owned by the same person are not prevented from being contiguous under paragraph (a) or (b) merely because there is a space between them that is not occupied or owned by that persons

2. the amendments made by subsection (1) have effect for financial years beginning on or after 1 April 2010.

19. In order to allow retrospective challenges to the 2010 Rating List which had, at the time of the Act had closed, the Government introduced the Non-Domestic Rating (Alteration of List) and Business Rate Supplements (Transfer to Revenues Accounts) (Amendments etc.) (England) Regulations 2018 to allow interested parties to submit proposals following the change in law.

The Non-Domestic Rating (Alteration of List) and Business Rate Supplements (Transfer to Revenues Accounts (Amendments etc.)(England) Regulations 2018 state as follows:

1 (1) These Regulations may be cited as the Non-Domestic Rating (Alteration of List) and Business Rate Supplements (Transfer to Revenues Accounts (Amendments etc.)(England) Regulations 2018 and come into force on 17th December 2018

(2). In these Regulations –
“the 2009 Regulations” means the Non-Domestic Rating (Alteration of Lists and Appeals)(England) Regulations 2009;
“relevant proposal means a proposal –

(a) Made by a ratepayer on the ground in regulation 4(1)(k) of the 2009 Regulations;
(b) Which can only be made on that ground as a result of the coming into force of section 64(3ZA) or (3ZB) of the Local Government Finance Act 1988.

Modification of the 2009 Regulations in respect of properties in common occupation

2 The 2009 Regulations as they have effect, by virtue of regulation 22(1) of the Non-Domestic Rating (Alteration of Lists and Appeals)(England)(Amendment) Regulations 2017 in relation to-

(a) A local non-domestic rating list compiled on 1 April 2010; and

(b) A proposal for the alteration of that list;

Apply to a relevant proposal with modifications set out in regulation 3 to 9

Modification of regulation 3

3 Regulation 3 (interpretation of Part 2) applied as if at the appropriate places there were inserted

"2010 list" means a local list compiled on 1 April 2010;
"relevant proposal" means a proposal made by a ratepayer on the ground in regulation 4(1)(K) as a result of the coming into force of section 64(3ZA or (3ZB) of the Act.

20. Mr Jones considered that the proposals lodged by Mr Rabbette dated 2 April 2019, which sought the merger of Daventry International Rail Freight Terminal, Railport Approach, Dirft with W H Malcolm, Celtic Way, Dirft, Northants, following the introduction of the Rating (Property in Common Occupation) were invalid as they were not 'relevant proposals'.

21. The position of Mr Jones was that the assessments in question did meet the criteria of a single hereditament under section 64 (3ZA) of the Local Government Finance Act 1988, following the Upper Tribunal decision in relation to *Libra Textiles Ltd (T/A Boundary Mill Stores) & Centric Assets v Roberts And Alford (VOs)* [2020] UKUT 237 (LC) (31 July 2020) as it appeared there was interconnection between them. Therefore, these properties would have been merged prior to the Rating (Property in Common Occupation) and Council Tax (Empty Dwellings) Act 2018.

22. In Mr Jones opinion, the request to merge could have been made before or after the Mazars decision whilst the 2010 list was open and prior to the amendments made to the Appeal regulations noted above. The proposals had therefore not been made as a result of the coming into force of Sections 64 (3ZA) or (3ZB) of the Act and had been deemed to be invalid.

23. Mr Rabbette contended that the appeals were a "Merge" appeal submitted following the introduction of the "PICO Act". It was submitted under amended grounds for submitting a proposal under Regulation 4(1)(k) contained within the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 (the "2009 Regulations").

24. These appeals were made following the PICO Act 2018 and subsequent regulations. The PICO Act gave a time limited opportunity to re-open the 2010 rating list in specific circumstances. In order to achieve this the regulations brought in an additional definition of a hereditament by adding subsections 3ZA to 3ZD to section 64 of the Local Government Finance Act 1988. Mr Rabbette stated that as the earlier appeal for a merger had been withdrawn, he requested that I confirm these appeals as valid, in order for the Non-Domestic Rating List assessments for the appeal properties to be correctly entered into the 2010 Rating List as one assessment with effect from 1 April 2010.

25. In considering the appeal, I referred to the parties submissions regarding the definition of ‘relevant proposal’ contained in the aforementioned regulations.

26. From the Upper Tribunal cases of *Libra Textiles Ltd (T/A Boundary Mill Stores) & Centric Assets Ltd v Roberts and Alford*, the two criteria to make a ‘relevant proposal’ are that the proposer must request a merger and the request to merge can only be made as a result of the coming into force of Section 64(3ZA) or (3ZB) of the Local Government Finance Act 1988.

27. Having considered the submissions from both parties, I found the statement of Mr Jones to be persuasive and accepted that a proposal could have been lodged, prior to and including, 31 March 2017 which would have resulted in the merger of the appeal properties. The fact that an earlier proposal for a merger had been withdrawn could not be considered.

28. I could not take into account any previous proposals that had been withdrawn or the reasons behind the withdrawn proposal, especially if the actual facts of the withdrawal were not known by either party. Furthermore, the submission from Mr Jones was clear that, if the earlier proposal had not been withdrawn, the hereditaments could have been merged and assessed as one unit with effect from 1 April 2010.

29. On this basis, I found that the current proposals do not meet the requirements of a ‘relevant proposal’ as they did not need the change in law for the proposals to have been lodged. Accordingly, I found that the proposals giving rise to these appeals have not been validly made.

Date: 7 July 2021

Appeal Number: 281033389815/285N10, 281033389769/285N10 & 281033377002/285N10