THE VALUATION TRIBUNAL FOR ENGLAND

Summary of Decision: non-domestic rates; wine bar and premises; restaurant and premises; mode and category of occupation; fair maintainable trade: appeal dismissed – panel determined that the correct mode and category of occupation for the appeal property was a wine bar and premises and the evidence showed that the existing valuation was reasonable.

Re: 52-54 The Broadway, Haywards Heath, West Sussex, RH16 3AL

APPEAL NUMBER: CHG100099864

BETWEEN:	Omniscient Limited Trading as Orange Square	Appellant
	and	
	Mr A Corkish (Valuation Officer)	Respondent

PANEL: Mr AB Jobanputra (Senior Member) and Ms N Akhter

CLERK: Mrs R James IRRV (Hons)

REMOTE HEARING ON 3 : Thursday 13 May 2021

PARTIES PRESENT: Mr G Wall (Appellant)
Mr P Emerick of Altus Group (on behalf of the Appellant) as Advocate, who was accompanied by Mr D Snell as Expert Witness
Mr R Das (Respondent's representative)

Summary of decision

1. The appeal was dismissed; the appeal property's assessment remained unaltered at £71,600 Rateable Value (RV), with effect from 1 April 2017.

Introduction

2. This appeal has been brought in respect of the following: 52-54 The Broadway, Haywards Heath, West Sussex RH16 3AL (the appeal property), which was entered in the 2017 Rating List as "wine bar and premises" at rateable value £71,600 effective from 1 April 2017.

3. The appellant's Challenge to the Valuation Officer (VO) was made on 24 May 2019. The appeal to this Tribunal was made on 26 February 2021, following the VO's Decision Notice dated 29 October 2020, in respect of the appeal property (hereditament).

4. This is a compiled list appeal so the material day is 1 April 2017.

5. The appeal hereditament was currently described in the rating list as a wine bar and premises. The property was of brick construction over two storeys under a pitched tiled roof. The appeal property was located on the ground floor, it comprised a small kitchen, bar with tables; there being 50 covers inside and 40 covers outside. The first floor comprised two residential flats that were separately assessed for council tax.

6. The property was located in an established commercial location in the middle of a parade of restaurants and shops on The Broadway.

7. 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.

8. 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.

9. Mr Snell was appearing on behalf of the appellant as expert witness. Therefore, it was important to ascertain if there was a success related fee involved and if so whether its existence was compatible with his obligations to the tribunal as an expert. This question was raised in view of the Upper Tribunal's judgment in *Gardiner & Theobald LLP v David Jackson (VO)* [2018] UKUT 0253 (LC).

10. Mr Snell explained that Altus Group was representing the appellant in this appeal on a contingency fee basis. However, he declared that he understood and accepted that his duty was to the Tribunal in giving his evidence and he would comply with this as well as the requirements of his professional body regardless of whether or not the evidence supported his client's case.

11. The panel have accepted this expert witness evidence on the above basis as the appeal is not complex and to do otherwise would be contrary to regulation 3 (Discharge of VTE functions – general) of the Procedure regulations and is 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). The panel therefore considered the "expert" evidence and attached such weight to it as it saw fit.

12. 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.

Issue

13. The issue to be determined was the correct method of valuation to be applied to the appeal property's assessment. The VO was defending the current entry, which valued the appeal property as a wine bar and premises having regard to the fair maintainable trade (FMT). In contrast, the representative contended that the appeal property should be valued as a restaurant and premises using the zoned approach at a zone A rate of £385/m^2, which resulted in his proposed assessment that was in line with the appeal property's passing rent.

Evidence and submissions

14. In a statement which accompanied the Challenge, together with his oral presentation at the hearing, the appellant's representative gave several reasons as to why he believed that the 2017 assessment was incorrect and excessive, which included:

    i) The appeal property was subject to a seven year lease from 1 November 2016 at a rent of £48,000 per annum (pa). That rent included two first floor flats that were rented out and subject to council tax. The rent from the two flats totalled £18,000, which resulted in a net rent for the appeal property of £30,000 pa.
    ii) The appeal property was located in a parade of shops and restaurants on The Broadway. The appeal property was currently valued as a wine bar and premises in accordance with its FMT. All the competition on The Broadway was valued as restaurant and premises.
    iii) The appeal property should be valued as a restaurant as it comprised a kitchen, sold food, had a breakfast and lunch menu and specials board. A wine bar would not cater for this, the property should be valued *rebus sic stantibus* in accordance with the case of *Scottish & Newcastle Retail Limited & Allied Domecq Retailing Limited v R F Williams (VO)* (Court of Appeal (2001) RA/480/1993 and RA/484/1993.
    iv) The appeal property was valued at over 50% more than 44-46 The Broadway. The appeal property mirrored 44-46 The Broadway; both sold food and had alcohol licences. 65 and 41 The Broadway were also valued on the same basis as 44-46 The Broadway.
    v) The appeal property should be measured on a net internal area (NIA) basis and zoned at a zone A rate of £385/m^2, in accordance with valuation scheme 384956. Accordingly, he sought a reduced assessment of £32,500 RV, with effect from 1 April 2017.

15. In response, in the VO's Challenge case decision notice, and in oral presentation at the hearing, the VO explained that:

    i) The subject rent was a tenancy between Omniscient Ltd, Trading as Orange Square, and the landlord, Altronrose Ltd. This was detailed on the form of return (FOR), completed on 30 March 2019 by Mr O'Riordan, who was the Secretary and Director of both Altonrose and Omniscient Ltd as shown on Companies House. Therefore, it was not an arm's length transaction.

    ii) The trade split for the appeal property was 80% wet and 20% dry, as such it was a heavily wet led operation, which indicated that it was more of a wine bar than a restaurant.

    iii) There had been appeals in respect of the appeal property on both the 2005 and 2010 Rating List, none of which disputed the basis of valuation.

    iv) In respect of the representative's comparable properties, it was stated:

a) 65 The Broadway had recently closed and was assessed as a restaurant because it was considered too small to support a bar, having an area of 60 m^2 (ITMS).
b) 44-46 The Broadway was very similar to the appeal property and was labelled as a café bar. The rent on this property was not a good indicator of its value owing to it being significantly below market rent and not having increased since 2007. Furthermore, there was a very large fit out on this property. The VO believed that this property had been misidentified and should be valued on the turnover basis.
c) 41 The Broadway was valued as a restaurant. However, the most recent occupiers had moved their focus to more wet led trade. The VO was to review this assessment.

v) The VO had regard to Café Rouge at 33 The Broadway and The Star, which were both valued on turnover. Both properties had similar offers to the appeal property. A Check was lodged against Café Rouge's assessment but was not followed up by a Challenge, which indicated that the occupier believed the valuation approach was correct.

vi) The VO accepted that trade figures demonstrated that food had increased following the employment of additional kitchen staff; however wet trade had also increased and the split between wet and dry had not altered a great deal. The following trade details were provided:

Year ended March 2013, wet trade £537,000, dry trade £86,000;
Year ended March 2014, wet trade £552,000, dry trade £80,000;
Year ended March 2016, wet trade £541,000, dry trade £103,000;
Year ended March 2017, wet trade £569,000, dry trade £121,000; and
Year ended March 2018, wet trade £602,000, dry trade £137,000.

Current FMT adopted wet £550,000, dry £80,000

Decision and reasons

16. The term 'rateable value' is defined in Schedule 6 to the Local Government Finance Act 1988 as amended. The value was required to reflect an annual rent on the property, assuming a new letting with the tenant being responsible for all rates, taxes, repairs and insurance. In respect of an appeal against an entry in the 2017 Rating List, the antecedent valuation date (AVD), when one was required to have regard to rental levels was 1 April 2015.

17. There was a rent passing on the appeal property. The whole property, including two first floor flats was subject to a lease from 1 November 2016 for a term of seven years. The rent set was £48,000 pa, it was suggested that £18,000 attributed to the two first floor flats that gave a net rent of £30,000 pa for appeal property. It had been accepted that the rent had been set between connected parties. The representative explained that advice was sought from Eddisons Real Estate & Business Valuers, an independent firm of Chartered Surveyors, when determining the rent and the rent had been set to open market value. However, the panel concluded that there was a degree of adjustments that were required to the rent to take account of the inclusion of the two first floor flats and the fact that it had been set between connected parties. As such, the panel attached little weight to the passing rent.

18. It had been explained that a previous caseworker had initially offered to agree the appeal. However, the panel had to arrive at a decision having regard to the facts afresh and based its decision on the evidence presented.

19. In this appeal, the panel had to determine the mode and category of occupation of the appeal property as at the material date of 1 April 2017. In the 2017 Rating List, the appeal property was currently valued as a wine bar and premises having regard to its FMT. The appeal property was currently valued at £71,600 RV, with effect from 1 April 2017. The VO was defending the current valuation of the property having regard to the turnover. The representative disputed the mode and category of occupation being categorised as a wine bar and premises. It was contended that the correct mode and category of occupation for the appeal property was that of a restaurant and premises and it should be valued on a zoned approach. The representative's proposed valuation reflected a zone A rate of £385/m^2, which equated to an assessment of £32,500 RV.

20. The representative had contended that since 1 July 2016, there had been a change in the mode or category of occupation of the appeal property, with the property now being a food led operation. The VO contended that the appeal property remained a wet led operation and it still remained in the mode and category of occupation of a wine bar and premises. When questioned, it was explained that the planning permission granted on the appeal property was A5, which was described as a 'catch all' category for both food and alcohol.

21. When determining the issue of mode or category of occupation, the panel had to consider the appeal property physically as it stood or *rebus sic stantibus*. Therefore, one had to look at the premises 'vacant and to let'.

22. The issue of valuing a property *rebus sic stantibus* had been considered by the Court of Appeal in the judgment of *Scottish & Newcastle Retail Limited & Allied Domecq Retailing Limited v R F Williams (VO)* as referred to by the representative. The *Scottish & Newcastle* case involved two public houses located within a shopping centre in Milton Keynes. The Court of Appeal upheld the Lands Tribunal's decision which found that the subject premises had to be valued *rebus sic stantibus* and having regard to the actual mode or category of occupation. It was held that the works required to strip the subject premises back to shells suitable for them to be let as retail units were not minor works and would not be in the contemplation of the hypothetical tenant when formulating a rental bid. It was held that the two public houses were not in the same mode or category of occupation as the shops and restaurants relied upon by the Valuation Officer; the premises were valued as public houses and premises.

23. The panel was aware that there were two limbs to the *rebus sic stantibus* rule, which must be treated separately. The first rule being that the physical state of the property had to be regarded as at the material day (1 April 2017). The only alterations permitted were minor alterations of a non-structural character. On this point, the panel had not been presented with any evidence to suggest there had been any major physical changes to the premises. It was confirmed that the bar was still in place and the area of the kitchen had not increased. As such, any alterations made would have been minor in nature and would not offend the *rebus* rule. In questioning, Mr Wall, the appellant, agreed that there had been no physical alterations. However, he added that the business was now a food led operation with the recruitment of additional chefs from July 2016 and the tables were laid differently.

24. The second limb of the *rebus sic stantibus* rule was that it had to be assumed that the hereditament could only be occupied for a purpose within the same mode or category of purpose as that for which it was being occupied on the material day. Any prospective change of use outside that mode or category should be ignored. As such, the question to be addressed was in what mode or category of use did the appeal property's actual use place it on the material day. After having regard to all of the evidence presented, the panel found the

following characteristics/facilities of the appeal property were more in keeping with a wine bar than a restaurant:

i) provision of a bar area;
ii) all day opening hours, at point 7.11 of the expert witness report it stated that food was available every day from 9 am until 7 pm, however, the property remained open until 12:30 am Sunday to Thursday and until 1:30 am on Friday and Saturday;
iii) in accordance with the FOR, the premises operated as a more wet led operation.

25. Mr Wall explained that he had not realised the significance of the questions when he had completed the FOR. He added that there was a fail in the system in that if the customer ordered a drink prior to food, the whole order was recorded as wet receipts. The business did not operate separate dry and wet tills, the apportionment in the turnover provided to the VO was an estimate without realising the consequences. Mr Wall advised that there were 23 employees, three of which were chefs and all staff were trained in waitressing.

26. The panel accepted that following the recruitment of additional kitchen staff on 1 July 2016, the dry receipts had seen an increase. However, the wet trade had also seen an increase. Moreover, by far, the wet trade still exceeded the dry trade. The panel agreed with the VO's statement, that he could only work with the figures supplied by the appellant on the FOR, which suggested that the appeal property operated as a more wet led operation.

27. Whilst the panel accepted additional catering staff had been employed from July 2016, it found that the mode or category of occupation of the premises had not altered from a wine bar and premises. Customers could visit the appeal property solely for drinks and stay until the early hours, which one would not do at a restaurant. Furthermore, the characteristics and facilities suggested it was a wine bar rather than a restaurant. It was also explained that the appellant had referred to the appeal property as a wine bar on planning documentation with the Local Authority and on its personal website the property had been described as a wine bar.

28. In arriving at its decision, the panel placed little weight on any of the comparable properties presented. The panel accepted that 44-46 The Broadway was very similar to the appeal property. However, the VO believed that this property had been misidentified and was to review the assessment. The VO had requested to inspect the premises but was unable to do so until 17 May 21, due to the existing restrictions in place in relation to the Covid-19 pandemic.

29. As the panel had determined that the correct mode or category of occupation for the appeal property was that of a wine bar and premises, it then went on to determine its valuation. Wine bars were generally valued by reference to their FMT. Having regard to the trading figures provided, the panel found that the current FMT adopted of wet £550,000, dry £80,000 was fair and reasonable.

30. Accordingly, the panel dismissed the appeal.

Date: 7 June 2021 APPEAL NO: CHG100099864