VALUE ADDED TAX – Refund of VAT to builders ("builder's block") – ss. 25, 26, 30 VATA 1994 – whether VAT charged on roller blinds incorporated in the buildings was eligible for recovery as 'building materials' – the definition of 'building materials' in Note 22, Group 5, Schedule 8, VATA 1994 considered – held the roller blinds were 'building materials' within that definition –* Price *considered –* Taylor Wimpey *applied – HMRC Customs Brief 02/11 rejected – appeal allowed

FIRST-TIER TRIBUNAL **Appeal number: TC/2017/08197**
TAX CHAMBER **TC/2018/03555**

BETWEEN

WICKFORD DEVELOPMENT CO LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE JAMES AUSTEN

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 24-25 June 2019

Ms Sarah Black of Counsel, instructed by Fisher Michael, Accountants, for the Appellant

Mr Anharul Qureshi, presenting officer of HM Revenue and Customs, for the Respondents

DECISION

APPEAL

1. These are conjoined appeals by Wickford Development Co Ltd ("the appellant") against:

   (1) An assessment to VAT (and interest) issued on 18 August 2017 (for VAT periods 05/15 to 02/17) in the amount of £35,826.95; and

   (2) An assessment to VAT (and interest) issued on 18 May 2018 (for VAT periods 08/14 to 02/15) in the amount of £6,625.63.

2. As I announced at the conclusion of the hearing, I allow the appeals and set aside the assessments. I set out the reasons for my decision below.

BACKGROUND

3. The appellant is a UK-incorporated, VAT-registered, property development company. It has a principal site at Woodlands Park, Great Dunmow, Essex. At the date of the hearing before me, approximately 1,000 homes had been built, with a further 600 left to be developed and sold.

4. The question for me to decide in this case was whether the supply of window blinds by the appellant (in the context of its property development trade) should be zero-rated for VAT, allowing the appellant to claim input tax on the same.

5. Ms Black noted in her submissions that the VAT treatment in question relates both to the periods under appeal and also to subsequent (and future) VAT periods. This is no doubt true, but my decision in this case will of course only bind HMRC (subject to any appeal) in respect of those VAT periods under appeal and it does not of itself set any binding precedent as to any future periods of time for the appellant or generally. Though the appellant might reasonably hope that HMRC would apply the law as set out in this decision for future periods.

THE LAW

Statutory provisions

6. This case concerns part of the UK's VAT legislation which is commonly described as the "Builder's Block", under which input tax which would otherwise be deductible in respect of expenditure on goods incorporated in a new dwelling and are supplied by way of a zero-rated supply is rendered non-deductible.

7. The Builder's Block operates through the application of various parts of the Value Added Tax Act 1994 ("VATA" – all statutory references in this decision are to that Act unless specified otherwise) and The Value Added Tax (Input Tax) Order 1992.

8. Ms Black's skeleton argument helpfully set out the scheme of the legislation and I have gratefully taken the legislative extracts in the Appendix to this decision (which set out the law as it applied throughout the periods subject to these appeals) from that.

Prior authorities

9. There have been a number of cases on the Builder's Block. The provisions have been recently – and, insofar as this Tribunal is concerned, authoritatively – examined by the Upper Tribunal in the *Taylor Wimpey* cases (considered below).

10. The precise issue in this case has come before this Tribunal once before, in *John Price v HMRC* [2010] UKFTT 634 (TC) (Judge John Walters QC).

11. Two features distinguish *Price* from these appeals: first, Mr Price was appealing a decision made pursuant to the DIY Scheme – but this difference is immaterial as the relevant provisions are in all material respects identical; secondly, Judge Walters decided the relevant

points on the basis of findings of fact he had reached by judicial notice. The significance or otherwise of this was addressed in submissions and is dealt with below.

12. The decisions of the Upper Tribunal in the *Taylor Wimpey* cases are binding on me (insofar as relevant to this appeal). Conversely, the decision of this Tribunal in *Price* is not directly binding, and I may depart from it if I consider that it was wrongly decided.

13. It is relevant that following the decision in *Price*, HMRC released Customs Brief 02/11 on 25 January 2011, which stated:

> **HMRC's position**
>
> HMRC's view remains unchanged in that roller blinds (and other 'window furniture') are not 'building materials' as defined and will not be changing its policy. The Tribunal chairman did not hear any evidence on the point of what is and what is not a 'building material' for VAT purposes but reached his conclusion as a matter of judicial notice, that is, as a common sense fact.
>
> Given the small amount of VAT at stake in this particular case, HMRC will not be appealing this decision further.

EVIDENCE AND FACTS

14. For the appellant, I had witness statement evidence from Stephen James Hammond (a consultant surveyor providing contractual services to the appellant), Paul Andrew Tayler (the contracts manager and company secretary of the appellant) and Nigel Jonathan London (the owner and managing director of Claudius Designs Limited, which supplies blinds and fittings to the appellant and other property development businesses). Each witness statement included a number of exhibits.

15. Each of Messrs Hammond, Tayler and London gave sworn (or affirmed) evidence and their witness statements were accepted as their evidence in chief without amendment. Their evidence is set out at [17] to [38] below.

16. For HMRC, Mr Qureshi did not introduce any evidence. Furthermore, his cross-examination of the appellant's witnesses was limited as described below.

Mr Hammond

17. Mr Hammond has over 28 years' experience in the building industry and property development. During that time, he has worked in the building trade, construction management, and educational teaching role, as a Local Authority Building Control Surveyor and for the appellant as a consultant surveyor.

18. Mr Hammond briefly described the appellant's history as a property developer and its involvement in the Woodlands Park site, as well as the demographic of the property purchasers.

19. Mr Hammond's witness statement included evidence as to the appellant's marketing of the Woodlands Park properties:

> "**Marketing of Woodlands Park**
>
> 13. Wickford deliver homes to a steady programme of one completed home per week over a 50-week period, annually. Wickford employ traditional build techniques meaning that the build programme is approximately 9-10 months for each house. Each home is then allowed a natural drying out period of approximately 3-4 months before being placed on the market. The product for sale by Wickford is the finished home, with no input allowed by the prospective purchaser. This marketing strategy has served Wickford world for many years. Selling completed homes negates the need for end of year/financial year sales targets which is favoured by many regional and

national house builders will stop the industry norm presently is to achieve bulk sales by the end of June or December. This is evidenced from HM Land Registry open data on new build house sale completions…

14. As a result of the traditional construction techniques which Wickford prefers, Wickford are at a distinct disadvantage to our competitors in terms of delivery speed. To mitigate for this Wickford do not allow for specification changes to be made by the potential purchaser. Wickford ordinarily include blinds to all properties and no distinction is drawn between the different sizes or styles of homes Wickford develop.

15. It has never been Wickford's policy to incentivise the purchaser. It has been our experience that extolling the quality of the build is the most influential factor in achieving sales. Wickford's marketing ploy is an all-inclusive specification which is not subject to any additional uplift. The prospective purchaser views the finished home prior to making an offer. Wickford's marketing strategy is to ensure a comprehensive internal and external finished specification a high specification and quality of build at Woodlands Park have been recognised by the National House-Building Council on numerous occasions… Wickford do not wish to incentivise the purchase of homes by using extras at over-inflated costs to the would-be purchaser. Wickford prefer the visual approach of viewing the completed property to demonstrate what is included within the asking price homes are sold 'turnkey as seen'. The price of the completed home is the only sum negotiated between the sales agent and the prospective purchaser…

Inclusion of Blinds

18. Surveys have often shown moving into a new home is recognised by many as one of life's more stressful events will stop Wickford see the inclusion of blinds as a small token towards enabling prospective purchasers to move in immediately and feel settled and secure in their new home. It also affords immediate privacy.

19. There are various references in the marketing to the inclusion of blinds as standard, under Wickford's "no hidden extras" policy…"

20. Mr Hammond drew my attention to exhibits SH5 and SH6 to his witness statement, which included various marketing details for the appellant's properties. The inclusion of curtains and blinds as window dressings was prominently referred to in those materials.

21. Mr Qureshi cross-examined Mr Hammond on this point. He put it to Mr Hammond that the appellant chose to develop 'turnkey' properties and installed blinds as standard to distinguish its properties from those of its competitors. Mr Hammond replied that the appellant builds complete homes and that blinds were a part of that. The appellant was not so concerned about its competitors and was more concerned as to the quality of the product offered.

22. Mr Hammond's evidence included reference to the essential nature of blinds and curtains (being integral to the fabric of the building) for the purposes of building regulation compliance. He referred me to the Building Research Establishment's methodology of how the energy performance of a building is to be obtained using the Standard Assessment Procedure calculation. As noted in his witness statement, for the purposes of Approved Document L1A, "[t]he Designed Emission Rate (DER) must not exceed the Target Emission Rate (TER). Within the calculation an allowance must be made as to whether there are blinds and curtains. Such inclusions assist with minimising heat loss and controlling solar gains. All homes on Woodlands Park are subject to an SAP calculation and have an energy performance certificate (EPC)." I was taken to copies of Form SAP12 ("The Government's Standard Assessment

Procedure for Energy Rating of Dwellings" (2012 edition)) and Approved Document L1A in the hearing bundle.

23. Mr Hammond was cross-examined on this point by Mr Qureshi. Mr Qureshi asked Mr Hammond to confirm that Building Regulations did not themselves specify the inclusion of either curtains or blinds. Mr Hammond responded that form L1A set out the required performance for Building Regulations purposes, and the Standard Assessment Procedure calculation for that form made it necessary to take account of the inclusion of either curtains or blinds. Pushed again by Mr Qureshi as to whether curtain poles or blinds were required, Mr Hammond replied that they were integral to the calculation.

24. Under further questioning from Mr Qureshi, Mr Hammond gave evidence as to his understanding of the marketing tactics of the appellant's competitors. As he understood it, the competitors would have standard specifications for the properties, but would use other means to incentivise their buyers, for example voucher schemes. Under such schemes, the developers would offer a 'voucher' for a given sum of money, e.g. £10,000, and enable the purchaser to use the value of that voucher to upgrade the fixtures or fittings in the property, or to acquire further such fixtures or fittings. Mr Hammond explained that under such schemes, house purchasers would naturally believe that they were improving their property at no or minimal cost to themselves, but that such improvements were always fully priced-in from the developer's perspective. In Mr Hammond's view, the appellant's marketing and pricing strategies were more transparent and therefore to be preferred. Overall, Mr Hammond considered that it made little difference from an economic perspective whether fixtures and fittings are included as standard but paid for within the sale price or whether 'vouchers' are used to add them as optional extras. The customer pays either way.

25. Mr Hammond confirmed that most of the appellant's sales (outputs) are zero-rated, meaning that the appellant's quarterly VAT returns invariably give rise to a net repayment.

26. With my agreement, in his oral evidence, Mr Hammond introduced into evidence a document dated 21 June 2019 and entitled "Photographic record of blinds and various fixings methods". This document was particularly helpful in understanding how the window blinds (and, where relevant, curtain poles) are affixed on the Woodlands Park site. The document contains 14 numbered and annotated photographs. I had regard to each photograph and the associated comments, but found those numbered 3, 4, 5, 8, 9, 11, 13, and 14 particularly relevant to the issue before me, and extremely useful.

Mr Tayler

27. Mr Tayler has been involved in the construction industry for 40 years. His role at the appellant makes him responsible for the day-to-day construction operations at Woodlands Park. This involves ensuring works are built to specification, planning the construction work the site, liaising with the sales team as to internal finishing specifications, carrying out appraisals that got, determining and agreeing monthly valuations for building works across various phases, and coordinating work between utility companies and the contractor.

28. Mr Tayler's witness statement elaborated on the sales strategy at Mr Hammond had described. It said as follows:

Sales Process

7. Although Wickford have fitted showhouses, and the plots may be viewed from site plan, the prospective purchasers can physically view the completed home they are interested in. Wickford have a stock list and price list of all the homes within the confines of the finished estate. Construction works are programmed so that completed homes on the price list are not within the operational construction area. Potential purchasers may be any home on the stock list. The prices of those homes on the stock list but not as yet on the price list are non-negotiable. The homes on the price list may be subject to a discount depending on negotiation between the Sales Agents given parameters and the offeror.

8. Once an offer has been agreed the home is reserved. Wickford does not request or take a reservation fee. The house is reserved for the agreed price dependent upon a 4-week exchange of contract term… The reservation form states that the aim is reserved 'as per standard specification'. On exchange of contracts the house is given its final inspection by the National House-Building Council to finalise Building Regulation compliance and to review all electrical, gas and energy efficiency certification. The house is further snagged by observation and a schedule of works produced. The plot is also redecorated to remedy any shrinkage crap that may have appeared prior to the sales' completion.

Specification

9. The standard work that specification is as follows in respect of fixtures and fittings. All kitchens come with integrated appliances, ovens, hobs, extractors, fridge/freezers, dishwashers, and washer/dryers. Carpets are laid throughout all habitable rooms. Vinyl script flooring is laid in bathrooms and en-suites. Tiled floor finishes are laid in kitchens and cloakrooms. Bathrooms and WCs have fitted space and vanity units. Bathrooms have touch light mirror cabinet. Natural gas Lane files are fitted on selected plots. It is downlights are located in bathrooms, cloakrooms and kitchens. All other rooms have standard ceiling rose mounted bayonet energy efficient lamps.

10. Bespoke measured fitted blinds are fitted to all windows. Curtain poles and curtains are fitted where blinds are impractical for example; externally opening French patio doors. Velux (roof light) windows in bedrooms and bathrooms have fitted blinds. Where Velux windows cannot be accessed, without steps (such as staircase landings) blinds are omitted.

11. The customer has no input into the finished specification prior to or post reservation. Occasionally covenant consent is granted for the installation of garage personal doors, sheds, and satellite dishes…

The inclusion of blinds

13. Blinds been fitted at Woodlands Park as standard since January 2015. All plots from 19 onwards on Sector 2 Phase 4 have consistently benefited from this specification. There are 253 plots on sector to Sector 2 Phase 4. Prior to this time blinds had been installed to selected plots only to assist in selling less popular house types, plot specific locations, and in market downturns. These were included free of charge and work the same type as we currently install stop

14. Wickford made the decision to install blinds and carpet as standard normal working practice. This was also viewed as a sales marketing tool to meet our purchasers' expectations. Our show homes come fully furnished with window dressings. Therefore, in selling a turnkey product rather than

off-plan when a potential customer used a completed home the sale it enforces their impression of a show home setting with the exception of furniture and furnishings.

15. One of my duties in 2015 was to research Wickford's competitors and their marketing strategies. This was done by visiting competitor site and talking with the respective Sales Managers, obtaining marketing literature and priceless. Wickford still do this today on a regular basis. We also use Internet online search engines and property websites such as Rightmove to research current market trends. Blinds became another way to demonstrate Wickford's commitment to attention to detail. It also enables customers to move into their homes immediately with their furniture without the need to employ tradesmen to fit blinds.

16. Blinds are fitted ordinarily across all house types, no differentiation is shown to house type or asking price of the property. The installation of blinds and style/fitment are decided upon by Claudius Designs Limited ("Claudius"), the independent company which Wickford contracts with to fit blinds, based upon availability and current market trends.

The fitting of blinds

17. Wickford contracts with an independent third company, Claudius, to measure and fit blinds in each property. Surveys are carried out by Claudius for each property as window reveal sizes vary on a plot by plot basis Claudius conduct a measurement survey of the house for blinds and carpet once internal decorations been completed. DJ Taylor & Sons Ltd as the Principal Contractor have management oversight and allow access and egress to the property. The blinds are fitted two weeks prior to the plot handover from the principal contractor to Wickford. The blinds are procured by Claudius from their stockist in Northern Ireland where these blinds are laser cut to size based upon the on-site survey measurements. Wickford place orders with Claudius for blinds, carpets and curtains on a plot by plot basis. The invoices are itemised, the cost pertaining to the 'Blinds' includes all the supply and fit, the item 'materials' are carpets, underlay and ancillary items relating to carpet floor coverings, the 'Labour' item is for the fitting of the carpet. I understand several Claudius invoices have been provided in evidence…

18. The blinds are an integral part of the house and build. It takes expertise and specialist tools to fit them stop brackets supporting the blind are fixed lintels and also onto UPVC doors. Window lintels are often formed in steel requiring hardened drill bit brackets must be secured with adequate proprietary fittings. Pull cords are also fixed onto holding hooks as this is a health and safety requirement.

19. Wickford homes are traditionally built with hard wall finishes (not dry lined). If these bespoke blinds are removed, damage would occur to the plaster within the window reveals, and also to UPVC door and door frames. Reveals would need filling and redecorating by someone possessing the technical skill to do so, whereas UPVC doors would need a specialist to repair the holes caused by the removal of the bracket [or] even a new door.

29. Ms Black had no questions for Mr Tayler.

30. Mr Qureshi asked Mr Tayler about the instructions on installing the blinds (which were exhibited to Mr London's witness statement). It was pointed out to Mr Qureshi that this was really for Mr London to comment on and not Mr Tayler, but Mr Tayler was content to answer Mr Qureshi's questions to the best of his knowledge. Under cross-examination from Mr

Qureshi, Mr Tayler confirmed that specialist tools (including screwdrivers, drills, tape measures and pencils) were required to fit and remove the blinds.

31. Mr Qureshi asked what degree of damage would be caused to the property on the removal of the blinds, and in particular the screws and supporting brackets. Mr Tayler said that the removal of the blinds would, for example, tear plaster from the wall and/or cause cracking. Mr Qureshi asked whether the effects would be localised, and Mr Taylor confirmed that they would probably be confined within the window reveal in each case.

Mr London

32. Mr London's witness statement included evidence of the services provided to the appellant by Claudius and to explain the supply and installation of blinds. It included the following:

> **Supply and installation**
>
> 5. Claudius have been contracted by Wickford for the last twenty years to supply and install their internal furnishings, specifically fitting blinds for Wickford on the Woodlands Park site since 2012 and as standard since January 2015. The blinds supplied by us are measured by ourselves and individually manufactured by Decora Blind Systems ("Decora").
>
> 6. This is done on instruction from Wickford, after which we visit the site to carry out a survey… Once the sizes have been collected, we create an order on one of our standardised order forms detailing the blinds desired, as well as our reference number in order to keep track of the blinds. Once an order form has been completed we either emailed the border war submitted electronically via Decora's website…
>
> 7. Each blind supplied by Decora is made to the exact sizes which we supply. Even though the windows themselves may be an exact replica of one another, the window sizes will vary depending on where the plasterboard and/or windowsill has been installed internally. This means that identical windows may often have differing sized blinds. Every blind is bespoke and made to a specific size with a tolerance of only 2mm. Once an order has been fulfilled by Decora they ship them out and deliver them to ourselves, after which we inform Wickford that we are now able to proceed with fitting…
>
> 8. Following the manufacturers guidelines… the blinds are fitted using all planks and screws which are drilled into the side wall and NOT the window. Support brackets are used for longer blinds to add a further degree of support and prevent warping. The blinds itself is mounted forward of the air ventilation strips to allow air flow in and out of the windows. Child safety cleats are used to wrap the chords/string in order to comply with health and safety regulations. All blinds are tested by the fitter to make sure they work properly upon completion of installation and to ensure a professional finish.
>
> **Other Developers & Builders**
>
> 9. Claudius have supplied and fitted blinds on new residential development sites for other regional developers in East Anglia for over 15 years.

33. In support of the proposition that the installation of blinds was widespread in the housebuilding industry, I was directed to a number of articles published in trade journals and newspapers, published between 2002 and 2019. Mr London's evidence was that these articles, several of which purported to draw on market research, supported his general contention that the installation of blinds by developers was increasingly commonplace.

34. I was also taken to brochures published by Persimmon Homes and Bellway Homes, both of which made reference to the installation of window blinds as optional extras in the construction of a home. It was apparent from these brochures that, unlike the appellant's own practice (discussed below), the addition of blinds by these other developers was at a specified additional cost to the purchaser.

35. Ms Black had no questions for Mr Tayler.

36. Mr Qureshi asked Mr London for further details on the tools required to put up the blinds. In reply, Mr London said that treatment would use specialist tools made to trade (and not DIY) specification. In addition, they would use ready-made templates to install the brackets.

37. Mr Qureshi asked what damage would be caused by the removal of the blinds. Mr London replied that the blinds themselves would not be damaged, though the wall would be. Mr London added that the cost of removal together with faring the damage caused would probably be greater than the cost of the blind.

38. I had particular regard to Exhibit NL4 to Mr London's witness statement, which was a copy of the fitting instructions for the blinds.

Facts

39. I consider that Mr Hammond, Mr Tayler and Mr London were each witness of truth endeavouring to assist the Tribunal and I accept their evidence (summarised at [17] to [38] above) as fact. As noted above, the evidence was (save as mentioned) not challenged by Mr Qureshi and Mr Qureshi did not introduce any evidence for HMRC.

SUBMISSIONS AND DISCUSSION

Burden of Proof

40. Ms Black accepted that the burden of proof in tax appeals at first instance rests upon the appellant. However, Ms Black submitted that, having provided sufficient evidence to raise a prima facie case, the appellant would discharge this initial burden of proof and the burden would shift to HMRC to disprove the appellant's case. Ms Black referred me to *Taylor Wimpey plc v HMRC* [2014] UKFTT 575 (TC) (Judge Barbara Mosedale) at [25] to [26]. At [26], Judge Mosedale considered the dictum of Chadwick LJ in *Wood v Holden* [2006] STC 443 at 641-3, which supports Ms Black's submission.

41. With that background, Ms Black drew my attention to HMRC's original statement of case, its combined statement of case and its amended combined statement of case. In these documents, under the heading "Burden of Proof", HMRC wrote: "*the respondents say that the onus of proof rests with HMRC to show that the appellant cannot recover VAT on the disputed items.*" In Ms Black's submission, this statement could only be read as an acceptance by HMRC that the appellant had discharged its prima facie burden of proof. It would follow that the appellant needed to prove nothing in this appeal and the onus was exclusively on HMRC to disprove the appellant's case.

42. In response, Mr Qureshi did not accept that characterisation of HMRC's position. Though he did not say so in so many words, it seemed clear that the statement in the combined statement of case constituted an oversight or error on Mr Qureshi's part. At first sight, that error might seem trivial, but if the Tribunal decided to hold HMRC to it then it could conceivably be determinative of the outcome.

43. Ultimately, the Tribunal decided that the appellant would easily have met the burden of proof (had it been on it), and so the point was not material in the circumstances (though it should be acknowledged that it might well have made a difference to the appellant's overall preparation of its case).

Price v HMRC

44. Ms Black rightly acknowledged that earlier decisions of this Tribunal do not constitute binding precedent and they are of presumptive or persuasive authority only. She referred me to *Simon Hurst v HMRC* [2019] UKFTT 286 (TC) (Judge Christopher Staker) at [19] to [24], which summarised the law in this regard. In particular, Ms Black relied on Judge Staker's summary to support her submission that I should give significant weight to Judge Walters' decision in *Price* and follow it in this case.

45. For HMRC, Mr Qureshi had little to say about *Price*. His written submission was as follows:

> The Appellant relies on the decision in *Price*,… The Respondents note in his conclusion the judge said "although as a matter of judicial notice, because there was no evidence on the point, that roller blinds are as much 'goods of any description ordinarily incorporated by builders in a [dwelling house]' as finished or prefabricated furniture, furniture designed to be fitted in kitchens or carpets or carpeting material. In short, this seems to me to be nothing 'extraordinary' about their incorporation into a dwelling house by builders."

46. Given that the paragraph quoted by Mr Qureshi from *Price* ([31]) is *against* HMRC, it is difficult to know what to make of this submission.

47. In his oral submissions, Mr Qureshi said that Customs Brief 02/11 stated HMRCs position. Mr Qureshi agreed with Ms Black that *Price* constituted persuasive authority, but he noted that it was not binding on this Tribunal and he said that the Tribunal in this case should not follow *Price*. This was because Price had been decided on the basis of judicial notice and no evidence had been put to the judge.

48. It is a long-established principle that only the *ratio* – the legal reasoning – of a decision constitutes precedent: the facts as found by a court or tribunal in a given case apply to that case alone, and are, in general, irrelevant to subsequent cases.

49. It follows that the fact that the decision in *Price* was reached by way of judicial notice of the facts should be irrelevant to its precedential status. As a prior decision of this Tribunal, the *ratio* in *Price* constitutes presumptive authority. This means that I am not bound to follow it. However, I should ordinarily only depart from it if I conclude that it was wrongly decided in law.

50. Though it was not necessary for the parties to deal with the nature of judicial notice in any detail, I note in passing the following from *Phipson on Evidence*:

> 3-02 Courts will take judicial notice of the various matters enumerated below. They fall into two broad categories. First, the concept covers matters being so notorious or clearly established or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary. Some facts are so notorious or so well established to the knowledge of the court that they may be accepted without further enquiry. Others may be noticed after inquiry, such as after referring to works of reference or other reliable and acceptable sources. Judicial notice can save time and cost, and promote consistency in decision making.

51. Subject as follows, I consider that the Tribunal in *Price* correctly stated the relevant law and I respectfully agree with it.

52. Consequently, Customs Brief 02/11 is in my view incorrect.

"Building Materials"

53. The only substantive issue in this case was whether the window blinds installed in the properties developed by the appellant met the definition of 'building materials' set out in Note 22 (which is set out in full at paragraph 5 of the Appendix).

54. Subject to its express exclusions, Note 22 provides that "'Building materials', in relation to any description of building, means goods of a description ordinarily incorporated by builders in a building of that description, (or its site)." Ms Black divided that provision logically into its constituent parts:

(1) "Goods of a description";

(2) "incorporated";

(3) "ordinarily";

(4) "by builders"; and

(5) "in a building of that description".

55. Ms Black made submissions on each element in turn. She further submitted that none of the exclusions in Note 22 (a)-(d) applied, for reasons she explained.

56. The separate parts of the definition of "building materials" and its exclusions are dealt with in turn below.

Definition of "building materials"

Goods of a description

57. In Ms Black's submission, it is first necessary to identify whether goods of a *generic* description are ordinarily incorporated by builders, and then to determine whether the goods in question fall within that generic category: *C&E Comm'rs v Smitmit Design Centre Ltd* [1982] STC 525 (HC) at 532(a-g), *per* Glidewell J. That passage quotes with approval the decision of the Manchester VAT Tribunal in *F Booker Builders & Contractors Ltd v C&E Comm'rs* [1977] VATTR 203, itself considering *F Austin (Leyton) Ltd v C&E Comm'rs* [1968] 2 All ER 13 (HC), *per* Stamp J, at 19.

58. I agree. The task is therefore to identify the *genus* of which the goods in this case are to be considered against. Acknowledging that blinds shares characteristics with curtain poles, curtains and shutters, Ms Black argued that either "window dressings" or "blinds" were the relevant *genus* in this case. On balance, she concluded that window dressings were too wide a category and that therefore blinds constituted the relevant *genus*. In doing so, Ms Black recognised that this made her task rather harder, as she would have to establish that blinds alone (rather than window dressings in general) were "goods of a description" ordinarily incorporated by builders.

59. Mr Qureshi had no relevant submissions on this point.

60. Contrary to Ms Black, I consider that the *genus* in this case is that of 'window dressings', of which curtains and poles, shutters, and blinds are each *species*. In this, I find support in *Booker*:

> …it is a wrong approach to look at any article in its specific capacity, that is to say to look at it either as a gas fire or as a central heating unit or as a solid fuel heating arrangement. What has to be looked at, in our view,… is the generic description of a heating installation.

61. I therefore agree with Ms Black's submission that "[i]f the goods being assessed were window dressings/coverings, then HMRC's illogical distinction in its guidance between curtain

poles and blinds is wholly unjustifiable." As Ms Black continued, "…this distinction… [is] wholly unjustifiable in any event, even if the generic category to be considered is 'blinds'. Given the level of incorporation required, it is much more logical to align blinds with curtain poles and rails, rather than with curtains themselves, which are easily attached and detached from the pole or rail." Quite so, and the evidence (especially including the photographic evidence) presented to this Tribunal amply substantiates those propositions.

Incorporated

62. In *Price*, the Tribunal determined that roller blinds had been installed in the building during the course of construction works in much the same way that curtain poles might be. The Tribunal noted that curtain poles or tracks were zero-rated for VAT purposes. The blinds in question had therefore been incorporated in the building within the meaning of Note 22.

63. The test for incorporation is set out in *Taylor Wimpey v HMRC* [2017] UKUT 34 (TCC) (***TWUT1***) at paragraphs [111]-[112]. Insofar as immediately relevant, this reads:

> [111] … the test incorporation is not determined by reference to the English land law of fixtures, nor by whether the item is part of the single zero rated supplies for VAT purposes. An item will be incorporated in the building if it is a fixture and also if it is installed as a fitting…
>
> [112] … there must in our view be a material degree of attachment to the building, albeit less than the degree of annexation required for something to be a fixture… Some… feature… of installation is necessary, whether by housing the item in a particular structure, or by fixing the item in a manner designed to be other than temporary… to a physical part of the structure…

64. I should add that the clarification of this test by the Upper Tribunal in *Taylor Wimpey v HMRC* [2018] UKUT 55 (TCC) (***TWUT2***) at [12]-[21] does not take the matter further in respect of these facts and it is not necessary to consider it in detail here (though I was directed to it by Ms Black and I have had regard to it).

65. In HMRCs view, as recorded in the review conclusion letter from Ms C Cosier (HMRC's Review Officer) to the appellant dated 13 October 2017 (and taken from HMRC's guidance on incorporation, at paragraph 13.3 of VAT notice 708), is as follows:

> For an item to be 'incorporated' into a building it has to be fixed in such a way that its fixing or removal would either:
>
> - Require the use of tools.
> - Result in either the need for remedial work to the fabric of the building or substantial damage to the goods themselves.

66. That may well be the case, and I am satisfied on the evidence before me that it was in fact the case with the blinds in question. However, that summary is essentially HMRC's gloss on the actual test - it is not the test itself. If anything, it is an unhelpful distraction from that test.

67. In his cross-examination of the appellant's witnesses and in his submissions, Mr Qureshi questioned whether blinds were in fact incorporated. He noted that only the brackets were fixed to the fabric of the property by means of screws and wall plugs: the blinds merely clipped into their brackets. In Mr Qureshi's submission, only the screws and wall plugs (or, at most, the brackets) could be regarded as being incorporated in the building.

68. Ms Black criticised Mr Qureshi's submissions on this point by comparison with HMRC's acceptance of other items being incorporated: most relevantly, HMRC accepted that curtain poles were incorporated; similarly, chandelier light fittings. On the logic of Mr Qureshi's

submission, only the screws and wall plugs (being the only parts of the units actually inserted into the fabric of the property) would be incorporated, and not the remainder of each object. But in fact, HMRC accepted the obvious fact that the items as a whole were incorporated, not merely the specific parts securing them to the building. Ms Black also observed that, as the evidence before the Tribunal showed, the blinds in question were supplied and fitted as complete units: the brackets ought not to be considered separately from the remainder of the unit – so HMRC's apparent acceptance that the brackets were incorporated but not the rest of blind unit was illogical and could not stand.

69. I agree with Ms Black's submissions on this point and I reject Mr Qureshi's proposed approach.

70. The evidence of each of the three witnesses entirely satisfied me that the blinds in question – and not merely their brackets – are indeed incorporated in the buildings. They are one unit, designed and installed as such.

Ordinarily

71. The parties' submissions on the test of ordinariness were starkly different. Mr Qureshi, relying on *F Austin*, initially argued that ordinarily meant "commonly or usually". Conversely, Ms Black took me to the test set out in *TWUT1* at [122]-[130]. Upon my questioning Mr Qureshi as to why he took me to *F Austin* rather than *TWUT1*, he eventually accepted that this was because he had been unfamiliar with the test set out in the latter. Mr Qureshi belatedly accepted that *TWUT1* set the relevant test, not *F Austin*. I therefore reject his earlier submissions.

72. There is no doubt that *TWUT1* [122]-[130] sets out the correct – binding – test for this Tribunal to apply. The relevant extract, which is worth quoting at length, is as follows:

> 126. That the judgment of Stamp J in *F Austin (Leyton) Ltd* is as relevant in the VAT context as it was to purchase tax is apparent from the later case, in 1982, of *Customs and Excise Commissioners v Smitmit Design Centre Ltd* [1982] STC 525. In that case the issue did not concern the Builder's Block, but the analogous provisions for zerorating for contract builders. Having referred at length to the above passage from Stamp J's judgment, Glidewell J (at p 531b) made it clear that to equate "ordinarily" with "invariably" would be to apply too rigid a test, saying that "ordinary" means in the ordinary way, and suggesting other synonyms of "commonly" or perhaps "usually".
>
> 127. We respectfully agree that, as a matter of language, "ordinarily" means something that is not invariable, and it must permit of exceptions. But that does not mean that it must be confined to those cases where the installation is so prevalent that it is only in exceptional cases that it would not be carried out. That too would be too rigid a test. Something will be ordinarily installed or incorporated, in our judgment, unless its installation or incorporation would be out of the ordinary, uncommon or unusual. The test, we consider, is whether the installation or incorporation of the item by builders is at the relevant time commonplace or not out of the ordinary.
>
> 128. On the other hand, we do not consider that merely because the installation or incorporation of a particular item has a quality of recurrence that permits it to be described as not exceptional, that will be sufficient to meet the degree of prevalence required to satisfy a test of ordinariness. Doing something merely more commonly or more usually than on an exceptional or isolated basis does not render that something as ordinarily done. There is a range of activity between something that is exceptional or an isolated occurrence and something that is ordinary. It cannot be enough, as the tribunal in *Rainbow Pools* appears to have thought, that the mere fact that swimming pools are

> sometimes included in luxury dwelling houses means that they must be regarded as ordinarily installed in such houses.
>
> 129. In our judgment, for an item to be ordinarily installed, the prevalence of its installation must be greater than that it is not exceptionally installed, and greater than merely sometimes installed. However, we do not consider that ordinariness can be equated with likelihood, and we disagree therefore with the FTT when it said, at [369], that ordinary means no more than that the item in question is more likely to be installed than not. Furthermore, we would not ourselves adopt the synonym of "usually" as suggested by Glidewell J in *Smitmit*; we consider that the meaning of ordinarily is closer to commonly, an expression also referred to by Glidewell J.
>
> 130. There is no bright-line test. The test, in our view, is one of ordinariness or commonness, which does not require that there be any industry standard (though clearly, if there were, that would be material factor), or that the items would be installed in most dwellings. It is, in the end, a matter of judgment, having regard to the evidence as to the relative frequency of installation by builders of the item in question at the material time.

73. In *TWUT2* at [65], the Upper Tribunal applied the above test to the facts of that case. It referred to the "rule of thumb" adopted by Stamp J in *F Austin*: "… Whether a prospective purchaser would have been surprised at the inclusion of all, as the case may be, exclusion of the item in question." The Upper Tribunal answered the question by considering the reaction of the prospective purchaser to the marketing materials available from a number of builders. If in light of that material such a prospective purchaser would have observed that the installation of an item was "commonplace and not out of the ordinary", that would be sufficient to satisfy the test.

74. Ms Black referred me to the evidence of Mr Tayler, who confirmed that the appellant had installed blinds as standard in all of its homes since 2015. She also took me to four published articles, which described how common the installation of blinds had become in residential properties in the UK. I was taken to the brochures and marketing materials of competitor housebuilders to the appellant (Persimmon and Bellway), both of which included the option of blinds as part the overall finishing package. Ms Black reminded me that in *Price*, Judge Walters had been able to conclude that blinds were ordinarily installed by way of judicial notice, which he would have been unable to do had the practice not been widespread.

75. Mr Qureshi argued that the appellant differentiated itself from other housebuilders by the inclusion of blinds in its properties. He submitted that the evidence before the Tribunal indicated, at most, that other developers might incorporate blinds on "special instruction" by the purchaser, but would not do so "ordinarily". The reference to "special instruction" is from *F Austin* at 19(D):

> … in my judgement,… what is meant by the words "ordinarily installed by builders" is that they are ordinarily installed in the course of building – articles which one would expect a builder to install as fixtures in the ordinary way *and without any special instruction.*
>
> [my emphasis]

76. The practice of other developers was, said Mr Qureshi, apparent from the Persimmon and Bellway brochures, which indicated that window blinds were a finishing option installed at the purchaser's specification and at additional cost to them. As a result, in Mr Qureshi's submission, such blinds were not "ordinarily" incorporated by property developers other than the appellant.

77. This line of argument by Mr Qureshi makes the respective approaches of the appellant and its competitors to both the marketing and pricing of their properties particularly relevant. I had evidence from Mr Hammond on these points, and Mr Qureshi cross-examined Mr Hammond on them. The evidence was that whilst the marketing and pricing strategies of the appellant and its competitors were seemingly different, in that the appellant marketed "turn-key" properties at an all-inclusive price, whilst other housebuilders typically offered properties at a basic specification with the option of improving the specification with the inclusion of at-cost extras (often in combination with incentive schemes, such as 'vouchers' to a fixed value (e.g. £10,000), which the purchaser could set against the higher specification items), the difference was one of appearance only and not one of substance. This was because, on either basis, the purchaser paid for the inclusion of the specified items (Mr Hammond added that the appellant's approach had the benefits of transparency and simplicity in his view).

78. Ms Black argued that the purchaser had no choice in the fitting of window blinds in properties built by the appellant, such that there could be no "special instruction" in respect of those. As regards the practice of other developers, Ms Black took me to the Persimmon brochure by way of example, which illustrated, in her submission, that Persimmon included the option of fitting blinds or curtain poles or rails, treating them both as equally usual and without distinction between them. The only difference between Persimmon's practice and the appellant's was that Persimmon gave the purchaser the choice between curtain poles and blinds. But the making of that choice by a purchaser could not constitute a "special instruction" by the buyer if blinds were chosen.

79. I agree with Ms Black's analysis on this point. I am satisfied that the apparent differences between the appellant's specification and marketing of its properties and the practices of its competitors are not material in this context: as Mr Hammond said in evidence, the purchaser pays for the finishing specification whether it is included as standard, as with the appellant, or whether it is classed as an upgrade at an apparent additional cost (with or without a 'voucher' to set against that cost), as with other developers. Economically, it is distinction without a difference.

80. Mr Qureshi argued that none of the evidence before me was quantitative: i.e. whilst it may at best establish that housebuilders *might* install window blinds, it could not satisfy me that blinds actually *were* installed ordinarily other than by the appellant. Mr Qureshi said that whilst the Bellway and Persimmon brochures indicated that blinds *might* be incorporated, they could not satisfy me that they *were* in fact incorporated. In Mr Qureshi's submission, the test as to whether building materials were 'ordinarily' incorporated was purely quantitative. He therefore said that I had to have regard to the relative frequency of the installation of window blinds by developers. In his submission, the lack of quantitative data meant that the appellant's case must fail.

81. In reply, Ms Black submitted that: (1) the Tribunal did have sufficient evidence (from the appellant's own practice, from the practice of Persimmon and Bellway as evidenced by their brochures, from the witness evidence of Mr London, and from the published articles) to determine the point in favour of the appellant; (2) in any event, requiring complete quantitative data on the incorporation of blinds in residential properties by developers would be far too onerous on the appellant when considering the standard of proof required; and (3) given that the appellant was in competition with other housebuilders, it would be simply impossible for the appellant to produce complete quantitative data on the use of blinds by other parties. Lastly, (4), Ms Black noted that HMRC had not introduced any evidence of its own to indicate that blinds were *not* ordinarily incorporated by builders. Accordingly, as the appellant had (at the least) made out a *prima facie* case, the evidential burden of proof had shifted to HMRC to establish the contrary and HMRC had failed to meet that burden.

82. I agree with Ms Black on all four of those points and I reject Mr Qureshi's arguments.

83. I placed only limited weight on the published articles put into evidence by Mr London: this was because the sources and quality of the underlying data were unclear. I expressed my view that articles like these might appear in the specialist or national or local press for any number of reasons and their existence alone proved little. However, they were clearly relevant to the issue at hand, and it was proper to allot them some evidential weight. In my view, those articles combined with the practice of the appellant and the evidence of the approach taken by other housebuilders was sufficient for me to find on the balance of probabilities that blinds were "ordinarily" incorporated by builders in residential properties. All the evidence before me supported that proposition. Mr Qureshi did not succeed in undermining it, and no evidence was introduced to the contrary.

84. Mindful in particular of the terms of *TWUT1* at [127]-[130], I conclude that I do not require precise quantitative data as to the relative frequency of the installation of blinds in new-build houses to enable me to come to a decision on this point. Like Ms Black, I consider that too high a threshold – and one that would be almost impossible for any appellant to meet. That is, as the Upper Tribunal put it, my judgment on the matter, "having regard to the evidence [before me] as to the relative frequency of installation by builders of the item in question at the material time".

85. I agree with Ms Black that the evidence in this case supports the contention that the use of blinds in new-build residential properties is already "ordinary", and increasingly prevalent. Relevantly in this context, the Upper Tribunal in *TWUT1* held at [139]:

> We should add that we do not agree with the FTT that the question whether an item was ordinarily installed or incorporated is to be measured as at the date of the legislation or the date of a legislative change (First FTT Decision, [367] - [368]). *It is clear that the legislation is looking at the state of affairs from time to time, and that the question whether items are ordinarily installed or incorporated will change over time.* The issue with which the Builder's Block is concerned is the deduction of input tax. It is the time that right arises that is the relevant time at which the question whether an item is ordinarily installed or incorporated must be determined.
>
> [my emphasis]

86. In Ms Black's submission, it was unreasonable of HMRC not to have updated its guidance in light the Upper Tribunal's comments in *TWUT1* and the (freely available) evidence of the frequent and increasing use of window blinds. Arguably, one might say that not only did HMRC's published guidance appear to ignore such evidence, but HMRC actively set its face against it by publishing Customs Brief 02/11 after this Tribunal's decision in *Price*. Ms Black also argued that in uncritically following its published guidance in this case, both in correspondence and in its submissions, HMRC was continuing its unreasonable conduct. Against that submission it must be acknowledged that as a decision of this Tribunal, *Price* did not constitute a binding precedent and HMRC was in principle free to take a different view of the matter. Also, as a responsible public authority, HMRC was right to consider the costs and benefits of a further appeal in a case in which it lost at first instance (and in *Price*, the VAT in dispute in respect of window blinds amounted only to £61.47). In light of these factors, the reasonableness of HMRC's contrary view might have relevance in subsequent cases. Of course, given the potential adverse consequences to HMRC of publishing a view which might later be adjudged unreasonable, it is not a risk-free option for HMRC openly to depart in published guidance from a Tribunal decision in lieu of pursuing an appeal – and (bearing in mind the extract from *Phipson* quoted above) perhaps especially where that decision was

reached by way of judicial notice. Whilst this issue was raised in argument, I have not needed to come to a view on it to enable me to determine the outcome of the appeal.

By builders

87. Mr Qureshi and Ms Black differed on the meaning of the requirement that the goods were to be incorporated "by builders".

88. Mr Qureshi tried several times to make an argument that the installation had to be part of a single supply of services provided by the appellant, apparently in mistaken reliance on *Rialto Homes PLC v C&E Comm'rs* [1999] VATTR 16340, at paragraphs [15]-[16]. As I explained to Mr Qureshi, that argument was untenable in light of the decision of the Upper Tribunal in *TWUT1* at [143] and *TWUT2* at [67].

89. After that, Mr Qureshi's core submission was that parliament specifically intended the use of the plural in "builders" – to the exclusion of the singular – meaning that the practice of just one builder would be insufficient for these purposes: the practice of at least two builders would be necessary to satisfy this part of the test. In Mr Qureshi's submission, the burden of proof was on the appellant to establish (to the civil standard) that builders (plural) incorporated blinds in new-build homes ordinarily, and otherwise than by special request. He argued that the appellant had failed to do so.

90. Ms Black relied on the submissions summarised above in respect of the practice of other housebuilders, exemplified by Persimmon and Bellway, together with the practice of the appellant. Evidence was provided that between them, Persimmon and Bellway controlled more than a third of the residential property development market. These factors, she argued, demonstrated that "builders" plural did incorporate blinds, thus answering Mr Qureshi's submission.

91. Ms Black argued that, properly understood, the phrase "by builders" actually only required that the item be incorporated (by the builders) during the period of construction. In her submission, it had nothing to do with the number of builders required before installation of an item could be considered "ordinary". She pointed to s.6 Interpretation Act 1978, which specified that ("unless the contrary intention appears") words in the singular include the plural and *vice-versa*.

92. I prefer Ms Black's submissions on this point: there is nothing in the language of Note 22 which of itself requires the use of the plural exclusive of the singular. If that was what Parliament had intended one would have expected it to have made its meaning clearer. Of course, the "ordinarily" test set out in *TWUT1* [122]-[130] and applied to the facts of this case would typically require multiple builders to adopt the same practice as regards window blinds in most or all circumstances, but that is a different point. Ms Black's submission of the meaning of "by builders" referring to the time of incorporation seems to me to be the right interpretation.

93. In any event, I find that the evidence before me sufficiently establishes that even if the plural of "builders" was deliberately used by Parliament in the way Mr Qureshi suggests, the appellant would have satisfied that criterion.

In a building of that description

94. The parties were agreed that the buildings in question were properties built as single family dwellings.

95. Nobody argued that the relevant buildings were "turnkey" properties finished to a different and higher standard than residential dwellings built by other developers. I agree with that, and note that in *Rialto* at [23], the VAT Tribunal held that the appropriate class of

buildings was residential properties in general and this was followed in *Tom Perry v HMRC* [2006] Lexis Citation 517 at [43] (the property in question in that case being a technologically advanced eco-home).

Exclusions

96. Ms Black was compelled to make arguments on the exclusions in Note 22 because it was her understanding, in light of earlier correspondence and HMRC's written pleadings, that HMRC argued that blinds fell into one or more of the excluded categories. Ms Black understood that HMRC was arguing that even if the appellant satisfied the Tribunal on the five constituent parts of Note 22 summarised above, recovery of input tax would still be blocked as blinds fell within the exclusions contained in Note 22 (a) to (d), i.e.: "finished or prefabricated furniture, other than furniture designed to be fitted in a kitchen"; "materials for the construction of fitted furniture, other than kitchen furniture"; "electrical or gas appliances…"; and "carpets or carpeting material". This necessitated her going through each of those exclusions.

97. I can readily see why Ms Black had come to this understanding of HMRC's position: arguments to that effect were put forward in HMRC's original Statement of Case and in its skeleton argument and documents prepared for this hearing. Those arguments were confused and confusing, and their comprehension was not always advanced by oral submissions. Mr Qureshi made submissions on the afternoon of 24 June, both briefly before and briefly after a short adjournment (which I allowed him to collect his thoughts), and again on the morning of 25 June, having risen early on the afternoon of 24 June (to give him more time to prepare).

98. In this decision, I have endeavoured to do justice to Mr Qureshi's submissions as I have understood them. However, I have not been entirely able to reconcile them with one another, as they seem to me to be mutually exclusive. Mr Qureshi advanced several competing arguments in the hearing and did not seek to conform one with another. It is possible that his different lines of argument were each made in the alternative, but if that was so then it was not made clear at the time.

99. Mr Qureshi argued first that blinds, as with curtains, were chattels and therefore incapable of being building materials within the meaning of Note 22. He relied on *Botham & Ors v TSB Bank PLC* (1997) 73 P&CR D1; [1996] Lexis Citation 5162 (CA). It was common ground that curtains (as opposed to curtain rails or poles) were not incorporated as building materials because their degree of attachment to the property was too slight: they could be put up and taken down without damage either to themselves or the building. Mr Qureshi pointed to the fact that curtains and blinds were treated alike in *Botham* and he argued that the treatment of the one should mirror that of the other. In parallel, Mr Qureshi pointed to the treatment of carpets in *Botham*, which was dealt with in some detail by the Upper Tribunal in *TWUT1* at [113]-[118]. The Upper Tribunal decided that this Tribunal had erred in law by departing from the Court of Appeal's judgment in *Botham* that fitted carpets held in place with gripper rods were not fixtures, by reason of the ease with which they could be removed from the grippers without damage to either (this was contrasted with the position in respect of glued carpet tiles, though, which were more substantially affixed). The logic of Mr Qureshi's submissions appeared to be that blinds should be included with curtains in the exclusion at Note 22(d).

100. Additionally, or in the alternative, as chattels – rather than fixtures – Mr Qureshi argued that blinds should be classed together with 'furniture', and thus also (or alternatively) within the exclusion at Note 22(a). In support of this proposition, Mr Qureshi relied on dictionary definitions of "furnishing" and "furniture", together with extracts on the same, and "chattels" from *Words and Phrases Legally Defined*.

101. Mr Qureshi's submissions did not deal with Note 23, which reads:

For the purposes of Note (22) above the incorporation or goods in a building includes their installation as fittings.

102. Mr Qureshi did not attempt to deal with the differences between fixtures and fittings, or why blinds should not be classed as "fittings", even if they were not fixtures. He had no reasoned response to the objection that blinds, irrespective of whether or not they were chattels, were neither "curtains" nor "furniture" and he argued that as furnishings they were encompassed within the meaning of the word "furniture" for the purposes of Note 22(a)-(b).

103. Ultimately, when pressed on the point, Mr Qureshi relied on his primary submission that blinds were not building materials because they were not incorporated by builders (plural) and that, as a result, it was not necessary to consider the exclusions in Note 22(a)-(d).

104. Ms Black made the obvious points that none of the exclusions in Note 22(a)-(d) mentioned blinds. In Ms Black's submission, the exclusions were intentionally exhaustive and there was no jurisdiction for the Tribunal to extend their reach. The Tribunal could only conclude that blinds were within the exclusions if, by means of standard legislative interpretation, it concluded that they fell within one of the specified groups. In her submission, that was not possible. By way of further support for her proposition, Ms Black relied on the Tribunal's comment in *Price* at [28] that "…clearly [blinds] are not within the specifically excluded items."

105. I agree entirely with Ms Black, and respectfully with the Tribunal in *Price*, and the submissions made by Mr Qureshi suggesting that blinds could be considered to be within any of the excluded categories in Note 22(a)-(d) are obviously incorrect and patently untenable.

106. A brief word is required on *Frank Haslam Milan & Co Ltd v C&E Comm'rs* [1989] Lexis Citation 2151 and *Perry*, both in the VAT Tribunal. Both of these cases concerned the builder's block, and both concerned blinds. The appellants lost both cases. Unsurprisingly, Mr Qureshi relied on them in arguing for the same outcome here. However, the blinds in those cases were sophisticated electrically operated blinds with in-built heat sensors, which opened and closed automatically in response to temperature changes to retain or disperse heat. The VAT Tribunal rejected the appeals in those cases because the blinds were electrical appliances and so within the exclusion at Note 22(c), but not within the carve-out at 22(c)(i) for electrical appliances "designed to heat space". The VAT Tribunal did not conclude that the blinds were subject to the builder's block on account of the fact that they were blinds *per se*. As a result, I find those cases of little or no assistance to the question before me.

CONCLUSIONS AND DISPOSITION

107. For the reasons set out above, I have concluded that manual window blinds are goods of a description ordinarily incorporated by builders in properties built as single family dwellings. They do not fall within any of the exemptions contained in Note 22(a)-(d). They are therefore to be zero-rated for VAT purposes.

108. HMRC's view on the matter, expressed in Customs Brief 02/11, is irreconcilable with these conclusions and is incorrect.

109. I allow the appeal in full.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

110. 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.

JAMES AUSTEN

TRIBUNAL JUDGE

RELEASE DATE: 5 OCTOBER 2020

APPENDIX
Statutory Provisions

1. Section 25, so far as is relevant, provides:

> *"(1) A taxable person shall –*
>
> *(a) in respect of supplies made by him, and*
>
> *(b) in respect of the acquisition by him from other member States of any goods,*
>
> *account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.*
>
> *(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.*
>
> *(3) If either no output is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as "VAT credit".*
>
> *…*
>
> *(7) The Treasury may by order provide, in relation to such supplies, acquisitions and importations as the order may specify, that VAT charged on them is to be excluded from any credit under this section and-*
>
> *(a) any such provision may be framed by reference to the description of goods or services supplied or goods acquired or imported, the person by whom they are supplied, acquired or imported or to whom they are supplied, the purposes for which they are supplied, acquired or imported, or an circumstances whatsoever; and*
>
> *(b) such an order may contain provision for consequential relief from output tax.*

2. Section 26 provides:

> *"(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.*
>
> *(2) The supplies within this subsection are the following supplies made or*

to be made by the taxable person in the course or furtherance of his business –

(a) taxable supplies;

…

3. Section 30 states:

"(1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section –

(a) no VAT shall be charged on the supply; but

(b) it shall in all other respects be treated as a taxable supply;

and accordingly the rate at which VAT is treated as charged on the supply shall be nil.

(2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified.

…

4. Schedule 8 sets out groups of supplies which are to be zero-rated. Anything listed within the schedule is zero-rated for VAT purposes. Group 5 of Schedule 8 is the relevant part, concerning the construction of buildings, etc., and provides, insofar as is relevant:

"*1 The first grant by a person-*

(a) constructing a building-

(i) designed as a dwelling or number of dwellings; or

(ii) intended for use solely for a relevant residential or a relevant charitable purpose; or

(b) converting a non-residential building or a non-residential part of a building into a building designed as a dwelling or number of dwellings or a building intended for use solely for a relevant residential purpose,

of a major interest in, or in any part of, the building, dwelling or its site.

2 The supply in the course of the construction of –

(a) a building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose or a relevant charitable purpose; or

(b) …

of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity.

3 - ...

4 The supply of building materials to a person to whom the supplier is supplying services within item 2 or 3 of this Group which include the incorporation of the materials into the building (or its site) in question.

5. The relevant Notes to Group 5 provide:

> *"(22) "Building materials", in relation to any description of building, means goods of a description ordinarily incorporated by builders in a building of that description, (or its site), but does not include-*
>
> *(a) finished or prefabricated furniture, other than furniture designed to be fitted in a kitchen;*
>
> *(b) materials for the construction of fitted furniture, other than kitchen furniture;*
>
> *(c) electrical or gas appliances, unless the appliance is an appliance which is-*
>
> *(i) designed to heat space or water (or both) or to provide ventilation, air cooling, air purification, or dust extraction; or*
>
> *(ii) intended for use in a building designed as a number of dwellings and is a door-entry system, a waste disposal unit or a machine for compacting waste; or*
>
> *(iii) a burglar alarm, a fire alarm, or fire safety equipment or designed solely for the purpose of enabling aide to be summoned in an emergency; or*
>
> *(iv) a lift or hoist;*
>
> *(d) carpets or carpeting material.*
>
> *(23) For the purposes of Note (22) above the incorporation or goods in a building includes their installation as fittings.*

6. The Value Added Tax (Input Tax) Order 1992 (which has effect as if it were made under s25(7) VATA), Art 6 provides:

> *"Where a taxable person constructing, or effecting any works to a building, in either case for the purpose of making a grant of a major interest in it or any part of it or its site which is of a description in Schedule 8 to the act, incorporates goods other than building materials in any part of the building or its site, input tax on the supply, acquisition or importation of the goods shall be excluded from credit under section 25 of the Act."*