TC01494

Appeal number: TC/2009/14332

VAT – DIY builders and converters refund scheme – whether building ceased to be existing building – whether what was retained was no more than a single façade – whether its retention a condition or requirement of statutory planning consent or similar permission – note (18), Group 5, Sch 8 VATA

FIRST-TIER TRIBUNAL

TAX

JONATHON BERRY LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 4 August 2010

The Appellant did not appear and was not represented

Rory Dunlop, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Having heard Rory Dunlop, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents. The Appellant did not appear and was not represented, but the Tribunal was shown copies of e-mail correspondence from the Appellant referring to the hearing and making certain representations. The Tribunal was satisfied that the Appellant had been notified of the hearing and that it was in the interests of justice to proceed.

The Tribunal decided that the appeal is dismissed.

Summary findings of fact and reasons for the decision

1. The Appellant appeals against the decision of HMRC of 26 August 2009 to refuse the Appellant's claim for a VAT refund totalling £7,541.18 under the DIY Builders and Converters Refund Scheme. That claim is made on the basis that the works carried out by the Appellant amounted to the construction of a building designed as a dwelling within section 35(1A) of the Value Added Tax Act 1994 ("VATA").

2. There is one question for us to determine in this appeal, with two issues. The question is whether the works are prevented from being the construction of a building because what has been done is either the conversion, reconstruction or alteration of an existing building, or an enlargement or extension of an existing building within note (16) to Group 5 of Schedule 8 VATA. This turns on when a building ceases to be an existing building, which is dealt with by note (18). To cease to be an existing building it must be demolished completely to ground level, or, if not demolished completely, the part remaining must consist of no more than a single façade or, where a corner site a double façade, the retention of which is a condition or requirement of statutory planning consent or similar permission. The two issues in this case are, firstly, whether what was retained is no more than a single façade (the property in question not being on a corner site), and secondly, if there was just a single façade retained, was that retention a condition or requirement of the planning consent that was obtained.

The facts

3. We did not have the benefit of oral evidence from, or on behalf of, the Appellant. Our findings of fact are accordingly made by reference to the documentary evidence produced to us and which we have considered.

4. Planning permission under reference number LW/07/1516 was granted to the Appellant on 28 February 2008 for:

> "… Remodelling of bungalow comprising ground floor extension and new roof to facilitate three bedrooms and bathroom within roof void, revision to LW/07/1146
>
> At 74 Northwood Avenue Saltdean East Sussex BN2 8RG

> PARISH: Telscombe
>
> to be carried out in accordance with Plan and Application No. LW/07/1516 submitted to the Council on 30 November 2007."

No plans in respect of this planning permission had been supplied by the Appellant to HMRC or to the Tribunal.

5. The works went ahead, but it appears that they were not carried out in accordance with the original plans. What was involved instead was a partial demolition. Retrospective planning permission under reference LW/08/0819 was granted on 4 September 2008 for:

> "… the retention of a ground and first floor extension to form chalet bungalow including partial demolition of existing building and garage (amendment to planning permission LW/07/1516) … to be carried out in accordance with Plan and Application No. LW/08/0819."

6. In the case of the retrospective permission, two plans on which the decision was based were attached. One was of the existing (which we take to be the original) building, and the other showed the elevations and a typical section of the building for which permission was granted. This second plan (referenced A336 05 A), a revised version of which (A336 05 B) which was the subject of subsequent conditional approval for building control purposes on 12 January 2009, has notes to the typical section, one of which shows, by reference to an arrow indicating internal walls, a "Line of existing walls and foundations". We had no plan of the new building with the September 2008 permission, but a document entitled "Proposed Plans – revised" and dated November 2007 was attached to the building control approval. There was no reference in that plan to the retention of existing walls.

7. On 4 February 2009 a Certificate of Completion under the Building Regulations 2000 was issued specifying as details of the works: "Construction of new dwelling utilising some pre-existing structure". This description was confirmed as an accurate reflection of the works by Mr R A Carsons, Head of Building Control at Lewes District Council, in an e-mail to the Appellant of 27 May 2009 which confirms Mr Carsons' understanding that the Appellant had chosen to retain a minimal amount of original structure in the area of some building services which would otherwise have been complicated or expensive to re-route. He also offered the view that to all intents and purposes the building was effectively a "new dwelling" with a specification meeting current Building Regulations requirements. The e-mail from the Appellant to which Mr Carsons was replying, which was also dated 27 May 2009, had asked him to "advise the reasons we kept the existing walls".

8. Following enquiries by HMRC of Lewes District Council, two responses were received:

(1) On 17 June 2009, Mr S J Howe, Area Team Leader (South), Planning Services confirmed firstly that the building was not on a corner site (meaning that, at maximum, a single façade could be retained for these purposes), and secondly he enclosed a plan marked to show the areas which were understood to

be the parts of the original bungalow that had been retained. We were shown a copy of this plan. The walls marked are the external walls of the kitchen on the north and west elevations, and internal walls dividing the utility room from the kitchen and bathroom, the bathroom from a bedroom and a bedroom from the living room and the other bedroom.

(2) On 20 July 2009, Mr Carsons provided information from the surveyor who had made the site inspections. At the inspection on 28 May 2008 some of the walls, both external and internal, had been removed, but others were intact. Subsequently, on 30 July 2008, referring to external walls, the surveyor reported that she believed the only original wall remaining was the front wall of the previous kitchen extension, described as the left half of the north west elevation. (This is a little confusing, as all the plans refer to north and west etc elevations; for consistency, we believe that what is referred to here is what we regard as the west elevation, the side of the building where the front door is sited.) As regards this second visit, the surveyor makes no reference to internal walls.

9. We did not have the benefit of hearing from the Appellant, or any evidence on his behalf. We also had very little information at all from the Appellant. His notice of appeal set out the following grounds:

> "Please find enclosed the credit note issued by Lewes Council, following the property deemed as zero rated. Following the planning permission being granted as a new build development. We were advised by the head of building control to carry out five alterations e.g. movement of velux to ensure that a completion cert would be issued, which incurred additional cost of £2,000 approx. The development at the point of demolition the said "remaining wall" was 12ft long and 4 ft high to secure all the services, water, gas + electricity which would have cost more to move. After taking advice we have chosen to appeal and approached our local MP. Desmond Taylor has supported us and believes the HMRC has interpreted the legislation far too narrowly and feels the first decision is unreasonable."

10. As we referred to above, the Appellant also wrote two e-mails to HMRC's Solicitors' Office which he asked to be produced to the Tribunal. He says that whilst building the house the Council advised him to try and achieve new build status by altering, at his cost, a few items that had already been finished. He says that he did this, and achieved a new build certificate. The Tribunal understands this to be the Building Regulations Certificate of Completion, and the reference to "new build" to be to Mr Carsons' e-mail of 27 May 2009. The Appellant describes "the wall in question" in his e-mail of 12 July 2010 as approximately 12 metres long and 2 feet high, and in his e-mail of 30 July 2010 as approximately 6 metres long and 2 feet high. He refers to this wall as the only part of the "existing" (which we take to mean the original) building left. He reiterates the points about the wall remaining in order to accommodate the services, and the intervention of Mr Turner MP.

11. As regards Mr Turner MP, we were shown a copy of a letter dated 15 July 2009 sent by him to HMRC in which he refers to the refund of VAT by the Council, and continues:

> "From what Mr Berry tells me only a small section of the two walls were retained, and having seen full details of the plans the local council acknowledge that the new build will use some existing structure. Given that the local council has refunded the VAT element of building control fees, I am at a loss to know why HMRC are failing to do the same."

Issue (1) – Was only a single façade retained?

12. The burden of proof is on the Appellant who has asserted that the wall in question is the only part of the original building that remained. On the evidence before us, we are unable to accept that as a matter of fact. We find that, on the balance of probabilities, there remained parts of two walls or facades and a number of internal walls. The evidence on which we base this conclusion is:

(1) The e-mail of 27 May 2009 from the Appellant to Mr Carsons, in which he refers to existing walls in the plural.

(2) The plan enclosed with the letter from Mr Howe dated 17 June 2009 shows Mr Howe's understanding that there remained two external walls and a number of internal walls.

(3) The Sections plan (A336 05 A), which was one of the plans on which the retrospective planning permission was granted, and the only one we have seen that makes any reference to retention of the existing structure, refers to the use of existing walls in the plural.

(4) The letter from Mr Turner MP dated 15 July 2009 records the Appellant as having told him that a section of two walls had been retained.

13. We do not consider that this evidence can be contradicted either by the Appellant's own assertions in this appeal, or by the site inspections reports. Although the first of those reports refers to the internal walls, confirming that some were intact, the second report, we find, makes reference only to the external walls, and not to the internal walls. Although this second report states that the surveyor believed that there was only one original external wall remaining, that does not provide sufficient evidence to persuade us that the Appellant's own references to walls in the plural, and the Sections plan, must be wrong.

14. On that basis, we decide that, by virtue of note (18) to Group 5 of Schedule 8 VATA, the building did not cease to be an existing building as it was neither demolished to ground level nor did the part remaining consist of no more than a single façade. The works carried out by the Appellant did not therefore amount to the construction of a building, and accordingly the works were not within section 35(1A) VATA.

Issue (2) – Assuming a single façade, was its retention a condition or requirement of statutory planning consent or similar permission?

15. Since we have decided the first issue against the Appellant, that would be enough to dispose of this appeal. However, as we heard submissions from Mr Dunlop on the

point we should also briefly refer to the question whether, assuming we had decided that there was but a single façade, this could satisfy note (18) by its retention being a condition or requirement of planning permission.

16. We have reviewed the various planning permissions, in particular the retrospective permission granted on 4 September 2008. We are satisfied that nothing in the planning permissions makes the retention of the wall in question a condition or requirement of the granting of consent. There is no reference in the planning permissions themselves to the wall in question. There is nothing in the planning permissions that specifically requires the preservation of any part of the existing building, and there is no apparent planning reason why such a requirement would have been imposed in this case.

17. In *Kevin Almond v Revenue and Customs Commissioners* [2009] UKFTT 177 (TC), a tribunal found that where, in a case in which an historic building was located in a conservation area, there was an express requirement that the development be undertaken in accordance with the plans, and those plans showed the relevant façade to be retained, from notes and annotations on the drawings and in the detail showing how the new walls and joists were to be attached to the existing façade, it was a condition or requirement of the statutory planning consent that the relevant façade be retained. That case is very different from this. The planning permission of 4 September 2008 does require the works (which had already been carried out) to be carried out in accordance with the plan. But although the Sections plan in question does refer to "existing walls", it does so without any degree of specificity that would be required to reach a conclusion such as that in *Kevin Almond*. Not only does it refer to existing walls in the plural, the arrow indicating the position of those walls (and foundations) points in generality only at a typical section, and makes no distinction between internal and external walls or facades.

18. We also agree with Mr Dunlop that in this case the granting of the planning permission could not be said to have imposed any requirement or condition with regard to any of the existing structure. Its only effect was to permit the retention of any elements of the original building that had been retained. That retention was a matter of choice on the part of the Appellant on grounds of convenience or economics. The planning permissions did not include any condition or requirement for the retention of a single façade.

19. Accordingly, even we had found that no more than a single façade had been retained, the requirements of note (18) to Group 5 of Schedule 8 VATA would not have been satisfied in this respect, and consequently the building did not cease to be an existing building. The works were therefore not within section 35(1A) VATA.

20. We should add that the question of a refund of VAT for a DIY housebuilder falls to be determined on the basis of the statutory provisions that provide that relief. This cannot be affected by the classification of the building works for other purposes, including Building Regulations. Nor is it affected by the fact that the Council made a refund of VAT paid to it in respect of building control fees. For the reasons we have

given, the Appellant is not entitled to a refund under the DIY Builders and Converters Refund Scheme on the facts of this case.

The hearing having taken place in the absence of the Appellant, the Appellant has a right to apply for this decision to be set aside pursuant to Rule 38 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. 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.

ROGER BERNER

TRIBUNAL JUDGE
RELEASE DATE: 6 August 2010