[2012] UKFTT 726 (TC)

TC02390

Appeal number: TC/2012/00153

Value Added Tax — Do-it-yourself builder's scheme — Relief refused — VATA1994 s 35 (1) (b) —— Planning permission for construction of dwelling to be used as part of business —Whether built in the course of furtherance of the business —Yes - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR & MRS S GARDINER **Appellants**

- and -

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

TRIBUNAL: JUDGE DR K KHAN
GILL HUNTER

Sitting in public at Bedford Square, London on 17 September 2012

Mr G Edwards, VAT Consultant for the Appellants

Pat Checkley, Higher Officer, for the Respondents

DECISION

Introduction

1. This is an appeal against the disputed Decision of the Commissioners for Her Majesty's Revenue & Customs ("Respondents") to refuse the DIY Builder's Claim made by Mr & Mrs Gardiner ("Appellants") in accordance with Section 35 of the Value Added Tax Act 1994 ("VATA 1994").

2. The disputed Decision is contained in a letter from the Respondents dated 15 August 2011 which examines the planning permission given for the construction of a "detached equestrian/agricultural workers dwelling". This is taken to mean the construction of a "dwelling in connection of the running of the mixed livery and equestrian enterprise".

3. A review was undertaken and communicated to the Appellants on 2 December 2011 which upheld the Decision of the officer and reiterated that "planning permission for a new dwelling was only granted, because you were able to demonstrate a need for a dwelling to support Mrs Gardiner's equestrian/agricultural business".

4. Mr & Mrs Gardiner bought approximately140 acres of land in 2003. They were not married at the time and purchased the land in separate parcels, part in the name of Mrs Gardiner (then Ms S Wilkinson) and part in Mr Gardiner's name. The land purchase was financed by a mortgage in both names.

5. They knew that obtaining planning permission to build on a green belt site would be difficult and at the time had no clear idea how the land would be used. The land itself and various buildings could be separated into a group of single storey structures in a courtyard layout adjacent to a lane and a collection of modern general purpose agricultural buildings. Most of the courtyard buildings were traditional brick style construction compatible with the farmhouse and its buildings. It was intended, at the time of briefing consultants in 2003, to develop some holiday accommodation and to use some of the buildings in connection with an agricultural or equestrian use of the land. It was intended to develop the existing farmhouse as a family home in a field near to the farm buildings but, in the event, the farmhouse was not purchased by the Appellants.

6. It was pointed out by the planning consultants (Reading Agricultural Consultants) who wrote to the Appellants on 8 September 2003 as follows:

> "In terms of the proposed dwelling, I explained that an application for which there was no site based functional requirement would have a very poor prospect of success. It would be an inappropriate development in the Green Belt. Any prospect of success would therefore be based on a special needs case, the most obvious of which being an agricultural case".

7. The letter then goes on to identify a possible equestrian business.

8. The planning consultants then outlined that there was a national planning policy which supports equestrian activity and development (PPG7 which is attached to the letter). It was pointed out that the policy did not extend to dwellings. It was further pointed out those proposals for "equestrian dwellings tend to be assessed using the same tests as applied to farm dwellings, i.e. a functional and financial justification has to be made".

9. The consultants then explained that if "the number of stabled animals exceeds 20, (where there are quality or specialist animals or breeding activity is involved), then there is a generally accepted need for on-site supervision. This is the scale of activity which you would have to contemplate and occupants of any dwelling commit to on a fulltime basis". The letter goes on to explain that if a business plan for sustainable equestrian activity could be developed, then there were certain obstacles in the way of having an on-site dwelling, one of which was identified as "the need for an activity to have been in place for at least three years before permanent accommodation can be contemplated". It is then proposed that planning permission be sought within the existing footprint of the buildings. The Report then goes on to say "it would be necessary to develop a business plan supported by at least one full-time worker".

10. In November 2006, some three years later, the consultants were instructed by the Appellants to provide an independent assessment for a proposal for the provision of an equestrian worker's dwelling at the property at Church Lane Farm, Shurdington, to support a mixed livery and agricultural enterprise.

11. The factual position this time was that there was a full livery service with stables and a farm engaged in modest agricultural activity with a small flock of sheep and some arable fields rented out.

12. In the period September 2003 to November 2006, the Appellants explained that they "supervised and secured the site from a mobile home located at the farm. They were now seeking to have more permanent accommodation".

13. The planning consultants explained that where permanent on-site accommodation is sought, any proposals must satisfy the following criteria.

i) The unit must be well established and the activities concerned in existence;

ii) There is a clearly established existing functional need for the dwelling;

iii) The need for accommodation relates to a fulltime worker;

iv) The unit and the activity concerned has been established for at least three years, has been profitable for at least one of them, is currently financially sound, and has a clear prospect of remaining so;

v) The functional need could not be fulfilled by another existing dwelling on the unit or any other existing accommodation in the area which is suitable and available for accommodation by the workers concerned;

vi) Other normal planning requirements, for example siting and access must be satisfied.

14. The consultants sought to establish all of these points in their appraisal and concluded that the livery business provides "a high quality facility recognised by the British Horse Society under its Livery Yard Accreditation scheme."

Other relevant facts

15. Mr Gardiner has registered two businesses with HMRC for VAT purposes.

16. An application to gain permission for the construction of an equestrian/agricultural worker's dwelling was submitted to Tewkesbury Borough Council (TBC) on 6 July 2007. The application made the following points:

i) The dwelling incorporates a small office where administration of the equestrian and agricultural operations carried out at Church Farm will be administered;

ii) It is intended that the dwelling and the office will be closely related to the operations which are to be administered. The site has also been arranged so as to be immediately accessible from existing vehicular access to the farmyard and farm buildings;

iii) The farm is engaged mainly in agricultural activity and employs casual labour.

17. The following additional points were made:

i) The Livery is dependent upon daily management tasks being undertaken by host owners. The responsibility for these falls to Ms Wilkinson when the owners are not present;

ii) The scale and nature of the equestrian activity and agricultural activity requires a key fulltime worker for its proper and effective management. It is explained that this is presently on-site but "if not continued would have adverse prejudicial consequences for the enterprise".

18. The Business is well established, profitable and soundly based and is capable of providing its Principal with a reasonable income and supporting the cost of an appropriate dwelling.

19. Permission for the development was granted in 2007 with conditions. The relevant conditions stated;

i) "The occupation of the dwelling shall be limited to a person solely or mainly employed, or last employed, in the locality in horsiculture or agriculture as defined by Section 336 of the Town & Country Planning Act 1990, or in forestry or as dependant of such a person residing with him or her, or a widow/widower of such a person"

ii) "The site is not in an area intended for general development. Permission is granted to the present proposal solely because the dwelling is required to house a person or persons employed or last employed in horsiculture, agriculture or forestry. A dwelling in this locality would normally be contrary to Policies S4, GB1 and H6 of the Gloucestershire Structure Plan, Second Review and therefore this condition is essential to ensure that the proposal accords with Policies HOU4, GRB1 and AGR2 of the Tewkesbury Borough Local Plan 2011- March 2006"

iii) "The dwelling is therefore considered to be essential for the efficient operation of the equine business and the best interest of animal welfare and is considered acceptable in terms of its impact….."

20. The National DIY Team received a VAT Refund Scheme claim on 3 August 2011. The Appellants were informed on 15 August 2011 that they were not eligible to use the scheme making reference to VATA 1994 Section 35(1). The Respondents made a decision on the grounds that the terms of the Planning Consent deemed the new dwelling to be authorised in connection with the running of the business on-site and are therefore used in relation to that business. The Planning Consultants made clear in their Application and Appraisal Report that there was a need for a dwelling in connection with the running of the mixed livery and equestrian enterprise.

21. The Appellants requested a review of HMRC's decision and on 13 September 2011 the review found the Appellants were not eligible for a VAT repayment and the original decision was upheld. An independent review was requested by the Appellants' advisers on 19 October 2011 but this again upheld the original decision; letter dated 2 December 2011 referred to at Para 3 above.

22. An appeal against this independent review was made on 19 February 2011 and in evidence the Tribunal was presented with the following:

i) A joint correspondence bundle;

ii) A joint legal authorities and other bundle;

iii) Joint supplementary bundle including details of goods supplied for construction, consultant's report and attachment;

iv) Witness statement of Stephen Gardiner who also gave oral evidence.

Relevant Statutory provisions

23. Section 35 VATA 1994
Refund of VAT to persons constructing certain buildings

(1) Where:

(a) A person carries out works to which this section applies

(b) His carrying out of the works is lawful and otherwise than in the course or furtherance of any business, and

(c) VAT is chargeable on the supply, acquisition or importation of any goods used by him for the purposes of the works,

The Commissioners shall, on a claim made in that behalf, refund to that person the amount of VAT so chargeable.

(1A) The works to which this section applies are:

(a) The construction of a building designed as a dwelling or number of dwellings;

(b) The construction of a building for use solely for a relevant residential purpose or relevant charitable purpose; and

(c) A residential conversion.

Relevant Case Law

24. *Margaret Elizabeth Wendels [2010] UKFTT 476 (TC)*
Customs and Excise Commissioners v Lord Fisher [1981] STC 238

Poultries Al Hilal ltd v Revenue and Customs Commissioners (2007) Decision 20381

Witness Statement of Steven Gardiner

25. Mr Gardiner makes the following relevant points in his Witness Statement which is dated 26 August 2012.

i) During the process of purchasing the property, we sought advice from a planning consultant on whether we would be likely to get planning consent for a

house. He advised there would be the possibility of converting one of the outbuildings but that a new home would be unlikely to get permission.

ii) A second planning consultant, (Reading Agricultural Consultants (RAC)) advised that the only way planning permission would be obtained would be to show that there was some agricultural need and in particular a livery business given his wife's interest in horses. During the period when their equestrian business was growing and becoming successful they lived in a mobile home on the property. They had no planning permission for the mobile home.

iii) A successful planning application was made in July 2007 supported by a full appraisal prepared by RAC which highlighted the horsicultural needs.

iv) The house has an office which both he and his wife use for their respective businesses. The house is regarded as a family home.

Appellants' Submission

26. The grounds of appeal as disclosed by the Notice of Appeal are:

i) HMRC has rejected a DIY VAT Reclaim (S.35 VATA 1994) on the ground that the dwelling was constructed in the course of furtherance of a business.

ii) The Appellants rely on the decision of the Tribunal in the case of Margaret Wendels (TC/2009/11830) and maintain that the dwelling was constructed as a principal private residence which is eligible for a refund.

iii) The Appellants say that the equestrian and livery business functioned without a house and would have continued to function had planning consent been refused.

iv) They say that the planning restriction on who can occupy the house is an occupancy restriction and is not a restriction on the separate use or disposal of the property.

Respondents' Submission

i) The Respondents submit that the house was constructed in the course of furtherance of a business. They support this position by saying that the Council required the Appellants to demonstrate a functional business in order to obtain planning permission for a house to be constructed on the site. For the business to function properly the Appellants had stated the business needs a person resident at the dwelling able to care for the animals, provide security and fulfil health and safety obligations.

ii) It was contentions submitted in support of the planning application specifically relating to the functionality of the business that contributed to planning consent being granted.

iii) Section 35 VATA 1994 is designed to assist individuals who are not and do not wish to register for VAT. The section identifies the relief will not be granted if the building has been constructed in the course of furtherance of any business. The construction of the dwelling was based on a business need.

Discussion

27. The core issue is whether the taxpayer could claim a refund under Section 35 of the VATA 1994 (DIY Builders Scheme) for VAT incurred in the construction of a building designed as a dwelling. The planning permission obtained for the construction had conditions attached. The conditions related to the occupation of the dwelling. The planning consent obtained in October 2007 was for "the construction of detached equestrian/agricultural worker's dwelling" which required that the occupation of the dwelling shall have been admitted to a person solely or mainly employed, or last employed in the locality in horsiculture or agriculture". The planning permission goes on to say that "permission is granted to the present proposal solely because a dwelling is required to house a person or persons employed or last employed" in the agricultural sector. The restrictions did not prohibit the separate use or disposal as a dwelling.

28. Section 35 is a relieving provision. It allows the Do-It-Yourself builder not to be disadvantaged when compared to a purchaser of a zero-rated dwelling and therefore gives the right to recover VAT on the construction of the new dwelling. If the Do-It-Yourself builder constructs a dwelling in the course or furtherance of any business then it will not qualify to recover the VAT on the construction of the dwelling. The construction should therefore be "otherwise" than in the course of furtherance of any business.

29. The Tribunal must look to see, not whether the Appellants are in business but whether the construction is otherwise than in the course of any business. The relevant time to decide on this matter is when the works were carried out. If, at that time, they formed an intention to use the dwelling in the course of furtherance of the business then that would be fatal to the recovery of VAT. The burden of proof is on the taxpayer who must establish a case on the balance of probabilities. They must establish that they intended to use the property themselves as a home and not in the business.

30. The taxpayer makes several points. The first is that the business existed before the house came along and if the house was not built the business would continue to exist. They lived in a mobile home on the property and ran the business from that mobile home in the period before planning permission was obtained. From the accounts which the Tribunal has seen, it would appear that the land (on which the dwelling is built) is treated as a business asset; the house is not treated as a business asset. The construction itself was funded by a private mortgage taken out by the Appellants. They funded the construction from their own private means. It was also shown that they paid council tax and treated the home as their private dwelling.

31. The Appellants support their arguments using the case of *Margaret Wendels (2010)*. The case concerned the construction of a dwelling on a plot of land beside a cattery. The planning consent stipulated that -

32. "the occupation of the dwelling shall be limited to a person solely or mainly employed or last employed in the cattery business…."

33. Judge Tildesley in that case held that an occupancy restriction is not a restriction on the separate use or disposal of the property. The Respondents argued that the occupancy restriction prevented the dwelling from being sold separately from the business. This argument was rejected the Judge. The Respondents indicated that planning permission was obtained on the functional need for a fulltime worker to be in sight and sound of the cattery to which the Judge stated;

34. "The fact that the planning consent was dependant on a functional link between the occupancy of (the dwelling) and the cattery was not determinative of whether the supplies of building materials were for business or non-business use within the meaning of the VAT legislation".

35. The Judge in that case found, as a question of fact, that the Appellants constructed the dwelling to provide a home and since they were not involved in the business of constructing property, the "supplies of building materials were not predominantly concerned with the making of taxable supplies for a consideration".

36. He distinguished the case of *Poultries Al Hilal Ltd (VTD 20381)*, a case concerning a company which owned a farm, but was not registered for VAT and built an agricultural dwelling to be occupied by an employee. In that case the refund of tax under Section 35 VATA 1994 was rejected by HMRC since the works were not done otherwise than in the course of the business. Resources from the business were applied to fund the construction and it was said that the building was not used as a private home but for an employee to supervise the farm. It was important to have living accommodation close to the established intensive poultry units so that immediate assistance was available in the event of problems arising and planning permission was given on this basis. The Judge indicated that for the purposes of s.35 (1)(b) VATA 1994, the legal basis for a refusal is where the dwelling is constructed in the course or furtherance of any business not only where constructed as part of a construction business.

37. It is our view that the primary question is to determine the Appellants' intention in carrying out the building work. Section 35(1)(b) refers to the "carrying out of works". The section does not speak about the time for the carrying out of those works. It refers only to the carrying out of works. It is fair therefore to assume that it refers to the whole project of building the dwelling. For the purposes of Section 35(1)(b), the carrying out of the works must be otherwise than in the course of any business.

38. If we look at the Appellants' intentions at the start of the project, as established from the documentary evidence, the clear intention was to have a dwelling where they could live to support their nascent equine business. They had to demonstrate that need to obtain planning permission. The construction of the dwelling was, in the words of their advisers, considered "to be essential for the efficient operation of the equine business". This was declared at the start of the building project.

39. What was the intention of the Appellants at the time the works were completed? It is clear there is a condition attaching to the granting of planning permission by Tewkesbury Borough Council that the "occupation of the dwelling shall be limited to a person solely or mainly employed or last employed, in the locality in horsiculture or agriculture". There is no dispute that those occupying the house would be engaged in the economic activity of horsiculture, agriculture or forestry. The Tribunal has not heard persuasive argument to contradict this intention.

40. The intention of the parties is critical in determining whether the supply is in the course of furtherance of any business. It may be that the intention may change during or at the end of the building project. But there is no evidence this was the case. The intention therefore was to construct a dwelling which was to be used as part of the business. The planning consultants advised that the development of Mrs Gardiner's business made the prospects of obtaining planning permission for a dwelling more likely. The consultants indicated that the "land and buildings were purchased with a view to establishing a mixed agricultural and equestrian enterprise. In this respect,

planning permissions have secured the use of existing farm buildings as a livery yard and the establishment of an outdoor exercise area (yet to be implemented).The rundown collection of farm buildings has been upgraded to provide 20 stable boxes and a loose box…"

41. The Appellants indicated that they carried on the business from a mobile home in the period before the planning permission was obtained. It was clear that there was a business being carried on during the course of construction and it is clear that the intention was to seek construction of a dwelling which was, as indicated on the planning application and approval, required for the business.

42. It is not disputed that there was a business being carried on both before and after the construction of the dwelling. For convenience, we refer to the six indicia for determining whether an activity is a business suggested by *Gibson J* in *Customs & Excise Commissioners v Lord Fisher [1981] STC 238.*

43. The tests suggested in that case were as follows:

a) Whether the activity is a serious undertaking earnestly pursued? The activity was a serious and growing undertaking as indicated from the trading profit and loss accounts.

b) Whether the activity is an occupation or function actively pursued at reasonable and recognisable continuity? The economic activity started immediately on acquisition of the site and continued in the following years. The Appellant intended to grow and develop the business.

c) Whether the activity has a certain measure of substance? The activity had substance as indicated by the income, cost of sales, expenditure and drawings in the accounts.

d) Whether the activity was conducted in a regular manner on sound and recognised business principles? The Appellants, in their evidence, indicated as much in their application for planning approval and correspondence.

e) Whether the activity is predominantly concerned with the making of taxable supplies to consumers for consideration? This is an option open to the Appellant.

f) Whether the taxable supplies are of a kind of which, subject to differences of detail, are commonly made by those who seek to profit by them? It is the intention of the business to make a profit and this would be a common intention for this type of business.

44. The Tribunal believes that the business satisfied most of these criteria. It should be borne in mind that these questions do not form a checklist where each and every criterion needs to be satisfied.

45. The parties do not dispute that the Appellants carried on a business and indeed it was a requirement for the obtaining of planning permission.

46. There was therefore an intention both at the time of the commencement of the work and at the time of the completion of the work to use the dwelling as part of the business and indeed it was required that this be the case. Therefore the primary

question of whether the Appellants intended to carry out the building in the course or furtherance of any business must be answered positively.

47. It is clear to the Tribunal that there was an intention, confirmed by the planning approval conditions, the planning consultant's report and representations to obtain that approval that the Appellants intended the construction of the dwelling in the course of furtherance of a business. The planning approval, in laying down conditions for the construction and use of the dwelling, tied the construction to the business. The occupation of the dwelling was limited to persons solely or mainly employed in the horsiculture or agriculture business as defined by Section 336 of the Town & Country Planning Act 1990. The linking of the construction in this way to the business makes it difficult for its construction to be treated as anything other than in the course or furtherance of the business. The dwelling cannot be carved out of the business and taken as a whole it is part and parcel of the economic activity of the business.

48. Mr Edwards for the Appellant referred to the HMRC internal guidelines (VCONST 24000 DIY Builders and Converters VAT Refund Scheme –Eligibility of claims) on farmhouses. In these guidelines, it was stated that a farmhouse, which was a dwelling not used by employees, would not fall to be treated as constructed in the course or furtherance of any business. The Respondents did not fully respond to this point either because they did not believe the Appellants' house was the same as a farmhouse or they felt that the intention at the time of building was to further the business. In the Tribunal's view, the guidelines are internal guidelines which HMRC did not consider were relevant to the final decision and which, in any case, they were not compelled to follow.

49. The Appellants have sought to rely on the Tribunal Decision in *Wendels*. The Tribunal in that case approached the question of whether the dwelling was built in the course of furtherance of the business by looking at whether the dwelling was treated as a business asset, the fact that the core business (cattery business) did not depend on the close proximity of the dwelling and the fact that the dwelling was in close proximity made it easier to run the cattery business. In the Tribunal's view, none of these factors established that the construction was a business activity of the cattery or any other business and "did not detract from the overall finding that the construction….. was for a non-business purpose."

50. In our case, we find an important distinction can be drawn by looking at the intention of the parties and the surrounding documentation. It was clear that the building of the dwelling had been constructed specifically with an equestrian business in mind. Representations were made to planning authorities to confirm that position. It was required that an employee of the business live in the property. In this sense, the case bears more resemblance to the decision in *Poultries Al Hilal Limited* where the dwelling was constructed to be used by the employees of the business. The planning permission required that the dwelling was constructed for a business purpose as a "workers dwelling" The Appellants were not able to show otherwise.

51. The Tribunal understands the plight of the Appellants but the Decision cannot be in their favour.

52. For the reasons given above, therefore the Appeal is therefore dismissed.

53. 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.

DR K KHAN
TRIBUNAL JUDGE

RELEASE DATE: 27 November 2012