TC02456

Appeal number: TC/2012/04290

VAT – DIY builders scheme –did the planning permission prohibit the separate use of the property –yes-appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERT DRUMMOND **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA J KING
WARREN SNOWDON

Sitting in public at North Shields on 8 November 2012

Mr Andrew Stephenson, a friend, for the Appellant

Mr John Nicholson, of HM Revenue and Customs, for the Respondents

DECISION

The issue

1. This is an appeal against the refusal of HMRC to pay Mr Drummond the VAT, amounting to £14,240.79, which he incurred when building his new house, now known as The Paddock. Mr Drummond made the claim believing that he came within what is known as the "do it yourself" builders scheme for VAT, which allows for certain work in the construction of a dwelling to be zero rated. HMRC have refused the claim on the ground that the house is subject to a planning condition which they say takes it outside of the scheme.

Background

2. Mr Drummond is a director of Evergreen Park Limited which owns Evergreen Park, a site containing static retirement homes near the coast, north of Hartlepool. Mr Drummond bought this site, in about 2001 and redeveloped it into a retirement park. It has been referred to as a caravan park in the past but Mr Drummond now refers to the site as a retirement park. The homes on the site are larger than many static caravans, there is an age condition for those occupying homes on the site and under a special licence residents are permitted to occupy the homes throughout the year ie it is not just for holiday homes.

3. Mr Drummond and his family moved into a bungalow within Evergreen Park and in 2004 he made an application for the bungalow to be rebuilt in the same place within the boundary of Evergreen Park. Planning permission was granted for this under reference 04/177

4. In 2006 Mr Drummond bought a paddock adjacent and to the north west of Evergreen Park and in 2008 an application was made to the planning authority for permission to build a new house in the paddock, instead of the house for which planning permission had been given in 2004. Outline planning permission under reference 2008/0554 was granted by Easington District Council and full planning permission was then given under reference PL/5/2009/0062. The permission was subject to a 'condition number 5' as follows:-

The occupation of the dwelling hereby approved shall be limited to a person solely or mainly employed or last employed prior to retirement, at the adjacent caravan park currently known as Evergreen Park, Coast Road, Crimdon, or a spouse and /or dependent of such person residing with him or her, or a widow or widower of such a person

Reason: The creation of a separate residential unit in this location would be contrary to PPS7. New housing should only be allowed where it is essential in the interests of a site manager or other essential worker, unless exceptional circumstances prevail.

The VAT Law

5. Section 35(1) and (1A) of the VAT Act 1994 provides as follows:

> (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.

6. Section 35(4) states that

> (4) The notes to group 5 of schedule 8 shall apply for construing this section as they apply for construing that group.

7. Note 2 to group 5 of schedule 8 to the VAT Act 1994 provides as follows:

> 2) A building is designed as a dwelling or a number of dwelling where in relation to each dwelling the following conditions are satisfied –
>
> (a) the dwelling consists of self-contained living accommodation;
>
> (b) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;
>
> (c) the separate use or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision; and
>
> (d) statutory planning consent has been granted in respect of that dwelling and its construction or conversion has been carried out in accordance with that consent.

The Appellants argument

8. Mr Drummond gave evidence about the medical history of his son who was aged 27 years old at the time the planning application was made in 2008. A psychiatric report dated 17 April 2008 was produced together with statements from those involved in the care of Mr Drummond's son. Mr Stephenson argued that these contained evidence that there were exceptional circumstances which would have allowed the planning authority to give permission for The Paddock to be built without the need for a condition connecting occupancy with Evergreen Park. Mr Drummond

only agreed to the planning permission being granted with 'condition number 5' attached because he had not realised that there would be financial implications affecting VAT, in the long run.

9. Mr Drummond has now submitted an application, on 30 October 2012 to the local authority, to have the planning 'condition number 5' removed and a copy of this application was shown to the Tribunal. Mr Drummond believes he has been told by his solicitors that the condition is not 'robust' and that he is likely to be able to succeed in having it removed.

10. Evergreen Park is owned by Evergreen Park Limited and The Paddock is owned under a separate Land Registry Title by Mr Drummond. This was already the case when planning permission was applied for. Separate disposal of The Paddock has not therefore been prohibited.

11. On the question of separate use Mr Stephenson referred to the decision in *Wendels v HMRC* TC 00737[2010] UKFTT 476 (TC) where the planning condition read

> *"the occupation of the dwelling shall be limited to a person solely or mainly employed or last employed in the cattery business or a widow or widower of such person or any resident dependants"*

12. This was held by the First Tier Tribunal to amount to a restriction on occupancy but not a prohibition on separate use and the appeal was allowed. Mr Stephenson believes that as the planning condition contains very similar wording this appeal should also be allowed. In any event he believes that as the planning condition should not have been imposed in the first place, Mr Drummond has a stronger case.

Arguments on behalf of HMRC

13. Mr Nicholson, on behalf of HMRC, agreed that separate disposal was not prohibited by the planning condition in this case. He did however consider that separate use was prohibited by the planning condition 5 contained in the permission PL/5/2009/0062. This meant that the dwelling did not satisfy Note 2(c) of group 5 and was the only point in dispute between the parties.

14. HMRC contend that the case of *Wendel* has been wrongly decided. It was not appealed by HMRC but in any event it is not binding on this Tribunal. The Tribunal sought in that case to distinguish between 'occupancy' of a dwelling and 'use' of a dwelling but the case of *Holden v HMRC* [2012] UKFTT 357 (TC) made it clear that 'use' and 'occupancy' of accommodation amount to the same thing.

15. In *Holden* the planning condition read as follows:

> *"The flat hereby permitted shall be occupied only in conjunction with the operation of the photographic studio from 240a Highbridge Road"*

16. The Tribunal Judge went on to say in paragraph 7

".. the condition of planning permission clearly prohibited separate occupation of the residential accommodation and the business premises, and since occupation and use of accommodation amount to the same thing, it followed that the appellants could not comply with condition (c).

17. Mr Nicholson acknowledged that Mr Drummond's son has difficulties but in deciding whether the conditions for a refund of VAT are due, it is the wording of the statute and the wording of the planning condition which must be looked at, not the reasons behind the imposition or non imposition of a planning condition.

Discussion and Reasons

18. This Tribunal cannot rule on whether the health of Mr Drummond's son should have enabled the planning authorities to give planning permission for The Paddock without the need for an occupancy condition. The medical evidence about Mr Drummond's son was available to the planning authorities at the time the application for permission was made and it was held not to amount to special circumstances to enable planning permission to be granted. The evidence shows that condition number 5 was added to the planning permission and we must therefore look at both the wording of the VAT legislation and at the wording of the statutory planning consent.

19. We agree with the comment in *Holden* that occupation and use of accommodation amount to the same thing. The planning condition uses the words '*shall be limited to*'. The wording in this case may not actually use the word 'use' but we find that the restriction on occupancy which links occupancy to an adjacent business, effectively imposes a prohibition on separate use.

20. In order to get planning permission Mr Drummond agreed, that he would, at least for a period of time, adhere to the conditions imposed with that planning permission. We find that the condition in this case imposes more than just a restriction on the class of worker who could occupy the dwelling now known as The Paddock. If the dwelling was to be occupied from the outset by anyone it had to be by someone '*solely or mainly employed or last employed prior to retirement, at the adjacent caravan park currently known as Evergreen Park, Coast Road, Crimdon, or a spouse and /or dependent of such person residing with him or her, or a widow or widower of such a person.*

21. It may be that it can be envisaged that at some time in the future circumstances will have changed and the planning authorities will agree to release the condition but at the time it was imposed we find that condition 5 of the planning permission is a prohibition. The application for a refund of VAT does not therefore satisfy Note 2(c)

22. This appeal fails and is dismissed.

23. We did not adjourn to allow Mr Drummond time to await a decision by the planning authority as to whether they will remove the condition attached to the planning approval given in 2009. He has had three years in which to apply for its

removal. Mr Drummond indicated that the legal advice he has obtained is to the effect that the planning condition is not 'robust'. This may mean that the condition cannot last but does not necessarily mean it should never have been imposed in the first place. The application for removal of the planning condition does not make it clear that they are seeking retrospective removal of the condition.

24. The evidence before us was that the condition was imposed in 2009, the dwelling was then built and occupied in accordance with the planning condition. On the face of it, it is a valid planning permission with a valid condition attached.

25. 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.

BARBARA J KING
TRIBUNAL JUDGE

RELEASE DATE: 19 December 2012