TC02522

Appeal number: TC/2012/4218

VAT – Refunds for DIY builders - s 35 and sch 8 VAT Act 1994 – whether a dwelling – Yes - whether works in course or furtherance of a business – No - whether restriction on occupation constituted a prohibition on separate use or disposal of dwelling – No – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr RICHARD BURTON **Appellant**

- and -

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

TRIBUNAL: JUDGE PETER KEMPSTER
ALAN REDDEN FCA

Sitting in public at Nottingham on 20 November 2012

Mr Andrew McDonald (Self Build VAT) for the Appellant

Mr Les Bingham (HMRC Appeals Unit) for the Respondents

DECISION

1. By a notice of appeal dated 15 March 2012 the Appellant ("Mr Burton") appealed against a formal internal review determination by the Respondents ("HMRC") dated 17 February 2012, which upheld their decision dated 13 October 2011 refusing a claim for refund of £8,566.72 VAT incurred by Mr Burton in connection with the construction of a building in Nottinghamshire ("the Building").

Legislation

2. Section 35 VAT Act 1994 ("VATA") provides (so far as relevant):

> "35 **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.
>
> (1B) For the purposes of this section goods shall be treated as used for the purposes of works to which this section applies by the person carrying out the works in so far only as they are building materials which, in the course of the works, are incorporated in the building in question or its site.
>
> …
>
> (4) The notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group …"

3. Note 2 to Group 5 sch 8 VATA states:

> "A building is designed as a dwelling or a number of dwellings 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."

Facts

4. In 2003 Mr Burton bought approximately ten acres of land in Mansfield Woodhouse, Nottinghamshire. The site included a lake approximately one third of a mile long. Mr Burton dredged, improved and stocked the lake and in 2004 opened it to anglers on a day permit basis as Park Hall Lake Fishery. At that time Mr Burton lived approximately two miles distant from the site and there were no structures on the site, apart from an equipment storage container at the entrance. On 15 May 2008 Mr Burton applied for planning permission to construct a house on the site. The site was outside the local urban boundary and permission was refused on 7 August 2008. Mr Burton appealed and his appeal was upheld on 11 March 2009 ("the Planning Permission"). Building works commenced in July 2009 and the Building was occupied in August 2010. The Building comprises a house with four bedrooms, three bathrooms and three reception rooms; it includes a study but Mr Burton confirmed to the Tribunal that this was used as a family room. The fishery business has never been registered for VAT as its turnover has always been below the threshold for mandatory registration; if registered then its supplies would be standard-rated for VAT purposes.

5. The Planning Permission states:

(1) (para 4) - "The main issue is whether the scale and nature of the fishery business … creates a demonstrable need for the proposed development having regard to its countryside location."

(2) (para 8) - "… a dwelling at or close to the site is necessary in order to carry out the daily tasks necessary to adequately care for the fish."

(3) (para 9) - "A permanent presence on the site would provide a significant deterrent to intruders, thus protecting the welfare of the fish and the business."

(4) (para 11) - "… the functional need relates to a full time worker."

(5) (para 16) - "… the combination of the improvements that an on-site presence would bring in terms of tending to the needs of the fish and the very significant benefits it would bring in terms of security are such that the functional need for a dwelling could not be satisfactorily met by any existing nearby dwelling."

(6) (para 21) - "I have attached a condition restricting the occupancy of the dwelling to ensure that it is retained in connection with the fishery."

6. The Planning Permission granted "planning permission for a new occupational dwelling with accessible w/c facilities" but imposed the following condition ("the Condition"):

> "The occupation of the dwelling shall be limited to a person solely or mainly employed or last employed in Park Hall Lake Fishery or a widow or widower of such a person, or any resident dependents."

Submissions for Mr Burton

7. Mr MacDonald submitted as follows for Mr Burton:

(1) The purpose of the relevant legislation was to put a DIY builder in the same position as if he had purchased the dwelling from a constructor, and the common sense result was that Mr Burton should receive his refund.

(2) HMRC's position had changed between the original decision and the internal review, but there were currently two objections to the refund. First, that the carrying out of the works to the Building was in the course or furtherance of a business (contrary to s 35(1)(b)). Secondly, that the provisions of Note 2(c) disqualified the Building from constituting a dwelling.

(3) In relation to the "course or furtherance of any business" point, Mr Burton did not carry on any business as a builder. The Building was not included as an asset in the accounts of the fishery business. The Building was insured as a house, separate from the business assets. Council tax was paid on the Building as a residential property (rather than commercial property rates). HMRC's own published guidance was in favour of Mr Burton. Para 24.7.4 in HMRC's manual (V1-8A) confirmed that working from home was an incidental economic activity that could be disregarded as use of the building in the course or furtherance of any business. The Building was just a house and VAT incurred on its construction could not have been reclaimed by the fishery business even if it had been registered for VAT. The fishery business was run for five years before the house was constructed and there had been no change to the operation of the business arising from the construction of the house. Mr Burton estimated the time spent on the fishery business at two to three hours per day, although sometimes it could amount to eight hours in a day – this depended on the time of year and the nature of the tasks to be performed.

(4) The information provided to the planning authority was not relevant to the VAT position and so should not be considered when looking at Note 2(c). The VAT legislation was confined to the permission itself, not the reasons for it. However, the Condition used standard wording from the national planning guidelines to justify development in rural areas. There was other available wording that the Inspector could have followed if he had wished. Planning Circular 11/95 had some conditions referring to "occupy" and others to "use".

(5) In terms of the actual wording of the Condition, if the fishery business ceased then Mr Burton (and his wife) could continue to live in the Building and the lake could be sold separately.

(6) Again, HMRC's own published guidance was in favour of Mr Burton. Notice 708 (Buildings & Construction) had been amended over the years but the February 2008 version stated (para 14.2.2):

"14.2.2 Is an occupancy restriction a prohibition on separate use or disposal?

No. Occupancy restrictions are not prohibitions on separate use or disposal and do not affect whether a building is "designed as a dwelling or number of dwellings". Common examples of occupancy restrictions include those that limit the occupancy to people:

- working in agriculture or forestry; and
- over a specified age."

Notice 708 was revised in 2011 so that para 14.2.3 changed to say:

"14.2.3 Is an occupancy restriction a prohibition on separate use or disposal?

It will depend on the wording but if all it does is restrict the occupancy of a building to a certain type of person such as persons working in agriculture or forestry; or persons over a specified age, the answer is No.

On the other hand, if the wording of the restriction prevents the building from being used separately from another building or from being sold (or otherwise disposed of) separately from another building, the answer is Yes.

If in doubt, the appropriate planning authorities should be consulted."

The current guidance on Note 2(c) in HMRC VAT manual at VCONST141404 included:

"To meet this condition, neither separate use nor separate disposal of the dwelling must be prohibited. If either separate use or disposal is prevented by covenant, planning or similar permission, the condition isn't met.

…

Disposal isn't restricted to a freehold disposal. It applies to leasehold interests and, pragmatically, we have settled for that occurring when a long lease is granted. By long lease, what is meant is a lease of the duration of a major interest grant (21 years or more or, in Scotland, for a period of not less than 20 years).

If there is a prohibition on separate disposal of the freehold and the same prohibition on granting a long lease, there is a prohibition on separate disposal. Conversely, if there is a prohibition only on granting a short lease, then there is no prohibition on separate disposal.

Occupancy restrictions don't prevent the separate use or disposal of a dwelling. They are, therefore, not Note 2(c) prohibitions. Examples include restrictions that limit occupancy to people:

- working, or last working, in the locality in agriculture or in forestry, or a widow or widower of such a person, and to any resident dependents
- over a certain age.

> **Note**: Where the restriction goes beyond identifying a particular class of person and ties use of a dwelling to, say, a commercial activity being carried on in another building, this is a prohibition on separate use or disposal of the dwelling."

(7) In relation to the authorities provided to the Tribunal:

(a) *Wendels* [2010] UKFTT 476 (TC) was directly on the points currently in dispute; the planning condition was almost identically worded to the current case; the Tribunal there had held in favour of the taxpayer both that the building was a dwelling and also that there was no business use; in fact, Mr Burton had even less day-to-day involvement than Mrs Wendels had in her business.

(b) *Poultries Al Hilal Ltd* [V20381] could be distinguished because although the VAT Tribunal had found connection with a business, the taxpayer there also carried on other types of business and let the property to an employee.

(c) *Cussins* [V20541] could be distinguished because there the property was mixed use, with 51% of the building found to be commercial use.

(d) *Lunn* [2009] UKUT 244 (TCC) [2010] STC 486 could be distinguished because the planning restriction in that case specifically referred to "separate use".

(e) *Sawyer* [V18872] simply involved a finding of fact that the taxpayer had no business and was merely repairing his own home.

Submissions for HMRC

8. Mr Bingham submitted as follows for HMRC:

(1) The refund claim failed to satisfy both s 35(1)(b) and the provisions of Note 2(c).

(2) The reference in s 35 to *any* business was clear and did not require the taxpayer to be carrying on business as a builder or otherwise connected with construction. That was clear from *Poultries Al Hilal* (at para 10). HMRC did not accept that the information provided to the planning authority was not relevant to the VAT position. It was clear from the Planning Permission that the motivation for the grant was related to the requirements of the fishery business.

(3) In response to a question from the Tribunal, Mr Bingham stated that if the fishery business had been registered for VAT then HMRC would accept that VAT on the construction of the Building would be recoverable input tax, subject to the 70% test usually applied to farmhouses (see VAT manual at VIT41800).

(4) On Note 2(c), it was clear that prohibition of *either* of separate use or disposal was sufficient to disqualify the claim. HMRC's view, as expressed in the guidance cited to the Tribunal, was that occupancy conditions in themselves were not objectionable, but in the current case the Condition restricted use of

the Building to the fishery business. Although the Condition did not use the word "prohibition", its effect was to restrict both use and disposal of the Building separately from the fishery business.

(5) The material quoted from HMRC's manuals represented general guidance and had to be tailored to the particular facts of a given taxpayer.

(6) In relation to the authorities provided to the Tribunal:

(a) Although HMRC had not appealed against the decision in *Wendels* they considered it was flawed, and it was not binding on the current Tribunal.

(b) *Cussins* demonstrated a close nexus between the commercial and residential uses of the property.

(c) *Sawyer* was not relevant to the circumstances of the current case.

Consideration and Findings

The s 35 point: "course or furtherance of any business"

9. The reference in s 35(1)(b) to "otherwise than in the course or furtherance of any business" is not confined to a business consisting of or relating to the construction of property; it extends to *any* business carried on by the person carrying out the building works. We consider that is plain from the statutory wording and we note that identical conclusions were reached by the VAT Tribunal in *Poultries Al Hilal* (at paras 9 and 10). Therefore, the fact that Mr Burton was running a fishery business, rather than running a construction business, does not by itself take him outside the exception in s 35(1)(b).

10. We have considered carefully whether the construction of the Building was carried out in the course or furtherance of the fishery business. We do not agree with Mr MacDonald's submission that the information given to the planning authority can or should be ignored; it is admissible evidence of what Mr Burton presented in 2008 as his justification for obtaining grant of planning permission for the Building. However, in determining whether the VAT reclaim is barred by s 35(1)(b) we are cautious about interpreting contentions designed to convince a planning authority to grant planning permission. We are not implying that the planning application was misleading; only that it would put the best light on the facts with a view to securing planning permission for a new house outside the urban boundary. The extracts from the Planning Permission quoted at para 5 above do refer to a relationship between the new house and the fishery business. However, that is not sufficient to establish that the house was constructed *in the course or furtherance of* the fishery business. We accept Mr Burton's evidence that although certain tasks at the fishery were more easily performed from the new house rather than from offsite, it would be perfectly possible to run the fishery business without the new house – as indeed he did for five years before the house was constructed. We conclude that the construction of the Building was simply the provision of a new home for Mr & Mrs Burton. Our conclusion is that Mr Burton's connection with the fishery business was important in enabling him to obtain (on appeal) the Planning Permission, but the carrying out of

the building works was not in the course or furtherance of the fishery business. Accordingly, we conclude that s 35(1)(b) does not prevent the VAT refund.

11. We note that this Tribunal reached a similar conclusion on this point in *Wendels* (at paras 56 to 58) and we accept Mr MacDonald's submission that running a fishery business requires less day-to-day involvement than running a cattery (as was done by Mrs Wendels). Also, we share the view of the Tribunal in *Wendels* (at para 57) that our respective findings that the construction of the respective houses were a non-business purpose is consistent with the line of Tribunal decisions set out in *Wendels*, holding that constructing or converting a property for personal occupation constituted a non-business purpose.

> "56. The Tribunal finds that the real nature of the activity involved in the construction of *Benaiah* was to provide a home for Mr and Mrs Wendels. It was a one-off activity. Mr and Mrs Wendels were not involved in the business of constructing properties. Mr and Mrs Wendels used their private resources to fund the construction. They did not apply revenues from the cattery business. *Benaiah* was not included as a business asset in the accounts of the cattery. The supplies of building materials were not predominantly concerned with the making of taxable supplies for a consideration. The success of the cattery business did not depend on the close proximity of *Benaiah.* Mr and Mrs Wendels had run offsite the cattery business profitably for ten years. The facts that the location of *Benaiah* makes the supervision of cattery by Mr and Mrs Wendels easier, and that a room within *Benaiah* was used as an office did not detract from the overall finding that the construction of *Benaiah* was for a non-business purpose.
>
> 57. The Tribunal's finding that the Mr and Mrs Wendels constructed *Benaiah* as a dwelling house which was a non-business purpose is consistent with a line of Tribunal decisions holding that constructing or converting a property for personal occupation constituted a non-business purpose (see *G Nixon* (1975) VAT Decision No. 233; *GWH Kelly* VAT Decision (1977) No 598; *Ronald Donald Elton* (1993) VAT Decision 11590 and John Sawyer VAT Decision 18872).
>
> 57. The Tribunal disagrees with [counsel for HMRC's] assessment that this Appeal was a starker example of the application of the business requirement than the VAT Tribunal case of *Poultries Al Hilal Ltd*. The facts of *Poultries Al Hilal Ltd* were materially different from this Appeal which supported a finding of business use. In *Poultries Al Hilal Ltd* the Appellant was a limited company which had the development and sale of real estate as one of its business activities. The Appellant applied resources from the business to fund the construction. The building was not used as a private home but for one of its employees to supervise the farm.
>
> 59. The Tribunal finds that the construction of *Benaiah* was not carried out in the course of or furtherance of any business."

The Note 2(c) point: "separate use, or disposal of the dwelling is not prohibited by the term of any … statutory planning consent"

12. We consider that "prohibited" is a strong word. It is not sufficient for HMRC to show that there are restrictions that may have an adverse effect (even a serious one) on the value of the property, nor that separate use or disposal of the Building was *de facto* difficult or even unlikely – Note 2(c) expressly requires a *prohibition*. We have considered the views put forward by HMRC in their publications – cited at para 7(6) above – but we conclude that those do not give sufficient weight to the word "prohibited". The Condition limits the occupation of the Building to present or past employees of the fishery business (and their dependents). Had the planning inspector granting the Planning Permission intended to prohibit the separate use or disposal of the Building then such a condition would have been imposed; instead, the Condition is a limitation on occupancy which does not constitute a prohibition on the separate use or disposal of the Building.

13. Accordingly, we conclude that Note 2(c) does not prevent the Building from constituting a dwelling for the purposes of s 35.

14. We note that this Tribunal in *Wendels* (at para 45) reached a similar conclusion in relation to an almost identical occupancy condition.

Decision

15. From our conclusions on s 35(1)(b) at para 10 above and on Note 2(c) at para 13 above, we decide that Mr Burton is entitled to a refund of the disputed VAT. The appeal is ALLOWED.

16. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 6 February 2013