TC04069

Appeal number: TC/2014/00213

VAT - DIY Builders Scheme - s35 VATA - Appellant received supplies of hire equipment and muckaway services - VAT refund refused - whether HMRC had correctly applied the legislation - yes - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALAN JOHNSON **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL S CONNELL
MR WARREN SNOWDON

Sitting in public at King's Court, Royal Quays, Earl Grey Way, North Shields NE29 6AR on 06 August 2014

The Appellant in person

Ms Lisa Fletcher Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. Alan Johnson (“the Appellant”) appeals against HMRC’s decision to refuse, in part, a Value Added Tax ("VAT") refund claim made by him under the DIY Housebuilders Scheme in accordance with s 35 of the Value Added Tax Act 1994 ("the Act"). The disputed amount under Appeal is £885.11

2. The point at issue is whether invoices for the disputed amount are for services which are not covered by the DIY Housebuilders Scheme.

Background

3. The Appellant is a Chartered Architect and Town Planning Consultant. In 2012/13 he was engaged in the DIY construction of a dwellinghouse.

4. The dwellinghouse was built with a timber frame enveloped with stone cladding and a tiled roof. The Appellant’s method of procurement was to sub-contract work to individual contractors.

5. The Appellant says that a contract from a building contractor would usually include all elements of the construction and materials. Schedules or Bills of Quantities are based upon an Industry accepted standard methods of measurement, with a section of what is normally headed “Preliminaries and general attendance” which would cover items such as the provision of site cabins, scaffolding, skips, rubbish removal, special tools and plant. It is not possible to construct a new dwelling without this expenditure and it normally comprises between 10 and 15% of the total costs.

6. Some of the sub-contractors supplied necessary plant and equipment, whereas others did not, saying that it was the responsibility of the employer or the general contractor. As there was no general contractor it was left to the Appellant to undertake and incur the cost of those items. He says that, had they been undertaken by sub-contractors, they would normally be charged out as “preliminaries and general attendance”, and VAT on those costs would invariably be allowed under the DIY scheme

7. The Appellant submitted a claim under the DIY Housebuilders Scheme ("the scheme") under cover of form VAT431NB for a refund in the total sum of £15,844.49 in respect VAT incurred. HMRC refunded £12,562.35, but the remaining £3,282.14 was rejected. HMRC provided a schedule of adjustments detailing the disallowed invoices together with a list of reason codes.

8. The Appellant accepted HMRC’s decision to reject invoices totalling £2,397.03, but maintains that invoices amounting to £885.11 should have been allowed. HMRC say that to be eligible for a VAT refund, the supply in question must be of goods only, whereas the disputed invoices related to the hire of services which are not covered by the scheme.

9. The items disallowed by HMRC included invoices for equipment hire, JCB hire, scaffolding tower hire, digger hire, skip hire and disposal of excavated materials. Included under 'equipment hire' were the costs of hiring various items like wheelbarrows, a petrol vibrating plate and scaffold towers.

10. HMRC said that as the hire costs related to the supply of services they are not covered by the DIY scheme for new builds.

11. The Appellant appealed HMRC's decision. In his appeal to the Tribunal he makes the point that although the amount in dispute is relatively small, he appeals as a matter of principle, because he says there has been a fundamental misunderstanding on the part of HMRC as to how the legislation and regulations should be applied.

Legislation

12. A supply of goods or services is charged to VAT at the zero rate if it falls within one of sixteen zero-rate groups set out in Schedule 8 VATA 1994. Group 5 –. 'Construction of buildings, etc.,' itemises those goods or services as follows:

'Item No:

1 The first grant by a person—

(a) constructing a building—

designed as a dwelling or number of dwellings; or

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 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

any civil engineering work necessary for the development of a permanent park for residential caravans,

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 The supply to a [relevant housing association] in the course of conversion of a non-residential building or a non-residential part of a building into—

a building or part of a building designed as a dwelling or number of dwellings; or

a building or part of a building intended for use solely for a relevant residential purpose,

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

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.'

13. The rules for the VAT Refund Scheme are set out in VATA 1994, s 35. Under these rules, a person who constructs a new qualifying dwelling, for occupation by themselves, is entitled to make a claim to HMRC for a refund of the VAT they have incurred on eligible goods.

Section 35(1) Where —

'a person carries out works to which this section applies,

his carrying out of the works is lawful and otherwise than in the course or furtherance of any business, and

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 on that behalf, refund to that person the amount of VAT so chargeable.'

14. Accordingly, HMRC may only refund VAT which has been rightly charged. If VAT has been wrongly charged, it is not refundable under the DIY Scheme.

15. Section 35(1B) states:

'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'.

16. HMRC say that the requirement in s 35 (1B) that the supply is of 'building materials' has not been met. This is confirmed to customers in guidance in VCONST24400 and on page 7 of VAT 431NB notes which state:

'You can only claim for building materials and cannot claim for services.'

17. The disputed invoices related to the hire of a JCB, and included the hire of an operator. HMRC say that whilst this would still not be covered by the DIY scheme for new builds as it is a supply of services, it may be that the supply could have been zero rated. However if the VAT has been charged incorrectly, there is no entitlement to any refund under the VAT Refund Scheme, (VATA 1994, s 35(1) (c)). However, as long as the invoice is within the last four years, a supplier can amend their VAT account with HMRC and refund any VAT wrongly charged to a customer.

18. Further guidance is available in the Public Notice 708 – 'Buildings and Construction', paragraph 3.4.2 - Goods on hire which states:

> 'Goods hired on their own are always standard-rated. Examples include the hire of plant and machinery (although plant hired with an operator can be zero-rated where all the conditions in sub-paragraph 3.1.2 are met)'.

19. A bundle of documents containing relevant evidence, legislation, correspondence between the parties, the Notice of Appeal and the parties respective Statements of Case, was admitted in evidence. No witnesses were called and we heard submissions from each of the parties.

Appellant's Case

20. The Appellant's grounds of Appeal are that the scheme regulations have been mis-applied by HMRC because they have misinterpreted both the wording and purpose of the legislation.

21. The sale of new buildings for residential use is a zero rated supply. The Appellant says that the Vat Regulations zero rate DIY house building in order to create an even playing field for private housebuilders. He says that there has been a too strict interpretation of the word 'materials'.

22. The Appellant argues that because there has been too strict an interpretation of 'materials', the costs of services are often deliberately hidden by builders in the costs of materials. As an example, he refers to the cost of stone used in the construction of a house which would include costs which may not, strictly speaking, be regarded as materials, such as excavating the stone from a quarry, transporting it to the stone masons, cutting it and then hiring a lorry and crane to offload it on site. Under the definition used by HMRC it would be only the actual cost of the stone on which a VAT refund is allowed, as the other elements would be classed as services. He argues that in the example he provides and in respect of his claim, the 'services' disallowed by HMRC form an inherent, integral, component part of the materials and as such should be allowed.

23. The Appellant maintains that the claim he makes relates to items which are essential to the construction of the house and for the reasons argued above should properly be regarded as falling within the definition of 'materials', failing which the 'level playing field' which the legislation was designed to achieve, is artificially thwarted.

24. He asks why the hire of a man and machine to carry out essential excavation work and to dispose of material (as in this case), is not allowed. He says that it is not logical to allow the costs of hardcore and concrete foundations whilst not allowing the costs of excavations and disposal of waste. If he had employed a specialist contracting firm to install the foundations the cost would have been refunded or zero rated, even though it would have included (hidden) costs of waste excavation and disposal.

25. The Appellant argues that a house could not be built without incurring the cost of the items which HMRC seeks to disallow. Every house needs foundations. To construct foundations it is necessary to excavate and remove surplus material. It is not possible to build a house without carrying out these tasks and it is illogical for regulations not to allow this to be VAT exempt.

26. The Appellant also argues that there are often other essential costs in the construction of a dwelling house apart from the actual materials, so that for example, having excavated foundations, these have to be protected and if rain floods the foundations, it is necessary to hire a pump. Again, the cost of hiring the necessary equipment should be allowed.

27. One of the larger disputed items claims was the removal of excess subsoil. The house was built on a steeply sloping site and disposal of the soil was a necessity to allow construction of the house. To enable this excavation it was necessary to use a JCB. Again, the costs should be allowed.

28. The Appellant maintains that other plant and equipment used on site was equally essential to the construction of the house. Under Health and Safety legislation it was not possible to construct the house without scaffolding. It was therefore an essential component cost that should fall within the meaning of 'materials'. If he had purchased the scaffolding it would have been allowed as 'materials'. He chose to hire it and considers it was essential to enable construction of the house.

29. The Appellant says that the hire of plant to lay concrete is a similar example, where costs were incurred to ensure that the concrete is laid properly. He says that that if he had employed a firm to do this they would have incorporated the price as a hidden charge in the supply of 'materials'.

30. The same arguments apply to the hire of other equipment, i.e. barrows, planks etc. and all of these should be allowable. A refund of the VAT incurred on the costs of the disputed invoices would be consistent with the legislative purpose.

31. The Appellant submits that the VAT regulations have been framed to allow zero rating of VAT on all works required to erect a new house, and that these should include the hire of equipment or labour of whatever nature if it is essentially a necessary component part of the cost of materials . He maintains that his claim should be allowed and a VAT refund of £885.11 made.

32. The Appellant says that he works in the construction industry, and whilst observing that new houses are VAT exempt but major alterations are not, he makes the point that he has often had great difficulty persuading firms not to charge VAT when the works are clearly exempt (e.g. lab furniture in a new build standalone School Science Block) he offers the suggestion that "it would be useful if at the inception of the job, the project (i.e. a new build DIY Home) could be given a VAT exemption Number or Code. This could be quoted to firms and they would not charge VAT", and that this would obviate the need for a refund claim. He says "To be given a Code, Planning Permission would have to be obtained and Building Regulation Approval, with a cost estimate of the project. The VAT budget could not be exceeded without a claim

and would be time limited. This would be much easier from an Administration point of view and stop money unnecessarily circulating around."

HMRC's Case

33. Mis Fletcher for HMRC says that the Appellant's appeal relates to invoices refused on the grounds that a DIY VAT Refund cannot be made for 'services', as opposed to 'materials'.

34. Section 35 of the Act is relevant to determine the appeal in that a refund under the Housebuilders Scheme can only be made where they have incurred VAT on eligible goods.

35. Group 5 of Schedule 8 of the Act states that the construction of a building does not include the supply of services.

36. The notes to the claim form VAT431NB advises that only VAT on building materials can be claimed.

37. HMRC contends that the legislation, as detailed above, states that in order for a VAT refund to be allowed the supply in question must be for goods. As the hire of equipment is a supply of services, the VAT cannot be refunded.

Conclusion

38. Normally, as the Appellant says, when constructing a new residential dwelling, the builder's services will be zero-rated in any event. VAT is not payable for their services. A VAT registered builder or subcontractor must therefore zero-rate their work and not charge VAT. Although the builder or subcontractor will have to pay VAT when they purchase materials, they will be able to claim that back at the end of each month, or whatever period they have agreed with HMRC, and they must not seek to pass it on.

39. Under the DIY scheme the situation is different. The principle purpose of the DIY scheme is to put the private individual in the same position as someone purchasing from a property developer. In this respect, the claimant can claim VAT on materials purchased for the project (subject to specified exclusions). Claimants are only entitled to a refund of VAT on eligible goods. The relevant legislation and regulations on the matter are quite clear. The claim for VAT repayment can only be for building materials.

40. HMRC's VAT431 B states that in respect of a DIY project, an individual can claim for the following services:

> '• Works to the fabric of the building. (These services can be supplied either at the reduced rate or, if approved alterations, at the zero rate of VAT)
>
> • Works closely connected to the above works, such as works in the grounds, for example, laying drains. (These services can be supplied either at the reduced rate, the

standard rate or, if, they are an approved alteration to a listed building, at the zero rate of VAT).'

41. VAT431 B goes on to state that VAT cannot be re-claimed on:

'• Professional and supervisory services, including the fees of architects and surveyors, and other fees for management, consultancy, design and planning, and

• The hire of plant, tools and equipment (such as generators, scaffolding, skips, temporary fencing)

• Haulage (including muckaway).'

The guidance is therefore quite clear and in our view correctly interprets and applies the relevant legislation and regulations.

42. In the case of *Anthony Jessop Price & Kaye Price* (VTD 20700) the Tribunal considered broadly similar issues. In that case, the Appellants as private individuals constructed a new dwelling. On completion of the construction, they were entitled under the DIY Builders' Scheme to make a claim for a refund of VAT on building materials incorporated in the building. HMRC met the Appellants claim except the VAT on the haulage of granite blocks from the quarry. HMRC accepted that the granite blocks constituted building materials because they were incorporated on the site to retain soil, which maintained the structural integrity of the dwelling and VAT was refunded. However, HMRC would not refund the VAT on the haulage costs which was carried out by a haulage contractor and invoiced entirely separately from the supply of the granite.

43. HMRC's reasoning in *Price* was that under the legislation governing the DIY Builders' Scheme, they were only permitted to refund VAT on the supply of goods. The haulage of the granite blocks constituted a supply of services, which did not qualify for a VAT refund. HMRC conceded they would refund VAT on haulage, if such services were made by the same person who supplied the building materials and in consequence issued a single invoice for the supply and delivery of the materials. However the supplies of building materials and their delivery had been carried out and invoiced separately by distinct legal entities.

44. In *Price,* in assessing the Appellant's eligibility for a refund of VAT on delivery charges, the Tribunal said

"..we are concerned with the wording of section 35 of the VAT Act 1994 not the advice given by the Respondents in their Public Notices unless the notice has force of law which was not the case with Notice 719. In our view the wording of section 35(1)(c) is unambiguous in that the Appellant was not entitled to a refund of VAT on a supply of services. On the facts agreed we find that the supplies of haulage of the granite blocks by W.M. O'Grady Limited were supplies of services. Thus the Appellants were not entitled to a refund of the VAT incurred on the haulage supplies unless they could demonstrate that the supplies of haulage and of granite blocks constituted single supplies of goods for VAT purposes. ……. The decisive features of the transactions in this Appeal were that the Appellants contracted for separate supplies of granite blocks

> and haulage services which were made by different legal persons and evidenced by separate invoices. The Appellant's contention that in reality one person made both supplies was not supported by the evidence. …… We, therefore, find that the Appellant received separate supplies of granite blocks and haulage services."

45. VAT is not recoverable for services, for the reason that the services cannot readily be identified in the same way as materials as being for the carrying out of works relating to the construction of a dwellinghouse. The distinction between materials and services has to be applied strictly, otherwise there is potential for the DIY scheme to be abused. HMRC do recognise that there are some areas where costs, which are in essence for services, should be allowed, because they form an inherent and inseparable part of the cost of the materials so that, for example, VAT incurred on delivery charges separately itemised on main invoices for eligible goods are part of the value of the goods for the purposes of the Scheme and can be refunded. Separate invoices for transport or delivery are not eligible for refund.

46. The Appellant appears to recognise the difficulties that could arise if the VAT refund procedure is not strictly applied, in his suggestions for improvements to the scheme, (paragraph 32 above).

47. The wording of s 35(1)(c) and s 35(1B) is unambiguous and the Appellant is not entitled to a refund of VAT on the disputed invoices, which were for a supply of services.

48. For the above reasons the appeal is dismissed and HMRC's decision to refuse, in part, the Appellant's VAT refund claim under the Scheme, in accordance with s 35 VATA, of £885.11 is upheld.

49. 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.

MICHAEL S CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 15 October 2014