[2016] UKFTT 733 (TC)

TC05462

Appeal number: TC/2012/08896

VAT – DIY Builders' Scheme – construction of dwelling – bungalow built by owner of fishery business for own occupation – whether designed as a dwelling for purposes of subsection 35(1A)(a) and Note (2)(c) to Group 5 of Schedule 8 to VAT Act 1994 – whether conditions of development contained in planning consent prohibited "separate use" of dwelling for purposes of Note (2)(c) – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THOMAS H HECKINGBOTTOM **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER SIMON NEWTON

Sitting in public at Appeals Tribunal, City Exchange, Albion Street, Leeds on 6 September 2016

The Appellant in person

Mr Barry Sellars, Officer of HMRC, for the Respondents

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DECISION

1. Mr Thomas Heckingbottom ("the Appellant") appeals the decision of the Commissioners for HMRC to refuse a claim for a VAT refund of £5,305.63 under the DIY Builders Refund Scheme, made by the Appellant in accordance with s 35 of the Value Added Tax Act 1994 ("the Act"). The claim was made in respect of VAT incurred on the erection of a detached bungalow at Horseshoe Fish Pond, Balne Moor Road, Balne, Goole, North Yorkshire DN14 OEU for the Appellant's own occupation. HMRC's decision is contained in a letter dated 1 June 2012 and confirmed in a letter of reconsideration dated 15 August 2012.

2. HMRC say that the erection of the bungalow does not satisfy the legislative criteria to be considered as a "building designed as a dwelling" in accordance with s35 and Group 5 Schedule 8 of the Act because of a restriction on the use of the bungalow contained in the planning permission.

3. At the hearing the Appellant gave evidence and represented himself.

4. The bundle of documents jointly provided by the parties included copy correspondence between the parties, a planning history relating to the erection of the bungalow, relevant legislation and case law authorities.

The Background

5. The Appellant is not registered for the purposes of Value Added tax ("VAT"). He made his claim to repayment of VAT under the DIY Builders Scheme, using form VAT 431 NB dated 29 May 2012. He was allocated the reference 99435.

6. By way of a letter dated 1 June 2012, HMRC rejected the claim as the planning permission granted by Selby District Council contained a restriction on the use of the property, contrary to Note 2(c) of Group 5 Schedule 8 of the Act.

7. In rejecting the claim on this basis HMRC did not consider the quantum or any other aspect of the claim.

8. By way of a letter dated 21 August 2012 the Appellant's representative made further representations reiterating their view that the Appellant's claim was valid and requested a review of the decision.

9. An independent review of the decision was carried out. By way of a letter dated 15 August 2015, the outcome of the review, upholding the decision was made known to the Appellant.

10. On 13 September 2012 the Appellant appealed the decision.

11. On 9 May 2013, following an application dated 10 April 2013, the Tribunal agreed to stay the appeal behind the lead case of *The Commissioners of HM Revenue & Customs v Richard Burton* [2016] UKUT 0020 (TCC) ("*Richard Burton*").

12. The *Richard Burton* case was heard by the Upper-tier Tribunal on 23 and 24 November 2015. The decision in favour of HMRC was released on 21 January 2016. The issue was, whether the taxpayer could recover VAT incurred in the construction of a house next to a lake in Mansfield Woodhouse, Nottinghamshire. Mr Burton had been managing the lake as Park Hall Lake Fisheries since 2004, opening it to anglers on a day permit basis. Mr Burton's planning consent to build the house contained a condition that:

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

13. Following completion of the property, Mr Burton applied to HMRC for a refund of £8,566.72 that he had paid in VAT under the DIY Refund Scheme. HMRC refused the claim on the basis that the dwelling did not meet the condition in paragraph 2(c).

14. Mr Burton had successfully challenged this at the First-tier Tribunal, which held that there was a difference between a limitation on occupancy and a prohibition ("prohibition" being the word used in paragraph 2(c)). The Tribunal held that the occupancy condition did not constitute a prohibition on a separate use or disposal of the building and allowed Mr Burton's appeal.

15. HMRC appealed. Mr Justice Barling in the Upper-tier Tribunal reversed the decision of the First-tier Tribunal and held that the occupation limitation in the planning consent was sufficiently mandatory and clear to amount to a prohibition. He said it was clear that what was prohibited, was use of the dwelling separately to the Park Hall Fishery. He pointed out that, the reasons for the condition were expressly referred to in the planning consent, which set out in detail how certain important requirements of the Park Hall Fishery business were to be met through the occupation of the building. The condition meant that each occupant of the dwelling had to have a specific link with the Fishery.

The Legislation

16. The law in relation to claims under the DIY Scheme is contained in VAT Act 1994 s 30 and s 35:

Section 30 Zero-rating....

> 30(2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified....

Section 35 Refund of VAT to persons constructing certain buildings

> 35(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.

35(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.

35(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

35(2) The Commissioners shall not be required to entertain a claim for a refund of VAT under this section unless the claim-

(a) is made within such time and in such form and manner, and

(b) contains such information, and

(c) is accompanied by such documents, whether by way of evidence or otherwise,

as may be specified by regulations or by the Commissioners in accordance with regulations

Schedule 8 Group 5

Notes

(2) 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 terms 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 Appellant's case

17. The Appellant says that "the bungalow meets all the criteria as defined in s 30 and s 35 VATA, covering designed as a dwelling". He says that the building is completely separate from the business and has independent services.

18. The business itself, (Horse Shoe Fishing Pond) has a separate permanent property on it which is independently rated and has its own utilities and services. The property albeit originally a mobile home had been extended by other permanent accommodation and had been occupied by the Appellant since 1993. Eventually in 2013 he received a Certificate of Lawful Use and Development for use of the property as a private dwelling connected with the business.

19. The Appellant erected the new bungalow in 2006 in order to separate himself and his family from the business. Although he accepts that it was a condition of the planning consent that the bungalow be used in connection with the business, following the issue by the planning authority of the Certificate of Lawful Use in respect of the mobile home (extended and now permanent), which was now occupied by his son who runs the business, to all intents and purposes there was no reason why the business could not be sold separately with the existing property to a third party. There was equally no reason why the new bungalow could not be sold separately to the business.

20. The Appellant said that he had built the bungalow in good faith having been advised at the time by the local VAT office that he would be able to reclaim the VAT.

21. At the hearing, the Appellant explained that he had originally received planning permission for the erection of a building for storage of equipment associated with his fishery business in 1994. He moved on site with the temporary mobile home for which he also received planning permission.

22. Between 1994 and 2005 he had received various additional planning consents, for toilets, an Angler's ticket office, retention of the mobile home, and eventually, having extended the mobile home into permanent accommodation, a Certificate of Lawful Use in 2013.

23. The Appellant was effectively arguing that because the mobile home, which had been used in connection with the fishery business was now a permanent dwelling which provided accommodation for his son as owner of the business, there was no need for the conditions attached to the planning consent in respect of the new bungalow, and on that basis, the conditions which he regarded as redundant, should not prevent him reclaiming VAT on construction of the bungalow.

24. He says that had he received the Certificate of Lawful Use for the extended mobile home earlier than he did, that is, before he receiving planning permission for the new bungalow, the Certificate of Lawful Use in respect of the mobile home would have been subjected to appropriate planning conditions restricting its use and occupation obviating the need for the restrictions on the bungalow. The planning restrictions should therefore should not disqualify his VAT reclaim.

HMRC's case

25. The Act provides that certain supplies are taxable at a zero rate. This is specified by s 30 of the Act.

26. The Act introduced the DIY Builders Scheme by way of s 35. The intention of the legislation is to put a person who chooses to build their own house in the same position as a person who buys a house from a developer. The 'supply' of a house is zero rated.

27. Under s 30 (2) of the Act, to meet the requirements of s 30 and s 35 of the Act, consideration must also be given to Group 5 of Schedule 8 of the Act, which is relevant to the circumstances of the Appellant's claim.

> Section 30(2) - A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified....

28. Condition 2 of the planning permission imposed a restriction relating to the use of the property.

> "The occupation of the dwelling hereby approved shall be limited to a person solely or mainly employed, in the fishing business on the site, or a widow or widower of such a person, and to any resident dependents.
>
> Reason
>
> The residential use would be unacceptable in the open countryside unless justified by the functional need of a rural enterprise."

29. HMRC contend that because of the restriction, by reference to Note 2 (c) Group 5 Schedule 8, the bungalow does not fall to be considered as "a dwelling".

> Note 2 (c) Group 5 Schedule 8
>
> (2) A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied -....
>
> (c) the separate use, or disposal of the dwelling is not prohibited by the terms of any covenant, statutory planning consent or similar provision;

30. HMRC further contend that the restriction within the planning permission creates a link between the bungalow and the business. As such, the claim also fails to meet the stipulations of s 35(1)(b) of the Act.

> 35(1) Where -
>
> (b) his carrying out of the works is lawful and otherwise than in the course or furtherance of any business,
>
> the Commissioners shall, on a claim made in that behalf, refund to that person the amount of VAT so chargeable.

31. HMRC maintain that, regardless of whether the planning permission does or does not allow for the separate disposal of the dwelling, the restriction the use of the dwelling would remain; in contradiction of Note 2 (c) Group 5 Schedule 8 of the Act.

32. HMRC argue that the narrative within the planning permission support their contentions on the point.

> "In reaching this decision the Council was mindful of the particular circumstances of this application, namely: The site has a long established use for which the Council have previously accepted has a functional need for a dwelling. Information has been submitted that demonstrates the business is financially sound.....
>
> It is considered that, although the proposal would not necessarily satisfy the functional requirements set out in PPS7, the planning history of the site is a material consideration, and that by approving temporary permission on four occasions the Council have accepted that there is a requirement for a dwelling on this site in connection with the existing business."

33. HMRC say that the decision of the Upper tier Tribunal in *Richard Burton* supports their position, in that the circumstances in the instant appeal are sufficiently similar to those decided in that case.

34. HMRC therefore contend that as the separate use of the building is prohibited by the planning consent, it follows that the building is not "designed as a dwelling" for the purposes of sub-s 35(1A)(a) of the Act and Note 2(c). Therefore its construction cannot attract a refund of VAT.

Conclusion

35. The separate use or disposal of the dwelling is prohibited by the terms of the planning consent. As a restriction exists within the planning permission, by reference to Note 2(c) Group 5 Schedule 8 of the Act, the bungalow does not fall to be considered as "a dwelling" within the DIY Builders Refund Scheme.

36. Further, the restriction within the planning permission also creates a link between the bungalow and the business. As such, the claim fails to meet the requirements of s 35(1)(b) of the Act, that the "carrying out of the works is lawful and otherwise than in the course or furtherance of any business, and....".

37. We do not accept the Appellant's reasoning as set out in paragraphs 17 – 24 above. The conditions attached to the planning consent for the bungalow are clear and unequivocal. Although not a matter for this Tribunal, had the Certificate of Lawful Use for the extended mobile home/static caravan been given prior to the application for planning permission for the bungalow, it seems unlikely that planning permission would have been granted for the bungalow in any event.

38. We therefore concur with HMRC that the building is not "designed as a dwelling" for the purposes of sub-s 35(1A)(a) of the Act and Note 2(c),. Therefore its construction cannot attract a refund of VAT pursuant to the Act.

39. The appeal is accordingly dismissed.

40. 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 CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 31 OCTOBER 2016