[2017] UKFTT 104 (TC)

TC05621

Appeal number: TC/2012/07601

Value Added Tax – DIY Builders Scheme – construction of dwelling – whether designed as a dwelling for the purposes of subsection 35(1A)(a) and Note (2)(c) to Group 5 of Schedule 8 VAT Act 1994 – whether condition in planning permission prohibited 'separate use' of dwelling – yes – whether subsequent removal of condition a material consideration – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JASON CAMPBELL **Appellant**

- and -

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

TRIBUNAL: JUDGE ALASTAIR J RANKIN

Sitting in public at Room 1, Tribunal Hearing Centre, 2nd Floor, Royal Courts of Justice,, Chichester Street, Belfast, BT1 3JF at 10:30 AM

No appearance for or by the Appellant but he informed Mrs Spence by telephone that he was content for the hearing to proceed in his absence.

Mrs Sharon Spence, Presenting Officer from HM Revenue and Customs, for the Respondents

DECISION

1. The subject of this appeal is a decision by HMRC contained in a letter dated 20 March 2012 to refuse a claim by Jason Campbell and his wife Mrs Jennifer Campbell for a refund of Value Added Tax of £7,776.49 incurred by them in building a dwelling and garage (the New House) on land adjacent to 14 Lisboy Lane, Drumcroone Road, Garvagh, County Londonderry (the Property).

2. HMRC understood that at the time of the VAT refund application Mr and Mrs Campbell and their children resided in the Property and that Mrs Campbell owned and ran a livery business which is located a quarter of a mile from the Property.

3. The outline planning permission in connection with the New House dated 7 August 2006 contained the following condition (the Condition):

> "The occupation of the dwelling shall be limited to a person solely employed by the livery business located within the lands outlined in blue on the approved plan attached, and any resident dependants."

4. HMRC considered the Condition prohibited the separate use of the New House from the livery business. As a result the claim for a VAT refund failed as the New House was not designed as a dwelling for VAT purposes.

5. Mr Rob McCann of the vat people wrote to HMRC on 21 May 2012 requesting a review of the decision on the grounds that the Condition did not prohibit the separate disposal of the New House as there was nothing to stop Mr & Mrs Campbell selling the New House as long as the sale was to an individual that was employed in the livery business. Mr McCann also claimed it would be possible for Mr and Mrs Campbell to sell the New House to a third party as long as they or any other employee of the tenant continued to reside in the New House as a dwelling under the terms of a lease.

6. Mr McCann was firmly of the view that the New House was used separately from the livery business and that such use is not prohibited by the Condition. He further claimed that HMRC accept that an occupancy restriction does not breach the requirements of the legislation to which I will refer later. He referred to various First Tier Tribunal decisions including *Wendels v HMRC [2010] UKFTT 476 (TC)* which concerned VAT refund claims in connection with planning conditions similar to the Condition and where the Tribunals found against HMRC.

7. An Appeals and Review Officer of HMRC replied by letter dated 5 July 2012 upholding the original decision on the basis that the Condition prohibits the separate use of the New House which means that it is not designed as a dwelling for VAT purposes. The Officer also considered that the carrying out of the relevant building works was not "otherwise than in the course or furtherance of any business." As a result the requirements of sections 35(1)(a) and (b) of the VAT Act 1994 were not satisfied.

8. Mr Campbell in his Notice of Appeal stated that his grounds of appeal were fully explained in the letter dated 21 May 2012 from Mr McCann.

9. On the application of HMRC the Tribunal directed that the hearing of the appeal should be stood over until the Upper Tribunal delivered its decision in the appeal of *Richard Burton [2013] 104 (TC)*. Mr Justcie Barling released his decision on 21 January 2016 *HMRC v Richard Burton [2016] UKUT 0020 (TCC)*.

The legislation

10. Section 35 of the Value Added Tax Act 1994 states:

> "(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 a 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."

11. Section 35 also states:

> "(4) The notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group…"

12. Schedule 8 of Group 5 of the 1994 Act states:

> "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 has been carried out in accordance with that consent."

13. The VAT Regulations 1995 provide as follows:

"201 Method and time for making claim

A claimant shall make his claim in respect of a relevant building by –

(a) furnishing to the Commissioners no later than 3 months after the completion of the building [the relevant form for the purposes of the claim] containing the full particulars required therein, and …"

The Tribunal Decisions

14. In *Swain v HMRC [2013] UKFTT 316 (TC)* the planning permission included condition 10 as follows:

"The occupation of [the dwelling] shall be limited to a manager or proprietor of the holiday accommodation being operated from [the other buildings on the site] and any residential; dependents."

15. The Tribunal continued:

"The clear effect of [the condition] is to prohibit anyone from occupying Barn D who is not a "manager or proprietor of the holiday accommodation business being operated from Barns A, B and C …, or any residential dependents." To comply with Condition 10, either such a person must occupy Barn D, or it must be unoccupied. If it is unoccupied, it is not being used at all. If it is occupied, it must be occupied only by appropriately "qualified" persons. The lawful use of Barn D is therefore circumscribed by reference to the relationship between its occupier(s) and a business being operated out of neighbouring premises. In that situation, we cannot see how it could properly be argued that there is no prohibition on the separate use of Barn D imposed by Condition 10; it cannot lawfully be used except by an occupier who fulfils the requirements of Condition 10 and who must therefore own or manage the neighbouring holiday letting development (or be a residential dependent of such owner or manager). Any use "separate from" that neighbouring development is therefore in our view, prohibited by Condition 10."

16. The above passage was quoted with approval in *Burton* where Mr Justice Barling said he was "in complete agreement with the approach and analysis of the FTT". Mr Justice Darling continued by stating that the approach in some of the other cases including *Wandels* was erroneous. I do not propose rehearsing the arguments contained in *Burton* where the planning condition was as follows:

"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 person, or any resident dependents."

Decision

17. This Tribunal considers the wording of the condition in *Burton* is identical to the wording in the Condition with the result that the New House is not "designed as a dwelling" for the purposes of subsection 35(1A)(a) of the 1994 Act. The Condition specifically imposes a restrictive condition restricting the occupation of the property to "a person solely employed by the livery business … and any resident dependents". Occupation of a dwelling is clearly a use of it with the result that the requirement of Note 2(c) cannot be met by Mr Campbell.

18. Accordingly the construction of the New House does not attract a refund of VAT pursuant to subsection 35(1).

19. During the time when the hearing of this appeal was stood over, an amended planning permission was issued on 22 April 2015. This permission removed inter alia the Condition. However in accordance with the decision of the Upper Tribunal in *HMRC v Asim Patel [2014] UKUT 0361 (TCC)* the legislation is quite clear:

> "The regulation is clear; when he makes his claim the claimant must provide documentary evidence that planning permission has been granted. This can only mean the correct permission, meaning permission relating to the works actually carried out. The requirements of the regulation are framed in mandatory terms: HMRC are allowed no discretion to accept something less than the prescribed documentation, nor to extend the time limit, and it is equally not open to the FTT or to us to do so."

20. Accordingly the removal of the Condition in 2015 in respect of planning permission submitted as part of a VAT refund claim in 2012 can have no effect on the decision of the Tribunal.

21. The appeal is dismissed. Mr Campbell is not entitled to any refund of VAT in respect of building the New House.

22. 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.

Alastair J Rankin
TRIBUNAL JUDGE
RELEASE DATE: 24 January 2017