[2018] UKFTT 284 (TC)

TC06514

Appeal number: TC/2017/04530

VAT – input tax – whether attributable to an exempt or zero-rated supply – Item 1 of Group 5 of Schedule 8 to VATA 1994 – Note 7 – whether or not two properties had been used as dwellings in the period of ten years immediately preceding their sales – agreement in respect of one property that it had not been used as a dwelling within the ten year period – finding that the second property had been used as a dwelling within the ten year period – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

FIREGUARD DEVELOPMENTS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD CHAPMAN
MS SUSAN STOTT

Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA on 21 February 2018

Mr John Ball, Director, for the Appellant

Mrs Sharon Spence, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This appeal is against a decision dated 4 May 2017 reducing the input tax claimed by Fireguard Developments Ltd ("Fireguard") from £23,496 to £9,378.47 on its 12/16 VAT return ("the 12/16 Return"). These inputs related to the renovation of two residential properties, 133 and 135 Hart Street, Southport, Merseyside ("No 133" and "No 135" respectively and together "the Properties"). Fireguard's entitlement to claim the input tax depends upon whether or not the subsequent sales of the Properties were exempt supplies or zero-rated supplies. HMRC now accepts that the sale of No 133 was zero-rated but continues to maintain that No 135 was exempt. In the context of the present case, the parties agree that the sole issue is whether or not No 135 was vacant for the whole of the period of ten years immediately preceding its sale.

The Legal Framework

2. The context of this appeal is best understood by setting out the legal framework at the outset. This legal framework was not in dispute.

3. The relevant sub-sections of section 26 of the Value Added Tax Act 1994 ("VATA 1994") are as follows:

> "(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.
>
> (2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business –
>
> (a) taxable supplies ..."

4. The relevant sub-sections of section 30 of VATA 1994 provide as follows:

> "(1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section –
>
> (a) no VAT shall be charged on the supply; but
>
> (b) it shall in all other respects be treated as a taxable supply;
>
> and accordingly the rate at which VAT is treated as charged on the supply shall be nil.
>
> (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. …"

5. The relevant parts of Item 1 of Group 5 of Schedule 8 to VATA 1994 provide for zero-rating of, amongst other things, the following:

> "The first grant by a person –
>
> …
>
> (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."

6. Note 7 to Group 5 of Schedule 8 to VATA 1994 provides as follows:

> "(7) For the purposes of item 1(b), and for the purposes of these Notes so far as having effect for the purposes of item 1(b), a building or a part of a building is "non-residential" if –
>
> (a) it is neither designed, nor adapted, for use –
>
> (i) as a dwelling or number of dwellings, or
>
> (ii) for a relevant residential purpose; or
>
> (b) it is designed, or adapted for such use but –
>
> (i) it was constructed more than 10 years before the grant of the major interest; and
>
> (ii) no part of it has, in the period of 10 years immediately preceding the grant, been used as a dwelling or for a relevant residential purpose."

7. Item 1 of Group 1 of Schedule 9 to VATA 1994 provides for an exempt supply to include the following:

> "The grant of any interest in or right over land or of any licence to occupy land"

Evidence

8. We have considered the documents put before us by both parties and the witness statements and oral evidence of Mr Cummins (HMRC's decision making officer) on behalf of HMRC and Mr John Ball (a director of Fireguard) on behalf of Fireguard. We also considered a statutory declaration of Mrs Kathleen Flood, although Mrs Flood did not attend the hearing (and there is no suggestion that she was requested by either party to do so). Neither party objected to us admitting and considering Mrs Flood's statutory declaration despite her non-attendance; Fireguard actively relied upon the statutory declaration and HMRC accepted that it should be admitted but made submissions as to its weight.

9. In making the finding of facts set out within this decision we bear in mind that the burden of proof is upon Fireguard and that the standard of proof is that of the balance of probabilities.

The Undisputed Facts

10. The following factual background was not in dispute. Fireguard carries on business in, amongst other things, the development and sale of properties. On 23 May 2016, Fireguard exchanged contracts for the purchase of the Properties, together with three other connected properties. All of these were registered with HM Land Registry under the same title number. The purchases completed on 10 August 2016. The vendor was Mrs Flood.

11. The Properties had been dwellings but had been unoccupied for some time. After purchasing the Properties, Fireguard renovated them and prepared them for sale. No 133 was sold on 28 July 2017 and No 135 was sold on 23 June 2017. The Properties had been vacant when purchased by Fireguard and remained vacant until sale.

12. Fireguard sought a repayment of £23,496 on the 12/16 Return. This was upon the basis that Fireguard had incurred expenditure upon the renovation of the Properties and since (on Fireguard's case) the Properties had already been vacant for more than ten years, it followed that their sale would be zero-rated.

13. HMRC did not accept that Fireguard had proved that the Properties had not been occupied for more than ten years and adjusted the 12/16 Return accordingly to a repayment of £9,378.47. There is no dispute that this would be the correct amount if the sales of both of the Properties are exempt, as this was based upon a partial exemption method agreed with Fireguard's accountants.

14. Fireguard disputed this and appealed to the Tribunal by a notice dated 1 June 2017. The grounds of appeal are admirably narrow and are as follows:

> "HMRC have ruled that there is insufficient evidence that the relevant property was empty for more than 10 years before renovation and the sale was therefore exempt from VAT.
>
> We contend that the property concerned was empty for more than 10 years before its renovation and sale and therefore the supply was correctly treated as zero-rated. Input tax relating to that supply was therefore recoverable. In support of this we [have] a sworn affidavit from the previous owner [that] the property was unoccupied for more than 10 years."

15. Prior to the hearing, the parties reached agreement that No 133 had been unoccupied for ten years prior to sale. As such, only the treatment of No 135 remains in issue.

The Disputed Facts

16. The factual dispute is therefore whether or not No 135 (or any part of No 135) was used as a dwelling for any part of the period of ten years immediately preceding 23 June 2017. Neither party gave oral evidence as to the position before Fireguard's purchase. The relevant documentary evidence is as follows.

17. Mrs Flood's statutory declaration is short and, given the importance placed upon it by Fireguard, merits repetition of its substantive parts in full.

> "[1] I was previously the owner and registered proprietor of 133 to 139 and 139a (odd numbers) Hart Street, Southport, Merseyside PR8 6DY which I had owned since before the year 2000. I sold the properties to Fireguard Developments Limited on 10th August 2016.
>
> [2] I confirm that from in or around 2005/2006 all the properties became vacant and I made application for planning permission in 2007 for the demolition of the existing houses and industrial buildings on the site and for the erection of 9 houses. My application was refused at that time. I made a further application in 2009, which was again rejected.
>
> [3] Prior to the properties becoming vacant, I had tenants in them. I can confirm that the tenants had all vacated the properties before the application for planning permission was made."

18. Fireguard obtained a letter from Sefton Metropolitan Borough Council ("the Council") dated 10 March 2017 ("the Council Letter"), which states that No 135, "has remained empty from 28/11/2008 to date." Although the Council Letter does not say so on its face, the parties agreed that this information was based upon the last date that Council Tax (although the parties referred to this as rates) was paid in respect of No 135.

19. HMRC rely upon a printout from a company named GBG Connexus ("the Connexus Report") and assert that it is a report compiled from the electoral roll. This purports to show various people as resident at No 135 from 1995 to 2009. In particular, it states that one person was resident from 2005 to 2007 and two people were resident from 2008 to 2009.

20. HMRC also rely upon a printout from its PAYE information (albeit that the name is redacted), which purports to show an individual was registered with HMRC for PAYE at No 135 with a start date of 23 February 2005 and an end date of 27 November 2008 ("the PAYE Record"). We note that the PAYE Record was provided to Fireguard shortly before the hearing. We asked Mr Ball whether or not he wished to apply for an adjournment and he said that he did not. Similarly, Mr Ball did not object to the PAYE Record being adduced although of course disputed its effect.

21. The bundle of documents includes a copy of Mrs Flood's application for planning permission dated 24 September 2007 ("the Planning Application"). This states that the site was not currently vacant, although it is of note that this does not go into any further detail as to whether or not this specifically relates to No 135.

22. The bundle of documents also includes an email from Fireguard's accountants to HMRC dated 31 March 2017 ("the March Email") relied upon by Fireguard. This records that Mr Ball had spoken to Mrs Flood, who confirmed that the Properties were vacated in November or December 2006 and the other units on the site were vacated in 2005. Further, it records that Mrs Flood had confirmed in enquiries before contract that, as at July 2016, the properties had been empty for nine or ten years. The March Email

also notes that Mr Ball had asked Mr Flood for "a written statement of truth" to confirm this information. However, no such document has been obtained.

Submissions

23. Mr Ball's submissions can be summarised as follows:

(1) The items of documentary evidence relied upon by HMRC conflict with each other and so cannot be determinative.

(2) The Council Letter merely shows when Council Tax was paid until. This is not conclusive as Mr Ball has experience of Fireguard being charged, and unwittingly paying for, properties which it did not occupy.

(3) The Connexus Report adds nothing as the electoral roll can be wrong. Further, the Connexus Report shows in brackets next to the names the number of people living at the property and yet this is inconsistent with the number of people registered during the relevant time.

(4) Mrs Flood's statutory declaration is to be treated in the same way as an affidavit by virtue of the Statutory Declarations Act 1835.

(5) Mrs Flood's statutory declaration is the best evidence available as she was the owner during the relevant time. Her evidence is that No 135 was vacant by, at the very latest, 31 December 2006. This evidence was amplified by the information set out in the March Email.

24. Miss Spence's submissions can be summarised as follows:

(1) Whilst the electoral roll is not conclusive evidence, it is still persuasive evidence that the registered individuals were residing at No 135. Miss Spence drew our attention to paragraph 35 of the First-tier Tribunal (and so not binding on us) decision of *Beverley Properties Limited* [2003] Lexis Citation 787, which states as follows:

> "[35] The Appellant's case was also weakened by the quality of the evidence produced by the Respondents. The City of Westminster's Council Tax database and the Electoral Roll were independent reliable sources of evidence. The database recorded Mr Percival Brown as the "Named Occupier" from April 1993 to January 2000 for paying Council Tax in respect of the upper floors of the Property. Mr Brown was liable for the full amount of the Council Tax which indicated that he resided at the premises. Likewise the Electoral Roll named Mr Percival Brown and Ms Joan Brown as the registered persons at the Property. Section 49(1) of the Representation of the People Act 1983 states that,
>
> "The register of parliamentary electors shall for the purposes of this Part of this Act be conclusive on the following questions –
>
> (a) whether or not a person registered in it was on the qualifying date resident at the address shown."
>
> Although section 49(1) does not apply to proceedings under the 1994 Act, the fact that named persons at the Property were registered for

> voting was persuasive evidence that they were residing there. The Appellant was unable to provide a statement from Mr Percival Brown to contradict the evidence about his residency at the Property. The Appellant in his planning application admitted the joint commercial/residential use of the Property. Grosvenor Estates, the lessor for the Property, informed the Appellant that the previous lease had a commercial user clause for the basement and ground floor, and a residential use for the upper four floors."

(2) Miss Spence also placed great store upon the PAYE Record. This showed that an individual was registered with HMRC as living at No 135 until 27 November 2008, comfortably within the ten year period. The Council Letter was broadly consistent with this.

(3) Finally, Miss Spence submitted that Mrs Flood's statutory declaration was unreliable because Mrs Flood was not independent as she had had an interest in selling the properties. She also said that Mrs Flood's evidence was vague.

Discussion

25. We find as a fact that No 135 was used as a dwelling during the period of ten years immediately preceding 23 June 2017. In particular, we find that No 135 was occupied until November 2008. This is for the following reasons.

26. First, the PAYE Record is particularly strong evidence. There is no evidence to suggest that this was incorrect. On its face, somebody was resident at No 135 until 27 November 2008.

27. Secondly, there is no evidence to displace the Council's position in the Council Letter that No 135 was empty from 28 November 2008. We have taken into account Mr Ball's argument that payments to the Council could have been made in error but there is simply no evidence to suggest that that was the case in respect of No 135. We do note that the Council wrote a similar letter in respect of No 133, which the Council said was empty from 12 August 2008, and yet HMRC have still accepted that No 133 was unoccupied for the requisite period of time. However, that is a matter for HMRC and we are not now required to adjudicate upon the position in respect of No 133. We find in respect of No 135 that the Council Letter is significant evidence in support of occupancy until November 2008. The fact that both the PAYE Record and the Council Letter refer to November 2008 make this conclusion all the more compelling.

28. Thirdly, we do not accept that Mrs Flood's evidence overrides the PAYE Record or the Council Letter. Mrs Flood's statutory declaration is admissible and we have considered it. However, even taking into account that it is a statutory declaration, we give it limited weight because Mrs Flood was not present to amplify it or be cross-examined upon it. Crucially, it leaves open matters which would have been raised with Mrs Flood, such as why she was vague about the precise date and as to why her dates were apparently inconsistent with her declaration on the Planning Application that the site was not vacant. This is not resolved by the March Email as Mrs Flood did not produce a witness statement confirming the matters within it and it does not resolve the shortcomings in the statutory declaration.

29. For the avoidance of doubt, we do not take into account the Connexus Report other than to note that it does not detract from our finding that No 135 was used as a dwelling until November 2008. Although HMRC refer to the document as the electoral roll, it does not say this on its face and does not explain how Connexus have compiled it or from what information. We make no findings as to Mr Ball's submission that the Connexus Report is internally inconsistent as it is unclear what the bracketed numbers next to the names mean (they cannot mean the number of people living at the property as some names have a bracketed zero next to them). It follows that *Beverley Properties Limited* adds nothing to our decision. In any event, we do not read *Beverley Properties Limited* as suggesting that the electoral roll should as a matter of course be given any greater evidential value that any other evidence.

Decision

30. The parties are agreed that the legal effect of a finding of fact that No 135 was used as a dwelling within the ten years immediately preceding its sale is that such sale is exempt and input tax cannot be claimed in respect of it. Given that the parties are agreed that input tax is claimable in respect of No 133, it follows that we allow the appeal in part to the extent that it relates to No 133.

31. The parties anticipated being able to reach agreement as to the recalculation of the 12/16 Return following our findings and so no submissions were made (or evidence presented) in that regard. If the parties are unable to reach agreement as to this, either party may apply to restore the appeal for a determination of such recalculation.

32. 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.

RICHARD CHAPMAN
TRIBUNAL JUDGE

RELEASE DATE: 30 MAY 2018