[2018] UKFTT 737 (TC)

TC06870

Appeal number: TC/2017/05054

VAT – DIY Builders Scheme – VAT refund – Section 35 Value Added Tax Act 1994- whether construction of a building designed as a dwelling – Notes 2, 16 and 18 Group 5 schedule 8 VATA – yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROY TABB **Appellant**

- and -

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

TRIBUNAL: JUDGE IAN HYDE
MOHAMMED FAROOQ

Sitting in public in Birmingham on 24 August 2018

Mr Tabb appeared in person

Mr Nicholson, officer, for the Respondents

DECISION

1. This appeal concerns whether the appellant is entitled to a VAT refund under section 35 of the Value Added Tax Act 1994 ("VATA") ("the DIY Builders Scheme") in respect of the demolition of an annexe and construction of a new building abutting the appellant's original house.

The facts

2. The appellant, a retired civil engineer specialising in foundation engineering, represented himself and gave evidence as to the nature and manner of the construction project the subject of this appeal.

3. The parties agree on the facts in this appeal and they are set out below. The amount of VAT which would be reclaimable were the appeal to succeed has, subject to the apportionment point raised in the appeal, been agreed between the parties.

4. We would mention as a preliminary point that throughout the course of events the subject of this appeal Mrs Tabb has, it appears, been a co owner of the property but is not an appellant in this appeal. HMRC have made nothing of this point, and in particular whether the supplies upon which the VAT reclaim is being made were made solely to the appellant or to the appellant and Mrs Tabb. We take it as accepted by HMRC that, subject to the arguments in this appeal, the appellant is entitled in principle to make the reclaim the subject of this appeal.

5. At the time of the relevant works described in this appeal the appellant and his wife owned a barn ("the Barn") and associated out buildings. One of the out buildings was a single storey cowshed which was a sizeable freestanding structure except that one corner of the cowshed had a short common wall with the Barn running somewhat less than half the length of the cowshed but there was no internal access between the barn and the cowshed. Soon after acquiring the property the appellant converted the cowshed into a games room ("the Games Room") but the alteration did not include creating any internal access not did it make any other structural alteration to the buildings.

6. In 1992 the appellant applied for and obtained planning consent to convert the Games Room into an annexe to provide living accommodation for his mother-in-law ("the Annexe"). The Games Room was converted into a bedroom, sitting room, kitchen and bathroom and a conservatory was added. The Annexe had a separate external entrance and also an internal access door to and from the Barn at the common wall. The Annexe occupied the same foot print as the Games Room except for the additional conservatory.

7. In 2009 the appellant's mother-in-law died and the appellant and his wife reviewed how they wanted to live in the Barn. They decided they would demolish the Annexe, build a new house on its footprint ("the New House") and sell the Barn.

8. In April 2014 the appellant made a planning application for this work, described in the planning application as a

> "Single storey and first floor extension to existing annexe …"

9. In September 2016 the appellant made another planning application to in respect of the same works, this time as being works to;

> "subdivide dwelling & annexe into 2 separate dwellings…"

10. Planning consent for the New House was eventually granted in November 2016 and construction was completed in January 2017.

11. Notwithstanding the descriptions in the planning applications the appellant's intention was to demolish the Annexe and construct a completely new structure, and this is what he did. We were shown extensive drawings and photographs of the work being carried out and the resulting New House. The New House is an extensive two storey dwelling, measuring some 10 metres by 8 metres containing living accommodation, bedrooms, kitchen and bathrooms.

12. The construction works involved the complete demolition of the Annexe including the replacement of the foundations so that there was no trace of any of the pre existing walls. The appellant had intended to keep the conservatory but that proved to be incapable of being saved and (following an additional planning application in August 2016 to do so) was also demolished and a new summer house built as an extension to the New House. The New House was constructed on a new reinforced concrete raft foundation within the footprint of the Annexe save for the summer house and a 3 metre deep single storey extension constituting the kitchen. The walls were built using extensive steel joists with stone and glass infill on the vertical elevations.

13. The New House is free standing in that no part of it joins the Barn but instead abuts it at the location of what was previously the common wall. The internal access to the Barn has been blocked up, although the shape of the previous internal door is visible from inside the New House in that the internal rendering where the door was is inset against the profit of the rest of the internal wall around it.

14. Mr and Mrs Tabb moved into the New House in January 2017 and sold the Barn in 2018.

15. On 11 April 2017 the appellant made an application under the DIY Builders Scheme for the refund of £31,381.46 of VAT incurred in constructing the New House. On 21 April 2017 HMRC rejected the claim and the appellant requested a review. By a letter dated 9 June 2017 the original decision was upheld. The appellant appealed that decision on 26 June 2017.

Legislation

16. Section 35 VATA provides to the extent relevant to this appeal;

"(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 purpose 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

….

(4) the Notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group…."

17. Note 2 to Group 5 provides;

"(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"

18. Note 16 to Group 5 provides;

"(16) For the purposes of this Group, the construction of a building does not include-

(a) the conversion, reconstruction or alteration of an existing building; or

(b) any enlargement of, extension to, an existing building except to the extent the enlargement or extension creates an additional dwelling or dwellings; or

(c) subject to Note (17) below, the construction of an annexe to an existing building"

19. Note 18 to Group 5 provides so far as relevant;

"(18) a building only ceases to be an existing building when:

(a) demolished completely to ground level; or

(b) ….."

Issues in the appeal

20. HMRC accept that in most respects the appellant satisfies the conditions for relief and have dropped a number of arguments at the hearing, including that the appellant's appeal was late. Accordingly the sole issue in this appeal is whether the works carried out to build the New House consists of "the construction of a building designed as a dwelling" within section 35(1A). The appellant has two arguments based on the application of Notes 16 and 18 to Group 5 of Schedule 8 for the purposes of construing Section 35.

21. The first argument is whether in accordance with Note 18 the New House is not part of an existing building because the Annexe was demolished to ground level.

22. The second argument is whether, even if Note 18 does not apply, Note 16 (b) treats the New House as being the construction of a building because whilst it is an enlargement of or extension to, an existing building Note 16(b) allows the works to be treated as the construction of a new building to the extent the enlargement or extension creates an additional dwelling or dwellings. A supplemental point raised by HMRC in the context of this argument is whether if Note 16(b) applies the legislation requires an apportionment of the VAT recovery between that incurred on the existing building and on the new building.

Note 18: The new building argument

23. The appellant's position was that Note 18 was met in that the Annexe was completely demolished. The New House is a new building and so the works amount to "the construction a building designed as a dwelling" within section 35 (1A). The Annexe was demolished to below foundation level. There is no internal access and the New House and the Barn, whilst abutting each other to a small extent, are not as HMRC argued, structurally indivisible. One of the buildings could be demolished without affecting the other.

24. HMRC argued that the appellant does not satisfy the conditions of the relief because the construction of the New House is not the construction of a building designed as a dwelling within the meaning of the legislation.

25. Note 18 to Group 5 defines an "existing building" and provides so far as relevant;

> "(18) a building only ceases to be an existing building when:
>
> (a) demolished completely to ground level; or
>
> (b) ….."

26. Here, according to HMRC, the "existing building" is the Barn and the Annexe and so the structure that needs to be demolished in Note 18 (a) is the Barn and the Annexe. The appellant demolished the Annexe to ground level but not the Barn. The 2014 planning consent refers to a "Single storey and first floor extension to existing annexe …". The fact that the appellant chose to demolish the Annexe to comply with the planning consent was up to him.

27. Accordingly, argue HMRC, whilst the New House is a self contained house with no internal connections to the Barn, the construction works do not satisfy Note 18 and the appellant does not qualify under the DIY Builders Scheme.

Note 16(b): the additional dwelling argument

28. The appellant argues that if he is wrong on Note 18, Note 16(b) applies. Note 16 applies for this purpose by virtue of section 35(4) and provides that;

> "(16) For the purposes of this Group, the construction of a building does not include-
>
> (a) the conversion, reconstruction or alteration of an existing building; or
>
> (b) any enlargement of, extension to, an existing building except to the extent the enlargement or extension creates an additional dwelling or dwellings; or
>
> (c) subject to Note (17) below, the construction of an annexe to an existing building"

29. The appellant argued that the New House is in any event a new dwelling created by the enlargement or extension and so within the proviso to Note 16(b). HMRC were seeking to insert the word "entirely" into Note 16(b), that is to say the new dwelling must be entirely within the extension which is not stipulated in the legislation and so not required.

30. HMRC accepted that there had been an enlargement or extension but argued that for the proviso in Note 16(b) to apply any new dwelling would need to be wholly within the enlargement or extension. Here the New House is substantially within the area of the Annexe (being part of the existing building) and so Note 16(b) does not apply.

The apportionment argument

31. As a supplementary point HMRC argued that in respect of the Note 16(b) argument, it was not possible for the Tribunal to allow the appellant to recover a proportion of the VAT by relying on the wording of Note 16(b) which treats the works as creating a new building "…*to the extent* the enlargement or extension creates an additional dwelling…" (emphasis added).

32. HMRC accepted that in *Alan & Maureen Wright v HMRC* [2011] UKFTT 681 this Tribunal held that there should be an apportionment under Note 16(b). *Wright* was concerned with the sale of a part of a house which had been extended and the question was whether the sale was zero rated as a new dwelling within Item 1 Group 5 Schedule 8 VATA. The Tribunal held that the sale was partly the sale of a new dwelling and partly the sale of land exempt under Group 1 Schedule 9 VATA. The Tribunal held that;

> "In the circumstances and in view of the word "except to the extent" in Note 16, we consider that it is appropriate for an apportionment to be made"

33. However, HMRC suggested *Wright* was only a decision of this Tribunal and so only persuasive. HMRC preferred the decision in *HMRC v Languard New Homes Limited* [2017] UKUT 307. *Languard* concerned the zero rating of the first grant of a major interest in buildings converted from existing buildings which were partly residential and partly commercial. The Upper Tribunal had to consider the interpretation of Note 9 to Group 5 of Schedule 8 VATA, which provides that;

> "The conversion, other than to building designed for a relevant residential purpose, of a non- residential part of building already contains a residential part is not included within items 1(b) or 3 unless the result of that conversion is to create an additional dwelling for dwellings"

34. The Upper Tribunal in *Languard* held at paragraph 9 that;

> "9. All parties rejected the idea that there could be an apportionment to allow some of the supply used in construction to be zero rated and some to be treated as exempt. Ms McCarthy pointed out that where the legislation intends to be apportionment of some kind this is made clear for example in Note 10(b)(iii)"

35. By way of comparison, Note 10(b)(iii) states that;

> "any other grant for other supplier relating to, what are any part of, the building (or its site) , an apportionment shall be made to determine the extent to which it is to be so treated"

36. HMRC argued that the wording of Note 9 is similar to Note 16(b) so the principles should be applied consistently to each. As with Note 9, Note 16(b) does not state that apportionment is available and therefore following *Languard*, it is not appropriate in the current appeal. The appellant, has created a dwelling by improving part of an existing dwelling and extending it. In order to claim VAT on a new build dwelling, the entirety of the new dwelling must fall within the extension that was created and so the appeal must fail in its entirety.

Decision

37. The issue in this appeal is whether the works carried out to create the New House amounts to "the construction a building designed as a dwelling" within section 35(1A).

38. Notes 16 and 18 to Group 5 of Schedule 8 apply for the purposes of construing Section 35 and their effect is to produce two arguments for the appellant. First, whether in accordance with Note 18 the New House is not part of an existing building because the Annexe was demolished to ground level. Second, whether, even if Note 18 does not apply, Note 16 (b) treats the New House as being the construction of a building because whilst it is an enlargement of or extension to, an existing building, the enlargement or extension creates an additional dwelling or dwellings.

39. Prior to the works starting, the Annexe was a single storey barn conversion containing living accommodation but was linked to the Barn by an internal access. When the Annexe was demolished it was demolished in its entirety and a new two storey house constructed. The New House is in construction terms a new house, semi-detached from the Barn and very different to the Annexe.

40. However, HMRC's argument on Note 18 rests on the point that the Annexe and the Barn were a single building and the appellant did not demolish that building, but only part of it, being the Annexe. Accordingly there is no new building.

41. In applying Note 18 we take the view that the test as to whether the building has been demolished should be determined by reference to the building before and after the works have been carried out. Accordingly, while the New House is a new dwelling, it has been built from an existing building constituting the Barn and the Annexe which were physically connected and had an internal connection. We agree therefore that cannot be said that the "existing building" has been demolished completely to ground level as required by Note 18.

42. The appellant's second argument is that Note 16(b) applies because, to the extent there is an alteration to an existing building, that alteration creates a new dwelling. HMRC's objection is that "enlargement or extension" should be measured against the pre-existing building being the Barn and the Annexe. As the New House was built substantially on the footprint of the Annexe Note 16(b) does not apply and, further, there can be no apportionment of VAT recovery.

43. We agree with the appellant on Note 16(b). Under Note 16(b) VAT recovery is allowed "to the extent the enlargement or extension creates an additional dwelling or

dwellings". This requires two elements to be present, an "enlargement or extension" and that the enlargement or extension "creates an additional dwelling or dwellings".

44. In our view both elements are present here. First, the New House is an extension or enlargement of the prior building in that an additional floor was added to make a two storey building and the footprint was extended by the lean-to kitchen. Second, that extension or enlargement created a new dwelling, the old Annexe previously being interconnected to and forming a single dwelling with the Barn and the New House now being a new dwelling.

45. On the consequential question of apportionment, we note the decision of this Tribunal in *Wright* and the Upper Tribunal in *Languard*.

46. In *Wright* this Tribunal allowed an apportionment. However, that appeal was concerned with apportionment of output tax and is at odds with *Languard* where the contrast was made with the express provision on apportionment in Note 10(b)(iii). We prefer the approach of *Languard* but in the circumstances of this appeal do not need to decide the point.

47. The facts of this appeal, concerned with input tax in respect of what is in substance (if not for the purposes of Note 18) a new building, is very different from the facts in *Wright* and *Languard*. Accordingly, even if Note 16(b) allowed for or required an apportionment, we find that the works carried out by the appellant in this appeal were entirely focused on and attributable to constructing the New House. That cost cannot be readily or sensibly apportioned to the element attributable to any "enlargement or extension" – for example the second storey – and other aspects of the cost to something else. All the works were a single project designed to deliver the two storey New House and there is no other purpose to attribute the cost to. We would therefore, even if an apportionment were required, allocate all the costs to the reclaimable purpose of creating the additional dwelling.

48. The appeal is allowed.

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.

IAN HYDE
TRIBUNAL JUDGE

RELEASE DATE: 14 DECEMBER 2018