[2020] UKFTT 0005 (TC)

TC07513

VAT – DIY housebuilders Scheme – whether works amounted to an extension – whether works carried out in accordance with statutory planning consent – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/00768

BETWEEN

(1) JOHN WATSON
(2) JILL WATSON

Appellants

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE JONATHAN CANNAN
MRS SHAMEEM AKHTAR

Sitting in public in Manchester on 15 October 2019 with further written submissions on 25 October 2019 and 28 October 2019

Mr Ian Spencer of Ian Spencer & Associates Limited for the Appellants

Mr Connor Fallon of HM Revenue and Customs' Solicitor's Office and Legal Services for the Respondents

DECISION

BACKGROUND

1. This is an appeal against a refusal by the respondents of the appellants' claim for a refund of VAT under the DIY Housebuilders Scheme. The appeal was made out of time but the respondents do not object to permission being granted to notify a late appeal and we grant permission accordingly.

2. The appellants made their claim for a refund on 25 April 2018 in the sum of £12,961. The respondents refused that claim on 9 October 2018. The appellants were out of time to request a review of the decision and their appeal was notified to the Tribunal on 27 January 2019.

3. Section 35 Value Added Tax Act 1994 ("VATA 1994") makes provision in certain circumstances for a refund of VAT incurred by persons constructing a building designed as a dwelling. It is generally known as the DIY Housebuilders Scheme. The works carried out must be lawful and otherwise than in the course of a business. Where various conditions are satisfied the VAT chargeable on goods supplied and used for the purposes of the works shall be refunded on a claim being made to HMRC. Section 35(1) provides as follows:

> " (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."

4. Section 35(1A) provides that the section applies to certain types of works including (a) "the construction of a building designed as a dwelling" and (c) "a residential conversion".

5. Section 35(1D) provides that works constitute a residential conversion to the extent that they consist in the conversion of a non-residential building or a non-residential part of a building into a building designed as a dwelling.

6. Section 35(4) provides that the Notes to Group 5 Schedule 8 VATA 1994 apply for construing section 35. Notes (2), (16) and (18) are relevant and provide as follows:

> "(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 …;
>
> (c) …; 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."
>
> "(16) For the purpose 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, or 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."

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

(a) demolished completely to ground level; or

(b) the part remaining above ground level consists of no more than a single facade or where a corner site, a double facade, the retention of which is a condition or requirement of statutory planning consent or similar permission."

7. We shall describe the works carried out by the appellants in more detail below. In summary, the appellants occupied a timber framed mobile home. A brick built chalet-style house was constructed on a larger floorplan including the site of the mobile home. During the course of construction, the mobile home was completely demolished.

8. The respondents refused the appellants' refund claim on the basis that the works were not the construction of a new dwelling but constituted an extension to an existing dwelling. As such the works did not amount to the construction of a building and did not qualify for a VAT refund. Further, the works were not a residential conversion because prior to the works being carried out the existing building had been used as a dwelling.

9. The grounds of appeal dated 27 January 2019 are essentially that the mobile home was demolished and a wholly new building was constructed. What was constructed was not an extension to the original building.

10. The respondents' Statement of Case is dated 28 March 2019. The respondents contend in their Statement of Case that the works comprised extensions and alterations to an existing dwelling, and that in accordance with Note (16) the works did not amount to the construction of a building. The respondents also raised an alternative case, namely that if the works were not an extension or alteration of an existing building then they were not in accordance with the planning permission which had been granted. As such, the requirement of section 35(1)(b) and the condition in Note (2)(d) were not satisfied.

FINDINGS OF FACT

11. We heard oral evidence from Mr Watson and were provided with documentary evidence which we refer to below. We also heard oral evidence from Ms Tracey Davies who is a Technical Officer in the respondents' National DIY Team and made the respondents' decision to refuse the refund claim. Based on the evidence before us we make the following findings of fact.

12. The appellants are the owners of Low Farm Stables, Camblesforth, near Selby. In 2015 they lived in a timber-framed mobile home or chalet on the site. On 22 December 2015 they applied to Selby District Council ("SDC") for planning permission ("the Original Application"). The proposal was as follows:

"Proposed erection of single story side and rear house extension, together with a new roof and veranda"

13. SDC refused planning permission in a notice dated 11 February 2016. The reason for refusal was essentially that the proposed extension would result in a disproportionate increase in the volume of the existing dwelling and would not be in keeping with the character and appearance of the existing dwelling and of the area. The refusal noted that the increase in volume of the dwelling would be 93.54%.

14. The appellants appealed the refusal of planning permission. The planning inspector appointed to conduct the appeal visited the site on 4 July 2016 and released her decision on 11 July 2016. She allowed the appeal. Planning permission was granted in the terms of the proposal, subject to certain standard conditions, including a requirement for the development to be carried out in accordance with a Flood Risk Assessment submitted with the Original Application. The inspector described the main issue in the appeal as "the effect on the character and appearance of the host dwelling and the countryside. She described the existing building and the proposal. We are content to adopt her description for the purposes of this appeal and make findings of fact as follows:

> "3. There is a detached chalet with a conservatory and decking sited within a mixed group of buildings including 2 large sheds in an isolated countryside position. The existing dwelling appears of a poor quality of design, being what appears as a mobile home with an added conservatory and raised decked areas.
>
> 4. The proposal is to extend the dwelling to create a dwelling of a different but unified appearance with a new steeply pitched chalet-style roof, re-faced walls and a veranda. The re-faced walls with red brick would be similar in appearance to the adjacent lower walls of the 2 sheds.
>
> 5. There would be an increase in height of about 3m to 6.5m from the low flat-roofed chalet to the proposed apex of the new roof line. There would also be an increase in floor space but not excessively so. Whilst there would be a significant increase in height and massing, the dwelling as extended and upgraded would be a high quality of design masking the original poor quality building. In these circumstances, I find the additions acceptable.
>
> …
>
> 7. Taking all these matters into account, I conclude that there would be no material harm to the character and appearance of the host dwelling and the countryside …"

15. The works carried out by the appellants were said by Mr Watson to be in accordance with this planning permission ("the Planning Permission"). However, whilst the planning appeal was in progress, Mr Watson made a second planning application ("the Second Application"). The Second Application was made on 28 April 2016 and referred to an extension which would increase the volume of the existing dwelling by only 50%. The proposal was as follows:

> "Proposed extension to the side and rear including internal alterations and alterations to the roof height and materials following demolition of the existing conservatory."

16. The Second Application was granted by SDC in a notice dated 20 June 2016.

17. We were provided with photographs of the actual works whilst they were being carried out. They show the existing mobile home with new foundations being dug and external walls being built over the enlarged floorplan whilst the mobile home remained in situ. On some sides the new walls were built right up to the existing mobile home walls. The appellants continued to live in the mobile home whilst the building works were being carried out. At or about the time the roof was put on the structure, the mobile home was completely demolished and removed. The effect was that in place of what had been a mobile home, there was now a much larger brick-built chalet type dwelling.

18. It certainly seems to us and we find that the demolition and removal of the mobile home formed no part of the Original Application. The proposal is for an extension and the planning inspector refers to the dwelling being "extended", the walls being "re-faced" and the works "masking" the original poor quality building.

19. Mr Watson accepted that when the planning inspector visited the site, he did not know whether she and the planners might have believed that the original mobile home would still be

in situ when the works were completed. However, his evidence, which we accept, is that building inspectors visited the site in the course of construction and did not raise any objection to suggest that the works carried out were not in accordance with the Planning Permission.

20. A building inspector issued a Final Certificate pursuant to section 51 Building Act 1984 and the Building (Approved Inspectors etc) Regulations 2010 on 27 February 2018. The Final Certificate stated that it related to the following works:

> "Single story side and rear extensions internal alterations to existing roof height & new external skin to existing dwelling house @ Low Farm Stables"

21. The Final Certificate stated that "the work **DOES NOT** concern a new dwelling" and confirmed that the works had been completed.

22. When it had become apparent that the Original Application would be refused there was an exchange of emails between the architect who had submitted the application on behalf of the appellants and a senior planning officer at SDC. The emails are all dated 11 February 2016. The architect asks whether it would be possible to reduce the size of the "extension" within the same application. The planning officer replies that any reduction would need to be significant and that he did not think it could be done within the same application. The architect then asks whether it would be better to resubmit an application for a "replacement dwelling". The planning officer advises that a replacement dwelling would require a "full application" and that certain other planning policies would then be engaged, including a policy which considered an acceptable increase in volume was 5-10%. It was against that background that the Second Application was made as described above.

23. The Second Application remained an application for an extension but with a reduced volume. It was not an application for a replacement dwelling because, as Mr Watson accepted in evidence, applying for an extension would enable them to build a larger home. It was also the case that an application for a replacement dwelling would have required a new Flood Risk Assessment, although there was no evidence as to what exactly that would have entailed.

24. The appellants made their claim for a VAT refund on 20 April 2018. The claim was made on the basis that what had been constructed was a new building, that planning permission had been granted for a new building and that the works were lawful.

REASONS

25. The reason given by the respondents for refusing the appellants' refund claim was that the works did not amount to the construction of a building, as required by section 35(1A) VATA 1994. The respondents say that is because the works involved an extension to an existing dwelling which Note (16) Group 5 provides does not amount to the construction of a building.

26. Mr Fallon on behalf of the respondents relied on an alternative argument raised in the respondents' statement of case, namely that if the works did as a matter of fact amount to the construction of a new building rather than an extension to an existing building, then those works were not lawful because the Planning Permission was for an extension to an existing building and not for a replacement dwelling. As such, section 35(1)(b) and Note 2(b) were not satisfied.

27. Mr Spencer, on behalf of the appellants, submitted that on the facts it was clear that the works did not amount to an extension. The original mobile home was demolished and removed and what was built was an entirely new building. He relied on a recent decision of the FTT in

Immanuel Church v HM Revenue & Customs [2019] UKFTT 0601 to emphasise the importance of identifying what was actually constructed. We accept it is right that we should focus on what was actually constructed.

28. Mr Spencer objected to the respondents raising the lawfulness of the works in this appeal. He submitted that the decision refusing the claim did not question the lawfulness of the works. It was premised solely on the basis that the works amounted to an extension and therefore could not satisfy the conditions for a refund. He fairly accepted that if the respondents are permitted to rely on their alternative argument then he could not say that the works were covered by the Planning Permission. They clearly did not amount to an extension but involved the construction of a replacement dwelling. Mr Spencer also made reference to the decision in *Immanuel Church* in relation to this argument but we do not consider the decision assists in this regard. The case concerned the distinction between an extension and an annexe which is not relevant here.

29. We agree with Mr Spencer that the works did not involve the construction of an extension. We have described the works above. It is clear that during the course of the works the original mobile home was demolished and removed from the site. At the time of the Final Certificate no part of it remained. What was constructed was a new building. Note 18 makes clear that a building ceases to exist when it is demolished completely to ground level which is the case here. On no view could the new structure be regarded as an extension. We do not accept Mr Fallon's submission that the works amounted to an extension to the existing mobile home.

30. We must therefore decide whether the respondents are entitled to rely on their alternative argument that the works were not lawful because the Planning Permission gave permission for an extension, whereas the works involved construction of a new dwelling. We have considered the terms of the respondents' letter refusing the refund claim. It focusses on what the appellants had permission to build, namely an extension to the existing mobile home. Ms Davies concluded that what could lawfully be done did not qualify for a refund because it amounted to an extension. It is true that Ms Davies did not go on to explain that if the works did not actually amount to an extension but were in fact a new building then a refund would not be available because such works would not have been lawful in the absence of statutory planning consent to build a new dwelling.

31. We are satisfied that the respondents should be entitled to rely on the alternative argument. In our view it was implicit in the decision to refuse the refund claim that there was no other basis on which the claim would be allowed. In any event, the respondents raised their alternative argument in their Statement of Case which was served in March 2019. The appellants have been well aware that the respondents were relying on the alternative argument for more than 6 months. It cannot be said that they have been taken by surprise or otherwise prejudiced in their conduct of the appeal.

32. We do not need to go on to consider whether the works were conducted in accordance with the Planning Permission. Mr Spencer conceded that they were not and we consider that he was right to do so. In the light of our findings of fact we must conclude that the new building was not designed as a dwelling because the condition in Note (2)(d) was not satisfied. The new building was not constructed in accordance with the Planning Permission. As such, the works were not lawful and the requirements of section 35(1)(b) were not satisfied. In the circumstances, the appellants are not entitled to claim a refund under section 35 VATA 1994.

CONCLUSION

33. For the reasons given above we must dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

34. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 24 DECEMBER 2019