Neutral Citation: [2024] UKFTT 00773 (TC)

Case Number: TC09269

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2023/10155

VAT – DIY refund scheme – appellant advised in a call with HMRC that construction of a static caravan is zero rated – claim for refund – claim rejected on basis that the scheme does not apply to caravans – legitimate expectation – strike out for want of jurisdiction or no reasonable prospect of success – appeal struck out

Heard on: 12 August 2024
Judgment date: 22 August 2024

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL

Between

GREGORY SEWELL

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person

For the Respondents: Mrs Fariha Hanif litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This case concerns a claim for repayment of VAT incurred by the appellant on the construction of a static caravan ("**the caravan**").

2. The appellant was told by HMRC during a telephone call which took place on 27 October 2022 ("**the telephone call**") that the construction was zero rated for VAT purposes, and on the basis of that the appellant made an application for a refund of costs incurred with the construction of the caravan.

3. HMRC then rejected that application on the basis that caravans are not within the DIY refund scheme.

4. The appellant has appealed against this decision. He does so on the sole ground that he was given wrong information and asks me to review HMRC's decision to deny him his repayment.

5. HMRC say that I have no jurisdiction to do so and so I must strike out the appeal. In the alternative, they say that the appeal has no reasonable prospect of success and must strike it out for that reason.

6. I have decided for the reasons given below that I have no jurisdiction and so I must strike out the appeal.

7. But I have considerable sympathy for the appellant who was clearly wrongly advised by HMRC who come out of this saga with little credit notwithstanding that they have succeeded in their application to strike out the appellant's appeal.

THE LAW

The refund scheme

8. Under section 35 of the Value Added Tax Act 1994 ("**VATA**"):

> 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 or importation of any goods used by him for the purposes of the works,
>
> subject to subsections (2) to (2C), 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(4) The notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group but this is subject to subsection (4A) below.

9. Under Note 2 to Group 5 of Scheule 8 of VATA:

(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.

Strike out

10. Under Rule 8 of the First-tier Tribunal Rules ("**Rule 8**"):

8(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal-

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) The Tribunal may strike out the whole or a part of the proceedings if–

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding...

THE EVIDENCE AND FINDINGS OF FACT

11. I was provided with a bundle of documents which included authorities. Mr Sewell gave oral evidence. From this evidence I find the following:

(1) The appellant lives in the New Forest. His property comprises a residence (the Lodge), in which the appellant and his wife lived until the caravan was constructed. The rationale for this was that he wants to live close to his son to whom he has (essentially) given the Lodge.

(2) He decided that it would be easier to get planning consent if he constructed a substantial static caravan and applied for planning permission under the legislation governing the siting and erection of caravans ("**the Caravan Acts**").

(3) And so, on 27 January 2022 the appellant applied to the New Forest National Park Authority for a Lawful Development Certificate.

(4) A certificate of lawfulness was granted to the appellant on 20 May 2022 ("**the certificate of lawfulness**"). It was granted in respect of the operations specified in the application which were summarised as the "siting of the caravan for incidental use in accordance with [drawings submitted with the application]".

(5) The appellant undertook some research into the VAT position regarding costs that he would incur on building the caravan, and on 27 October 2022 telephoned HMRC. The transcript of the telephone call was provided to me in the bundle.

(6) In summary, the appellant told the adviser (Alex) that as far as the appellant understood it, the rate of VAT on constructing a building is 0% but on the construction of the caravan, it is 5%.

(7) Alex told him that he was going to have a quick look at some VAT notices and asked the appellant to hold on while he chatted to one of his technicians. It was made expressly clear to Alex that the proposal was to build a static caravan.

(8) Alex then had a chat, on teams, with the technical adviser and also looked at VAT Notice 708. In his view, section 3 of that notice dealt with the appellant's position. Alex confirmed that the construction was zero rated as it was classed as a new build. That was based on the information he was given by the technical adviser. The appellant was also told that if any of the builders who were involved in constructing the caravan needed a reference number, "you just point them in the direction of that VAT notice and say this is classed as a new build".

(9) Alex went on to tell him that this is classed as a new build because it is technically a permanent structure. The appellant confirmed that it would have a concrete base. The appellant explained to Alex that because planning consent was granted under the Caravan Acts it was a mobile home or caravan. Alex responded that even so it is a permanent structure "so as far as we're concerned that's classed as a new build… Under the VAT Notice 708, section 3 that is dealt with a (sic) new build so it's zero rated".

(10) The caravan was then constructed and on 7 July 2023 the appellant made an application for a VAT refund using the claim form for new houses for the cost of goods which were supplied to him during the construction. The amount claimed was £16,093.82.

(11) In a letter dated 28 July 2023, HMRC rejected the claim on the basis that the appellant had not met the relevant statutory criteria. It purported to provide a full explanation for this rejection. HMRC did not consider that there was a dwelling constructed. Only a caravan sited. This is in accordance with the certificate of lawful development.

(12) This was bolstered by the restriction in the certificate that the siting of the caravan was for incidental use.

(13) Following a telephone conversation with HMRC in October 2023, the appellant, on 2 October 2023, appealed to the tribunal.

(14) The caravan is a substantial building, built on a concrete base, the dimensions of which are just shy of the statutory limitations set out in the Caravan Acts (i.e. 20 metres long, 6.8 metres wide, and 3.05 metres high).

(15) The utilities (water, electricity etc) from which the caravan benefits are not supplied to it directly but via the Lodge.

(16) In answer to my question that if he had been told that the VAT rate was 20%, would he still have proceeded to build the caravan, the appellant answered yes. Indeed, he would have done so had the rate been higher. As far as he was concerned, the issue was that he was told the wrong thing by HMRC and then told by them to "go away" which cannot be right.

DISCUSSION

Submissions

12. In summary Mrs Hanif submitted as follows:

(1) The appellant's grounds of appeal relate to matters appropriate to a complaint or, at its highest, breach of a legitimate expectation created by the information given to the appellant during the telephone call. The tribunal has no judicial review jurisdiction to consider the appellant's legitimate expectation of being entitled to the refund based on the information in the telephone call.

(2) In any event the appellant has no justifiable claim for the refund.

(3) Firstly, as evidenced by the certificate of lawfulness, no building was constructed; the caravan was merely "sited".

(4) Secondly the caravan is not a building within the statutory definition. This is because caravans are dealt with in group 9 of schedule 8 to VATA whereas buildings to which the refund scheme applies are dealt with in group 5 of schedule 8 to VATA.

(5) Thirdly, even if it is a building, its separate use or disposal is prohibited by the terms of the certificate of lawfulness which restricts the siting of the caravan "for incidental use".

13. In the summary, Mr Sewell submitted that he had clearly been incorrectly advised by the HMRC adviser during the telephone call and he finds it grossly offensive to be told now that he cannot recover the VAT when he was told the wrong thing. He would like me to say that he can have his VAT refund.

My view

14. Mr Sewell has appealed solely on the grounds that he was given incorrect information during the telephone call. Whether that information was indeed incorrect was never seriously challenged at the hearing.

15. HMRC's view set out in the decision letter and as evidenced by their submissions above, is that the information given to the appellant was wrong, and the construction costs fall outside the refund scheme.

16. The first submission is that this is because there was no construction, merely siting.

17. This is clearly wrong on the evidence. The caravan was constructed on site.

18. Secondly, they say that because caravans are dealt with in a separate group in schedule 8, they cannot, as a matter of principle, fall within the refund scheme, which is deals, exclusively, with buildings to which the scheme applies which must be within group 5 of schedule 8.

19. This was not explored in detail, but I am suspicious of that justification. Whilst caravans are clearly dealt with in group 9, they are referred to in group 5 note (19) ("a caravan is not a "residential caravan" if residence in it throughout the year is prevented by the terms of the covenant, statutory planning consent or similar permission". I was not referred to this provision, but it seems that it militates against the principle submitted by HMRC that caravans are dealt with exclusively in group 9.

20. I understand HMRC's policy is that the refund scheme does not apply to caravans, and that might be on the basis that a caravan cannot be a building. But that is not how it was presented to me by HMRC. And it would require an analysis on a case by case basis as to whether, in any particular circumstances, a structure does comprise a building. I can see arguments that the caravan does comprise a building. But I go no further than that.

21. HMRC also say that if it was a building, then the refund scheme cannot apply because the certificate of lawfulness limits the siting of the caravan for "incidental use", and this means that its separate use or disposal is prohibited. The caravan could not be separately used or disposed of independently of the Lodge. I can see superficial merit in that submission but I was provided with no juristic analysis of the interaction between "incidental use" in the certificate of lawfulness, and the provisions of Note 2. Again, I go no further than that.

22. But the important thing as far as the appellant's grounds of appeal are concerned is not whether HMRC are correct and that, as a matter of law, he is not entitled to the VAT refund. It is that having told him that he was so entitled to zero rate the relevant costs and so qualify for a refund, HMRC have now argued, as above, that he is not so entitled.

23. The appellant is justifiably aggrieved by this. The question is whether I can, as he asks me to allow his refund claim, on the basis of this error by HMRC.

24. And that, in turn, depends on whether I have jurisdiction to consider that error and its implications. Regrettably for the appellant I do not consider that I do have that jurisdiction.

25. In the Upper Tribunal decision in HMRC v Hok Ltd [2012] UKUT 363 ("**Hok**"), the Upper Tribunal made it clear that the First-tier Tribunal does not have a jurisdiction to enforce any common law duty of a public body to act fairly in administering its statutory powers. Challenges to

administrative actions of government departments for which no clear avenue of appeal is provided have to be made by way of judicial review. The First-tier Tribunal does not have any judicial review jurisdiction. That is the only conclusion which can be drawn from the structure of the Tribunals, Courts and Enforcement Act 2007 which brought the First-tier Tribunal and the Upper Tribunal into being and conferred a judicial review function on the latter.

26. It said:

> "38. The Decision assumes, even if it is not articulated in this way, a jurisdiction in the First-tier Tribunal to enforce what the Tribunal described, at para. 9, as the 'common law duty of a public body to act fairly not just in its decision-making process but also in administering its statutory powers'. That HMRC should ordinarily act fairly cannot, we think, be doubted, and Mr Vallat did not suggest otherwise. We do not, therefore need to dwell on this point. What is in doubt is whether, and if so how, the First-tier Tribunal can give effect to that duty, by providing a remedy if it is breached.
>
> 39. Ordinarily challenges to administrative actions of government departments for which no clear avenue of appeal is provided must be made by way of judicial review: so much was made quite clear by the Court of Appeal in Aspin v Estill [1987] BTC 553, in which the taxpayer argued that he should not be assessed to tax (which he accepted was due as a matter of law) because of advice he maintained he had been given by the Inland Revenue. At that time, judicial review was a comparatively rarely used remedy, and the jurisprudence was at an early stage of development. On this point, however, it has remained constant. The reasoning was given by Nicholls LJ at p. 556:
>
> > "The taxpayer is saying that an assessment ought not to have been made. But in saying that, he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review".
>
> 40. The position here, as it seems to us, is materially the same. The Company accepted (as the Tribunal's record of its case shows) that the penalty was lawfully imposed in principle, but that other facts -the absence of a timely reminder - should relieve it from some or all of the liability. It follows from what Nicholls LJ said (and, it should be added, other judges have said the same on many occasions) that in the absence of a statutory route of appeal, as in this case, the only remedy available to an aggrieved person is to seek judicial review.
>
> 41. There is in our judgment no room for doubt that the First-tier Tribunal does not have any judicial review jurisdiction. That was made abundantly clear by the House of Lords in C & E Commrs v JH Corbitt (Numismatists) Ltd .(1980) 1 BVC 330; [1981] AC 22. That case related to the Value Added Tax Tribunals rather than the First-tier Tribunal, but they too were a creature of statute with no inherent jurisdiction, and the relevant principles are identical. Lord Lane (with whom the majority agreed) said, in what remains the classic statement on the point:
>
> > "Assume for the moment that the tribunal has the power to review the commissioners' discretion. It could only properly do so if it were shown the commissioners had acted in a way which no reasonable panel of commissioners could have acted; if they had taken

> into account some irrelevant matter or had disregarded something to which they should have given weight. If it had been intended to give a supervisory jurisdiction of that nature to the tribunal one would have expected clear words to that effect in the [Finance Act 1972]. But there are no such words to be found. Section 40(1) sets out nine specific headings under which an appeal may be brought and seems by inference to negative the existence of any general supervisory jurisdiction".

27. It is clear from the cases masterfully summarised by Judge Redston at [161]-[189] of her decision in *MWL International and another v HMRC* [2024] UKFTT 00402 that this does not mean that the FTT never has jurisdiction to determine public law questions. The tribunal may have no judicial review jurisdiction but may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. It all depends on the statutory provisions under consideration.

28. I do not have jurisdiction to consider public law arguments where the question in the appeal relates to the amount of tax due, nor do I have any jurisdiction where HMRC have no discretion and the appeal in question relates to the taxpayer's liability. That is the situation in this case.

29. In this appeal the appellant asserts what is essentially a "freestanding" public law ground of appeal, namely that HMRC should not be allowed to go back on their word and that by doing so they are behaving unconscionably. It is clear from Hok that I have no jurisdiction to consider this as a basis for allowing his claim to a VAT refund. Even if that assertion is tied to the failure to provide that refund, and so I might conceivably consider it in the context of his liability to VAT, then as HMRC have no discretion to allow the refund (as a matter of law), nor do I.

30. So HMRC's application to strike out the appellant's grounds of appeal on the basis that they are, in essence, assertions of unfairness, and that he had an expectation that HMRC would honour the advice that he was given in the telephone call, must succeed. I have no jurisdiction to deal with these grounds of appeal.

31. It is worth observing that one of the difficulties that the appellant might face if he claims that he had a legitimate expectation that HMRC would honour that advice, is the fact that it is clear from his evidence that he did not rely on that advice to his detriment. His evidence is that he would have constructed a caravan even if it had been told that the rate of VAT was 20% and he was not, thus, entitled to any refund. But equally, it is worth pointing out that HMRC did not know that he was not intending to rely on it when they gave him that wrong (on HMRC's pleaded case) advice

32. However, I have considerable sympathy for the appellant who was wholly wrongly advised (on HMRC's pleaded case) that he could obtain a VAT refund as the services supplied to him were zero rated. And I have equal sympathy for his view that HMRC are behaving in an objectionable way in having first said that he could have the refund and are now saying that he should be denied it. I have not seen that HMRC have made any apology for this error. Certainly, none was made by HMRC in their skeleton argument nor by Mrs Hanif at the hearing. Mrs Hanif suggests that the appellant's grounds of appeal should be more appropriately made by way of a complaint. Whether the appellant has the appetite for this is a matter for him. But HMRC's patent misdirection calls into question the validity of the point they make in many tax cases where they criticise taxpayers for failing to contact HMRC to clarify their tax position. Whilst I do not underestimate the quality control issues

faced by HMRC, if this is typical of the quality of advice that is given when making contact, then HMRC might want to consider whether that criticism is justifiable.

DECISION

33. The appeal is struck out.

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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 22nd AUGUST 2024