TC02887

Appeal number: TC/2012/07473

VAT – reduced rate for renovation of residential premises- Item 1 Sch7A VATA 1994 – condition that premises be unoccupied for 2 years before start of works – whether the evidence before the tribunal was enough to conclude that that was likely – Held: no. Appellant seeking in accordance with HMRC's published practice certification from council's empty property officer – council unhelpful – whether that affected the outcome of the appeal- Held no.

FIRST-TIER TRIBUNAL
TAX CHAMBER

GURPREET SINGH BHACHU **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
JOHN ROBINSON

Sitting in public at Bedford Square WC1B 3DN on 28 May 2013

Mr I Chakraborty for the Appellant

Mrs Erika Carroll for the Respondents

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DECISION

1. This appeal relates to the application of the reduced (5%) rate of VAT provided for in section 29A and Item 1 Group 7 Schedule 7A VAT Act 1994.

2. This is a full statement of our findings and reasons for dismissing the appeal. On 1 August 2013 the tribunal released a decision which contained a fairly extensive summary of our findings and reasons. On 6 August 2013 the appellant sought permission to appeal to the Upper tribunal. But Rule 35(4) of the tribunal's rules requires a party to apply for a notice of full findings and reasons before he may seek permission to appeal. We therefore took his application to be such a request, and this slightly fuller decision is the result. Once this notice has been sent to the appellant he may renew his application to appeal.

3. Section 29A provides that:

> "(1)VAT charged on-
>
> (a) any supply of a description for the time being specified in Schedule7A…
>
> shall be charged at the rate of 5%."

4. Item 1 of Group 7 of that Schedule specifies:

> "1. The supply in the course of the renovation or alteration of qualifying residential premises of qualifying services in relation to the renovations or alterations"

5. And Note (3) to Item 1 provides that a supply falls within this item only if either:

> (1) the premises had not been lived in for 2 years before the start of the works; or
>
> (2) the premises had been unoccupied for two years before their acquisition by someone who then lived in them and the work started within one year.

It will be seen that it is the first of these conditions which is relevant in this appeal.

Background

6. Mr Bhachu was engaged to renovate and alter 266 Kings Road, Kingston-on-Thames by its new owners Mr Kakatsos and Mrs Vasanthi Kakatsos. He did the work in the first part of 2011 and the new owners moved in shortly afterwards.

7. In his 10/11 VAT return (that for the period ending 30 October 2011) Mr Bhachu accounted for VAT at 5% on these works on the basis that they fell within Item 1 of Group 7.

8. HMRC were satisfied that 266 Kings Road was qualifying residential premises and that the supply was of qualifying services but were not satisfied that the condition of Note 3 that the property had been unoccupied for two years had been met, and assessed Mr Bhachu accordingly. Mr Bhachu appeals against that assessment.

9. The only issue for us in this appeal was thus whether the property which Mr Bhachu renovated had been empty for two years before he started work.

The evidence

10. Mr Chakraborty drew our attention to HMRC's notice in relation to the application of the 5% rate. Section 8.3.2 of that notice indicates that a trader may be required to prove that the property had been empty for the required period and then continues:

> "Proof of such can be obtained from the electoral roll and council tax records, utilities companies, empty property officers in local authorities, or any other source that can be considered reliable.
>
> "If you hold a letter from an Empty Property Officer certifying that the property has not been lived in for 2 years, you do not need any other evidence. If an Empty Property Officer is unsure about when a property was last lived in he should write with his best estimate. We may then call for other supporting evidence."

11. Mr Chakraborty had attempted valiantly to obtain such a certificate from Brent council but they had told him they did not have an empty property officer and had not been helpful. He provided evidence of his attempts to obtain confirmation from that council. The only other evidence before us was of copies of letters[1] between the parties and to Brent Council, copies of two council tax demands addressed to the new owners and the oral evidence of Mr Bhachu.

12. The following evidence related to the time of acquisition of the house by Mr Kakatsos and Mrs Vasanthi Kakatsos, the date Mr Bhachu first saw the house, the period in which he worked there, and the date on which the new owners moved in:

> (1) Mr Bhachu's invoices[2] are dated 18 March 2011 and 6 April 2011. It was not clear that these were delivered only after the work had completed. Mr Bhachu told us that the work had taken some 12 to 14 weeks. Mr Bhachu put the start of his work as sometime in January 2011.
>
> (2) Mr Bhachu told us that when he started work there was an estate agent's board outside the house.
>
> (3) Two council tax demand notices addressed to Mr Kakatsos and Mrs Vasanthi Kakatsos were in the bundle before us. These show periods of charge of (1) 11 February 2011 to 31 March 2011, and (2) 1 April 2011 to 31 March 2012. Each charge was rebated to nil (we understood because the property was considered to be empty). The first of these notices carries the legend "Reason for Bill: New Accnt". This to our minds puts the latest date for completion of the purchase as 11 February 2011.
>
> (4) Mr Bhachu told us that that Mr Kakatsos and Mrs Vasanthi Kakatsos had bought the house 3 to 4 months before he started work.
>
> (5) Mr Bhachu told is that he was taken to see the property a week or so before he started work. He was uncertain as to the time of year but thought that it may have been summer.

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[1] As Mr Chakraborty points out in the application referred to in paragraph 2 that any "letter" from Brent Council took the form of a manuscript note on a compliments slip.A copy of this was appended to a letter from the Appellant to HMRC

[2] In the same document Mr Chakraborty explains that small businesses combine quotations with invoices, and says that the documents we refer to were thus quotations not invoices. The text above is the same as that which appeared in our summary decision. No disrespect to Mr Chakraborty is intended by making no change to it, but the account set out in the text is the opinion we formed at the time, and even if it is wrong it does not affect the conclusion to the appeal.

13. It seems unlikely to us that the purchase was completed before 11 February 2011: if the new owners had completed the purchase before that date we can see no reason why the council tax bill would have been for "New Accnt" starting on that date. We conclude that it is likely that the purchase was completed on 11 February 2011.

14. It seems to us possible that Mr Kakatsos and Mrs Vasanthi Kakatsos had access to the property before completion of the purchase; indeed they may have exchanged contracts for its completion some months before completion and had access after exchange. It is possible that Mr Bhachu visited the property before 11 February in pursuance of access given to the purchasers

15. We conclude that Mr Bhachu's hazy recollection of visiting the property during the summer was probably a mistake, that he first visited in early January 2011 and he started work shortly thereafter. We think it unlikely that he started work before completion and so conclude that he started shortly after 11 February 2011. We also conclude that it is likely that Mr Kakatsos and Mrs Vasanthi Kakatsos moved into the house in the latter part of 2011.

16. Thus the question for us was whether the house had been unoccupied for two years before about 11 February 2011.

17. The following evidence related to the question of how long the house had been empty before 11 February 2011:

> (1) Mr Chakraborty wrote to Brent Council on 15 March 2012[3] saying "from various private sources including neighbours it's found out that the subject was uninhabited for 4 years".
>
> (2) In the notice of appeal Mr Chakraborty said that there had been a verbal confirmation from the owner/buyer that the property had been vacant for two years or more;
>
> (3) Mr Bhachu told us that:
>
> > (a) there was no furniture in the house
> >
> > (b) there were quite old and fairly dirty curtains at the windows;
> >
> > (c) there was damp in the kitchen;
> >
> > (d) the electricity was working;
> >
> > (e) there were small tree seedlings which were five or six feet high growing in the garden, together with some small shrubs but no brambles;
> >
> > (f) there was a fish tank in the garden with water but no fish; and
> >
> > (g) he had spoken once or twice to the neighbours.

18. Of these factors the growth of seedlings in the back garden appeared of significance. It suggested to us that the garden had been unattended for several years. That would have been consistent with the property having been vacant for that time but it would also have been consistent with the ill-health or incapacity of an occupant.

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[3] In our summary decision we made a slip and said 15 March 2011; Mr Chakraborty kindly pointed out in the application to appeal that this date should have been 15 March 2012

19. Mr Bhachu did not give us any details of statements made by the neighbours about the previous inhabitants. We take the statements in Mr Chakraborty's letters as evidence of what Mr Bhachu told him, but we had no detail about who said what and when, or anything by which we could test the reliability or accuracy of the statements made by neighbours, or the extent of their knowledge.

Discussion

Was the house shown to be empty for two years?

20. Where an appeal is brought by a taxpayer the general rule is that that taxpayer has to prove his case. That is to say he must bring to the tribunal sufficient evidence to convince the tribunal that it is more likely than not that his view of the facts is the right one. That is because generally it is the taxpayer who knows or has the best prospect of finding out what happened and when.

21. We had to determine *from the evidence before us* whether it was more likely than not that the house was empty for two years before Mr Bhachu started work.

22. There is no requirement that such evidence be from any particular source or in any particular form: we may have been persuaded by a certificate from the council that the property was empty, but equally we may have been persuaded by the testimony of a neighbour who came to the tribunal to tell us who had lived in the house and when.

23. Unfortunately evidence of neither of these was available, and the evidence before us was not sufficient for us to be able to conclude that it was likely that the property had been empty for a two year period before Mr Bhachu started work.

24. We must pay tribute to the valiant efforts made on behalf of his client by Mr Chakraborty who presented his client's case with clarity and consideration. Unfortunately however he was unable to provide sufficient evidence for us to find for his client.

HMRC's Notice 708 Customs: Building and construction

25. Mr Chakraborty drew our attention to the words of paragraph 8.3.2 of this notice, which are quoted above. He said that the council had not fulfilled its obligations and that HMRC had not "called for other supporting evidence".

26. We accept that the words of paragraph 8.3.2 of Notice 704 could be taken in two ways:

> (1) as indicating that if the Empty Property Officer's statement was equivocal *the taxpayer* would be called upon to provide HMRC with other evidence; or
>
> (2) as indicating that HMRC would call upon the Council to provide further evidence.

27. It seems to us that first of these is the natural way to read those words. That is because the VAT Act does not impose an obligation on HMRC itself to seek out the evidence to support a taxpayer's claim. If that is right then it seems to us that HMRC did tell the taxpayer that he needed to provide further evidence: for in HMRC's letter of 7 March 2012 denying the reduced rate, they say:

> "As discussed in order to qualify for reduced rate the property should have been vacant for 2 years however to date no further proof has been provided.",

and in HMRC's review letter of 2 July 2012, which follows correspondence in which Mr Chakraborty explained his dealings with Brent council, they say

> " …as you did not have evidence that the property had been empty for 2 years …you could not be certain, and did not have the proof, that the property had been unoccupied for the required 2 years…"

.

28. However, even if the second reading of the words in para 8.3.2 is the correct way to read them, it cannot affect the outcome of this appeal. The notice is a statement by HMRC. It only represents HMRC's views. No doubt those views are carefully considered and generally represent the law, but even if HMRC failed to comply with what they thought was their obligation that would not affect the VAT due on the supply under the Act - because the amount of VAT due is determined by the Act, not HMRC's views.

29. That last sentence is subject to this caveat. If HMRC's statement and actions gave rise to a legitimate expectation in the mind of the taxpayer that he had done all that was necessary and that, having done so, the buck passed to HMRC, then some public law remedy might be available to him. But in this case the content of HMRC's letters make clear that that is not how they viewed the position and the taxpayer cannot draw from then any legitimate expectation that HMRC regard the onus of calling for evidence from a third party as lying upon them.

30. Nor can the taxpayer succeed in an argument that the Council was in default of a duty relevant to the computation of VAT under VAT Act 1994. Not only is there no such duty in the Act, but HMRC's notice could not impose such a duty upon it.

Disposition

31. We therefore dismiss the appeal

Rights of Appeal

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.

33. Permission cannot be given to appeal unless the applicant can point to an error *of law* which it says that the tribunal made.

34. Finally, we note that in the application referred to in paragraph 2 above Mr Chakraborty says that Mr Bhachu may seek new evidence from the occupiers of the neighbouring houses. It is only fair to point out that such evidence could not be taken into account by this tribunal to revisit or review its decision: this tribunal was required to find the facts on the evidence before it at the hearing.. Nor could such new evidence be relevant to any argument on an appeal before the Upper tribunal that this tribunal had erred in law. That tribunal may only interfere with the decision of this tribunal if it finds that this tribunal has erred in law – that is to say misapplied or misunderstood the law or come to a wholly unreasonable conclusion on the evidence which *had been* before it..

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 20 September 2013