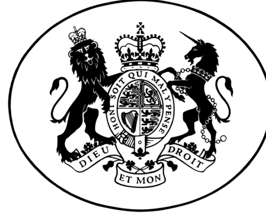
[2014] UKFTT 320 (TC)



TC03454

Appeal number: TC/2012/10686

VAT – DIY Housebuilder's scheme – demolition of existing building – compliance with planning laws – whether consent to amended plans sufficient to meet the requirements for the scheme – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JACK WILSON **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER HACKING
MR ALBAN HOLDEN

Sitting in public at Prestatyn on 12 November 2013

Mr Kevin Cooper of Cooper Christian Sykes, Accountants for the Appellant

Mrs Ann Sinclair, Case presentation Officer for the Respondents

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DECISION

The Appeal

1. The Appellant appeals against a decision to refuse his application for a VAT refund under the Housebuilders DIY Homebuilder's scheme pursuant to Section 35 of the Value Added Tax Act 1994 (VATA)

2. HMRC refused the claim in letters dated 01 May 2012 and 28 June 2012.

3. The reasons for refusal stated in the first of the above letters can be summarised as follows:

    (i) where an existing building is to be extended the works must create an additional dwelling contained entirely within the extension (VATA Schedule 8 Group 5 Note 16). This condition was, say the Respondents, not met.

    (ii) the extension does not meet the conditions relating to non-residential conversions as the dwelling would have had to have been empty for 10 years (VATA Schedule 8 Group 5 Note 7 (A) (b) (ii)).

4. In the second letter which followed representations made by Mr Wilson, HMRC repeat the above objections to the refund of VAT adding that the building constructed by Mr Wilson was not built from scratch and did not meet the relevant criteria for a newly built property which would attract the refund. Additionally it was stated that the Planning Permission granted to Mr Wilson was only for a rear extension further adding:

"and the completion certificate states "Two Storey Extension" to an existing dwelling and no explicit condition within the Planning Permission stating that these walls have to be retained and incorporated into the new dwelling"

5. Furthermore it was questioned in this second letter whether Mr Wilson had in fact obtained Planning Permission to substantially demolish the existing building.

6 A third letter also dated 01 May 2012 was sent to Mr Wilson by HMRC threatening the imposition of a penalty under Schedule 24 Finance Act 2007 for the submission of an ineligible claim. That is not a matter which was pursued nor in all the circumstances is it likely that it could have been in that Mr Wilson submitted his claim based on advice he received from the VAT Help line. That advice suggested to Mr Wilson that as he was intending the property to be built for his daughter, then, as long as she was resident at the property for a 2-year period the VAT would be refunded. That advice, which is accepted by HMRC to have been given to Mr Wilson, was in fact incorrect as the Respondents now accept. It was, the Respondents say, based on a misunderstanding by the Help line staff member. That however is an

aspect of this appeal which is outside the jurisdiction of this Tribunal and has no relevance to its decision which is based on other matters.

The Appellant's case and relevant law

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7. It was Mr Wilson's case that he had complied with the requirements of the DIY Housebuilder's Scheme in that the property was a new build following substantial demolition of the old building.

10 8. Section 35 VATA relevantly provides:

> "35 Refund of VAT to persons constructing certain buildings
>
> (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

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9. The above basic refund provision is elaborated in a number of further provisions including those of Schedule 8 Part II VATA - relevantly the following note

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“ (18) A building only ceases to be a building when:

(a) demolished completely to ground level; or

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

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10. It is Mr Wilson’s case that this particular provision is relevant because he found on his closer examination of the property that it would be necessary to demolish most of the building so that within the terms of the above provision it would cease to be a “building” as a consequence of which he would become the builder of a new building.

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11. At the hearing Mr Wilson gave evidence that when it became apparent to him that he would need to demolish most of the existing building, he arranged a meeting between himself, his architect, the Chief Planning Officer, Mr Alan Rowlands, and the Building Control Manager, Mr Iswyn Huws, both of the Local Planning
20 Authority, Gwyneddd Council. Mr Wilson’s evidence, which the Tribunal accepted, was that he explained to these officials that as the structure was unsound it had become necessary to depart from the original plans on which planning permission had been granted so as to effectively demolish the property.

25 12. This was, says Mr Wilson accepted by Mr Rowlands but it was made clear to Mr Wilson that there was a requirement to maintain the two externally visible walls. This is understood by the tribunal to be a not infrequent requirement of planning authorities where the property to be demolished lies in a row of properties. This particular property was at the end of a row of properties so that the two walls needed
30 to be retained

13. The necessity to undertake this more extensive work is referred to in a letter from Mr Wilson’s architect dated 12 July 2012. That these revised works including the demolition were approved by the Council in its role as planning authority appears
35 clear from a letter dated 25 July 2012 from Mr Huws. This letter includes the following statement:

“In conclusion, I confirm that application, reference R10G/01325, and the subsequent completion certificate do in fact include all works relating to the
40 *rebuild of demolished parts and the two story extension”*

14. In the same letter referring to the planning application granted to Mr Wilson Mr Huws states:

45 *“With hindsight we should have asked for a revised application form to include a revised description of works to include this additional work”*

The Respondents' case

15. The Respondents' contentions as set out in their Statement of Case are as follows:

(i) that no additional dwelling was created by the works carried out by the Appellant.

(ii) that the notes to Group 5 Schedule 8 stipulate that a building only ceases to be a building when demolished to ground level or the part remaining above ground level consists of no more than a single façade, or where a corner site, a double façade. Additionally the retention of the façade(s) must be a condition or requirement of statutory planning consent or similar.

(iii) that there was no explicit condition within the Planning Permission for retention of the existing walls

(vi) that for a DIY builder to successfully claim a refund of VAT, his claim must be lawful at the time the works are undertaken. Section 35 (1) (b) of the Act takes a snapshot in time. The act is lawful if it is supported at that time by the relevant Planning Permission

(vii) The Planning Permission granted in respect of the works concerned was for a "Rear Extension", however the completion statement stated that the works were a "Two Storey Extension" to an existing dwelling.

(viii) The Appellant does not qualify for a refund of VAT for the conversion of an existing building into a dwelling as the property had been used as a dwelling within the ten years prior to the grant.

(ix) The letter from Mr Huws of 25 July 2012 is said to constitute evidence that planning consent was not obtained for the works as modified and that accordingly the construction was unlawful under Section 35 VATA (above).

The tribunal's findings and consideration of the appeal

16. The Tribunal finds on the evidence before it that the works undertaken by Mr Wilson had the necessary permission of the planning authority. That permission was given at the meeting referred to above. At the meeting it was, said Mr Wilson, agreed by Mr Rowlands, the Chief Planning Officer, that the revised works could go ahead as long as they met the Building Control Officer's requirements. We are satisfied on the evidence that Mr Wilson kept in close touch with the Building Control Officer throughout the works. The Appellant's evidence as to this matter was not challenged.

17. The approved revised works included the demolition of the building to ground level apart from the retention of the two façades on what was a corner site. The tribunal was shown photographs and plans from which it was clear that the works involved were extensive involving demolition to the ground but did include the retention of the two façades. As already indicated, the tribunal accepted Mr Wilson's evidence that the retention of the two walls had been required by the local authority although as the original planning consent had referred only to the construction of an extension it was accepted that this condition was not expressly stated in the planning consent which had been issued before the change was agreed to the scope of the works..

18. The *"with hindsight"* remark made by Mr Huws in his letter of 25 July 2012 was said by HMRC to evidence the fact that formal planning consent had not in fact been granted. The Tribunal does not accept that this is a bar to Mr Wilson's claim for a refund of VAT paid. The requirement in Note 18 refers specifically to a "requirement of statutory planning consent *or other similar permission"* (emphasis added). In relation to the matter of the retention of the walls and the substantial amendments made to the original scope of the works the tribunal is satisfied that Mr Wilson had the necessary permission from the local planning authority to carry out the works concerned. Mr Wilson's evidence supports the fact that such consent was given to the amended plans which did include as a condition the retention of the two walls. No evidence was offered by the Respondents that this was not so. The Respondents' case appears solely to rest on what it considers to be the proper construction of the legislation.

19. The Tribunal does not consider it to be credible, given the close liaison between Mr Wilson and the representatives from Gwynedd Council, that the works undertaken by Mr Wilson were not approved by the planning authority. Those works included demolishing the building to the ground save only for the two walls identified above. A new building was created as a result of the subsequent construction work. That was the work which was approved and that was the work which was carried out by Mr Wilson.

20. The tribunal agrees that it would have been preferable had Mr Wilson pressed the Chief Planning Officer to secure and issue a new or revised consent more properly reflecting what had been agreed but there was no evidential support for the suggestion advanced by the Respondents that the works were in fact carried out unlawfully. The letter from Mr Huws with the remark concerning hindsight confirms the essentially lawful nature of the works carried out by Mr Wilson and not as, the Respondents suggest, the contrary. Had it been seriously suggested by the Respondents that the works were unlawful then evidence to that effect should have been obtained and presented to the tribunal

21. The tribunal finds that as a matter of fact this appeal does not concern an extension to a property although it is acknowledged that this was the Appellant's original intent. What in fact this appeal concerns is the construction of a new building

following the demolition of an old building. The works were at all material times approved by the local planning authority and were not unlawful as the Respondents have sought to suggest. This was not a case of Mr Wilson going along to the planning authority after the works had been completed and seeking approval retrospectively. Had that been so there would be some substance to the point concerning timing raised by the Respondents.

22. The Respondents did not contend that the consent of Mr Rowlands in his capacity of Chief Planning Officer to the extended scope of the works was in some way itself either unlawful or beyond his authority. What Mr Rowlands had was an approved plan for the premises as intended to be constructed by way of an extension to an existing property. It is reasonable to conclude that what he recognised was that Mr Wilson was right in his judgment that the existing property needed to be demolished for safety's sake. The scope of the works was enlarged to include the demolition and the change was, quite reasonably, conditional on supervision by the Building Control Inspector. There was no evidence to suggest that this was unlawful. It did, however, have the consequence that the character of the works changed in terms of the DIY Housebuilder's scheme from a project which did not comply with the Scheme's requirements to one which did. This was not a consequence which in some way Mr Wilson orchestrated to his advantage. Indeed Mr Wilson already thought he was entitled to a refund following the (mistaken) advice he had received.

23. The ten year period to which reference has been made by the Respondents is not relevant as this is a condition which attaches to the conversion of a non-residential building (or part of such) into a building designed for relevant residential use. This has no application to the facts in this appeal.

24. To the extent to which the tribunal places reliance on the notes to Group 5 of Schedule 8 VATA the tribunal agrees with the submission by the Respondents that Section 35 (4) of the Act dictates that the notes apply in construing that section (which deals with the Scheme). Mr Wilson relies on those notes as indicating by the words "or similar permission" that the permission granted by Mr Rowlands is, in these particular circumstances, aptly embraced by the term.

25. The tribunal finds that Mr Wilson has discharged the burden upon him to prove that he has satisfied the conditions of the DIY Housebuilder's scheme. He is consequently entitled to reclaim VAT of £10,099.02 incurred in the works undertaken by him.

26. This appeal is allowed.

27. 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.

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CHRISTOPHER HACKING
TRIBUNAL JUDGE

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RELEASE DATE: 1 April 2014

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