NCN: [2021] UKFTT 317 (TC)

TC08258

VAT – DIY Builders Scheme- s 35 VATA

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/9108

BETWEEN

STUART HACKETT **Appellant**

-and-

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

TRIBUNAL: JUDGE CHARLES HELLIER
REBECCA NEWNS

The hearing took place on 19 July 2021. With the consent of the parties, the form of the hearing was in relation to the members of the tribunal and HMRC's representative by Tribunal video platform, and in relation to Mr and Mrs Hackett, by telephone so that they could hear and speak over the video platform but not see the other participants or be seen by them. A face to face hearing was not held because of the covid pandemic

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr and Mrs Hackett, together for the Appellant

Darren Bradley for the Respondents

DECISION

Introduction

1. This appeal relates to a claim made by Mr Hackett for the repayment of input VAT under the provisions of the "DIY Builders" scheme in section 35 VAT Act 1994 ("VATA").

2. In 2014 Mr and Mrs Hackett bought a derelict house known as Llwyndu Farm. The roof had holes in it, the front wall was leaning outward, the radiators had been cut out and taken away and when they first saw it, water was running out of the door.

3. In the period between 2014 and 2019 they reconstructed the house and added an extension to produce an attractive home. In doing so they incurred costs which included VAT. Claims were made for the recovery of that VAT. HMRC refused those claims and this is an appeal against that refusal.

The Legislation

4. Section 35 VATA provides that if a person carries out works to which the section applies he may reclaim the input VAT incurred in so doing. Subsection (1A) defines the works to which the section applies:

> "(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."

5. Of these three activities (a) and (c) look at first sight relevant to the works Mr Hackett conducted: para (b) is not relevant because a relevant residential purpose is defined to be use as a childrens' home or similar institution.

Section 35(1A)(a): construction of a dwelling

6. In relation to para (a) it is clear that the works Mr Hackett undertook produced a dwelling. It is also clear that in normal language, what he undertook was the construction of a dwelling. But the Notes to Group 5 of Sch 8 are incorporated into section 35 (by subsection (4)) and among these Notes is the following provision:

> (16) For the purposes of this Group, the construction of a building does not include—
>
> (a) The conversion, reconstruction or altercation 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.

7. Thus if what would normally be a called the construction of a dwelling is the conversion or reconstruction of an "existing building" it is not to be treated as a the construction of a dwelling, and similarly with an extension to an existing building; and as a result the works would not fall into para (a) of section 35(1A).

8. Each of those paragraphs of Note (16) refer to an "existing building". That is further defined by Note (18):

> "(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 façade, the retention of which is a condition or requirement of statutory planning consent or similar permission."

9. The Farm House was an existing building before work started. It thus remained an "existing building" unless either demolished to ground level – and that did not happen – or the conditions in (b) were satisfied. If the works fell within (b) the farm house was not to be treated as an existing building and so the works would fall to be taken as a the construction of a dwelling within section 35(1A)(a); if the works did not fall within that paragraph then, because they would be properly described as the reconstruction or extension of an existing building, they would not be the construction of a building and so would not fall within section 35(1A)(a).

10. Thus the first issue for decision is whether the works fell within Note (18) para(b).

Section 35(1A)(b): a residential conversion

11. If Mr Hackett's works did not fall within section 35(1A)(a) he would still be entitled to recover the input VAT if the works were a "residential conversion" within section 35(1A)(c)

12. The words "residential conversion" are defined by section 35(1D):

> "(1D) For the purposes of this section 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) a building designed as a dwelling or a number of dwellings;
>
> (b) a building intended for use solely for a relevant residential purpose; or
>
> (c) anything which would fall within paragraph (a) or (b) above if different parts of the building were treated as separate buildings."

13. The reconstructed farm house was a building designed as a dwelling, and thus satisfied para (a). The works would thus be a residential conversion if the farm house was, before the works started, a non-residential building. Given the state it was in, in ordinary language the farm house might not be described as a residential building when the works began, but again Parliament has chosen to give a particular meaning to those words by incorporating Note (7A) of Group 5 Sch 8 into section 35 (see section 35(4A). This provides, as incorporated by section 35(4A):

> "(7A) For the purposes [of section 35]…a building or part of a building is "non-residential" if—
>
> (a) it is neither designed or adapted for use [as a dwelling]
>
> (b) it is designed, or adapted, for such use but—
>
> (i) it was constructed more than 10 years before the commencement of the works of conversion, and
>
> (ii) no part of it has, in the period of 10 years immediately preceding the commencement of those works, been used as a dwelling for a relevant residential purpose, and

(iii) no part of it is being so used."

14. The farm house had clearly been designed and occupied as a dwelling. Thus it did not fall within para (a), But (a) and (b) are alternatives so the farm house could qualify as non residential if (b) applied. It was constructed more than 10 years before the commencement of the works and so satisfied (i) It was not being used as a dwelling when the works started, so (iii) is satisfied. That leaves the remaining question for a decision which is whether it had been used as a dwelling in the previous 10 years.

The Evidence and our findings of fact.

15. We heard oral evidence from Mr and Mrs Hackett. We thought they were truthful witnesses although sometime they had difficulty in remembering precisely what happened when.

16. We had an electronic bundle of documents which included correspondence between the parties and copies of documents such as planning permission. Mr and Mrs Hackett did not have access to this bundle at the time of the hearing, so when passages in documents were referred to we read them out loud. Mr and Mrs Hackett were content with this procedure.

17. In addition to the facts already recounted we find as follows.

18. When Mr and Mrs Hackett acquired the farm house it was unoccupied. Mr and Mrs Hackett told us that it had been let for a number of years and then there had been a period in which it was left vacant and had been vandalised. They thought that it had last been occupied some 5 years before they bought it. We conclude that its occupation ceased at the end of 2009 at the earliest.

19. The house was originally constructed in about 1800 as a farm house. Since then other houses had been built round about.

20. After their purchase of the house Mr and Mrs Hackett applied for planning permission to build an extension and to remodel the interior of the house. Planning permission was given in July 2014.

21. Work started on the reconstruction and extension in 2014 (as was shown by an invoice which was part of the claim). But the works took some 4 years to complete. This in large part was because they had unexpected difficulties with the walls of the farm house. The front wall (which was bowed) was taken down to be replaced. The back wall turned out to have rotten lintels over the doors and windows and their replacement brought down the back wall. That left the two gable ends. These were unstable and needed underpinning. If one wall had fallen inwards it would have taken the other with it. The walls were supported by scaffolds. Then they discovered that the house had a cellar. The underpinning of the gable walls had to be done below the level of the cellar. In all a depth of some 3 metres of concrete was put in place.

22. The works for which planning permission was given did not encompass the demolition of the farm house. The Local Authority took a close interest in the works. When they saw that there were only two gable ends left they told Mr Hackett that permission would not be given for a new rebuilt house if the gable ends were demolished. This was the reason for the extensive underpinning works.

Discussion

23. The First Question: was the farm house an "existing building"?

24. Unless the two gable ends which remained consisted of no more than a façade or, if it were a corner site, a double façade, the farmhouse must be treated as an existing building,

25. We do not consider that the two opposing walls can be described as a single façade: that phrase clearly relates to one continuous wall, and not to two separate walls.

26. And we do not think that the two opposing gable ends can be described as a double façade on a corner site. Those words convey to us two adjoining exterior walls of a building which broadly track the boundaries of the site on which it is built. The two gables did not join one another and, from the plans, were not on a corner.

27. Thus we conclude that the farm house *was* an "existing building" and accordingly that the work done to it cannot, *for the purpose of section 35(1A)(a)* be termed the construction of a dwelling.

28. The Second Question: was the work a "residential conversion.

29. It could be such only if the farm house had not been used as a dwelling for 10 years prior to the work starting. We concluded that the last time the building had been occupied as a dwelling was in 2009. Work started on 2014 and finished in 2019. The 10 year test is therefore not satisfied. The works cannot have been a residential conversion. Section 35(1A)(c) is not satisfied.

Other matters

30. Mr Hackett says that the way in which section 35 operated in his case was anomalous particularly in the context of the planning constraints. In his case if all the walls had fallen down he would have been entitled to VAT repayments but he would not have been given planning consent for the works. If all but one wall had fallen down and that had been retained in accordance with planning consent he would have got the VAT back, but the planning consent would have been problematic. Retaining two opposite gables meant no VAT repayment but planning consent. Retaining two adjacent walls might if it could be said to be a corner site have given rise to VAT repayments but given the state of the walls was not possible. The distinctions did not make sense.

31. Further he says that a large part of the overspend on the construction had been caused by the discovery of the cellar and the need to have massive underpinning. The need for the underpinning was to save the old gable walls – surely the VAT system should provide some incentive to retain what the planners thought desirable?

32. We agree that the conditions for VAT repayment have some oddities, one such which occurs to us is that if the planners required three faces of a building to be retained rather than two relief would not be available. Ours is not however to reason why: our job is to seek to apply the legislation. That may require us to consider the purpose of the legislation, and on occasion to apply wide European Law concepts, but in this case we can see no way in which the legislation may be read so that it would permit Mr Hackett's appeal to succeed.

The Result

33. We conclude that the works did not fall within section 35(1A) and therefore that repayment of the VAT on the inputs to the works is not available.

34. We dismiss the appeal.

Rights of Appeal

35. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 03 AUGUST 2021