[2021] UKFTT 0343 (TC)

TC08277

VAT: DIY New Build Claim for repayment of VAT on goods, whether s35 VATA permits more than one claim to be made by an individual during construction, yes, whether the regulations permit more than one claim, no, whether the regulations are ultra vires, yes, appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/01005/V

BETWEEN

ANDREW ELLIS AND JANE BROMLEY **Appellants**

-and-

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

TRIBUNAL: JUDGE Heather Gething
MEMBER SHAMEEM AKHTAR

The hearing took place on 19 July 2021. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video platform. A face to face hearing was not held because of covid 19 restrictions. The documents to which I was referred are a Documents Bundle of 111 pages, and the Respondents skeleton argument.

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 Andrew Ellis and Ms Jane Bromley, the Appellants in person.

Ms Olivia Donovan Presenting Officer of HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. Mr Ellis and Ms Bromley appeal against a refusal by HMRC to allow a second claim for repayment of VAT under the DIY housebuilder scheme in respect of supplies of goods to them used to construct their dwelling house called Fox Way, in Horsham. The second claim is referred to as "***the 2019 claim***" and was made on 2 May 2019.

2. We heard evidence from Mr Ellis and Ms Bromley and make the following findings of facts based on their evidence and on the documents supplied.

THE FACTS

3. Mr Ellis and Ms Bromley bought the property called Fox Way in Horsham, which comprised a wooden 3-bedroom bungalow, in 2002.

4. An application for planning permission was made and permission was granted and then extended on 2 April 2013. The permission permitted the demolition of the wooden bungalow and the construction of a replacement dwelling at Fox Way. The replacement dwelling has 4 bedrooms.

5. Mr Ellis is a jobbing builder and has spent the last 5 years constructing his new home at weekends and on holidays. He engaged builders to undertake the construction of the shell, namely the external walls, roof and windows. During this phase Mr Ellis and Ms Bromley lived in a mobile home on the site.

6. The council tax in respect of the property was reduced to zero after the wooden bungalow was demolished.

7. Following a complaint to the council by a local resident about the presence of the mobile home, the council visited the premises and undertook a revaluation of the property in its then unfinished state for the purposes of council tax.

8. As the structure was capable of being inhabited, the Valuation Office Agency issued a Notice of Alteration of the Valuation List on 27 December 2015 ("***the 2015 Notice***") . There was no suggestion that the works were completed and the dwelling was placed in Band F for council tax purposes which is the same as the other homes of the same size in the street. Council tax was paid from September 2015 onwards.

9. The 2015 Notice, confirming the new valuation for council tax purposes, does not refer to completion of the works at all, nor does it mention completion of the constriction work in accordance with the planning permission. It is not evidence of completion.

10. The planning permission required more external works, including the erection of retaining garden walls, a balcony and appropriate access to the front door (as the dwelling is raised above the ground level).

11. The Valuation Office was not concerned with internal completion of the building. At this stage the internal walls upstairs had to still to be covered with plasterboard and plastered, there was underfloor heating but no appropriate floor covering, there was no outside balcony, no utility room or kitchen.

12. A Building Control Completion Certificate had not been obtained at the date of the hearing before us, and cannot be obtained until all aspects of the construction have been completed. The floor tiles have not yet been purchased, and as some 160 square meters of tiles are required the cost will be around £11,000.

13. Mr Ellis and Ms Bromley made an interim claim for repayment of VAT under the DIY Builder scheme in respect of £5,182.87 in April 2017 ("***the 2017 Claim***"). Form VAT 431NB was completed and the VAT was repaid. It is clear from the schedule of items covered in the 2017 Claim that no claims had been made for the construction of the garden walls, accessway to the property or kitchen and bathrooms.

14. There are guidance notes for the completion of the VAT Return 431NB which are not legally binding. There is a note in the guidance notes which indicates that only one claim may be made in respect of one building and the claim must be made within 3 months of completion. The VAT reclaim form VAT 431NB contains a declaration that the claimant has read the notes.

15. Mr Ellis found the form self-explanatory and had no need to cross refer to the notes. There was no box on the form requesting confirmation that the construction was completed. The form indicates that a valuation is satisfactory evidence to allow a repayment claim to be made.

16. A VAT Repayment was made in June 2017 in the sum of £5,182.87.

17. The 2019 claim was made on 2 May 2019 ("***the 2019 Claim***") but it was rejected on the ground that only one claim can be made for a particular building under the DIY Builder Scheme, and it must be made within 3 months of completion of the construction work. The 2019 Claim was for the recovery of VAT on supplies of goods used in the construction of the dwelling which supplies were not covered by the 2017 Claim.

18. The Relevant legislation

SECTION 35 VAT ACT 1994 ("S35 VATA")

Section 35 Refund of VAT to persons constructing certain buildings

(1) Where-

(a) a person who carries out work to which this section applies;

(b) his carrying out of those works is lawful and otherwise not in the course or furtherance of a business; and

(c) VAT is chargeable on the 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; and

(c) a residential conversion

(1B) For the purpose of this section goods shall be treated as used for the purposes of works to which this section applies by the person carrying out the works in so far only as they are building materials, which in the course of the works are incorporated in the building in question or its site.

(1C)…

(2) The Commissioners shall not be required to entertain a claim for a refund of VAT under this section unless the claim

(a) is made within such time and in such manner, and

(b) contains such information, and

(c) is accompanied by such documents, whether by way of evidence or otherwise,

as the Commissioners may by Regulations prescribe or, in the case of documents as the Commissioners may determine in accordance with the Regulations.

VAT Regulations 1995, SI 1995/2518

"Made by the Commissioners of Customs & Excise under VATA 1994 ss.....35(2)……"

"PART XX111"

"REFUNDS to 'DO IT YOURSELF' BUILDERS"

200. "Interpretation of part XXIII

In this Part

"claim" means a claim for refund of VAT made pursuant to section 35 of the Act,

"Claimant" shall be construed accordingly

"relevant building" means a building in respect of which a claimant makes a claim.

201. Method and time for making claim

A claimant shall make his claim in respect of a relevant building by

(a) furnishing to the Commissioners no later than 3 months after the completion of the building the form numbered 11 in Schedule 1 to these Regulations containing the full particulars required therein, and

(b) at the same time furnishing to them

(i) a certificate of completion obtained from a local authority or such other documentary evidence of completion of the building as is satisfactory to the Commissioners,

(ii) an invoice showing the registration number of the person supplying the goods, whether or not such an invoice is a VAT invoice, in respect of each supply of goods on which VAT has been paid which have been incorporated into the building or its site,

(iii) in respect of imported goods which have been incorporated into the building or its site, documentary evidence of their importation and of the VAT paid thereon,

(iv) documentary evidence that planning permission for the building had been granted, and

(v) a certificate signed by a quantity surveyor or architect that the goods shown in the claim were or, in his judgement, were likely to have been, incorporated into the building or its site.

INTERPRETATION ACT 1978

Section 6 provides as follows:

"In any Act, unless the contrary intention appears, -

(a) Words importing the masculine gender include the feminine.

(b) Words importing the feminine gender include the masculine.

(c) Words in the singular include the plural and words in the plural include the singular.

MR ELLIS AND MS BROMLEY'S CASE

19. The VAT Self Build Scheme is aimed at individuals rather than building companies or contractors.

20. The scheme is intended to provide zero rated VAT on supplies of goods purchased in the construction of a new dwelling.

21. It is not unreasonable to expect that more than one claim can be made as the period of construction is likely to be years where the individual is able to work on the building only at weekends and during holidays. To do otherwise is not to place a DIY Builder in the same position as the developer. HMRC policy needs to be amended to put self-builders in a comparable position even if not in an identical position.

22. The claim form was self-explanatory, and no assistance was needed to complete it. Mr Ellis did not therefore need to read the explanatory notes.

23. There is no mention of the fact that only one claim can be made on HMRC website https;//www.gov.uk/vat-building-new-home/how to claim, nor in the section concerning eligibility, nor in the VAT form VAT 341NB and the first mention is at page 10 of the notes to VAT431NB.

24. The repayment following the 2017 Claim ought not to have been made on HMRC's analysis.

25. HMRC made an error in processing the first claim because:

(a) the valuation was made at least 15 months earlier, and

(b) the valuation could not have been taken to provide evidence of completion,

HMRC's error ought not to disadvantage Mr Ellis and Ms Bromley.

26. The ability to make periodical reclaims of VAT allows a self-builder to apply the sum received as a result of repayment of VAT to purchase other goods to be incorporated into the building. This is what developers do. Without it the self-builder's ability to complete the construction phase will necessarily be delayed further.

27. Most self-builders will only ever build one house. It surely cannot be the intention of Parliament to cause hardship of this nature to be visited on self-builders.

28. Further that HMRC officers mistakenly allowed the first claim ought not to prevent Mr Ellis and Ms Bromley making a second or final claim. HMRC's process seems to ignore the fact that valuations can be demanded in cases such as this where the valuation was brought about because of a compliant about the use of a mobile home on the site. A valuation for Council tax purposes may indicate that the dwelling is habitable but not that it is complete.

29. The dwelling is still not complete.

30. Mr Ellis and Ms Bromley say that the 2015 Notice from the valuation agency dated 27 December 2015 (at page [60] of the Bundle) is not evidence of completion. Further, the works are not yet complete.

HMRC's CASE

31. HMRC consider that the claim for repayment of input tax must be disallowed because:

(a) Section 35 VATA provides that only a single claim for repayment of VAT by a DIY builder may be made under the VAT DIY Builder Scheme. HMRC point to the references to "**a** claim" and "the claim" in section 35 and the use of the possessive pronoun "**his** claim" in the regulation 201.

(b) Section 35(2) enables HMRC to prescribe by Regulations the timing and evidence to support a claim. Regulations 200 and 201 of the 1995 Regulations support the assertion that only one claim may be made. The regulations provide that the claim must be made within 3 months of completion. Although various documents may be accepted as evidence of completion there can only be one completion date.

(c) The guidance notes which form part of the claim form VAT 431NB state that:

- "*You can only make one claim and your claim must be made within three months of the building having been completed." (S*ee the side note to section 2 of the Notes at page [92] of the Bundle).
- *"Remember you can only make one claim no later than three months after the construction work is completed". (*See Part B Point 14 on page 92 of the Bundle.)
- *"Remember you can only send one claim and that claim must be submitted no later than three months after work of construction has been completed."* (See Part F of the Notes at page [95] of the Bundle.)

32. Mr Ellis and Ms Bromley admit they made two claims and that they used the same evidence of being entitled to make the claim, namely a Notice of Council Tax Banding, dated December 2015 (the 2015 Notice) which was effective 1 September 2015. The 2019 claim must be disallowed.

33. HMRC assert that even if a second claim may be made the second claim was made later than three months after the evidence of completion.

34. The object of the legislation is to put the owner of a self-build dwelling in the same position as a developer in the sense that a developer issues a certificate of practical completion and makes no reclaims for VAT thereafter.

35. The object is not to put the self-builder in the same position as a developer which would permit the self-builder to make multiple claims for repayment on a quarterly or monthly basis. The self-builder is entitled to repayment of VAT only after completion.

36. The Regulations introduced by HMRC, as permitted by section 35 VATA, specify that a certificate of completion ought to be obtained from a local authority or such other evidence of completion as may be satisfactory to HMRC. It is this certificate that the Regulations identify as the basis of the claim for repayment of VAT. There can only be one completion date.

37. As the Appellants had not read the Guidance notes they were unaware of the HMRC interpretation that only one claim for repayment may be made by a DIY Builder following completion.

38. HMRC urge the Tribunal to follow the FTT decision in *Stuart Farqueson v HMRC* [2019] UKFTT 425 (TC) in which Judge Poon determined the appeal in favour of the Appellant on the basis that completion for the purposes of the DIY Self-Build Scheme meant the date of a formal certificate of completion. Mr Farqueson's claim for repayment had been made within 3

months of the certificate of completion issued by the Local Authority. Judge Poon commented that there could only be one claim even though she considered the regime for house builders was to create fiscal neutrality between developers and self-builders.

39. HMRC also rely on the FTT decision in *Samson v HMRC* TC/2019/01957 which considered whether Mr Samson's claim was in time, i.e. within 3 months of completion. The issue in contention was whether what constitutes completion is a "multi-factorial test" i.e. whether all the main elements for the building to function for its intended purpose were in place, or whether the three months ran from the issue of the certificate of completion. It was held by Judge Redstone that completion meant the issue of a certificate of completion by a local authority. The wording in regulation 201 (b)(i) "*or such other evidence of completion of the building as is satisfactory to the Commissioners*" was in the alternative. The FTT found that the test of what was completion is not a multi-factorial test. It is by necessity a simple test as a self- builder has to be able to bring his claim in time.

40. HMRC note the Appellants say the that form VAT431NB notes do not make it clear that only one claim for repayment may be made but note that that the Tribunal does not have jurisdiction to consider the adequacy of the notes.

DISCUSSION

41. The following issues arise for determination in this case:

(a) Does section 35 VATA prevent more than one claim for repayment being made?

(b) If, as HMRC suggest, the Regulations purport to provide that only one section 35 claim is possible for a given building, are the Regulations to that extent authorised by the powers conferred by primary legislation and are therefore intra vires?

(c) If the Regulations are *intra vires*, are they compatible with the principle of fiscal neutrality?

(d) Was the 2015 Notice evidence of completion?

(e) Was the 2017 Claim a valid claim?

We consider that section 35 does permit more than one claim in respect of a building because on their proper construction the terms of section 35 permit such claims and in so far as the Regulations on their proper construction purport to bar such claims, the Regulations are ultra vires as a matter of UK law. We consider that the Regulations may be incompatible with the principle of fiscal neutrality but as we did not receive submissions on this issue we do not make a determination on it.

Does section 35 VATA prevent more than one claim for repayment being made?

42. In our view it does not. On the plain reading of the section there is no express indication that only one claim may be made. Like many provisions, section 35 VATA is drafted in the singular. Drafting in the singular is an established technique to assist in clarity and to enable the proposal to be dealt with succinctly. As there is no express indication to the contrary in section 35 VATA, section 6 Interpretation Act 1978 applies to confirm that the reference to "a claim" in section 35 VATA must be read as including "claims".

Are the Regulations authorised by the powers conferred by primary legislation and therefore intra vires?

43. As "*Bennion on Statutory Interpretation"* published by LexisNexis Seventh Edition indicates at [3.7], "*The scope of an enabling power is to be determined in accordance with the usual principles of statutory construction*." "*The scope of an enabling power depends on the*

proper interpretation of the enabling Act (and therefore there are no hard and fast rules), the legislature might expect that if certain powers- such as the ability to create new offences, to impose taxes, to amend the enabling Act or other legislation, to intervene with fundamental rights or to permit sub delegation, - are to be conferred, the enabling Act will expressly state that provision of this kind may be made"

44. Section 35(2) does not expressly provide for the introduction of regulations that alter section 35(1).

45. Section 35(2) empowers HMRC not to entertain a claim unless it is made in such time and form and contains such information and is accompanied by such documents are as specified by Regulations. Neither Section 35 nor any of the other provisions of the VAT Act under which the Regulations were made give authority to introduce regulations that alter the scope of section 35(1) and restrict a self-builder to make a single claim upon completion of the dwelling. Regulation 201 is therefore ultra vires to the extent that it limits a self-builder to make a single claim following completion of the dwelling.

46. Regulation 201 may well be lawful to the extent that it requires evidence of completion of the building work in respect of which a claim has been made. The goods in respect of which a claim for repayment has been made must have been incorporated into the dwelling. But Regulation 201 is ultra vires in so far as it requires evidence of completion of the dwelling before a claim may be accepted as that would have the effect of restricting the scope of section 35(1). To restrict a self-builder to make a single claim only after the building has been completed in its entirety goes too far.

47. Regulation 201 is also lawful to the extent that it places an outer limit on when claims can be made, i.e. that all claims by a self-builder of a dwelling must to be made before the expiration of three months of the completion of the building.

Are the Regulations compatible with the principle of fiscal neutrality?

48. We note that Judge Poon mentioned obiter that Section 35 was intended to put a self-builder in the same position as a developer of residential property and that the issue of fiscal neutrality was engaged but she did not go on to explore the issue. The first disposal by a developer of a residential property is treated as a zero-rated supply. The developer is allowed to make periodic claims for recovery of VAT in the course of construction of residential property. The periodic recovery of the VAT on goods and services reduces the need for extra finance and will be reflected in the purchase price of residential property.

49. The Regulations purport to limit the ability of a self-builder to reclaim input VAT by restricting the claims for repayment to claims made within 3 months after completion. That would not put a self-builder in the same position as a developer or a purchaser from a developer.

50. As section 35 and the 1995 Regulations give effect to an extension of the scope of the zero-rate to cover self-builders, the UK legislation giving effect to the extension must satisfy the European principle of fiscal neutrality. We did not receive submissions on the principle of fiscal neutrality. If this case is appealed this is an issue for consideration by the Upper Tribunal.

51. The principle of fiscal neutrality was considered in the 2011 case of *The Commissioners for Her Majesty's Revenue & Customs v The Rank Group* Case C-719-10 [2011] CJEU. There were two cases and they both concerned reclaims for VAT paid by The Rank Group on services supplied to it in connection with certain games. The issue in that case arose out of the fact that UK legislation treated slot machines differently from mechanised cash bingo (MCB) and slot machines differently from fixed odds betting terminals for VAT purposes although they were comparable. From the customers point of view the two types of supply were identical but they

enjoyed different status under the Gaming Act which led to different treatment in Schedule 9 to the VAT Act. A reference was made to the CJEU by the Court of Appeal. The Court said

" *…the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purpose of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle. Such an infringement thus does not require in addition that the actual existence of competition between the services in question or distortion of competition because of such difference in treatment be established"*.

52. We note if the principle of fiscal neutrality were engaged there are two possible consequences:

(a) If the principle is a "fundamental right" as referred to in Bennion on Statutory Interpretation at [3.7], the Regulations would be ultra vires as Section 35 does not expressly authorise the introduction of Regulations which disregard the right.

(b) If the 1995 Regulations do restrict the right to claim to a single claim then they would discriminate against a self- builder in restricting the number of claims that may be made, the Regulations would have to be read so as to ensure compliance with that principle.

Was the 2015 Notice evidence of completion?

53. The re-banding of Fox Way for council tax purposes in 2015 was not evidence of completion in this case. It is merely evidence that some building works had been undertaken and that the dwelling was capable of being inhabited.

54. If the Regulations were lawful in restricting the number of claims to one, the council tax re-banding in this case would not have been evidence of completion of the dwelling as the *eiusdem generis* rule would have had to be applied. As a result, the 2015 Notice in this case was not akin to a completion certificate issued by a local authority.

Was the 2017 claim a valid claim?

55. As the Regulations are ultra vires in restricting the number of claims, the 2017 claim was a valid claim.

56. We observe that if HMRC were correct in their view of the meaning and application of section 35 VATA and the Regulations, the position would be as follows:

(a) The re-banding of Fox Way for council tax purposes in 2015 was not evidence of completion in this case. It is merely evidence that the building was capable of being inhabited. The *eiusdem generis* rule must be applied in considering whether any item of evidence was akin to a completion certificate issued by a local authority. In consequence, the 2017 claim was not a "valid" claim within the meaning of section 35 VATA and the Regulations, and so would not prevent a subsequent claim. (Whether HMRC would be entitled to recover the VAT repaid in 2017 in consequence is not before this Tribunal.)

(b) As the property was still not complete at the date of the hearing, and as the 2015 Notice re council tax banding cannot be accepted as evidence of completion, the 2019 claim would be an invalid claim also.

(c) A further claim will be possible once the building is complete.

DECISION

57. We allow the appeal

58. 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.

HEATHER GETHING
TRIBUNAL JUDGE

RELEASE DATE: 21 SEPTEMBER 2021