TC01425

Appeal number: TC/2010/04395

VAT – Contractor – failure to deduct VAT – Appeal dismissed.

FIRST-TIER TRIBUNAL

VAT

D & H DEVELOPMENTS **Appellants**

- and -

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

TRIBUNAL JUDGE: **JOHN M BARTON, WS**
MEMBER: **EILEEN SUMPTER**

Sitting in public at George House, 126 George Street, in Edinburgh on Tuesday 23 August 2011

Alan Pearce, for the Appellants

Ms Ros Shields, for the Respondents

DECISION

1. This is an appeal by D & H Developments ("D & H") against an Assessment by the Commissioners for Her Majesty's Revenue and Customs ("HMRC"). The Assessment was originally for Value Added Tax ("VAT") of £8,511 in respect of the period from 1 December 2005 to 30 April 2006, and VAT of £1,787 in respect of the period from 1 February 2008 to 30 April 2008. The latter figure was subsequently modified.

2. The appeal was heard in Edinburgh on 23 August 2011. The Appellants were represented by Mr Alan Pearce; and HMRC was represented by Ms Ros Shields.

3. In the course of the Hearing, Ms Shields intimated that HMRC had withdrawn that part of the Assessment which related to the period from 1 February 2008 to 30 April 2008, and that the only issue before the Tribunal was the charge to VAT of £8,511 in respect of the period from 1 December 2005 to 30 April 2006.

4. The Tribunal heard the evidence of Mr Steven Duffy, one of the partners of D & H; and Mr Pearce and Ms Shields addressed the Tribunal.

Material Facts

5. The material facts were not in dispute and are as follows –

(1) D & H are a firm of Joinery and Building Contractors which was established in November 2003. The partners are Mr Duffy and Mr Colin Hughes. Since their formation, D & H had carried out, on a sub-contract basis, the erection of kit houses through various main contractors.

(2) Mr Duffy had known Mr Charles Kean of Kean Slaters Ltd for many years. Mr Kean had been a prominent and respected figure throughout Dundee.

(3) Mr Duffy was approached by Mr Kean who asked if D & H would be interested in constructing new offices for Kean Slaters Ltd at Herons Lane, Dundee. The work was due to start in December 2005. Mr Duffy was given the drawings and asked to quote for the whole contract less the drainage, ground-works and roof slating. A price of £129,500 was initially calculated but following a meeting with Mr Kean in October 2005 a final cost was agreed. At that meeting, Mr Kean indicated that the contract was to be treated as Zero rated for VAT on the basis that the building was to double up as a dwelling house to promote the lack of council housing in the area. This statement was accepted by Mr Duffy.

(4) Thereafter, Mr Duffy contacted his firm's accountant Mr Pearce who advised D & H to register for VAT as the contract would place D & H above the VAT threshold.

(5) In December, 2005, Mr Duffy, Mr Hughes and Mr Pearce met with Mr Kean. Mr Pearce asked Mr Kean if the contract should not be positively rated for VAT and Mr Kean confirmed that there was no VAT element applicable to the contract.

(6) In support of the VAT application, Mr Kean supplied a letter dated 23 December 2005 as follows.

> **New Offices and Yard – Herons Lane, Lochee, Dundee**
>
> I would confirm acceptance of your quotation for construction of offices etc., at the above location at a cost of £119,800.

(7) Between December 2005 and April, 2006, D & H issued invoices (all without VAT) for the following sums

£10,000.00

£17,500.00

£19,650.00

£10,000.00

totalling £57,150.00. Kean Slaters Ltd made payment of each of those sums.

(8) Kean Slaters Ltd failed to pay the balance due under the contract and an action was raised in Dundee Sheriff Court. The action was settled prior to a hearing with a payment of £15,000 to include all judicial expenses.

(9) In November 2008, HMRC carried out an inspection at the premises of D & H and concluded that VAT was payable in respect of the contract works at Heron Lane. The said payments totalling £57,150 were therefore deemed to have been paid gross of VAT and that the VAT payable thereon was therefore $7/47^{th}$ of the same, namely £8,511 (rounded down to the nearest £).

Statutory Provisions

6. The Value Added Tax Act 1994 ("the Act") contains the following

> **1 Value added tax.**
>
> (1) Value added tax shall be charged, in accordance with the provisions of this Act—
>
> (a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply),
>
> (b) on the acquisition in the United Kingdom from other member States of any goods, and
>
> (c) on the importation of goods from places outside the member States, and references in this Act to VAT are references to value added tax.
>
> (2) VAT on any supply of goods or services is a liability of the person making the supply and (subject to provisions about accounting and payment) becomes due at the time of supply.
>
> **30 Zero-rating**
>
> 30(1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section
>
> (a) no VAT shall be charged on the supply; but

(b) it shall in all other respects be treated as a taxable supply;

and accordingly the rate at which VAT is treated as charged on the supply shall be nil.

30(2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified.

Within Schedule 8, Group 5 includes the following items –

2 The supply in the course of the construction of

(a) a building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose or a relevant charitable purpose; or

(b) any civil engineering work necessary for the development of a permanent park for residential caravans,

of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity.

Submissions

7. On behalf of D & H, Mr Pearce submitted

(1) that the development had been designed in a manner that would have allowed for the property to have been used as a dwellinghouse, and

(2) that D & H had acted in good faith in accepting the assurances by Mr Kean that the work was zero rated for VAT.

8. On behalf of HMRC, Ms Shields contended:

(1) The Planning Application had described the proposed works at Heron Lane as "Erection of office, storage, portakabin, boundary walls and formation of yard".

(2) Section 1 of the Act provides that "Value added tax shall be charged…….. on the supply of goods or services……." And that "……VAT on any supply of goods or services is a liability of the person making the supply …."

(3) The provision for zero rating is limited to "the supply in the course of the construction of a building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose…." At the relevant time, the proposed building at Heron Lane was not intended to be used as a dwellinghouse.

Reasons

9. The material facts, including the evidence of Mr Duffy, were not in dispute and are set out fully in the findings above.

10. As was pointed out by Ms Shields, the basic principles in s1 of the Act are that VAT requires to be charged on the supply of goods or services, and that it is the party making the supply who is liable to pay the VAT. This is the normal procedure, namely that where a registered party makes a supply, that party is

liable for the VAT. There is that liability whether or not the supplier seeks to recover the VAT from the customer.

11. In this case, D & H charged Kean Slaters Ltd the 4 sums totalling £57,150. As D & H did not separately charge VAT at the then rate of 17½ %, the invoiced amount is ordinarily regarded as a gross payment (ie inclusive of VAT) and the supplier is expected to account for the VAT element, which represents 7/47th of the gross amount.

12. Section 30 provides an exception to the foregoing when any transaction is zero rated, but this only arises if it can be established that the transaction comes within any of the provisions of Schedule 8. Within that Schedule, the critical items are in Group 5 and in particular "the supply in the course of the construction of a building designed as a dwelling …….or intended for use solely for a relevant residential purpose …"

13. Was the building designed as a dwelling? Mr Duffy produced a copy of the original plan and pointed out that the design is compatible with that of a dwellinghouse in that there was to be a number of rooms, which could be used as living rooms or bedrooms, together with a kitchen, shower room and 2 separate toilets. However it was significant that the plan identified various rooms as "Mr Kean's office", "general office", "office", "power tools storage" and "kitchen/messroom". Ms Shields also pointed to the terms of the planning application which had contained the description "Erection of office, storage, portakabin, boundary walls and formation of yard". On the basis of this evidence, it is concluded that the building was not *designed* as a dwelling.

14. The alternative question is whether the proposed building was "intended for use solely for a relevant residential purpose"? The presence of the word "solely" is critical in that even Mr Kean only regarded this as an alternative use.

15. There was also anecdotal evidence that at some future date, the building might be used as a dwelling, but in the opinion of the Tribunal, Schedule 8 is to be interpreted on the basis of the circumstances prevailing at the date of the relevant supply.

16. The Tribunal accordingly concludes that the development at Herons Lane did not fall to be regarded as zero rated.

17. It was clear that D & H, and Mr Duffy in particular, had trusted Mr Kean in accepting his statement that the contract works were to be zero rated; but unfortunately, the legislation does not allow any decision to be influenced by considerations of good faith.

18. Ordinarily, D & H might have resolved the matter by invoicing Kean Slaters Ltd for the amount of the VAT which could have been added to each of the sums previously invoiced, but by that stage, Kean Slaters Ltd had gone into liquidation, owing substantial sums to HMRC and there was no prospect of recovery from that company.

19. There is accordingly considerable sympathy for D & H but unfortunately this Tribunal has no discretion in regard to their liability for VAT.

20. It should be added that at the date of the Hearing, D & H were still in negotiation with HMRC regarding other aspects of their VAT liability, but it was

confirmed by both parties that a decision was called for only in relation to the amount of £8,511.69; and in regard to that aspect, the decision of the Tribunal is that the Assessment is confirmed.

21. 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.

JOHN M BARTON, WS
TRIBUNAL JUDGE

RELEASE DATE: 7 SEPTEMBER 2011