TC01953

Appeal number: TC/11/05517

VALUE ADDED TAX – Value Added Tax Act 1994 (VATA), Schedule 8, Group 5, Note 2. Refund to persons constructing certain dwellings – residential conversion – separate use or disposal of the dwelling was prohibited by the terms of the statutory planning consent at the time the conversion was designed – thus works were not eligible. Appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

JAMES J HOPKINS **Appellant**

- and -

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

TRIBUNAL: W RUTHVEN GEMMELL WS, Judge
CHARLOTTE BARBOUR CA, CTA Member

Sitting in public at Edinburgh on 16 March 2012

James Hopkins Senior for the Appellant

Ms Harry Jones, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by James Hopkins ("JH") against a refusal, issued by the Commissioners for HM Revenue and Customs ("HMRC") on 18 May 2011, of a claim under the DIY Scheme as the dwelling house could not be used or disposed of separately from the granny annexe.

2. The total amount of tax claimed was £21,426.60.

3. HMRC state that the criteria for a refund for DIY house building for new houses have not been met.

Background and Facts

4. On 17 June 2007, planning permission was granted to JH for "partial demolition of existing dwelling house to form granny annexe. Erection of attached dwelling house and attached garage".

5. An amended planning permission was applied for and granted on 18 December 2008.

6. Condition 2 of both permissions stated that "the use of the granny annexe to be ancillary to the use of the dwelling house and not to be occupied or sold as a separate residential unit".

7. The reason given for this was "the formal layout of the proposed dwelling house would be inappropriate for two separate residential units".

8. On or around this time, JH obtained a DIY claim form from the local Edinburgh VAT office and on 27 April 2011, following completion of the building works, JH submitted this form together with invoices and the amended planning permission.

9. This was returned by HMRC asking for an up to date form to be completed and gave JH a reference number for the claim.

10. On 16 May 2011, JH sent HMRC the new claim form, the planning permission, completion certificates and building warrants.

11. The claim form stated that the date of completion of the building was 8 April 2011 and that it was occupied on 12 April 2011.

12. At question 13 of the form under the section "Are You Eligible to Claim" was the question "Do the terms of your planning permission (or similar permission) prevent the separate disposal, or separate use, of the new building from any other pre existing building?".

13. This question was answered in the negative.

14. On 18 May 2011, HMRC issued a decision letter saying that the claim was not eligible under the DIY Scheme as the dwelling house could not be used or disposed of separately from the granny annexe.

15. The letter quoted from the HMRC Note VAT431NB, provided in relation to the claims, which stated as follows:

> "You **are not eligible** to use this scheme if you have ..... constructed a property that, because of a condition in the planning permission, cannot be sold separately or used separately from another property."

16. The letter went on to refer to Note 2(c) of Group 5 of Schedule 8 of the VATA and made reference to the planning permission reference 08/01756(FUL) issued by Scottish Borders Council ("SBC").

17. JH submitted photographs to the Tribunal which clearly showed that the original bungalow had been radically changed so that the remnants of this became the building known as the granny annexe and a substantial dwelling house built along side on one side of the former bungalow and a garage on the other side.

18. JH stated that in retrospect the description of the existing bungalow, as the "granny annexe", was misleading and also that he was unaware that any prohibition of use or sale would affect a DIY claim. One of the reasons for this was the absence of any questions relating to separate disposal or use on the first obtained claim form.

19. Once planning permission had been obtained, it was necessary, in the normal process of erecting a new building, to obtain a building warrant from the Building Control Department of SBC.

20. When it came to obtaining such a warrant, SBC required that the properties, being the new dwelling house and the remnants of the bungalow described as the "granny annexe", each had their own separate supplies of utilities because it was considered likely that the properties might be sold separately.

21. Thereafter, the Council then required that the properties had two council tax bands and that the newly constructed house and the granny annexe should have different addresses.

22. JH asked HMRC if a retrospective application would change the initial decision but was advised that HMRC would not accept this.

23. JH stated that the two properties were completely separate but contiguous and shared a common driveway. This was verified by the plans and photographs submitted to the Tribunal.

24. The granny annexe is currently let out commercially contrary to the conditions of the original planning consent. The dwelling house is available for JH's family but he is currently working in the oil industry in South America so the property is vacant.

25. On 23 May 2011, JH wrote to HMRC asking for a review of the decision, claiming that the claim met all the conditions of Schedule 8, Group 5, Note 2, on the basis that the buildings had their own services, addresses, council tax and self-contained living accommodation.

26. This letter conceded that if it was ever decided to sell the original bungalow (the granny annexe) it would require Section 75 of the Town and Country Planning (Scotland) Act 1997 approval from the local authority given the condition that was imposed at the time of the original planning permission to demolish part of the bungalow to create the new dwelling house and the granny annexe and garage.

27. On 23 June 2011, HMRC carried out a review and upheld their original decision stating that whereas the circumstances met all the criteria of Schedule 8, Group 5, Note 2 of the VATA, Note 2(c) was not met because the building had not "been designed as a dwelling and, accordingly, all four requirements had not been met".

28. The review letter emphasised that the test was how planning permission was granted rather than actuality of how the building had been constructed or whether or not it had separate utility services, council tax banding and mailing addresses.

29. Reference was made to a number of Tribunal cases which cover Note 2(c) including *Giblin* and *Sherratt* and HMRC offered to forward copies to JH if JH wished to see them.

30. On 24 June 2011 and 4 July 2011, JH wrote to HMRC enclosing bills to confirm the buildings, separate council tax bandings, separate services and addresses and registering a complaint that no information was provided with the DIY pack and claim form that was sent out in 2008.

31. The granny annexe, being the remains of the original dwelling house, consisted of three bedrooms, two full bathrooms, a water closet, kitchen and lounge.

Legislation

32. Section 35 Value Added Tax Act 1994 (the Act) states:

> 35(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 purposes 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 the section applies are –
> (a) the construction of a building designed as a dwelling or number of dwellings
> (b) …..
> (c) …….

33. Section 35 is designed to place do-it-yourself builders in the same position as commercial builders so that they can recover the VAT they incur in paying for the building work that is not constructed in the course or furtherance of a business. The section incorporates (and gives statutory effect to) the notes to Group 5 of Schedule 8 of the Act. Those notes impose a number of conditions which are to be satisfied if JH is to recover the VAT incurred.

34. Part 11 The Groups [Group 5 – construction of buildings etc)
Notes.
Amendment
Substituted by SI 1995/280. art 2
[***Item No***
….4. (2) A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied-
(a) the dwelling consists of self-contained living accommodation;
(b) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;
(c) the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning permission or similar provision; and
(d) statutory planning consent has been granted in respect of that dwelling and its construction or conversion has been carried out in accordance with that consent.
The parties accept that all the provisions of the notes have been complied with save that HMRC say that condition 4(2)(c) has not been.

Cases referred to

Harris & Anor v *Customs & Excise* [2004] UKVAT V18822
Martin James Giblin v *HMRC* VAT Decision 20352 [2007]
David and Elizabeth Sherratt v *HMRC* [2011] UKFTT 320 (TC)

Submissions of the Appellant

35. JH says that if he had known about the conditions at the time he would have negotiated with the planning authorities in a different way and was now in the position of being unable to remedy the issue even if retrospective planning permission was obtained.

36. JH considered HMRC had been negligent in not conveying this information so the decision should be reviewed.

37. JH says that the DIY form sent in 2008 made no mention of condition (c) relating to the prohibition of use or sale of the property as a separate dwelling although this was the law at the time.

38. JH says that the reality is that the dwelling is separate and this is confirmed by the requirements by Borders Council to have separate utilities, to give them separate council tax banding and different addresses.

39. JH says the Appeal should be upheld.

HMRC's Submissions

40. HMRC say that the claim refers to the new building and not to any work on the granny annexe. Neither the main dwelling nor the granny annexe can be used or disposed of separately so works to the new building will not qualify for this reason in terms of the legislation.

41. HMRC say that the claim is not eligible because of the condition in the planning permissions and under Note 2(c).

42. As a consequence, the building cannot be considered to have met the "designed as a dwelling" criteria.

43. HMRC refer to the case of *Gilbin* as follows: -

> "It seems to us that condition 'c' was satisfied only if there is no prohibition on the separate disposal and no prohibition on separate use. Effectively, it encompasses two conditions.
>
> If it had read separate use and disposal is not prohibited, if one activity not the other were prohibited the condition would be satisfied but the use of 'or' to our minds makes plain that neither separate use nor separate disposal may be prohibited."

44. HMRC refer to the case of *Sherrat* where the Tribunal concluded that the building and surrounding farmland could not be diposed of separately so that Note 2(c) applied and the building was not eligible under the DIY Scheme.

45. HMRC say that JH, in his letter of 23 May, confirmed that if the buildings should be sold separately it would require fresh planning permission to allow independence of both buildings.

46. HMRC say the Appeal be dismissed.

Reasons for the Decision

47. It was clear from the evidence that JH was not aware of the Condition "c" where it refers to the prohibition on the use or sale of the property at the time of applying for permission and up to the time of the claim.

48. Although this question was specifically asked in the new form that was sent to JH it was answered in the negative whereas the grant of planning permission was quite clear that it should have been answered in the positive.

49. The Tribunal did not consider HMRC had been negligent in not including the question on the form and the responsibility for knowing the rules and regulations lay on JH.

50. The Tribunal were sympathetic to the extent that the local council appeared on the one hand to prohibit separate use and sale of either the dwelling house or the granny annexe as separate dwellings and yet, at the further stage of obtaining permission to erect a building, they then insisted on additionally expensive requirements to ensure that each property had its own utilities, its own council tax band and its own address based on the premise that the properties might be sold separately.

51. At the date of the hearing, however, no attempt had been made to ascertain if the properties could be sold separately and, therefore, it was a hypothetical consideration as to whether the requirements of the building warrant were in fact justified.

52. The Tribunal ascertained from JH that he had not challenged the council on this apparent contradictory stance as regards the prohibition of the sale of either of the properties in relation to planning permission and insisting that they be erected in a way to facilitate their separate sale on the other.

53. The Tribunal considered the words used at Note 2(c) and, in particular, whether the prohibition was "by the terms or covenant, statutory planning consent or similar provision".

54. Consideration had to be given as to whether the building warrant was a "similar provision" and, if it was contrary to the planning consent, whether in fact there was a valid prohibition.

55. Reference was made to the *Harris* decision where the Tribunal considered the timing at which the planning consent or similar provision had to be satisfied.

56. The Tribunal then considered the context in which the four conditions were to be satisfied which is in relation to a building "being designed as a dwelling".

57. The Tribunal accepted the *Harris* Tribunal's definition that these words indicated that "any relevant conditions had to be satisfied at the time of the design of the building (that is at the date of the planning consent) and not later". The *Harris* Tribunal went on to say "we are confirmed in our view by the fact that if a later planning consent could fulfil the condition then in theory a claim for a refund could be made many years after the completion of the building which could not have been intended".

58. The Tribunal, therefore, was of the view that the conditions attached to the planning permission, and not the building warrants, were of significance and they quite clearly enforced a prohibition on separate use and sale.

59. The legislation relates to a "*building* designed as a dwelling or *number of dwellings* where in relation to *each dwelling"* the condition as to (c) is met – emphasis added. The Tribunal considered the 'building' as being the granny annexe, the attached dwelling house and attached garage.

60. The legislation is quiet clear as to the effect of such a prohibition contained at Note 2(c) and, accordingly, the Appeal is dismissed.

61. 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.

W RUTHVEN GEMMELL, WS
TRIBUNAL JUDGE

RELEASE DATE: 19 April 2012