TC02455

Appeal number: TC/2012/02906

VAT- zero rating-alterations to listed building-planning condition imposed-whether dwelling was subject to prohibition on separate use- yes-appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BRIMS CONSTRUCTION LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA J KING
WARREN SNOWDON

Sitting in public at North Shields on 20 November 2012

Tim Clark, solicitor with Adderstone Group for the Appellant

William Brooke of HM Revenue and Customs, for the Respondents

DECISION

The Issues

1. Brims Construction Limited (Brims) are appealing against an assessment for VAT raised by HMRC on 23 January 2012 in the sum of £15,833. This concerns an invoice raised by Brims on 1 August 2011 for £90,000 which was said to be a zero-rated supply. HMRC say the supply should not have been zero-rated as it involved the conversion of part of a listed building which was subject to a prohibition on separate use of the building.

2. Brims also submit that they applied for an extra statutory concession (ESC) to be applied and that at the time of the supply, 1 August 2011, this would have been possible. HMRC state that the ESC was withdrawn on 1 January 2012 and was not therefore available at the time the HMRC's decision was made. In any event HMRC submit that a first tier tribunal has no jurisdiction to hear matters concerning concessions. They are not decisions which are subject to appeal to the Tribunal.

Background

3. This appeal concerns part of a Grade 2 listed building, formerly a school for 'delicate children' and known as Joicey Road Open Air School, in Gateshead, Tyne and Wear. Adderstone (3 Acre Park) Limited, had acquired the whole of the school site from Gateshead Council on 31 March 2010, with a view to developing it. The school site has now been renamed 'Saltwell Business Park'.

4. Adderstone (3 Acre Park) Limited is part of the Adderstone Group who own shares in Brims and the latter were employed to carry out conversion work in Saltwell Business Park.

5. Planning permission was obtained, under reference DC/11/00342/FUL, from Gateshead Council on 8 July 2011 to convert various buildings on the site. The full Certificate of planning permission was produced to the Tribunal but not the plans listed therein.

6. The 'Description of Proposal' referred to in the planning permission includes

'*change of use of rest barn to dance studio (use class D2) with residential annex (use class C3).*

7. Paragraph 30 of the permission is as follows:-

The residential floorspace of the dance school unit within the rest barn shall not be occupied other than by a person solely or mainly employed, or last employed in the business occupying the business (dance school) floorspace of that unit.

8. Mr Clark stated that what is referred to in the planning permission as 'residential floorspace' is now a separate dwelling known as number 10 Telford

Close. The remaining part of the rest barn is now known as number 9 Telford Close. Adderstone wish to build numbers 1-8 Telford Close but this has not yet happened and the planning permission does not refer to them.

9. Mr Clark produced a copy of the Land Registry title for number 10 Telford Close, Saltwell Business Park, Gateshead (NE9 5BG). This records that a leasehold interest in number 10 was sold to a Mr and Mrs Robins on 31 August 2011. Mrs Robins is also the proprietor of the dance school in number 9 Telford Close.

10. The plan attached to the land registry certificate shows that number 10 is a small area on the end of a building which curves around the north west side of the old school site. The building is single storey and sits across an open area from what were formerly three single storey pavilions. The rest barn and the pavilions contain large areas of glass as they were formerly open to the air when they were used to enable children attending the school to get fresh air whilst still under a roof.

The VAT Law

11. Section 30 VATA 1994 provides that supplies of goods or services of the description specified in Schedule 8 are zero rated.

12. Group 6 of Schedule 8 deals with approved alterations to protected buildings and provides that works carried out to protected buildings can be zero rated if the building is designed to remain as or to become a dwelling.

13. Note 2 in the notes to Group 6, provides that a building is designed to remain as or to become a dwelling when 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 terms of any covenant , statutory planning consent or similar provision

The Appellants argument

14. Mr Clark produced a written skeleton argument. He argued that it has been accepted that the dwelling is capable of separate disposal and that the planning condition does not prohibit separate use.

15. Several earlier decisions are referred to. In the case of *Revenue and Customs Commissioners v Lunn* [2010] UKUT 244 (TCC) the planning condition was

"the development hereby permitted shall only be used for purposes either incidental or ancillary to the residential use of the property known as Radbrook Manor and shall not be used for commercial purposes"

16. This is an Upper Tribunal decision which disallowed zero rating but Mr Clark argued that it can be distinguished from this appeal because the planning condition refers to 'use' of a building in connection with 'use' of another building. It is a restriction on use not just on occupancy.

17. In *Wendels v HMRC* TC 00737[2010] UKFTT 476 (TC) the planning condition read

> *"the occupation of the dwelling shall be limited to a person solely or mainly employed or last employed in the cattery business or a widow or widower of such person or any resident dependants"*

18. In *Philips v HMRC* [2011] UKFTT 372 (TC) – a Scottish case -the Minute of Agreement and planning condition read

> "*The house shall be occupied and the Proprietor will ensure that the House is occupied only by persons engaged in the management or operation of the existing holiday chalet letting business operating on the subjects together with their family members or other persons normally resident with them"*

> "*That the house subject of the outline planning permission reference 04/00189/OUTRC shall be occupied only by persons engaged in the management or operation of the business trading as Wester Brae Highland Lodges together with family members"*

19. In both *Wendels* and *Philips* the Tribunals found in favour of the Appellants and allowed zero rating under Group 5 of the VAT Act which contains a similar Note 2(c) to note 2(c) for Group 6.

20. In the case of *Holden v HMRC* [2012] UKFTT 357 (TC) the Tribunal found against the tax payer. The planning restriction read as follows:

> *"The flat hereby permitted shall be occupied only in conjunction with the operation of the photographic studio from 240a Highbridge Road"*

21. Mr Clark argued that the wording in this case could be distinguished from the cases of *Wendels* and *Philips* because it used the words 'in conjunction with the operation of'. This suggested that use of the first property was linked to use of the other and separate use was therefore prohibited.

22. Mr Clark argued that these cases were developing a line of argument that distinguished 'occupancy' restrictions from 'use' restrictions and that this appeal has greater similarity to the former. He also referred to HMRC guidelines but accepted that it is the wording of the planning conditions themselves which must be considered in the context of the wording in the statute.

Arguments on behalf of HMRC

23. Mr Brooke, on behalf of HMRC, argued that the case of *Wendels* and *Philips* have been wrongly decided. They were not appealed by HMRC but in any event they are not binding on this Tribunal.

24. Mr Brooke accepted that the wording in VAT Notice 708 had changed between the edition issued in February 2008 and that issued in November 2011. He believed that the officer who raised the assessment in this case had looked at the November 2011edition, but whichever was used these notices do not have the force of law. It is the wording of the statute which must be looked at.

25. Mr Brookes argues that the case of *Holden* clearly supports the view that use and occupation of accommodation amount to the same thing and therefore a prohibition on separate occupancy is sufficient to prevent compliance with note 2(c).

Discussion and reasons

26. We consider that the wording of the planning permission in this appeal does clearly impose a prohibition involving its use.

27. There was, incorporated within the planning permission, permission for 'change of use' of the former school rest barn to 'dance school' in one part and residential in another part. In order to get that planning permission the owners of premises had to agree, that they would, at least for a period of time, adhere to the conditions imposed with that planning permission. We find that the condition in this case imposes more than just a restriction on the class of person who could occupy the residential part. If the residential part was to be occupied from the outset by anyone it had to be by someone 'solely or mainly employed or last employed in the dance school'.

28. It may be that it can be envisaged that at some time in the future circumstances will have changed and the planning authorities will agree to release the condition or allow a further 'change of use' of the premises but at the time it was imposed we find that paragraph 30 is a prohibition at least for a period of time.

29. We agree with the comment in *Holden* that occupation and use of accommodation amount to the same thing. The wording in this case may not actually use the word 'use' but we find that the restriction on occupancy effectively imposes a prohibition on use.

30. This appeal therefore fails and is dismissed.

31. HMRC agreed that the dwelling which is now the subject of this appeal does not have any connecting door through to the dance school and they agreed that there is no condition attached to the planning permission which prohibits separate disposal of the dwelling. It appears, however, that the planning permission is based on a description of the conversion which only ever envisaged a residential part of the '*rest barn'* being used as an apartment or annex involving part of the floorspace of the '*rest barn'*.

32. We were concerned that none of the plans attached to the planning permission had been supplied and considered adjourning to establish whether, at the time the planning condition was imposed, the residential part was envisaged as an annex, with a connecting door. In view, however, of the fact that the appeal fails on the question of 'separate use' we consider that there is no need to adjourn for further information on the question of whether 'separate disposal' would have been precluded if it had been envisaged that the residential part would form a separate dwelling.

33. The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, which came into force on 1 April 2009, provides that appeal to the First Tier Tribunal (FTT) lies against decisions made under the Taxes Acts. The FTT has no jurisdiction to hear an appeal against 'other decisions' by HMRC. A decision by HMRC not to award an Extra Statutory Concession comes in the category of 'other decisions'. In any event any decision concerning this would need further evidence from Brims to show that at the time the planning permission was obtained it was not envisaged that there would be a connecting door from the residential part of the rest barn to the dance school. If that were the case then Brims would have difficulty establishing that they had a legitimate expectation that their work would be zero rated.

34. 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.

BARBARA J KING
TRIBUNAL JUDGE

RELEASE DATE: 19 December 2012