TC02831

Appeal number: TC/2012/04759

Value added tax – refund under Do-It-Yourself House Builders New Houses Scheme – whether claim made within 3 months of completion – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID HEWETT **Appellant**

- and -

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

TRIBUNAL: JUDGE JILL GORT
DAVID BATTEN

Sitting in Plymouth on 12 March 2013

The Appellant appeared in person

Mr Martin Priest, Presenting Officer for HMRC, appeared on behalf of the Respondents.

DECISION

1. This is an appeal against a decision of Her Majesty's Revenue and Customs ("HMRC") originally made on 14 December 2011, which was upheld upon review by a letter dated 16 March 2012, to reject Mr Hewett's claim to a refund of Value Added Tax (VAT) under the Do-It-Yourself ("DIY") House Builders – New Houses Scheme ("The Claim").

2. The claim was for a payment of VAT in the sum of £6,121.01 and was dated 14 November 2011. It related to the construction of a new dwelling. The original decision of HMRC was to refuse the claim on the basis that it was both out of time and unlawful. Following correspondence with Mr Hewett, Mrs S Dale, the HMRC officer who had originally refused the application, by a letter dated 17 January 2012 upheld her original decision. Following Mr Hewett's request for a review of the original decision, a different HMRC officer, Ms Helen Eastwood, upheld the original refusal of a claim, but the reason for the refusal was amended to the following:

> "The building works you have carried out constitute the alteration of/extension to/enlargement of an existing building, which has not created an original dwelling; the works do not constitute the 'construction' of a building 'designed as a dwelling'. The works are not, therefore, covered by s.35 of the VAT Act 1994; in the circumstances, I regret that there is no entitlement to any refund under the VAT Refund Scheme."

She stated that she did not consider that the matter of whether or not the claim was made 'in time' was any longer relevant.

3. The grounds of appeal set out in the Notice of Appeal dated 3 April 2012 relate entirely to the question of whether or not the decision in respect of a new building at Hayne Mill Cottage ("the cottage"), the subject of the claim, was correct and Mr Hewett asked for his VAT reclaim in respect of it to be approved. He did not refer to the issue of the application being out of time.

4. In a statement of claim dated 14 June 2012 HMRC dealt only with the substantive issue in the review decision, namely the claim did not comply with s.35(1)(b) of the VAT Act 1974. By an amended statement of case dated 25 September 2012 HMRC set out their reasons for upholding the conclusion in the original decision that the claim was out of time. Although he had not referred to the matter in his original grounds of appeal, at the hearing of the appeal Mr Hewett presented the Tribunal with a statement of his own case in which he made specific reference to his claim having been refused on the grounds that it was out of time under VAT Regulation 201, and gave his reasons for contesting that decision, which we will refer to below.

5. At the conclusion of the hearing the Tribunal delayed consideration of the appeal for Mr Hewett to provide evidence which he had stated in the course of the hearing was in his possession, but had not been produced by him previously, relating to the completion of the installation of a water supply borehole to the cottage. This

evidence, together with a further statement relating to the substance of the appeal which had not been the subject of the direction of the hearing, was subsequently produced. We had allowed the Respondents seven days in which to reply if they so wished, to any further evidence that Mr Hewett might provide. In the event the Respondents' reply was received outside that time limit the matters raised therein do not affect our decision.

The Issue

6. Whilst there were two issues before us, namely whether the building works constituted a new build within the provisions of the VAT Act, and whether the application for the VAT refund was made within the time limits laid down by Regulation 201 of VAT Regulations 1995, we are only giving our reasons for deciding the latter of these issues because our conclusion that the application was not made within the relevant time limits precludes there being any possibility of the appeal succeeding.

The Legislation

7. The rules for VAT Refund Scheme are set out in the VAT Act 1994, s.35.

Section 35(1) states:

> "35(1) where –
>
> (a) a person carries out works to which the section applies,
>
> (b) his carrying out of the works is lawful and otherwise than in the course of 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.
>
> 35(1A) The works to which this section applies are -
>
> (a) the construction of a building design 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.
>
> The Notes of Group 5 of Schedule 8 to the VAT Act 1994, (construction of Buildings, etc), are imported into the VAT Refund Scheme provisions by section 35(4).
>
> Note (2) to Group 5 states:
>
> (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 terms of any covenant, statutory planning consent 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.

Note (16) to Group 5 states:

(16) For the purpose of this Group, the construction of a building does not include -

(a) the conversion, reconstruction or alteration of an existing building; or

(b) any enlargement of, 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.

Note (17) to Group 5 of Schedule 8 relates to relevant charitable purpose annexes and is, therefore, not relevant.

Note (18) to Group 5 states:

(18) A building only ceases to be an existing building when:

(a) demolition completely to ground level; or

(b) the part remaining above group level consists of no more than a single façade or where a corner site, a double façade, the retention of which is a condition or requirement of statutory planning consent or similar permission.

Regulation 201 of the Value Added Tax Regulations 1995 (SI 1995/2518) 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 relevant form for the purposes of claim] contain 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,

…"

The Evidence

8. Both parties provided bundles of documents and Mr Hewett produced photographs of the cottage as it was at various stages of its rebuild. Mr Hewett himself was the only witness.

The Facts

9. Mr Hewett, who is an engineer, purchased the cottage in December 2003. The cottage consisted of a concrete pre-fabricated construction – a 'Woolaway' Bungalow ("the bungalow") – with an extension added to the south, and also an annex to the east. Both extension and the annex had been added some time after the bungalow was originally built in the 1960s. Prior to Mr Hewett's purchase, the annex was known as 'Avonstans' and was inhabited separately from the bungalow and its extension.

10. The bungalow at the time of Mr Hewett's purchase had become unmortgageable and potentially uninhabitable because it had developed concrete cancer. Mr Hewett, after consulting an engineer and the local planning officer, decided to remove the bungalow and was advised that it should be rebuilt with an enlarged footprint. However, it was stated by the planning officer that the concrete slab on which the bungalow stood must not be removed although the addition of 1.8 metres to the east of the original footprint joining the planned new building to the old annex was permitted.

11. A planning application was received by the West Devon Borough Council on 13 January 2005. The description of the proposed development was "An extension to facilitate the removal of Woolaway Bungalow". Under "type of application" it was stated *inter alia* "full application for alterations/extension to an existing dwelling-house but not including erection of new dwelling …". On 17 February 2005 conditional planning permission was granted for the "erection of single storey extensions". Conditional approval was given on 6 April 2005 for "extension to facilitate removal of Woolaway Bungalow", the approval being subject to smoke detection being provided. A certificate of completion was granted by the Devon Building Control Partnership dated 16 July 2008.

12. On 14 November 2011 Mr Hewett submitted his application for a VAT refund on the basis that the work done was to create a new building. He gave 2 July 2008 as the certified date of completion. To the question "Is the property that you have built a new build? By new build we mean a building that has been constructed from scratch and does not incorporate any part of an existing building", Mr Hewett replied 'Yes'. Mr Hewett reclaimed £6,121.01 in VAT.

13. HMRC refused the application as stated above, but following their original refusal letter of 14 December 2011, Mr Hewett wrote on 16 January 2012 stating that the demolition and rebuild were not unlawful and were in accordance with the Approval Notice of 6 April 2005. In his final paragraph he stated:

> "A water supply is an essential in a new build and is part of the construction – does not require planning permission or has to comply with Building Regulations and at Hayne Mill Cottage this was installed

> and completed 19 October 2011. Up until the installation of the borehole and water processing equipment I had to purchase bottled water for drinking and cooking. My claim was made within 3 months on the completion of the final piece of construction and therefore fully in accordance with all the stated requirements."

14. There was considerable further correspondence between Mr Hewett and HMRC, the majority of which concerned the nature of the planning permission and the rules for the VAT Refund Scheme which are set out in s.35 of the VAT Act 1994, concluding with the review letter upholding the original refusal decision but on different grounds.

15. Mr Hewett in his evidence to the Tribunal dealt extensively with the nature of the building work done, as well as the issue of the provision of a water supply, which in his submission was essential to the work being considered completed. His evidence in relation to that aspect was that prior to the building work there was a private water supply which came from neighbouring property, Hayne Manor, which had an underground reservoir, but the water was not deemed fit to drink. Mr Hewett had resided in the bungalow as from 16 July 2008, the date of the completion certificate, but had used bottled water. He referred us to the itemised list of works in respect of which he was claiming the refund of VAT, and the last item claimed was in respect of "insulation (sic) – water. £2.863", the date of the invoice being 15 June 2011.

16. In cross-examination Mr Hewett gave the last date for completing the works as being July 2011. His evidence was that the cottage was on land owned by the owner of the adjacent Hayne Manor. In exchange for Mr Hewett agreeing to alter the deeds to the cottage, which gave him access to the land owned by Hayne Manor, so as to end his right of access, the owner of Hayne Manor agreed to pay for the putting in of a water supply to the cottage. Mr Hewett stated that he had a declaration from his neighbour that the work was completed in about September 2011. As stated above, we allowed Mr Hewett time to serve that evidence on the Tribunal after the conclusion of the hearing. However, the evidence when it was submitted, was dated 19 October 2011 and stated that the works, which consisted of the "installation and commissioning of a water supply borehole", were completed in July 2011. This conflicts with Mr Hewett's statement to the Commissioners in his letter of 16 January 2012 that the work was completed in October 2011.

The Respondents' case

17. HMRC relied on the date of the completion certificate, namely 16 July 2008, as being the relevant starting time for the 3 months within which the claim must be made, the claim not having been made until 16 November 2011. The fact that Mr Hewett had lived in the cottage from 16 July 2008 showed that it was habitable and complete before the water supply was installed. There was no reliable evidence of the claim that the water was installed subsequently. We were referred to the cases of *Brahma Kumaris World Spiritual University* (Decision No.12946) in which the Tribunal considered the issue of when a building was said to be complete. The Tribunal at paragraph 8.6 said:

> "… legislation clearly zero-rates what we will call the original construction of a building but also clearly excludes from zero-rating additions made after the original building exists. In our view it is a question of fact and of degree as to when the original building can be said to come into existence so that additions thereafter becomes standard-rated. We consider that we have to reach a decision on that issue objectively having regard to all the facts and evidence before us.
>
> 8.7 The legislation does not mention the intention of the parties in this connection and, in our view, the mere intention of a taxpayer at the outset cannot mean that all subsequent activity on a building, whenever undertaken, so long as it is in accord with the original intention, must be in the course of the construction of it. That could lead to the conclusion that additions to a building made many years after its completion should be zero-rated so long as the taxpayer could show an intention at the outset to incorporate such additions. In our view the legislation cannot be interpreted in that way.

18. In the alternative it was pointed out by Mr Priest that Mr Hewett had referred to an invoice in respect of the water installation dated 16 June 2011 but the refund claim was submitted five months after that date.

The Appellant's Case

19. Mr Hewett's claim was based on the necessity for there being a water supply to a house for it to be considered complete. We were referred to the case of *Carrophil Limited* (Decision No.10190) in which the Tribunal had said:

> "I cannot accept, as an immovable principle, the proposition that the course of construction of a building stops when the architect issues the certificate of practical completion. It may be a useful working rule that it will be displaced where for example, under the provisions of the original building contract, some structural work is carried out or some essential services are installed, in both cases after the issue of the certificate."

20. As stated above, with his later submitted document relating to the timing of the installation of the water supply Mr Hewett had also submitted further information about the timing of its installation. Whilst no direction had been given in relation to this, we have accepted it. Mr Hewett contends that a requirement by the Environment Officer was that the water supply had to be of an approved type and that Mr Hewett had *inter alia* to obtain an "environmental survey". He set out the length of time it had taken him to find a company to carry out the necessary work and to get the necessary approval, and that from the outset to the time of appointing someone to do the work took around two years and then from appointment to installation took around six months.

Reasons for decision

21. We accept Mr Hewett's argument that it is open to the Tribunal when considering the provisions of Regulation 201 to take into account work done after the issuing of the Certificate of Completion. The Regulations refer to a Certificate of

Completion 'or such other documentary evidence as is satisfactory to the Commissioners'. However, whilst the basis of the decisions in *Brahma Kumaris* and *Carrophil* referred to above, we consider that the relevant date in the present case is capable of being the date on which the water supply was finally installed, we have been presented with conflicting evidence as to when that was. There has been no documentary evidence whatsoever to support Mr Hewett's contention that the work was finally finished in October 2011, and indeed in his oral evidence before us he did not repeat that as the date when the work was concluded. The date provided in the late submitted document is July 2011, but that document is not accompanied by a VAT certificate showing what, if any, VAT Mr Hewett paid in respect of it. In fact on the basis of his evidence to us, that work was paid for by the owner of Hayne Manor and Mr Hewett would not therefore be entitled to claim a VAT refund in respect of it. In any event July 2011 is outside the prescribed three months and therefore the application which was made in November 2011 was too late.

22. Whilst we have not set out the facts or arguments relating to the issue of whether or not the works carried out by Mr Hewett constituted the construction of a building designed as a dwelling, the appeal is disposed of by our conclusion that the application was out of time. In all the circumstances the appeal is dismissed.

23. 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.

J C GORT
TRIBUNAL JUDGE

RELEASE DATE: 24 May 2013