[2016] UKFTT 0195 (TC)

TC04980

Appeal number:TC/2015/02933

VALUE ADDED TAX – DIY Housebuilders – section 35 VATA 1994 – Notes 16 and 18 Group 5 Schedule 8 VATA 1994 – demolition of building leaving a gable wall prior to rebuilding – whether construction of a building – whether construction of a new building or reconstruction and enlargement or extension of existing building – whether an existing building – whether gable wall was a façade – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANDREW DAVID REEVES **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MRS BEVERLEY TANNER

Sitting in public in Manchester on 17 November 2015

The Appellant appeared in person together with his wife Mrs Cheryl Reeves

Mrs Lisa Fletcher of HM Revenue & Customs appeared for the Respondents

DECISION

Background

1. This is an appeal against a decision of HMRC refusing a claim for repayment of VAT made pursuant to the DIY Housebuilders Scheme. It relates to work done by the Appellant on premises known as Woodcroft, Bangor on Dee, Wrexham ("Woodcroft"). Mr Reeves has claimed a VAT refund of £12,543.78.

2. We can summarise the grounds of appeal as follows:

(1) The Appellant says that he was misled by HMRC's guidance and in correspondence.

(2) Woodcroft was effectively rebuilt and as a new build the works satisfy the requirements for repayment of VAT.

3. Various other issues arose during the course of the hearing and we discuss these in detail below. We first set out the relevant legislation and then our findings of fact. We then consider Mr Reeves' grounds of appeal and the issues generally.

Legislation

4. Section 35 Value Added Tax Act 1994 ("VATA 1994") makes provision in certain circumstances for a refund of VAT incurred by persons constructing a building designed as a dwelling. It is generally known as the DIY Housebuilders' Scheme. The works carried out must be lawful and otherwise than in the course of a business. Where various conditions are satisfied the VAT chargeable on goods supplied and used for the purposes of the works shall be refunded on a claim being made to HMRC.

5. Section 35(1A) provides that the section applies to certain types of works including "*the construction of a building designed as a dwelling…*". Section 35(4) provides that the notes to Group 5 Schedule 8 VATA 1994 shall apply for construing section 35. We are concerned with Notes 16 and 18 which give specific meaning to the phrase "*construction of a building*".

6. Note 16 in so far as relevant for present purposes provides as follows:

" *(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, or extension to, an existing building except to the extent the enlargement or extension creates an additional dwelling or dwellings …"

7. Note 18 in so far as relevant for present purposes provides as follows:

> " *(18) A building only ceases to be an existing building when:*
>
> *(a) demolished completely to ground level; or*
>
> *(b) the part remaining above ground level consists of no more than a single façade … the retention of which is a condition or requirement of statutory planning consent or similar permission.*"

8. In broad terms the effect of these provisions is that a DIY builder will generally have no right to a refund of VAT if he converts, reconstructs or alters an existing building. Where work is done to an existing building the builder will only be entitled to a refund of VAT where the existing building is demolished completely to the ground or demolished save for a single façade the retention of which is required by a planning or similar permission.

Findings of Fact

9. We heard evidence from the Appellant's wife, Mrs Cheryl Reeves. There was no real dispute in relation to her evidence and based on that evidence we make the following findings of fact.

10. Mr and Mrs Reeves purchased Woodcroft in May 2011. It was a 2 bedroom bungalow which they intended to alter and extend to provide a 4 or 5 bedroom home for themselves. In January 2012 they obtained planning permission for "extension and alteration to dwelling". The plans by reference to which planning permission was granted involved retaining three exterior walls of the existing bungalow, a small part of one gable end and an interior wall which ran lengthways through the middle of the bungalow. The other part of that gable end was to be removed and that was where the bungalow was to be extended.

11. Woodcroft is in a rural setting. The front of the property, including its front door, is several meters from a lane. It is otherwise surrounded by countryside.

12. During the course of the works, when the part of the gable end was removed some parts of the adjoining walls collapsed and some moved off the damp proof membrane. The architect's advice was that what remained was not structurally sound. On the basis of the advice received Mr and Mrs Reeves decided to demolish the remaining exterior walls save for the other gable end which was sound and did not need to be demolished. We shall refer to that as the "Gable Wall".

13. The local planning officer and an enforcement officer visited the site. At the time of that visit Mr and Mrs Reeves had intended to retain the existing interior wall, although that had never been a requirement of the planning permission. Lengthy negotiations with the planning authority followed and eventually the planning authority were content for the work proposed by Mr and Mrs Reeves to proceed without the need for any amendment to the planning permission. That was on

condition that the exterior walls that were demolished were re-built on the same foundations. Mrs Reeves told us that as far as the planning authority were concerned this was a "new build" even though the Gable Wall was being retained.

14. Treating the work as a new build had implications for building regulations. As the build continued, Mr and Mrs Reeves realised that the building regulations would require removal of the interior wall as well. The layout of the bungalow required a 900mm gap for wheelchair access in what was to be the hallway. The insulated plasterboard which they were required to use and the fact that by choosing to install a wider staircase than originally intended meant that the hallway would only have been 700mm if the existing wall was retained. In the circumstances they demolished the existing interior wall and moved it 200mm to the side. Demolition of the interior wall did not take place until the exterior walls had been built because it provided structural support for the Gable Wall.

15. The circumstances described by Mrs Reeves were confirmed in a letter from the planning authority dated 11 June 2013. The planning authority seemed to have been under the impression that the interior wall had also been retained but as it was not a condition of the planning consent nothing turns on that.

16. Mr and Mrs Reeves moved into Woodcroft in September 2013, although at that stage they still had a sunroom and garage to build. The certified date of completion was 3 November 2014.

17. On 21 October 2013 and on the advice of a planning consultant Mr Reeves wrote to HMRC for advice about submitting an application to reclaim VAT. He set out the circumstances we have described above, stating that originally they had intended to demolish 50-60% of the property but that due to unforeseen circumstances they had demolished over 90% of the property. What had been left was only the Gable Wall.

18. HMRC replied on 14 November 2013. That response broadly set out the conditions to be satisfied in any claim and referred Mr Reeves to VAT Form 431NB which is the claim form and notes directed towards claims under section 35 in relation to new homes "constructed from scratch".

19. Mr Reeves submitted his claim for a refund dated 14 January 2015, together with a covering letter dated 7 January 2015. It was received by HMRC on 22 January 2015.

20. On 4 February 2015 HMRC refused the claim for a refund. The officer stated that the claim would have been accepted if only a single façade had been retained. However, because a gable wall and the interior wall had been retained it was not considered to be a "new build". The description of a "new build" is not taken from the statutory provisions which govern such claims. We take it as being shorthand to describe works which fall within the words used in the statute, namely the construction of a building, taking into account the exclusions in Note 16.

21. Mr Reeves asked for a review of that decision by letter dated 5 February 2015. He understood that the claim had been rejected because the interior wall had been retained. He explained the circumstances surrounding the interior wall and how it had been demolished during the build.

22. The review was contained in a letter to Mr Reeves dated 30 March 2015. It upheld the decision to refuse the claim on the basis that there was no condition or requirement that the Gable Wall be retained. Further, the Gable Wall was not a "façade" for the purposes of Note 18 and therefore the works must be treated as alterations to an existing building. The review officer stated that a façade "*is more than a wall that has remained standing on a construction site, it is a street facing frontage that has character or significance to the area that would lead to its retention*".

Discussion

23. We can deal relatively briefly with the first ground of appeal which alleges a misdirection in HMRC's guidance and in their letter dated 4 February 2015. This Tribunal has no jurisdiction in relation to allegations of misdirection. We can only apply the law to the facts of the case as we find them to be. Having said that, we note that even if Mr and Mrs Reeves had been misled in some way by the letter dated 4 February 2015 or HMRC's guidance to which they were referred on 14 November 2013, it only encouraged Mr Reeves to make the claim for repayment and to challenge HMRC's refusal of that claim. The building work was substantially finished by September 2013 when Mr and Mrs Reeves moved into Woodcroft. Any misdirection did not affect the building work, and it is by reference to the building work and the associated planning consents that the entitlement to reclaim VAT must be judged.

24. If the work had been carried out as originally intended then it is clear that it would not have satisfied the requirements for a reclaim of VAT under section 35. The works would have been the alteration of an existing building and would therefore not have amounted to the construction of a building because of the effect of Note 16(a). However we must take into account the actual works carried out and the planning consents and agreements that were in place.

25. The review decision refused the claim on two grounds. Firstly because the review officer considered there was no planning condition or other agreement with the planning authority to retain the Gable Wall. Secondly because the Gable Wall was not a façade.

26. We do not agree with the review officer that there was no planning condition or other agreement with the planning authority requiring retention of the Gable Wall. The original planning consent was by reference to the plans submitted with the application. Those plans showed three walls, including the Gable Wall which was eventually incorporated into the building works, as being retained. Retention of the Gable Wall was therefore required by the original planning consent. The subsequent agreement with the planning authority had the effect that they would not require a

new planning consent to permit demolition of the other walls which Mr and Mrs Reeves had originally intended to retain. Retention of the Gable Wall was not affected by this agreement because it was required by the original consent.

27. Mr and Mrs Reeves relied on a decision of the Upper Tribunal in *Commissioners for HM Revenue & Customs v Astral Construction Limited [2015] UKUT 0021 (TCC)*. That case concerned the development of a nursing home on a site comprising a redundant church. All buildings on the site were demolished apart from the church around which two new wings were built. The original church building formed the main entrance and reception area of the nursing home. The First-tier Tribunal held that the work could not properly be viewed as a conversion, enlargement or extension to the church. It thus fell outside Note 16(a) and (b) and therefore qualified for zero rating.

28. HMRC appealed and before the Upper Tribunal HMRC contended amongst other arguments that the works did not amount to the construction of a building, and even if they did the F-tT had applied the wrong test in determining whether the completed development was an enlargement or extension of the church within Note 16(b).

29. In the present appeal HMRC have not suggested that the work done on Woodcroft would not, apart from Note 16, amount to the construction of a building. We do not therefore need to refer to the Upper Tribunal's consideration of that issue in Astral Construction.

30. The Upper Tribunal went on to consider whether the works fell within Note 16(b) as an enlargement or extension to an existing building. It held that the question of whether works were an enlargement or extension was a question of fact and degree. The F-tT had been entitled to conclude that it was not because the size, shape, function and character of the work was so different from the existing building. That was a finding of fact made by the F-tT on the evidence before it.

31. We are also concerned in this appeal with a question of fact. Did the works amount to the reconstruction or alteration of an existing building within Note 16(a) or the enlargement or extension of an existing building within Note 16(b). To answer that question we must consider whether there was an existing building following the demolition works and at the time when the construction of Woodcroft was carried out. That in turn depends on Note 18 which has the effect that what we might call the "original Woodcroft" will be treated as an existing building unless it was demolished completely to ground level or where the only part remaining above ground level is a single façade retained as a condition of the planning consent or other agreement.

32. The original Woodcroft was not demolished completely to the ground, therefore the real issue, which did not arise in Astral Construction, is whether following demolition of the original Woodcroft, the Gable Wall was a façade as that term is to be construed for the purposes of Note 18(b). If it was a façade, then the original Woodcroft building ceased to exist and Note 16 could not exclude Mr Reeves' claim. If the Gable Wall was not a façade then the original Woodcroft did not cease to exist

and the works plainly amounted to reconstruction, alteration, and enlargement of, and/or an extension to the existing building. We say that because the planning permission was couched in terms of "extension and alteration" of Woodcroft. More significantly the works involved reinstating the two walls which were demolished on the same foundations. The works resulted in a building which structurally has the appearance of the original Woodcroft but with an extension or enlargement on the other gable end.

33. Since the hearing of this appeal the Upper Tribunal has released its decision in *Boxmoor Construction Limited v Commissioners for HM Revenue & Customs [2016] UKUT 0091 (TCC)*. The facts of Boxmoor were not dissimilar to the present appeal. A house had not been completely demolished to ground level. A small portion of what was accepted was the façade including part of a projecting bay window was retained. The issues for the Upper Tribunal were:

(1) Whether the F-tT had been entitled to conclude that retention of part of the façade was not a condition of the planning consent.

(2) If so, whether what was retained should be regarded as de minimis, that is so small as to be insignificant.

(3) Even if the original house had not ceased to exist, whether the construction works were the conversion, reconstruction, alteration, enlargement or extension of the previous house and therefore excluded from zero rating.

34. For the reasons given above we are satisfied that a planning consent or similar permission did require retention of the Gable Wall. There is nothing in Boxmoor that makes us think otherwise. On the present facts there was much more than the "understanding" between the architect and the planning authorities in Boxmoor. The plans showed the Gable Wall being retained.

35. The Upper Tribunal in Boxmoor described the de minimis principle which is to the effect that "the law is not concerned with very small things". The Upper Tribunal held that the principle could apply to the analysis of facts in the context of Note 18 but held that the projecting bay was not de minimis. Whilst the point was not argued before us, at least in these terms, we do not consider that the gable wall in the present appeal could be regarded as de minimis. It was an exterior whole wall of the original Woodcroft.

36. In Boxmoor the Upper Tribunal rejected on the facts an argument that the works were the construction of a ***new*** building. Mr and Mrs Reeves also argued before us that the works were the construction of a new building, and not the conversion, reconstruction, alteration, enlargement or extension of the original Woodcroft. For the reasons give above we do not accept that argument. The result was plainly a partial reconstruction together with an enlargement or extension of the original Woodcroft.

37. Finally we turn to a question not previously considered in any of the authorities. Namely what constitutes a façade for the purposes of Note 18?

38. The review officer described a façade as "*a street facing frontage that has character or significance to the area that would lead to its retention*". The notes to Form 431NB describe a façade as "*any face of a building given special architectural treatment*".

39. Mrs Fletcher for the Respondents relied on the definition of a façade given by the review officer. She also submitted that because the refund scheme was effectively an exemption from VAT we should give it a narrow construction in accordance with established principles.

40. We accept Mrs Fletcher's submission that Note 16 must be given a strict interpretation because it has the effect of exempting certain transactions from VAT. However the requirement for a strict interpretation does not mean that the provisions must be interpreted restrictively (See *Astral Construction* at [37]). In other words, if there is some doubt whether a fair interpretation of the exemption covers the transaction in question then the claim to the exemption must be rejected. But it is not necessary to reject a claim which does come within a fair interpretation of the exemption just because there is another, more restricted, meaning.

41. We are not sure from where the review officer took her definition of a façade. The Oxford English Dictionary definition is:

> " *The face or front of a building towards a street or other open place,* esp. *the principal front. Also* attrib. *or as adj., of an architectural design concerned with elegance, etc., in the façade of a building alone.*"

42. The ordinary meaning is therefore the face or front of a building and that is the definition we accept for present purposes. It is not simply a wall of a building. It is clear to us therefore that the Gable Wall of Woodcroft was not a façade. It was not the front of the building and did not face towards the lane. We do not need to decide whether a façade must have some architectural character or significance or whether a gable wall with architectural character or significance might be a façade.

43. For all the reasons given above we are satisfied that Woodcroft did not cease to be an existing building and that the works undertaken were the reconstruction together with the enlargement or extension of that existing building. They therefore fall within Note 16 and do not amount to the construction of a building for the purposes of section 35. HMRC were therefore entitled to refuse the claim to repayment of VAT.

Conclusion

44. In all the circumstances we must dismiss the appeal.

45. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 23 MARCH 2016