



[2020] UKFTT 0065 (TC)

TC07561

VAT – DIY Housebuilders Scheme– construction of new building – demolition of existing building – planning permission for alternation not for new build – completion certificate – whether within the provisions of VATA 1994 Sch 8 Group 5 – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/02108

BETWEEN

DAVID STEWART

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at George House, Edinburgh on Monday 27 January 2020

Having heard Mr David Stewart, the Appellant and his wife in support

Nikki Griffin, Presenting Officer, Officer of HMRC for the Respondents

DECISION

INTRODUCTION

1. The matter under appeal is the Respondents (“HMRC’s”) decision to reject the Appellant’s Value Added Tax (“VAT”) refund for DIY housebuilders claim on the basis that it does not meet the criteria of “designed as dwelling” for VAT purposes.
2. It is agreed that this is an appealable matter under Section 83(1)(g) of the Value Added Tax Act 1994 (“VATA”).

Background facts

3. The Appellant’s wife had suffered a serious stroke and it was decided to apply for planning permission to convert an old workshop in the garden to a dwellinghouse that was suitable for her to manage with her disabilities.
4. Plans were drawn up and on 15 June 2016 planning permission was granted by Fife Council. That planning permission was described as “Alterations and extensions including change of use from vehicle workshop (Class 5) to dwellinghouse (Class 9)”. The plan was to demolish all but two walls of the existing building but retain the foundations.
5. The Appellant employed the services of an engineer who inspected the old workshop and checked the existing foundations but advised that the building was unsound and should be demolished in its entirety.
6. New drawings were prepared and submitted to Building Control at Fife Council. Those were authorised, approved and stamped by them. The drawings for the house, as originally designed, were unchanged.
7. The old building was demolished and then rebuilt on new foundations according to the plans. The two walls that it had been intended that the Appellant would retain were rebuilt to the specification of the old walls.
8. A Completion of Development Certificate was ultimately granted on 21 August 2018.
9. On 30 August 2018, the HMRC VAT for DIY housebuilders claim form for a new build (431NB) was received by HMRC together with the invoice list.
10. On 19 September 2018, HMRC requested further information and documents in order to process the claim and on 28 September 2018, HMRC received the Appellant’s letter outlining the sequence of events in relation to the Appellant’s new build.
11. Correspondence ensued. The Enforcement Officer from Fife Council was approached by the Appellant and he visited the site and following that visit issued a further completion certificate covering the construction of the foundations and building of the two walls. On 20 November 2018 he sent to the Appellant an email in the following terms:

“... I am aware that you advised me on applying for the completion of development certificate that the alteration of the vehicle workshop could not be carried out, as the building was unable to be retained due to the structural suitability and required to be completely demolished prior to development. Whilst a new application should have been sought it was considered that the built development was for all intentions (*sic*) purposes as per the previously approved drawings albeit now a new dwelling rather than an alteration. It was therefore considered acceptable to issue the completion certificate I trust this clarifies the councils (*sic*) position.”

12. The decision made by HMRC's National DIY Unit on 16 November 2018 was reconsidered in the light of the email from Fife Council and on 5 December 2018 it was upheld. The Appellant requested a review and on 12 March 2019 the Review Conclusion letter was issued.

13. The Appellant appealed to the Tribunal on 1 April 2019.

The Appellant's arguments

14. The Appellant argues that he had claimed on the basis that the construction had been a new build and HMRC's guidance indicated that VAT on materials is reclaimable for a new build as is VAT on materials for conversion of a building to form a dwellinghouse under the DIY scheme.

15. He argues that HMCR misinterpret the rules on VAT.

HMRC's argument

16. Essentially HMRC simply argue that in order for a valid DIY housebuilders claim to be refunded, the applicant must have constructed a dwelling in line with the planning permission extant at the time of completion, as outlined at Note 2, Group 5, Schedule 8 of VATA. The Appellant did not have planning permission to construct a new dwelling and therefore he did not meet the criteria for constructing a dwelling for VAT purposes.

17. Section 35(1) VATA allows a claim to be made in relation to VAT incurred in works where they are not being carried out in the course or furtherance of a business and the construction is lawful. Section 35(1A) VATA specifies that the works for which a claim can be made include the construction of a dwelling and Section 35(1B) specifies that goods can only be claimed for if they are building materials and are incorporated into the building or its site.

18. Regulation 201 of the Value Added Tax Regulations 1995 ("the Regulations") sets out the requirements for making a claim for a refund and the relevant portion reads:-

"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 the claim containing 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 had been paid which have been incorporated into the building or its site,
...
 - (iv) documentary evidence that planning permission for the building had been granted, and
 - (v) a certificate signed by a quantity surveyor or architect that the goods shown on the claim were, or, in his judgement, were likely to have been incorporated into the building or its site."

19. Note 2, Group 5, Schedule 8 of VATA sets out the conditions which are required in order for a building to be designed as a dwelling:-

“(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.”

Discussion

20. It is not in dispute that the workshop was completely demolished and a new building was constructed.

21. Planning permission was never sought or obtained in relation to the new build.

22. Although Fife Council did issue the Completion Certificate, they make it clear that a new planning permission application should have been submitted.

23. Whilst I do understand that the building that was constructed was exactly as specified in the original application for planning permission, nevertheless the foundations and two walls were new and the appropriate form of planning permission was never obtained.

24. The original building had ceased to exist so the planning permission that had been obtained for alterations and extensions could not be valid. Accordingly, in the absence of statutory planning consent to build a new dwelling the construction was not lawful in terms of Section 35(1) VATA. Furthermore the construction was not carried out in terms of the planning permission that had been granted so there was no compliance with Note 2, Group 5 Schedule 8 VATA.

25. I have every sympathy with the Appellant but I must apply the law.

26. I can understand why the Appellant might think that this is unfair. Unfortunately for him I had no discretion. In *HMRC v Hok Limited*¹ the Upper Tribunal looked at the question of whether the Tribunal has the jurisdiction to consider whether the law (and therefore its impact) is fair and decided that it did not in the following paragraphs:-

“56. Once it is accepted, as for the reasons we have given it must be, that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does not matter whether the Tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither course is within its jurisdiction. As we explain at paras 36 and 43 above, the Act gave a restricted judicial review function to the Upper Tribunal, but limited the First-tier Tribunal’s jurisdiction to those functions conferred on it by statute. It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC’s conduct.

¹ [2012] UKUT 363 (TCC)

57. If that conclusion leaves ‘sound principles of the common law languishing outside the Tribunal room door’, as the judge rather colourfully put it, the remedy is not for the Tribunal to arrogate to itself a jurisdiction which Parliament has chosen not to confer on it. Parliament must be taken to have known, when passing the 2007 Act, of the difference between statutory, common law and judicial review jurisdictions. The clear inference is that it intended to leave supervision of the conduct of HMRC and similar public bodies where it was, that is in the High Court, save to the limited extent it was conferred on this Tribunal.

58. It follows that in purporting to discharge the penalties on the ground that their imposition was unfair the Tribunal was acting in excess of jurisdiction, and its decision must be quashed. The appeal is allowed and we determine that all five of the penalties are due.”

27. For all these reasons the appeal must fail.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

28. 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.

**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 03 FEBRUARY 2020