



TC07650

VAT – DIY housebuilders scheme – Reconstruction of derelict property – Planning permission subject to restrictions – Whether such restrictions precluded VAT refund – Whether property had been used for residential purposes in 10 years immediately preceding commencement of works – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/03676

BETWEEN

MARGARET BAILEY

Mrs Bailey

-and-

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

Respondents

TRIBUNAL: JUDGE KIM SUKUL

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 25 February 2020

Mrs Bailey did not appear and was not represented

Olivia Donovan, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION

1. Mrs Margaret Bailey appeals against a decision of HM Revenue and Customs dated 21 February 2019 and upheld following a review on 30 April 2019, to deny her claim for a VAT refund of £19,229.49 that she had made on 6 December 2019 under the DIY housebuilders scheme in respect of a property known as “Common Farm” in North Lopham, Norfolk (the “Property”).

2. Having been notified of the hearing by the Tribunal on 19 January 2020, Mrs Bailey, in an email to the Tribunal, explained that she would not attend the hearing but had provided a statement “as part of the legal papers” to be taken into account. I have read this statement and have carefully considered its contents. In the circumstances, as I was satisfied that Mrs Bailey had been notified of the hearing, and as I considered it was in the interests of justice to do so, I proceeded with the hearing in Mrs Bailey’s absence in accordance with Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

RELEVANT LEGISLATION

3. Unless otherwise stated all subsequent statutory references are to provisions of the Value Added Tax Act 1994.

4. Section 35 provides:

Refund of VAT to persons constructing certain buildings

(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 this section applies are—

- (a) the construction of a building designed 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.

(1B) For the purposes of this section goods shall be treated as used for the purposes of works to which this section applies by the person carrying out the works in so far only as they are building materials which, in the course of the works, are incorporated in the building in question or its site.

(1C) Where—

- (a) a person (“the relevant person”) carries out a residential conversion by arranging for any of the work of the conversion to be done by another (“a contractor”),
- (b) the relevant person's carrying out of the conversion is lawful and otherwise than in the course or furtherance of any business,

- (c) the contractor is not acting as an architect, surveyor or consultant or in a supervisory capacity, and
- (d) VAT is chargeable on services consisting in the work done by the contractor,

the Commissioners shall, on a claim made in that behalf, refund to the relevant person the amount of VAT so chargeable.

(1D) For the purposes of this section works constitute a residential conversion to the extent that they consist in the conversion of a non-residential building, or a non-residential part of a building, into—

- (a) a building designed as a dwelling or a number of dwellings;
 - (b) a building intended for use solely for a relevant residential purpose;
- or
- (c) anything which would fall within paragraph (a) or (b) above if different parts of a building were treated as separate buildings.]¹

(2) The Commissioners shall not be required to entertain a claim for a refund of VAT under this section unless the claim—

- (a) is made within such time and in such form and manner, and
- (b) contains such information, and
- (c) is accompanied by such documents, whether by way of evidence or otherwise,

as may be specified by regulations or by the Commissioners in accordance with regulations.

(3) This section shall have effect—

- (a) as if the reference in subsection (1) above to the VAT chargeable on the supply of any goods included a reference to VAT chargeable on the supply in accordance with the law of another member State; and
- (b) in relation to VAT chargeable in accordance with the law of another member State, as if references to refunding VAT to any person were references to paying that person an amount equal to the VAT chargeable in accordance with the law of that member State;

and the provisions of this Act and of any other enactment or subordinate legislation (whenever passed or made) so far as they relate to a refund under this section shall be construed accordingly.

(4) The notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group but this is subject to subsection (4A) below.

(4A) The meaning of “non-residential” given by Note (7A) of Group 5 of Schedule 8 (and not that given by Note (7) of that Group) applies for the purposes of this section but as if—

- (a) references in that Note to item 3 of that Group were references to this section, and
- (b) paragraph (b)(iii) of that Note were omitted.]²

(5) The power of the Treasury by order under section 30 to vary Schedule 8 shall include—

- (a) power to apply any variation made by the order for the purposes of this section; and
- (b) power to make such consequential modifications of this section as they may think fit.

5. Given the reference to it in s 35(4) and (4A) above, it is also necessary to set out the notes to Group 5 of Schedule 8 that are applicable to the present case:

Group 5 Construction of buildings, etc

...

NOTES

(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 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.

...

(7A) For the purposes of item 3, and for the purposes of these Notes so far as having effect for the purposes of item 3, a building or part of a building is “non-residential” if—

- (a) it is neither designed, nor adapted, for use—
 - (i) as a dwelling or number of dwellings, or
 - (ii) for a relevant residential purpose; or
- (b) it is designed, or adapted, for such use but—
 - (i) it was constructed more than 10 years before the commencement of the works of conversion, and
 - (ii) no part of it has, in the period of 10 years immediately preceding the commencement of those works, been used as a dwelling or for a relevant residential purpose, and
 - (iii) no part of it is being so used.

...

(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; or
- (c) subject to Note (17) below, the construction of an annexe to an existing building.

6. A claim for a refund of VAT must be made in accordance with regulation 201 of the Value Added Tax Regulations 1995 (“VAT Regulations”) which, provides that a “claimant shall make his claim in respect of a relevant building by 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 other specified documents.

FACTS

7. On 6 December 2018, in accordance with regulation 201 of the VAT Regulations, Mrs Bailey and her husband submitted a completed “relevant form” to HMRC to claim a VAT refund on cost of the works undertaken to the Property to transform it from a derelict house to their home. The letter enclosing the relevant form explained that the Property was:

“... an old cottage deleted from the council tax register because I had been uninhabited for more than 10 years and I enclose the confirmation of it being deleted with an effective date of 1 April 1993.”

Also enclosed with that letter were:

- (1) a list of invoices;
- (2) a Completion Certificate for the Property from Breckland Council dated 4 December 2018 which records that the work carried out to the Property consisted of “one and two storey extensions, internal alterations, convert outbuilding to accommodation and new carport”;
- (3) plans for the Property; and
- (4) a copy of the planning permission dated 23 December 2014 which was granted subject to several conditions including that the Property “shall not be occupied at any time other than for purposes ancillary to the residential use of the dwelling known as Common Farm”.

8. HMRC confirmed receipt of the DIY Claim by letter of 18 December 2018 to Mr and Mrs Bailey. In that letter HMRC also requested further information and that they be provided with evidence that the Property had been empty/unoccupied for “at least 10 years immediately before work started and that this information:

“... needs to be obtained from an Empty Property Officer or Council Tax data from your Local Authority. We cannot accept the ‘Notice of Agreement’ from the Valuation Tribunal as it only confirms that the property was added to the list in April 1993 and deleted on 9th May 2014.”

The letter continued by explaining that the claim for a VAT refund could not be processed without this information which had to be provided in writing.

9. It would appear from the letter sent to Mr and Mrs Bailey by HMRC on 25 January 2019 that some of the information sought had been provided. However, as that letter explained:

“Under the VAT DIY scheme, the property is to have been empty for 10 years prior to the works commencing. The evidence you have provided does not cover the entire period.

Therefore I would be grateful if you could forward the following at earliest convenience:

- Please provide evidence that the property was empty prior to 2004

If your property is not every empty prior to 2004 or this cannot be evidenced then your claim may be invalid.”

10. Mr and Mrs Bailey replied to HMRC’s letter on 29 January 2019:

“Further to your letter of 25th January 2019, we are aware of the rules regarding the need for the property to have been empty for 10 years prior to commencement of the works and we are satisfied that we have complied with this, and not by design.

I can confirm that Council Tax was not paid after 1 April 2006 as previously advised by the Council. However, the property was empty for some time before this as the old lady who owned it was in a home hence the deterioration in the property. (I am just trying to confirm to you that the property was not habitable hence it being removed from the valuation list).

We gained planning permission (full discharge of conditions) in April 2015 – see attached confirmation of this. We then needed to plan the detailed works and make the site safe. I attach some photographic evidence of the condition of the property at this time to illustrate that we needed to expand some funds on the site to simply make it safe. We spent some money on a new build garage in order to provide basic facilities and enable storage of some initial materials while we planned the detailed design of the actual property to accommodate the findings and requirements of the architectural report that had been required for planning.

No actual works took place until well after April 2016

I hope you will consider our claim favourably as we undertook the works on the basis of a DIY refund.”

11. On 21 February 2019 HMRC rejected Mr and Mrs Bailey’s claim on the basis that it did not comply with the criteria to allow repayment under the scheme. In particular, the planning permission specifically limited occupation of the Property, “at any time other than for purposes ancillary to the residential use of the dwelling known as Common Farm”, which HMRC state in their letter, “makes the claim ineligible.” The letter explains that:

“The above quoted condition prohibits that separate [use] of the dwelling from the residential use of the dwelling known as Common Farm [address]. Therefore Note 2(c) [of Group 5 of Schedule 8] has not been met. Unfortunately this does mean that your house does not qualify for a refund under the DIY Scheme

Even if there wasn't a restriction to the occupation you have been unable to provide a 10 year evidence ... this means your claim does not meet the criteria for a refund.”

12. On 13th March 2019, a review of HMRC’s decision was requested by Mr and Mrs Bailey. HMRC conducted a statutory review as requested by Mr and Mrs Bailey. The original decision was upheld. By a letter dated 30th April 2019, HMRC notified Mr and Mrs Bailey of the outcome of the review. In addition to rejecting the claim for the original reasons, the Officer conducting the review also stated that the claim would have been rejected on the basis that Mr and Mrs Bailey had “built an extension” which is specifically excluded from being a dwelling by Note 16 of Group 5 of Schedule 8.

13. On 20 May 2019, Mrs Bailey brought this appeal before the Tribunal.

DISCUSSION

14. There are three issues in this case:

- (1) Whether or not the building is “designed as a dwelling” in accordance with Note 2 of Group 5 of Schedule 8?
- (2) Whether or not the building is “non-residential” within the meaning of Note 7A of Group 5 of Schedule 8?

(3) Whether or not the works amount to “the construction of a building” within the meaning of Note 16 of Group 5 of Schedule 8?

Before I consider these issues, I remind myself that it is for Mrs Bailey to show that her claim for a VAT refund qualifies under s 35.

DESIGNED AS A DWELLING

15. Note 2(c) provides, “the separate use, or disposal of the dwelling is not prohibited by the terms of any covenant, statutory planning consent or similar provision”.

16. HMRC contends that the application does not satisfy the statutory criteria by reason of the fact that the planning permission for the rear extension specifically limits the use of the building to ‘purposes ancillary to the residential use of the dwelling known as Common Farm’. HMRC takes this to mean that the extension can only be used as accommodation for farm workers or other staff, family or friend working on the farm.

17. Mrs Bailey states that “this is an incorrect assumption - The property is not a farm. There is no agricultural restriction and there are certainly no workers. The address suggests it is a farm but that is not the case. Only my husband and I live here and the planning permission applied for and granted was for one large dwelling extending the footprint of the existing building”. She goes on to state that “The planning permission does not prevent separate use or disposal (because there is no separate accommodation) - it simply requires us to seek new permission should we wish to create separate accommodation”.

18. The planning consent expressly prohibits the separate use of the extension for residential purposes, as that would not be ancillary to the residential use of Common Farm. There is however no restriction on the separate use or disposal of the entire building, which is the subject of Mrs Bailey’s claim.

19. It follows that Mrs Bailey’s VAT claim does not fail in respect of Note 2(c).

NON-RESIDENTIAL

20. Note 7A requires the building to have been non-residential. Note 7A(b)(ii) specifically requires that no part of the building has been used as a dwelling in the period of 10 years immediately preceding the commencement of the works.

21. Mrs Bailey’s statement to the Tribunal states, “Again, we have tried to provide as much information as possible. The DIY refund scheme asks applicants to support the 10 year unoccupied status with evidence such as “electoral roll data, council tax, utility bills or confirmation from the empty homes officer” and as per the guidance “HMRC may accept a best estimate and call for other supporting evidence”. Based on the derelict nature of the property and the fact the previous owner is dead, we were only able to provide council tax information which indicated council tax was paid for the 2005/6 year even though we know the old lady was already in care. No council tax was paid after April 06. The guidance states that we need to evidence that “no-one has lived in the property 10 years prior to commencement of the works”. We know that the old lady was in hospital/care home for some time prior to 2006 and we did not commence works until summer/autumn 2016 so we are satisfied that it was empty for more than 10 years the invoices submitted dated prior to 2016 were on the new build garage to ensure that we could make the site safe and provide minimal facilities to undertake the conversion... The definition of commencement of works is to be a contention and because we have undertaken the works ourselves and are unable to prove a contract start date for example, the balance of probabilities appears to fall against us. We have however been transparent providing as much information as we can for completeness undertook the conversion in good faith or receiving a refund of VAT and it appears HMRC will not accept a best estimate...”.

22. The evidential weight of Mrs Bailey's statement is limited by the fact that she did not give evidence under oath before the Tribunal, and her evidence could not be subjected to cross-examination.

23. Mrs Bailey did provide documentary evidence to show that the property had been removed from the valuation list (effective from 2014) and photographs of the property in a dilapidated condition, in support of her assertion that the property was derelict.

24. However, there is an absence of evidence, such as electoral roll data, council tax records or utility information, to support a finding that the property was not used as a dwelling during the entire the period of 10 years immediately preceding the commencement of the works.

25. By reason of these factual matters, Mrs Bailey's appeal fails on this point.

THE CONSTRUCTION OF A BUILDING

26. Note 16 provides that the construction of a building does not include the conversion, reconstruction or alteration of an existing building or any enlargement of, or extension to, an existing building except to the extent the enlargement or extension creates an additional dwelling.

27. Mrs Bailey states, "The reality is that the outbuilding permission was to link an outside toilet/store to what was the previous house via a new "hallway" with a back door. The so-called link is now the back door and the outbuildings are now part of the main dwelling".

28. Further, the documentary evidence provided by Mrs Bailey includes an email from Ms Rebecca Collins, Head of Major Projects at Breckland Council. Ms Collins states, "the permission is for an 'extension' and conversion of outbuilding to (ancillary as defined by the condition) accommodation and therefore could not be used as separate accommodation without a further planning permission".

29. The architect's plans also confirm that the works included an extension with direct internal access between the existing dwelling and the new building and Mrs Bailey states, "You can see the plans show the property is one dwelling".

30. Finally, the Completion Certificate records that the work carried out consisted of "one and two storey extensions, internal alterations, convert outbuilding to accommodation and new carport"

31. Mrs Bailey's statement to the Tribunal, Ms Collins' email, the planning documents, the architect's plans and the Completion Certificate are all consistent with the fact that the works amounted to the conversion, reconstruction or alteration of an existing building and an extension of an existing building which did not create an additional dwelling.

32. On the basis of my reading of these documents, I find that the works did not amount to the construction of a building in accordance with Note 16, in consequence of which Mrs Bailey's appeal fails on this point.

CONCLUSION

33. It is evident to me from what Mrs Bailey has put forward in support of her appeal, that she sincerely believes her claim qualifies for a refund of her VAT expenses. It is similarly evident to me that the facts I have found confirm my conclusion that her appeal fails.

34. For the reasons I have set out above, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

35. 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.

**KIM SUKUL
TRIBUNAL JUDGE**

RELEASE DATE: 25 MARCH 2020