[2016] UKFTT 0783 (TC)

TC05510

Appeal number: TC/2016/ 01191

VAT – DIY housebuilders' scheme - VAT charged at 17.5% - VAT refunded at 5% - correct level of refund –unjust enrichment – HELD – VAT refundable at 17.5% for earlier periods – unjust enrichment – outside jurisdiction – appeal allowed in part.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR CHARLES DENIS SMITH **Appellant**

- and -

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

TRIBUNAL: JUDGE Rachel Short
Mr David Batten (Member)

Sitting in public at Exeter Magistrates' Court, Heavitree Road, Exeter on 16 August 2016

Mr Smith the Appellant

Mr Ryder, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against HMRC's decision of 16 December 2015 confirmed on review on 2 February 2016 that the Appellant, Mr Smith, is not eligible for a refund of VAT charged at 17.5% on works supplied for the conversion of a barn under the DIY Housebuilders' Scheme at s 35 Value Added Tax Act 1994 ("VATA 1994").

2. HMRC refunded Mr Smith's VAT on some elements of the barn conversion work, but at the 5% not the 17.5% rate at which Mr Smith had been charged VAT. HMRC refused to refund any VAT on some elements of the conversion work either on the basis that they fell outside the scope of the DIY Housebuilders' Scheme or because valid invoices had not been provided.

3. Mr Smith appealed to this Tribunal on 22 February 2016. The amount of VAT in dispute is £24,429.58.

Background facts

4. Mr Smith is a retired building services engineer who lives in Kingsbridge in Devon. In 2005 he decided to convert a barn adjoining his property (described as a 16th century devon pillar barn) into living accommodation. Mr Smith commissioned this work on a "cost plus" basis, using small local craftsmen. The work was finished in May 2015.

5. Mr Smith applied for and received planning permission for the conversion in June 2005. A conservatory was added to the conversion but no planning permission was required or obtained for this aspect of the building works.

6. Mr Smith spoke to a building consultant in September 2006 who explained that if he included a steel framework the conversion could include two stories and become a three bedroom free-standing residential property.

7. Mr Smith was not aware that he could re-claim VAT charged on the conversion work under the DIY Housebuilders' Scheme until the local buildings inspector informed him of this in 2007, when 60% of the work had already been carried out.

8. Mr Smith put in a claim under the DIY Housebuilders' Scheme (VAT form 431C) on 13 July 2015. The total amount of VAT re-claimed was £32,185.20 split between the following supplies:

(1) Building works

(2) Electrical works

(3) Carpentry

(4) Flooring

(5) Consulting on steel framework

(6) Jacuzzi bath

(7) Conservatory

(8) Under floor heating, boiler and heating equipment.

9. HMRC re-paid £7,755.62 of VAT on 21 December 2015, being VAT at 5% on the supplies which they considered eligible under the DIY Housebuilders' Scheme, which they considered to be;

(1) all of the supplies made under items (1) – (4), excluding four invoices for electrical works which HMRC rejected because they were not in Mr Smith's name (invoices numbered 1474,1497,1633&1681), but

(2) excluding items (5) – (8) which they considered were either not eligible for the scheme in principle (items (5) (7)), because valid invoices had not been provided (item (6)) or because the invoices provided were not addressed to Mr Smith, (item (8)).

10. HMRC originally rejected Mr Smith's claim in its entirety because they believed the barn conversion was "ancillary" to his existing dwelling. That decision was cancelled on 4 December 2015.

11. It is accepted that the barn conversion is a "qualifying conversion" within Schedule 7A, Group 6 VATA 1994 and a "residential conversion" under s 35(1A) (c) VATA 1994.

12. Mr Smith is not a VAT registered trader.

Law

13. The DIY Housebuilders' Scheme is set out at s 35 VATA 1994. This is the legislation which Mr Smith is relying on to re-claim the VAT charged to him on the conversion work on his barn.

"s 35 *Refund of VAT to persons constructing certain buildings.*

(1) Where –

(a) a person carries out works to which this section applies,

(b) his carrying 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 purpose 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; and

(c) a residential conversion

(1B) .....

(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 that 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 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"

14. The VAT rates applicable to qualifying residential conversions are set out at Schedule 7A Group 6 Items 1 and 2. These are the rules which stipulate that a reduced rate of VAT should be charged by those supplying the conversion works to Mr Smith:

"Group 6 – Residential Conversions

Item No

1. The supply, in the course of a qualifying conversion, of qualifying services relating to the conversion.

2. The supply of building materials if

(a) the materials are supplied by a person who, in the course of a qualifying conversion, is supplying qualifying services related to the conversion, and

(b) those services include the incorporation of the materials in the building concerned or its immediate site.

NOTES

Meaning of "qualifying conversion"

A "qualifying conversion" means –

(a) a changed number of dwellings conversion (see paragraph 3);

(b) a house in multiple occupation conversion (see paragraph 5); or

(c) a special residential conversion."

Mr Smith's conversion was a "changed number of dwellings conversion" defined by paragraph 3 of the Notes as:

(1) "A "changed number of dwellings conversion" is –

(a) a conversion of premises consisting of a building where the conditions specified in this paragraph are satisfied.....

(2) The first condition is that after the conversion the premises being converted contain a number of single household dwellings that is –

(a) different from the number (if any) that the premises contain before the conversion, and

(b) greater than, or equal to, one.

(3) The second condition is that there is no part of the premises being converted that is a part that after the conversion contains the same number of single household dwellings (whether zero, one or two or more) as before the conversion".

VAT on residential conversions under items 1 and 2 of Group 6 is chargeable at the reduced VAT rate of 5%.

Evidence seen

15. We saw photographs of the converted barn and conservatory after the conversion work had been done by Mr Smith.

16. We saw copies of the disputed invoices on which VAT had been reclaimed by Mr Smith relating to the structural survey, the under floor heating, boiler and heating equipment.

17. We saw copies of four invoices for electrical works (numbers 1474, 1497, 1633 and 1681) from Mr Paul A Barlow to Mr T Rhymes for electrical works.

18. We saw the planning consent awarded by South Hams District Council for the barn conversion on 6 June 2005 which gave planning consent for "*Conversion of barn to self-contained accommodation ancillary to existing dwelling*" and the letter from

South Hams District Council on 16 March 2006 confirming that no planning consent was required for the conservatory.

19. We saw various correspondence between Mr Smith and HMRC including their review letter of 2 February 2016.

Mr Smith's arguments

20. Mr Smith said that he had fulfilled all the requirements of the DIY Housebuilders' Scheme and had increased the housing stock in his area. In his view, it was not reasonable to expect a private individual like him to understand all the details required to fulfil the conditions of the DIY Housebuilders' Scheme. He did not think about VAT when he started the conversion work and was unaware that VAT could be re-claimed until he was more than half way through the work.

21. The builders who worked for him were small local builders who were also not aware of the detailed VAT rules which applied when buildings were converted. They had charged VAT at the standard rate which they believed to be due and he had paid it.

22. The contractors would not have known in advance whether the building would be an extension to the existing property or an independent three bedroom dwelling. It only became clear as the existing structure was gradually demolished that this was possible and after Mr Smith had conversations with the building consultant in September 2006.

23. Mr Smith did not consider that there was any reason why consulting services should be excluded from the DIY Housebuilders' Scheme. To exclude this type of service encouraged unscrupulous building practices.

24. He had provided the invoices which HMRC had requested for the jacuzzi bath and had reimbursed the VAT suffered by the plumber who had installed the under floor heating, who was not registered for VAT.

25. He had kept detailed records of all of the invoices and VAT which he had paid and this should be repaid in full at the rate which he had originally paid.

26. Mr Smith said that if he was not repaid the VAT at the full 17.5% rate which he had suffered, HMRC would have been unjustly enriched at his expense.

HMRC's arguments

27. Mr Ryder explained that under s 35 VATA 1994 specific expenditure was excluded from the DIY Housebuilders' Scheme, including the services of consultants. He could not explain why this was a feature of the legislation.

28. Mr Ryder acknowledged that Mr Smith had provided the invoices requested for the jacuzzi bath and said that HMRC would consider this further.

29. Mr Ryder said that Mr Smith could not make a reclaim for VAT for which he had not been invoiced and could not claim input tax because he was not a registered trader. The invoices for the under floor heating, boiler and heating equipment and four invoices for electrical works (numbers 1474, 1497, 1633 and 1681) had not been issued to Mr Smith.

30. He said that it was HMRC's view that because the conservatory had not been included in the original planning application for the conversion work, it did not fall within the DIY Housebuilders' Scheme.

31. On the question of the rate at which VAT should be repaid for the expenses which were eligible under the scheme, HMRC could only repay VAT which was properly chargeable (s 35(1) and 35(1C) VATA 1994). The correct, chargeable rate of VAT on the supplies made to Mr Smith was 5%, under Items 1 and 2, Group 6 Schedule 7A VATA 1994, relating to supplies of goods and services for a residential conversion. VAT was therefore repayable on these supplies at 5% not 17.5%.

32. It was up to Mr Smith to negotiate with his suppliers if they had charged him the incorrect amount of VAT at the time, this was not something which HMRC could get involved with. Mr Ryder referred to the VAT tribunal decision in *R J Vincett v Customs and Excise Commissioners* (LON/93/233) to support this position, that it is the supplier's responsibility to ascertain the correct VAT liability of his supplies.

33. Mr Ryder accepted that in fact HMRC had no obligation to re-pay VAT at the reduced 5% rate since the invoices produced by Mr Smith all showed VAT incorrectly charged at the 17.5% rate. Mr Ryder said that HMRC had effectively operated a concession to repay at the 5% rate.

Findings of Fact

34. Neither Mr Smith nor his contractors knew until after September 2006 that the conversion work on the barn could result in a three bedroom independent free-standing dwelling which would qualify for relief as a residential conversion under Schedule 7A Group 6 VATA 1994.

35. Planning consent was not required for the conservatory which was built to link the converted barn to Mr Smith's existing dwelling.

36. All of the contractors who had made supplies to Mr Smith as part of the conversion work were, at the time of Mr Smith's appeal, outside the four year time limit for re-claiming wrongly charged output tax.

Decision

37. We agree with HMRC that there is no basis under the law at s 35(1C) VATA 1994 on which VAT can be re-claimed on the services of consultants. Mr Smith's VAT re-claim for the VAT charged on those services is rejected.

38. We agree with HMRC that there is no basis under the UK's VAT legislation on which Mr Smith can re-claim VAT which was charged to a third party, even if he has reimbursed the third party for those costs. We reject this element of Mr Smith's claim.

39. We agree with Mr Smith that the fact that the conservatory which was added to the barn conversion was not part of the original planning application does not preclude it from falling within the DIY Housebuilders' Scheme in principle. The requirements at s 35 VATA 1994 are only that the conversion be legal. No planning permission was required for the conservatory, as evidenced by the letter from South Hams District Council in March 2006. This element of Mr Smith's claim is accepted, subject to our decision below considering the rate at which that claim should be re-paid.

40. We have not considered the VAT treatment of the jacuzzi bath on the basis that HMRC have agreed to reconsider this themselves taking account of the invoices which Mr Smith has now provided.

41. There is no dispute that the other elements of Mr Smith's claim fall within the DIY Housebuilders' Scheme, the only question is at what rate any VAT should be repaid.

42. We agree with HMRC that any issue with VAT which has been charged at the wrong rate is an issue of civil law between the customer and his supplier. Mr Ryder referred to the *Vincett* decision and this issue has been considered at some length, in slightly different contexts by the European and higher UK courts since that case was decided. Cases such as *Danfoss* (Case C-94/10 *Danfoss A/S and Sauer- Danfoss ApS v Skatteministeriet* [2011] I – 09963) have concluded that a tax authority has no obligation to repay wrongly charged VAT to a consumer such as Mr Smith unless it is impossible or excessively difficult for a consumer to claim the wrongly charged VAT from their supplier. There was no suggestion that this was the case here.

43. We do however take issue with HMRC's starting premise that all of the VAT charged to Mr Smith was incorrectly charged and therefore not available for repayment as "chargeable" VAT under s 35. Our view is that up until the time when Mr Smith's consultant explained in September 2006 that by the use of a steel framework it would be possible to produce a two storey building which could be a stand-alone dwelling house, the suppliers were correct to be charging VAT at the standard rate of 17.5%.

44. At the time when the supplies were made on a "cost plus" basis and invoices were issued to Mr Smith prior to the end of September 2006 none of the suppliers could have been aware of the fact that their supplies were being made in relation to a qualifying conversion. They were correct, and not mistaken, to charge VAT at the standard rate for supplies made at that time.

45. For this reason our view is that VAT on eligible invoices issued to Mr Smith prior to the end of September 2006 should be re-payable at the 17.5% not the 5% rate.

46. In respect of invoices issued after that date, we agree with HMRC that VAT has not been properly charged and so cannot be repaid at the 17.5% rate. The fact that neither the suppliers nor Mr Smith were aware of this error or of the detailed law in this area does not alter this conclusion.

47. We have taken account of the fact that, as HMRC accept, it is now too late for any of the suppliers to re-claim the wrongly charged output tax from HMRC, because the four year cap under s 80(4) VATA 1994 applies from the end of the accounting period when the supplies were made. Were Mr Smith to make a claim from them, they would be out of pocket and HMRC would be in a position to have retained more VAT than was legally due.

48. We have considered whether there is any basis in European or UK law on which Mr Smith has a claim for unjust enrichment against HMRC. Neither party considered in detail whether, or on what basis, Mr Smith might be able to make such a claim as a consumer rather than a VAT registered trader. We have concluded that Mr Smith's claim for unjust enrichment cannot succeed before us either because it is a civil claim which is outside our remit or because he has not demonstrated that it is impossible or excessively difficult to re-claim the VAT wrongly charged from his suppliers.

49. We have not considered, what, if any remedies might be available to Mr Smith's suppliers as against HMRC.

50. For these reasons Mr Smith's appeal in respect of valid invoices issued after the end of September 2006 is rejected and HMRC's repayments of VAT under the DIY Housebuilders' Scheme at the 5% level are confirmed for those periods, (including the repayments in respect of the conservatory building).

51. 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.

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 24 NOVEMBER 2016