TC06418

Appeal number: TC/2016/05883

VAT – DIY Builders Scheme – VAT refund – whether construction of a building designed as a dwelling – Notes 2(a) and 2(c) group 5 schedule 8 VATA - no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

COLIN JAMES MITCHELL and KIM LOUISE MITCHELL **Appellants**

- and -

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

TRIBUNAL: JUDGE IAN HYDE
MOHAMMED FAROOQ

Sitting in public in Birmingham on 4 December 2017

Mrs McCoy for the Appellant

Miss Dosanjh, officer, for the Respondents

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DECISION

1. This appeal concerns whether the appellants are entitled to a VAT refund under section 35 of the Value Added Tax Act 1994 ("VATA") ("the DIY Builders Scheme") in in respect of the construction of a building at the bottom of their garden.

2. This appeal concerns only the question of principle as to whether the appellants are entitled to the refund as the HMRC have reserved their position on quantum.

The facts

3. Mrs Mitchell, one of the appellants, and Mr McCoy, her father, gave evidence. The parties agree the facts in this appeal and they are set out below.

4. The appellants are husband and wife and own a semi-detached house constructed in the 1930s. The appellants needed more space and so, rather than move house, they decided to demolish their prefabricated garage at the bottom of their garden and construct a new building. The idea was that this would be additional space where they could work, the children could play and have friends over and so on.

5. The building is a two-storey brick and pitched roof building. The building is connected to mains electricity, water and sewerage. On the ground floor there is a garage and a bathroom with a toilet and shower. On the first floor under the eaves of the roof and reached by internal stairs, is an open area currently laid out as a bedroom and sitting room. There is no kitchen but an area of the ground floor is sufficient to install and use a microwave. The garage has an up and over metal door which opens onto a private lane giving access to the back of the row of gardens including the appellants' garden. A door at the front of the building enables access from the garden to the building.

6. The appellant obtained planning consent for the building and the consent included the following as condition 3;

> "the proposed garage shall only be used for social and domestic purposes incidental to the occupation of the dwelling house as such and no trade or business use shall be carried out therefrom. The hereby approved garage shall not be used as a separate residential units at any time, without the prior written approval of the Local Planning Authority."

7. On 31 May 2016 the appellant made an application under the DIY Builders Scheme for the refund of £3,903.62 of VAT incurred in constructing the building. On 13 June 2016 HMRC rejected the claim and on review the original decision was upheld by letter dated 15 September 2016. The appellant appealed that decision.

Legislation

8. Section 35 VATA provides to the extent relevant to this appeal;

> "(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 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 or relevant charitable purpose; and

(c) a residential conversion

….

(4) the Notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group…."

9. Note 2 to Group 5 provides;

"(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"

Issues in the appeal

10. It was accepted by HMRC that the conditions for refund under the DIY Builders Scheme were met save for two issues.

11. First, HMRC argued that the building was not designed as a dwelling within section 35(1A) because it is not "self-contained living accommodation" within Note 2(a) to Group 5 of Schedule 8. The appellants disagreed.

12. Second, HMRC argued that the requirement at Note 2(c) to Group 5 was not met as condition 3 in the planning consent prohibited the separate use of the building from the house. The appellants argued that Note 2(c) did not apply because the

appellants could always obtain the consent of the local authority for separate use and had they known this was a problem they would have done so before.

13. Separately the appellants argued that the conditions for relief should be treated as satisfied because they had telephoned HMRC to understand the conditions for a refund under the DIY Builders Scheme and were told that they met the conditions and were entitled to a repayment.

Note 2 (a): Self-contained living accommodation

14. In accordance with section 35(1)(a) a refund under the DIY Builders Scheme is only available if the works are works to which section 35 applies. Section 35(1A) defines the works to which section 35 applies to be the construction of one or more buildings designed as a dwelling, the construction of buildings solely for residential or relevant charitable purposes or a residential conversion. Here the relevant works can only be the construction of a building designed as a dwelling.

15. Section 35(4) provides that the Notes to Group 5 of schedule 8 apply in construing section 35. Note 2 (a) requires that in order to be a building designed as a dwelling within section 35(1A) it must be "self-contained living accommodation". The question here is whether the building has sufficient facilities to operate as self-contained accommodation. As the building had an area that could function as a living and sleeping area and a toilet and shower, the issue between the parties was the absence of a kitchen.

16. HMRC argued that this meant the building was not self-contained accommodation. Further, HMRC argued that as the building was described in the planning consent as a garage it could not be self-contained living accommodation.

17. The appellant argued that it was enough that there was an area where a microwave could be plugged in and used.

18. We are taken to a number of Tribunal cases.

19. In *Oldrings Development Kingsclere Limited* (VTD 17769) the VAT Tribunal determined that a studio flat could be self–contained living accommodation nothwithstanding the absence of a shower or bath.

20. In *SA Whiteley* it was held by the Tribunal that the basic elements of living had to be contained within one building and not spread around several buildings.

21. In *Agudas Israel Housing Association* (VTD 18798) the VAT Tribunal held that a microwave cooker and a kettle were sufficient;

> "In the twenty-first century, premises with their own front door, en suite bathing facilities and the ability to cook with a microwave cooker and a kettle are self contained living accommodation"

22. We accept the appellants' argument that the ability to install and use a microwave is sufficient, with all the other facilities in the building, for it to constitute self-contained living accommodation within Note 2(a). One or more people could live in the building without the need to use facilities elsewhere. We do not believe it is

fatal to meeting the test that the planning consent described the building as a garage. The test is one as to the design and facilities in the building rather than its description.

Note 2(c): prohibition on separate use

23. HMRC argued that the requirement in Note 2(c) to Group 5 that the separate use, or disposal of the dwelling is not prohibited by the terms of any planning consent was not met because of condition 3 in the appellants' consent for the building.

24. The appellants argued that Note 2(c) did not apply because if they ever wanted to use it separately they could always obtain the consent of the local authority at the time. Indeed had they known this was a problem they could have got that consent before now.

25. HMRC further argued in response that the test had to be looked at at the time of the refund claim and even if a local authority later waived the condition this did not affect the merits of the claim now.

26. We were referred by HMRC to a number of decisions on the separate use point, including the decision of the Upper Tribunal in *Revenue and Customs Commissioners v Lunn* [2009] UT 244. In *Lunn* the Upper Tribunal had to consider the effect of a more limited restriction, that the building would only be used for purposes either incidental or ancillary to the residential use of the main property, and decide whether such a restriction was a prohibition on separate use within Note 2(c). The Upper Tribunal decided that it did.

27. We agree with HMRC. Condition 3 is clearly the type of restriction intended to be caught by Note 2(c) and no construction is required to decide that "shall not be used as a separate residential units at any time" amounts to a prohibition on separate use. Further, whilst we were not shown any authority on the point, in our view whether Note 2(c) is met must be judged at the time the construction works are carried out. To determine otherwise would make the legislation impossible to apply. Accordingly, the condition in Note 2(c) not having been satisfied, in our view the building is not "designed as a dwelling" for the purposes of section 35.

HMRC conversations

28. Mrs Mitchell gave evidence that she and her mother, Mrs McCoy, presenting for her in this appeal, had called HMRC several times to talk through their position. Mr McCoy gave evidence to confirm the calls took place but could not say anything about the content of the calls.

29. Mrs Mitchell and Mrs McCoy described how in the calls to HMRC they described the building and specifically mentioned planning condition 3. They asked if there were any problems with making the refund claim and how they should do it and were told is was fine.

30. HMRC did not contest that the calls took place but did not know what was said. In any event HMRC argued that even if the appellants were misled it is not within the jurisdiction of this Tribunal to hear such an argument.

31. We agree with HMRC. This argument amounts to an argument that, even though the tax legislation does not entitle the appellants to the relief they are claiming, nevertheless because HMRC has provided specific guidance to the taxpayer that the relief is available, the taxpayer should be granted the relief. It is a well established principle that this Tribunal does not have jurisdiction to hear such arguments as to legitimate expectation, that jurisdiction being an exclusive matter for the Administrative Court, see *HMRC v Abdul Noor* [2013] UKUT 71 (TCC) STC 998, *Trustees of the BT Pension Scheme v HMRC* [2015] EWCA Civ 713 and *Shanklin Conservative and Unionist Club* [2016] UKFTT 135.

Decision

32. In our view the building is on general principles capable of being "self-contained living accommodation" within Note 2(a) to Group 5 of Schedule 8. However, condition 3 in the planning consent means that Note 2(c) is not satisfied. Accordingly, as the conditions in Note 2 are cumulative, the building is not "designed as a dwelling" within the meaning of Note 2 and therefore for the purposes of section 35.

33. As to the argument that HMRC provided guidance to the appellants this Tribunal does not have jurisdiction to hear the point and so the argument must fail in this Tribunal.

34. Accordingly, the conditions required to be met for the appellants to be entitled to a refund under section 35 are not met and the appellants' appeal is dismissed.

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.

IAN HYDE
TRIBUNAL JUDGE

RELEASE DATE: 29 MARCH 2018