[2011] UKFTT 644 (TC)

TC01486

Appeal number: TC/2010/8422

VAT – DIY builders scheme – barn conversion with planning restriction on use separate to farm house – whether a 'building designed as a dwelling' – no

FIRST-TIER TRIBUNAL

TAX

GERRARD SILVER **Appellant**

- and -

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

TRIBUNAL: Mrs B Mosedale (Tribunal Judge)
Mr M Farooq (Tribunal Member)

Sitting in public at Temple Court, Birmingham on 15 September 2011

Miss K Tilling, Officer of HMRC, for the Respondents

DECISION

1. Mr Silver, the Appellant, made a claim on 17 May 2010 to recover £17,773.34 of VAT incurred by him on the conversion of a barn into domestic living accommodation, and now called "Ye Oll Barn". HMRC refused the claim on 23 June 2010.

2. Mr Silver appealed on 19 October 2010.

3. The appeal was made out of time but HMRC took no objection to this and we formally admitted it.

Jurisdiction of the Tribunal

4. Mr Silver did not attend the Tribunal hearing. To hold the hearing in his absence the Tribunal must be satisfied that the Appellant has been notified of the hearing or that reasonable steps have been taken to notify him of the hearing and in both cases that it is in the interests of justice to proceed with the hearing. This is rule 33 of the rules applicable to this Tribunal.

5. We were satisfied that Mr Silver had been properly notified of the hearing as a letter dated 25 July 2011 notifying him of the hearing date had been sent to the same address (Ye Oll Barn) as the address he used when writing to the Tribunal.

6. Was it in the interests of justice to hear the case in Mr Silver's absence? Mr Silver wrote to the Tribunal on 20 June 2011 asking for the hearing to be after the next "3/4 months" as he was recovering from slipped discs. The Tribunal clerk when arranging the hearing on 15 September must have overlooked this letter as the hearing was booked for September whereas he indicated he wanted the hearing not to be earlier than November.

7. However, we took into account that there was nothing to suggest that Mr Silver did not receive his post and yet he had not replied to the notice of hearing to say that it was inconvenient and not in accordance with his dates to avoid.

8. We also note that his letter of 20 June 2011 asked the question "am I needed?" which suggested that he was in doubt over whether he would attend in any event.

9. We also took into account that the only case put forward by Mr Silver in his Notice of Appeal and the letters to support his claim for a refund did not turn on any disputed facts on which Mr Silver could assist the Tribunal. The case turned on a simple point of law.

10. We decided that in all these circumstances it was in the interests of justice to continue with the hearing in the absence of the Appellant.

The facts

11. There was no dispute on the facts, and relying on the documents put forward by Mr Silver, we find them to be as follows:

12. There was a barn in the curtilage of a listed building called Home Farm and it had been used for chicken and duck pens and as a workship. Mr Silver, Mrs J Silver and Miss K Silver applied on 30 March 2005 for planning permission to convert the barn. The application described the planned conversion as "listed building conversion of existing barn to additional living accommodation for Home Farm" and as a "granny annex". In his covering letter Mr Silver explained he wished to convert the barn into a granny annex for his mother to occupy. He stated "It is not required that the barn can be subsequently offered on the open market for sale, but shall be kept as part of Home Farm."

13. Planning permission was granted on 24 May 2005. The permission was for "barn conversion to form granny annex…". Condition 3 of the permission was:

> "the development hereby permitted shall not be used other than for the purposes of ancillary residential accommodation to the adjacent farmhouse known as "Home Farm" without the prior written consent of the Local Planning Authority."

The reason given for this condition was:

> "To ensure that the details of the development are acceptable to the Local Planning Authority and any other form of residential use would not be in accordance with Local Plan."

14. It was not suggested and there was no evidence that the Local Authority had ever given any consent to a change of use from use as ancillary residential accommodation to Home Farm.

15. The Appellant's mother died during re-construction of the barn and "Ye Oll Barn" was therefore never used as a granny annex.

16. The certificate of completed works was dated 11 September 2009 and Mr Silver made an application for DIY builders' VAT relief on 17 May 2010. This was refused by HMRC on 23 June 2010 because of the restriction in the planning conditions. The claim for DIY builder's relief was made out of time to HMRC but Ms Tilling said that HMRC did not wish to take a point on this.

The law

17. Section 35 of the Value Added Tax Act 1994 ("VATA") provides:

> "(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 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 that person the amount of VAT so chargeable."

18. HMRC accepted that the Appellant fulfilled conditions 35 (1)(b) and (c) but refused his claim for failing to satisfy condition (1)(a). Section 35(1A) sets out what are the "works" to which section 35(1)(a) applies.

"(1A) The works to which this section applies are –

(a) the construction of a building designed as a dwelling or a 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 but this is subject to subsection (4A) below."

19. The Appellant was undertaking a conversion: the barn was a pre-exising building. But was it a "residential conversion" within the meaning of Section 35(1A)(c)?

20. Section 35(1D) provides as follows (in so far as relevant):

"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) …."

21. The effect of Section 35(1D) is that Mr Silver's barn conversion would only qualify for DIY builders relief if the barn conversion was, as a result of the conversion, designed as a dwelling. The phrase "designed as a dwelling" is one with a statutory definition. This is contained in the notes to Group 5 of Schedule 8, which under s35(4) applies as much to the DIY Builders scheme as it does to Group 5.

22. Note (2) to Group 5 of Schedule 8 provides as follows:

"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."

23. The effect of Note (2) is that Mr Silver's barn conversion must meet the conditions (a)-(d) in order for Mr Silver to be entitled to the DIY builders relief. HMRC accepted that conditions (a), (b) and (d) were satisfied by the barn: they did not agree that condition (c) was met.

Appellant's submissions

24. As the Appellant did not attend the hearing, for his submissions we relied on his Notice of Appeal and various letters. In summary these submissions were:

- His mother had died and so the converted barn was never used as a granny annex;
- He was not permitted a shared driveway as the barn was in the cartilage of a listed building;
- "Ye Oll Barn" was a self contained dwelling with its own council tax, amenities and house number.

Decision

25. The four conditions, (a) to (d) set out in Note (2) to Group 5 of Schedule 8 are cumulative: all four conditions must be met for any building or part of building to be a dwelling. Condition (c) is that "the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision"

26. The planning permission contained a restriction on the separate *use* of Ye Oll Barn (that it could not be used "other than for the purposes of ancillary residential accommodation to the adjacent farmhouse known as 'Home Farm'"): there was no express prohibition on the separate *disposal* of Ye Oll Barn.

27. Ms Tilling said that in practical terms the restriction on separate *use* would make separate *disposal* of Ye Oll Barn difficult. We would agree that (assuming that the planning restriction could be enforced) the restriction is likely to have a very significant impact on the value of the barn if disposed of separately: but that is not the issue. Separate disposal was not prohibited.

28. Nevertheless, this is only important if Condition (c) is only failed if there is both a restriction on separate use *and* disposal. But is condition (c) cumulative like this? Or does it mean that neither the separate use nor the separate disposal of the building must be prohibited by planning in order for it to qualify as a dwelling?

29. We think that this is certainly a normal interpretation of the phrase as it uses the word "or" and not the word "and". Further, it must have been the legislative intent as

the clear scheme of Group 5 is that buildings which amount to extensions or annexes to an existing property whether or not physically attached are not new dwellings and not entitled to zero rating.

30. We also note that this is the conclusion reached in the Tribunal in *Wiseman* (2001) VTD 17374 which was drawn to our attention by HMRC. We respectfully agree with this decision.

31. So it is irrelevant that separate disposal was not prohibited. Ye Oll Barn fails condition (c) if separate use is prohibited.

32. What does "separate use" mean? This was recently considered by the Upper Tribunal in the case of *Lunn* [2010] STC 486. Decisions of the Upper Tribunal are binding on this tribunal. In *Lunn*, the Upper Tribunal held that a restriction:

> "[the new building] shall only be used for purposes either incidental or ancillary to the residential use of the property known as [name of pre-existing building] and shall not be used for commercial purposes"

meant that condition (c) was not met. Separate use was prohibited because use separate from the pre-existing building was prohibited. In particular, their decision was that a planning condition which permitted the occupation of the new building by a separate household to the original building did *not* meet condition (c) if it was clear that its use was incidental or ancillary to the use of the original building.

33. In other words, condition (c) did not duplicate condition (a): the question was not whether it was and/or could be used as separate living accommodation. The question was whether it could be occupied separately from the other building. In other words, a prohibition on the use of a new building other than as an annex to another building means the new building would not meet condition (c) and there would be no entitlement to VAT relief.

34. In this case, we find that the separate use of Ye Oll Barn was prohibited. Its use was restricted to being ancillary to the use of Home Farm and therefore it necessarily follows that separate use of Ye Oll Barn was prohibited by the planning permission.

35. It does not matter whether it has a separate house number or separate registration for council tax. It does not even matter if the barn is now or at some stage in the future occupied in breach of the planning consent (there is no suggestion that this was the case). It certainly does not matter that the person for whom it was built (Mr Silver's mother) died before it was complete and its occupation is not actually as a "granny" annex. It does not matter whether or not it has a separate driveway.

36. The effect of the planning restriction is that condition (c) was not met when the building was completed, therefore the barn was not designed as a dwelling within the meaning of the VAT legislation and Mr Silver is not entitled to DIY builders relief. His appeal is dismissed.

37. 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.

TRIBUNAL JUDGE
RELEASE DATE: 5 October 2011