TC01950

Appeal number: TC/2010/04618

VAT -Section 35 VAT Act 1994 – the DIY Refund Scheme- HMRC refused the claim by the Appellants for a VAT refund on the grounds that at the time the development took place the correct statutory planning permission was not in place – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CAMERON BLACK (LONDON) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE SANDY RADFORD
HENRY RUSSELL OBE FRICS

Sitting in public at Bedford Square London WC1B 3DN on 22 December 2011

Mr T. Brown for the Appellant

Mr H O'Leary for the Respondents

DECISION

1. This is an appeal against a decision by HMRC that supplies made by the appellant during the construction of a new building did not qualify to be zero-rated for VAT purposes under the provisions of Schedule 8 Group 5 of the Value Added Tax Act 1994 ("VATA").

2. The issue to be decided was whether the supplies of construction services made by the appellant as the main contractor in the construction of a building at 28 Lion Court, Magdalen Street, London SE1 2EN qualified for treatment as zero-rated supplies under Schedule 8 Group 5 of VATA ("the VAT DIY Refund Scheme").

3. Messrs Bailey and Pope gave evidence for the appellant.

Background and facts

4. The appellant carried out works on a dwelling on the top floor of a block of flats. The appellant approached Southwark Borough Council with an application "..to erect a one storey flat roof extension on the roof of the building to provide additional residential accommodation. This extension would be on top of the existing roof extension".

5. Planning permission was granted in 2004 for a conservatory extension and other works.

6. Planning permission was refused on 2 February 2006 for the erection of a one storey extension onto the fourth floor flat.

7. A further planning permission for an extension was applied for on 25 September 2007 and planning permission was granted on 25 January 2008.

8. The development as described in the planning application of 24 September 2007 was "Fifth floor extension to the existing apartment". The planning permission described the details of the proposal as "It is proposed to erect a one storey flat roof extension on the roof of the building to provide additional residential accommodation. This scheme has been amended from the previous refused planning application". The planning permission stated that permission is granted for a "sixth floor extension to existing apartment".

9. Design and Access Statements (DAS) are required for certain types of development under Section 62 of the Town and Country Planning Act 1990. Their purpose is to illustrate and explain the design approaches to the development.

10. In the DAS under the heading 'The Existing Context', was stated: 'Following detailed consultations with the Southwark Planning team, the proposal is to add a level to the apartment in a contemporary style and further set back to hide from street level'.

11. In the DAS under the heading 'The Proposal', the development was described as 'a single storey extension on a small section of the Lion Court roof, remaining below the adjacent apartment and the main Lion Court roof line' […] The design allows for the re-modelling of the existing apartment to create improved space in a style which is in keeping with the vision for the surrounding area.' The sketch shows a dotted line indicating the proposed extension over the existing part of the apartment.

12. Under the section on the 'Amount of Development', reference was made to an 'additional floor'. Under the section on 'Layout', it was stated that the 4th floor (the existing building) would be 'remodelled internally only'.

13. The Southwark Council report states that the property is within the boundaries of the Tooley Street conservation area. The legislation relating to conservation areas meant that consent was required for complete demolition.

14. Construction work commenced after 4 February 2010. The extent of the demolition was described in the Schedule of Works. This is a document which would not normally be submitted to the local authority as part of a planning application. It forms part of the contract documents for the execution of the work, and is to be read with the contract drawings in defining the scope of the works which the contractor will carry out.

15. Paragraph A defined the extent of demolition: 'Carefully dismantle, remove down to ground floor level and remove from site the existing single storey structure of number 28 Lion Court. Remove structure as noted on drawing 820 GA 100 and in accordance with specification clause C20. Remove all roof, external and internal walls, timber windows where indicated, fixtures and fittings, floor finishes and existing structure down to existing concrete slab level…The document was not dated.

16. The appellant's then representatives submitted an application on the appellant's behalf for non-statutory clearance to HMRC dated 4 February 2010. The application requested a VAT ruling in respect of the VAT treatment which the appellant should apply to their provision of supplies of construction services "..as part of a project which the appellant is undertaking whereby a single storey free-standing dwelling located on the roof of another building will be demolished and replaced by a new two storey building to be constructed in its place. The application also stated that the building below on which the existing dwelling was built would not be demolished.

17. HMRC requested a copy of the planning permission and after receiving it HMRC informed Baker Tilly in a notice dated 24 February 2010 that the supplies made by the appellant would be subject to VAT at the standard rate.

18. Baker Tilly sent an email on 2 March 2010 requesting a review of the decision.

19. The reviewing officer upheld the decision and Baker Tilly were notified of this in a letter dated 27 April 2010.

20. On 2 November 2010 Southwark Council received a planning application in respect of the development for the complete demolition and reinstatement of the existing fifth floor of the building and the addition of a new sixth floor extension.

21. Planning permission was granted by the Council on 1 February 2011 for "complete demolition of the existing fifth floor of the building and the addition of a sixth floor extension (an amended scheme to previous planning permission to create a three bedroom dwelling) (retrospective).

22. A certificate was issued by Head Projects Building Control Limited on 1 November 2010 relating to the following work: "Demolition of existing 4th and 5th floor penthouse apartment and construction of duplex apartment to 4th and 5th floors at 28 Lions Court, Magdalen Street, London SE1 2EN." The certificate also stated at paragraph 2: "…the work described above was the whole of the work described in an initial notice given by ourselves and dated 28 May 2009."

23. On 23 February 2011 the VAT Consultancy wrote to HMRC on behalf of the appellant attaching the fresh planning consent and appealing against the decision of 27 April 2010.

24. HMRC replied on 9 March 2011 and informed them that once a review had been concluded there was no right to a further review. HMRC added however that their letter had been forwarded an HMRC written enquiries officer.

25. On 11 March 2011 Mr Baker, the written enquiries officer informed the appellant that after liaising with the Unit of Expertise for Construction and taking into account all the relevant facts, he wished to clarify that the VAT liability of construction services was fixed at the time of supply. At the time of supply the planning permission in place was for an extension and the liability was standard rated. The retrospective planning permission could not change the liability of work already carried out.

Mr Bailey's evidence

26. Mr Bailey, the owner of the flat stated in his written evidence "However, despite the use of the word "extension" [in the planning application and permission] it was obvious throughout the process that the development necessitated demolition and was a new build". He stated further "Our clear intention to demolish and completely redevelop is further evidenced by the specification of works that were used to control the build".

27. Mr Bailey went on to state that it was not technically possible to build the extension without complete demolition of the existing building. He argued that the final certificate for Building Regulations understood the situation, as it certified the 'demolition of the existing 4th floor penthouse apartment …'

Mr Pope's evidence

28. Mr Pope, the planning consultant, confirmed in oral evidence that demolition had been completed before the second application was made. On being asked why it was necessary to apply for consent to demolish, he explained it was to "tidy up" the proposal. His proof of evidence made reference to a conservation area.

29. He also explained that the original survey drawings were not accurate and it was necessary to prepare amended drawings to show the abutment of the new work to the adjacent building. In his proof of evidence, Mr Pope stated that Southwark Council did not regard the necessary changes as "non material", and they required a new application to "deal comprehensively with all the 'changes'". The application also included the proposal for complete demolition.

The Law

30. Section 35 (1) of the VAT Act 1994 ("VATA") states:

> (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

31. Schedule 8, Group 5 of VATA Note 2 states:

> 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.

32. Schedule 8, Group 5 of VATA Note 16 states:

> 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.

33. Schedule 8, Group 5 Note 18 states:

> A building only ceases to be an existing building when:
>
> (a) demolished completely to ground level; or
> (b) the part remaining above ground level consists of no more than a single facade or where a corner site, a double facade, the retention of which is a condition or requirement of statutory planning consent or similar permission

34. The Town and Country Planning Act 1990 Section 73A states:

> **Planning permission for work already carried out**
>
> (1) On an application made to a local planning authority, the planning permission which may be granted includes planning permission for development carried out before the date of the application.
>
> (2) Subsection (1) applies to development carried out—
>
> (a) without planning permission;
>
> (b) in accordance with planning permission granted for a limited period; or
> (c) without complying with some condition subject to which planning permission was granted.
>
> (3) Planning permission for such development may be granted so as to have effect from—
>
> (a) the date on which the development was carried out; or
> (b) if it was carried out in accordance with planning permission granted for a limited period, the end of that period.

Appellant's submissions

35. Mr Brown submitted that although planning permission was granted in 2008 for an extension to an existing premise, the works carried out were in accordance with this planning permission and whether or not it was described as an extension was irrelevant.

36. Whilst it was correct that amendments to the planning permission were granted in 2011 which specified demolition in the title, it could be seen that the 2010 amendments when considered in detail did not apply for demolition of the property. He submitted that the reason for this was that the new application regularised the position and demolition was already part of the original condition. He submitted that this could be seen by examining the plans for the 2007 application.

37. He submitted that Notes 16 and 18 to Group 5 were relevant to whether a building was an existing property. Conversions, reconstructions, alterations, enlargements, extension to existing buildings were excluded from zero-rating. In order to satisfy Note 16 an existing property ceases to be so when it is completely demolished to the ground or the part remaining above ground level consists of no more than a single façade.

38. He submitted that it was clear from the evidence that the external walls of the property except for the party wall had been demolished to ground level.

39. Mr Brown submitted that account should be taken of the final certificate issued by the Head Projects Building Control as described in paragraph 22 above which referred to the demolition. Mr Brown submitted that the 2008 permission clearly allowed for the demolition as otherwise the building control would not have issued the certificate.

40. Alternatively Mr Brown submitted that planning permission had been granted albeit retrospectively. Although there was no need to reapply as the previous permission was adequate the 2010 application was made to satisfy the height problem. He pointed out that despite granting demolition in the new permission the Council still referred to roof extension in their final paragraph.

41. The appellant contended that the issue had been addressed at Tribunal in the cases of *(ED) Bruce* 1991 and *JS and L Bell* (MAN/94/438). On both occasions the Tribunal found for the appellant and the decision was not appealed. Mr Brown submitted that in *Bruce* the finding was that it was the work done which counted and not what the planning permission stated.

42. Finally he submitted that the work fell within Schedule 8 Group 5 of VATA because it was a building designed as a dwelling, satisfied the condition in Note 2(d) in that the works were carried out in accordance with planning consent and Note 16 did not apply to exclude the works as the building was demolished to ground level.

HMRC's submissions

43. Mr O'Leary submitted that under Note 2 for a building to be designed as a dwelling four conditions (a) to (d) must be met.

44. Mr O'Leary stated that HMRC accepted that conditions (a) to (c) had been met. However this was not so in respect of condition (d). This condition required that in respect of the dwelling, statutory planning consent had been granted in advance of the construction.

45. The original proposal made by the appellant was "to erect a one storey flat roof extension on the roof of the building to provide additional residential accommodation. This extension would be on top of the existing roof extension".

46. Mr O'Leary submitted that the planning permission granted by the Council prior to the start of any works was for a "sixth floor extension to existing apartment. It did not mention the demolition of the existing roof extension. It was only after the work started that it became apparent that the existing roof extension needed to be demolished.

47. The certificate issued by Head Projects Building Control on 1 November 2010 stated that the work was the whole of the work described in an initial notice given by ourselves and dated 28 May 2009. Mr O'Leary submitted that this meant that the

demolition of the existing roof extension was therefore complete by 1 November 2010 and possibly by 28 May 2009.

48. He submitted that the planning permission allowing demolition of the existing roof extension was not applied for until 28 October 2010 and not received by the Council until 2 November 2010.

49. It was not granted by the Council until 1 February 2011 and therefore at the time the works were started planning permission for the demolition of the existing roof extension had not been granted.

50. He submitted that in order for the appellant's appeal to succeed it should have asked the Council to use its powers under Section 73A of the Town and Country Act 1990 to backdate the consent to a date prior to when the work began but it did not do so. Furthermore he submitted that although the planning permission granted on 1 February 2011 contained the word retrospective it did not specify its retrospective effective date or terms.

51. He submitted that his submissions were in line with the Tribunal's findings in *Michael James Watson v Commissioners for HMRC [2010] UKFTT 526* and *Abbeytrust Homes v Commissioners for HMRC [2011] UKFTT 150* (TC).

52. In conclusion he stated that the building at 28 Magdalen Court was not a building designed as a dwelling for the purpose of Group 5 Schedule 8 because condition (d) of Note 2 was not met.

53. Accordingly the supplies made by the appellants did not qualify for treatment as zero-rated supplies.

Findings

54. We found that that in both the 2007 planning application and the DAS the description of the development was that it was to be an extension.

55. We found that the letter from King Sturge dated 28 October 2010 which accompanied the 2010 application conflicted with Mr Bailey's assertion that the intention to demolish and rebuild was clear from the outset. In the final paragraph of page 2 of the King Sturge letter, Mr Pope (who wrote it) states:

> "As construction lawfully commenced the extent of rebuilding of the 'host' building/apartment necessary to support the extension has become evident with the effect that it has become necessary to remove the existing fifth floor to slab level – with the exception of the party wall to Flat 35 – and effectively rebuild the fifth floor to 'host' the sixth floor extension. This is of no material planning significance as it is effectively a repair and reinstatement of what is already there – with no elevational change – in order to ensure efficient and sound construction of the development.

56. We found that the building certificate was only relevant to the construction works carried out and was not cross-referenced to the planning permission. The Building Regulations explain what work was given technical consent.

57. We found that as the property is in a conservation area specific consent is required in law for demolition. As the appellant had demolished the main floor of the flat, it was presumably necessary to regularise the consents by seeking retrospective consent for demolition.

58. We found that at the time the demolition and construction took place statutory planning permission had not been granted for the demolition and so the building did not qualify for zero rating at that time. Note 2 states that a building is considered to be designed as a dwelling provided that four conditions are met. Condition (d) of Note 2 is that "statutory planning consent has been granted in respect of that dwelling and its construction has been carried out in accordance with that consent".

59. Whilst the correct planning permission was obtained on 1 February 2011 and was retrospective we find that although the retrospection applies to the work carried out before 1 February 2011 it does not mean that the planning permission was effective before that date. In the case of *Watson* Judge Gort found that in order for the Appellant to succeed the relevant council would have needed to use its powers under Section 73A of the Town and Country Planning Act 1990 at the time it issued the retrospective planning consent to backdate the consent to a time before the work began.

60. We found that the cases mentioned by the appellant were both very old cases which were decided before VATA under the VAT 1983 Act when there was no Note 18.

Decision

61. The appeal is dismissed.

62. 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: 12 April 2012