TC02043

Appeal numbers TC/2011/04280

VALUE ADDED TAX — do-it-yourself builders' scheme — VATA s 35, Sch 8 Gp 5 Note (2) — "live-work" unit — whether conditions for zero rating satisfied — no — appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ADRIAN RICHARD RAILTON HOLDEN
JANE ELISABETH HOLDEN **Appellants**

- and -

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

Tribunal: Judge Colin Bishopp
Mr Richard Law FCA CTA

Sitting in public in London on 25 May 2012

Mr Adrian Holden for the Appellants

Mrs Rita Pavely for the Respondents

DECISION

1. This is an appeal against the Commissioners' refusal to pay to the appellants the VAT, amounting to £5,904.67, they incurred in the construction of a single-storey flat. The claim was made in accordance with what is generally known as the "do-it-yourself builders' scheme", which is governed by s 35 of the Value Added Tax Act 1994. The effect of the section is to zero-rate certain works, subject to conditions, and to put those undertaking construction work themselves on the same footing as a commercial builder. The Commissioners' refusal is based upon their view that one of the relevant conditions is not satisfied, and that no refund is therefore due.

2. The property with which we are concerned, situated in Highbridge Road, Sutton Coldfield, consisted of a studio and workshop (used for professional photography) adjoining an office and garage. The office and garage were demolished and in their place the flat was constructed. It abuts, but is not tied into, the studio and workshop, and there is no internal means of access from the one to the other: it is necessary instead to use a courtyard they share. At all material times the entire property has been in the appellants' ownership, and we understand it is they who, at the time of the work, used the studio and workshop for the purposes of their business, and who lived in the flat. The property, as so developed, is what is known as a "live-work unit".

3. The work was the subject of planning permission granted by the local planning authority. One of the conditions imposed by the permission reads:

> "The flat hereby permitted shall be occupied only in conjunction with the operation of the photographic studio from 240a Highbridge Road.
>
> REASON: In order to safeguard the amenities of occupiers of premises/dwellings in the vicinity."

4. Section 35 of the 1994 Act sets out the conditions which must be satisfied if a person who has incurred VAT on the purchase of materials used in the construction of certain buildings, including dwellings, is to be eligible for a refund of that VAT. There is no dispute that in this case most of the conditions are satisfied, and it is unnecessary to set out the section in full. The provision which identifies the types of work which come within the section is sub-s (1A)(a), which includes "the construction of a building designed as a dwelling or number of dwellings". The appellants say that the flat falls within that description, which at first sight it plainly does.

5. The Commissioners, however, rely on sub-s (4), which provides that "The notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group …". It is note (2) to that Group which is of critical importance here. It provides that

> "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."

6. The Commissioners accept that conditions (a), (b) and (d) are met, but contend that (c) is not, because of the condition imposed by the planning permission which we have set out above. Mrs Rita Pavely, who appeared for the Commissioners before us, referred us to the decision of the VAT and Duties Tribunal (the predecessor of this tribunal) in *Paul Cussins v Revenue and Customs Commissioners* (2008, VAT Decision 20541) in which it said, in another case in which a condition of the planning permission was that "[t]he residential accommodation hereby permitted shall only be occupied in conjunction with the commercial use hereby approved" that

> "We find that the planning permission in its wording restricts its separate use or disposal and the provisions of Note (2)(c) are not satisfied."

7. Although the facts of *Cussins* differed in detail from this case, Mrs Pavely said, the principle was the same. Whatever the reason behind it, the condition of the planning permission clearly prohibited separate occupation of the residential accommodation and the business premises, and since occupation and use of accommodation amount to the same thing, it followed that the appellants could not comply with condition (c). Thus the appellants had not constructed a dwelling within the meaning of the statutory provisions, and no refund was due.

8. Mr Aidan Holden, who represented himself and his wife at the hearing, sought to distinguish *Cussins* because, he said, that was a case in which the two properties—residential and commercial—had been brought together to form a single unit, whereas here the property had always been in single ownership. He relied, too, on the Commissioners' own published guidance, in Public Notice 708. At para 15.4 the notice deals with live-work units:

> "A live-work unit is a property that combines, within a single unit, a dwelling and commercial or industrial working space as a requirement or condition of planning permission.
>
> Zero-rating or reduced-rating is only available to the extent that the unit comprises the dwelling, provided that the dwelling meets the normal conditions outlined in paragraphs 14.2 to 14.5 [which reproduce note (2)].
>
> Dwellings that contain a home office are not live-work units and no apportionment is needed."

9. If the Commissioners were right, he said, no live-work unit could ever qualify since, by definition, a live-work unit is one in which the living and working parts are to be occupied as a single unit. The legislation should be construed pragmatically so that its obvious purpose, of zero-rating new residential accommodation, as this was, was achieved.

10. Mr Holden presented his arguments with great skill, and we can see their merit: it may well be that, in practice, few live-work units can qualify for zero-rating and that this is not the result Parliament intended. We have, however, to construe and apply the legislation as it stands. We do not see that the factual difference between *Cussins* and this case is material; the planning conditions were essentially the same, in requiring the residential and business accommodation in issue to be in common occupation. Disposal of the residential part without the commercial part, or *vice versa*, would be unlawful, and the development therefore does not comply with condition (c). It necessarily follows that the Commissioners were right to refuse a refund.

11. The appeal is accordingly dismissed.

12. This document contains full 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 45 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.

Colin Bishopp
Tribunal Judge

Release date 29 May 2012