[2016] UKFTT 0794 (TC)

TC05519

Appeal number: TC/2015/03520

VAT – DIY Housebuilder scheme –whether prohibition on separate use or disposal-multiple conditions in planning permission-whether mere occupation condition

FIRST-TIER TRIBUNAL
TAX CHAMBER

PETER BOGGIS **Appellant**

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER
MRS JANET WILKINS

Sitting in public at Fox Court, 30 Brook Street, London EC1N 7RS on 31 October 2016

Mr Tim Brown, Counsel for the Appellant, instructed by Mr Dave Brown of Dave Brown VAT Consultancy

Ms Jane Ashworth, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. *Preliminary matter*

2. The appeal should have been made by 2 January 2015 but was not submitted until 7 April 2015. The reason for the late submission was that after the time for appealing had expired, on 15 January 2015, the Upper Tribunal released the decision in a case (*HMRC v Barkas* [2014] UKUT 558 TC) which the Appellant considered cast doubt on HMRC's view in the Appellant's case. Following further correspondence with HMRC, HMRC declined to reconsider the position and indicated that the Appellant's remedy was to appeal to the tribunal.

3. HMRC do not object to the late appeal.

4. We gave permission for the Appellant to appeal out of time.

5. *Introduction*

6. This is an appeal by Mr Boggis against a decision by HMRC, following a review, dated 3 December 2014 rejecting Mr Boggis' claim for a refund of VAT under the "DIY Housebuilders' Scheme".

7. *The facts*

8. The facts in this case are straightforward and are not in dispute.

9. The Appellant purchased Avil's Farm in 2006. It consisted of approximately 120 acres of land, the farmhouse and a range of dilapidated farm buildings.

10. In 2011, the Appellant was granted planning permission to carry out works on both the farmhouse and the adjacent barn, in order to convert it into a dwelling. At that point there was an equestrian business based at the site.

11. The planning permission for the barn included a condition ("Condition 4") that:

"4.The occupation of the dwelling hereby permitted shall be limited to persons solely or mainly employed in the equestrian enterprise at the site … or a widow or widower of such a person and any resident dependants or for purposes ancillary to the residential use of Avil's Farmhouse.

REASON The additional accommodation is sited in a position where the Local Planning Authority, having regard to the reasonable standards of residential amenity, access and planning policies pertaining to the area, would not permit a wholly separate dwelling."

12. In 2013 the Appellant sold the farmhouse and commenced construction work on the barn.

13. In 2014, the Appellant sought clarification from HMRC's VAT Clearances Team that it would be eligible for a DIY claim under s.35 VAT Act 1994 (VATA) by virtue of Item 1 Group 5 Sch 8 VATA.

14. Whilst this was being considered, the Appellant submitted a DIY Housebuilders' Claim to HMRC on 10 October 2014, under s. 35 VATA.

15. The Commissioners rejected the claim by a decision dated 17 October 2014 on the basis that Condition 4 failed to satisfy Note 2(c) to Group 5 of Sched. 8 VATA, as it prohibited the barn's separate use.

16. On the same day, the VAT Clearances Team wrote to Mr D Brown, Mr Boggis's representative. They had previously asked for confirmation from the planning authority that it accepted that the converted barn could be disposed of separately from the main farmhouse without breaching the planning consent. Such a letter was provided The Clearances Team wrote:

"You have kindly provided a letter from the council advising that the properties could be sold separately, provided condition 4 of the permission remains extant. The barn must be occupied by:

- *Employees of the equestrian enterprise; or*
- *A widow or widower of such a person and any resident dependents; or*
- *For purposes ancillary to the residential use of Avil's farmhouse.*

*Therefore, provided you can satisfy the DIY Housebuilders' Scheme team that the property is occupied by one of the above, HMRC would consider that the barn conversion is a dwelling under Note 4(3), Group 6, Schedule 7A VATA [*which is equivalent to Note 2(c)]"

17. The decision to reject the claim was upheld on review on 3 December 2014.

18. Mr Brown considered that the decision letter and the VAT Clearance Team letter were inconsistent, but in fact they were each addressing a different question. The Clearance Team were addressing the question whether the separate *disposal* of the buildings was permitted and in the light of the council's confirmation decided that it was. The council's letter and their letter specifically indicated that compliance with condition 4 of the planning permission continued to be required and the barn had to be occupied by a member of the specified class if the occupation was not ancillary to the residential use of the farmhouse. The decision letter refused the claim on the grounds that the planning permission did not permit the separate *use* of the barn.

19. *The Law*

20. Section 35 VATA provides for the DIY Housebuilders' Scheme. It allows a person who constructs a property designed as a dwelling or converts a non-residential

property into a residence to claim a refund of the VAT incurred in purchasing materials to build the property. It provides, so far as relevant:

" [(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.

(1A) The works to which this section applies are—…

(c) a residential conversion.

…

(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 a 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.]

…

[(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].

[(4A) The meaning of "non-residential" given by Note (7A) of Group 5 of Schedule 8 (and not that given by Note (7) of that Group) applies for the purposes of this section but as if—

(a) references in that Note to item 3 of that Group were references to this section, and

(b) paragraph (b)(iii) of that Note were omitted.]"

21. Note 2 to Group 5 of Schedule 8 VATA provides so far as relevant:

"(2) A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied—

…

(c) the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision"

22. It is common ground that the barn and the farmhouse may be disposed of separately.

23. This appeal turns on whether condition 4 of the planning permission constitutes a prohibition on the separate use of the barn.

24. *The Appellant's submissions*

25. The separate sale of the farmhouse did not breach the planning conditions.

26. The Tribunal should construe the legislation in a purposive manner as in *Capital Focus v HMRC* [2016] UKFTT 440 (TC).

27. Note 2(c) must be applied in the light of the precise wording of the condition and the factual context in which it applies in the particular case. Per *HMRC V Shields* [2014] UKUT 0453 (TCC) cited in *Revenue and Customs Commissioners v Burton* [2016] UKUT 0558(TCC)

28. Condition 4 is too general or tenuous (see *Burton*) to amount to a prohibition.

29. A strict or narrow approach is to be avoided in favour of one which is benevolent and applies common sense (*Burton*).

30. None of the recent Upper Tribunal cases have considered conditions with such wide terms as in this case.

31. None of the cases has considered a case where there are multiple conditions as here.

32. The link to the equestrian business amounts to an occupancy restriction only. If the business failed or relocated the barn could continue to be lawfully occupied by someone with no connection to the farmhouse.

33. The case of *Revenue and Customs Commissioners v Barkas* [2014] UKUT 0558(TCC) stated that the Tribunal could take into account the fact that a restriction would cause hardship to an occupier on the failure of his business or retirement.

34. *The Respondent's submissions*

35. Note 2(c) does not require a prohibition on *both* disposal and use. Even if the barn could be disposed of separately from the farmhouse, there is still a prohibition on the barn being used separately from *either* the equestrian business *or* the farmhouse.

36. *Burton* and *Shields* both concerned planning conditions restricting occupation to individuals employed in a particular business but expanded to allow occupation by a wider class including widows, widowers and dependants.

37. Both *Burton* and *Shields* emphasise the link to specific land or premises. A requirement to work at a particular location amounts to a prohibition.

38. The case of *Barkas* concerned a live/work unit which is not relevant here.

39. *Discussion*

40. Both parties have referred to the same Upper Tribunal cases in support of their respective submissions. We must now consider those cases more closely.

41. Mr Brown urged us to take a purposive approach as was done in *Capital Focus.* However, that case concerned the question whether a property in multiple occupation constituted a "dwelling" for the purpose of the zero- rating provisions in VATA. The Tribunal took account of the fact that the purpose of that legislation was to zero rate the creation of new homes where none existed before and in the light of this, the Tribunal found that a property in multiple occupation could be a dwelling.

42. *Capital Focus* cannot be regarded as permitting a purposive approach to the VAT legislation in general. The Notes to Group 5 are intended to define the circumstances in which zero rating will be available. Note 2 seeks to ensure that any building to which zero rating applies must be built and occupied in accordance with an extant planning permission and Note 2(c) seeks to ensure that only genuinely separate dwellings are entitled to zero rating.

43. The question then arises; separate from what?

44. In *Shields*, the condition was *'The occupation of the dwelling shall be limited to a person solely employed by the equestrian business at 274 Bangor Road, Newtownards, and any resident dependants.'*

45. The Upper Tribunal said:

"The issue in this case is whether the effect of Condition 3 is to prohibit use of the dwelling at 274 Bangor Road separate from the equestrian business at the same address.

[55] *We considered whether the reference to 'solely employed by the equestrian business' could be construed as a general restriction on the occupation of the occupant, as in* Wilson*, and not a prohibition on the use of the dwelling separately from the rest of the site. We concluded that it could not be so construed. Unlike the condition in* Wilson *which required the occupant to be employed in agriculture or forestry generally, Condition 3 referred to employment in a specific business at a specific address.*

[56] *In our view, a condition of planning permission for a dwelling that requires it to be occupied by a person who works at a specified location prohibits the use of the dwelling separately from the specified location. The dwelling at 274 Bangor Road can only properly be used to provide accommodation for a person employed in the equestrian business at the facilities (stables etc) at that address. Any use of the dwelling at 274 Bangor Road 'separate from' the equestrian business carried on at the same address is therefore, in our view, prohibited by Condition 3. That is a prohibition within the meaning of Note (2)(c) to Group 5 of Sch 8 to VATA94 and the dwelling is not, therefore, a building 'designed as a dwelling' for VAT purposes."*

46. In *Burton*, the planning condition was: *"the occupation of the dwelling shall be limited to a person solely or mainly employed or last employed in Park Hall Lake Fishery or a widow or widower of such a person, or any resident dependants."*

47. The class of permitted occupants in *Burton* is similar to the class in the present case. The Upper Tribunal commented:

"I do not consider that the condition is disqualified as a prohibition on separate use simply because the class of occupants is expanded, beyond the Park Hall fishery's workers or retired workers, to include their widows, widowers and resident dependants. Each such occupant must still have a specific link

with the fishery at Park Hall. It is that required link to specific land or premises which is crucial, and which puts cases such as the present in a different category from those which have no such link or in which any link is too general or too tenuous … No doubt there will be cases which are borderline and therefore difficult to call, but I do not regard the present case as one of those. Here the link between the occupancy of the Building and the Park Hall fishery is sufficiently close, specific, clear and unequivocal."

48. The answer to our question therefore is that the barn must be capable of being occupied separately from other specific land or premises.

49. We note the comments in both *Burton* and *Shields* that it is essential to look at the condition in each individual case and to look at it in context. This was explained in *Burton* (citing *Shields*) as follows.

"Thus, in construing a condition in a planning permission, the whole consent falls to be considered, and a strict or narrow approach is to be avoided, in favour of one which is benevolent, applies commonsense and, where appropriate, takes account of the underlying planning purpose for the condition as evidenced by the reasons expressed.
61. Further helpful guidance was provided by the Upper Tribunal in Shields, at paragraph 53:
"Our view is that the issue of whether Note 2(c) applies should be determined in the light of the precise wording of the condition and the factual context in which it applies. It follows that an analysis of different cases with differently worded conditions and different facts is unlikely to assist in determining whether Note 2(c) is satisfied in another case. Accordingly, we prefer to focus on the terms of the planning permission and, in particular, Condition 3 in this case rather than engage in a detailed discussion of the other more or less similar cases considered by the FTT in this appeal."

50. *Burton* and *Shields* were both decided in favour of HMRC. The *Barkas* case was decided in favour of the taxpayer. The condition in *Barkas* was somewhat different from those we have been considering. It said:

> *"The workshop/office within the application site shall only be used/operated by the occupiers of the dwelling hereby granted permission."*

51. So, in that case, the prohibition on separate use was a requirement that the person who occupied the workshop on the site had to occupy the dwelling which was the subject of the planning permission. It was the reverse of the situation in this case and those discussed above. The house could be occupied by anyone in the world, whether or not they used the business premises, but the business premises could only be occupied by a person who also occupied the house.

52. The Upper Tribunal commented:

"Finally, we observe that a permission that restricted the occupation of the dwelling to a person who worked in the workshop/office would cause hardship to the relevant occupier on the failure of his business or on retirement. We consider that such a restriction would require express words to alert any potential occupier. The absence of clear words reinforces our conclusion that the permission is not to be construed to have that effect."

53. So, in *Barkas*, the Tribunal pointed out that a prohibition on a house being used separately from a business could cause hardship if the business ceased. It did not assume that continued occupation of the property would be lawful. It said that if such a prohibition were intended, it would have to be expressed clearly. *Barkas* is of limited assistance to the Appellant as it was held that the restriction applied to the business property, not the house. Given the hardship which would apply if the prohibition applied to the house, such a prohibition would need to be clearly stated and the Tribunal held that in that case the words were insufficiently clear.

54. We now apply the principles established in the above cases to Mr Boggis' barn, being mindful of the fact that we need to look at the specific facts in this case, taking account of the terms of this condition and the reason for it.

55. None of the previous cases dealt with a situation where the condition imposed multiple possibilities for permitted use. In this case, the condition is satisfied if the occupant satisfies any of the following conditions:

- He is an employee of the equestrian enterprise at the site; or
- A widow or widower of such a person or a resident dependent; or
- He occupies the barn for purposes ancillary to the residential use of Avil's farmhouse.

56. In all cases, the condition requires that essential link between the occupation of the barn, and the use of another specific piece of land or building-Avil's farm on which the equestrian business was being carried out or Avil's farmhouse . It is sufficient if there is a connection *either* with the equestrian enterprise on the site *or* with the farmhouse, but one or the other must be present. The barn cannot be occupied separately from the specified other land and the condition expresses that clearly.

57. The fact that the class of permitted occupants is widened to include widows/widowers or dependants of the employee does not alter the position. The link to the business on the farm or farmhouse is still required.

58. The condition is not simply an occupancy condition and it is by no means certain that Mr Boggis could continue to occupy the barn lawfully in accordance with the planning permission if the equestrian business ceased at the farm whether on his retirement or on the business failing or moving to another site.

59. It is also important to look at the stated reason for the imposition of the condition.

"REASON The additional accommodation is sited in a position where the Local Planning Authority, having regard to the reasonable standards of residential amenity, access and planning policies pertaining to the area, would not permit a wholly separate dwelling."

60. It could not be plainer that the local planning authority did not intend to permit the construction of a dwelling which could be occupied otherwise than as ancillary to the business carried on at the farm or to the farmhouse itself. The site was not suitable for a wholly separate dwelling. That is why the condition required occupation to be ancillary to other activities on the site. That amounts to a prohibition on the separate use of the dwelling within Note 2(c).

61. *Decision*

62. For the reasons set out above, we consider that the separate use of the barn is prohibited by the terms of the statutory planning consent applicable to the barn so that it cannot qualify as a "building designed as a dwelling" for the purposes of Note 2 to Group 5 of Schedule 8 VATA and is not eligible for zero rating.

63. We dismiss the appeal.

64. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 02 DECEMBER 2016