[2017] UKFTT 598 (TC)

TC06040

Appeal number: TC/2013/09598

VAT – DIY Builders Scheme – construction of dwelling – Note (2)(c) to Group 5 of Schedule 8 to VAT Act 1994 – whether planning condition prohibited "separate use" of the dwelling – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DUNCAN LICHFIELD **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
ANDREW PERRIN

Sitting in Public in Bristol on 30 May 2017

Mr Andrew McDonald for the Appellant

Mrs Sharon Hancox, Officer of HM Revenue and Customs, for the Respondents

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DECISION

Background

1. This is a VAT case. It concerns the DIY House-Builders Scheme (the "Scheme"). The appellant has claimed a refund of VAT of £10,981.27 under the Scheme in relation to a dwelling which he constructed in 2012/13. That claim has been rejected by the respondents. The appellant has appealed against that rejection.

2. There is no dispute about the relevant law and facts, only on the application of the former to the latter. The issue is whether an occupation condition in the appellant's planning consent prohibits the separate use of the dwelling. The appellant says not and so is entitled to a refund. The respondents say it does.

3. Regrettably for the appellant we agree with the respondents and so for the reasons set out in more detail below, we dismiss his appeal.

Evidence and Finding of Fact

4. We were provided with a bundle of documents. The appellant and his wife were present throughout the hearing and shipped in on occasions to clarify points but did not give formal evidence.

5. From the documents and these comments we find the following facts:

(1) The appellant traded in partnership, with his wife as proprietors of a garage at West Quantockshead, Somerset.

(2) Prior to constructing the dwelling, they were living in rented property in Williton, approximately 3 miles away from the garage. The dwelling was built on land from which they had previously sold motor vehicles.

(3) The dwelling is located next to the garage. As well as working in the garage, the appellant and his wife employed around 2 full time staff and approximately 8 part-time staff.

(4) On 9 October 2012 the appellant was granted conditional planning consent by West Somerset Council to build "a dwelling, double garage and associated works for site manager" at St Audries Garage, West Quantoxhead. This is the building which we describe as the "dwelling" in this judgment. The dwelling was constructed in accordance with that planning consent and on 11 September 2013, the appellant moved into the dwelling. Condition 3 of the planning consent reads:

> "*3 The occupation of the dwelling shall be limited to a person solely or mainly working at the property currently known as St Audries Garage, West Quantoxhead as shown on Drawing No. 2365.04B and to any resident dependants.*"

(5) On 25 September 2013 the appellant submitted an application to recover VAT under the Scheme. The claim was for £10,981.29.

(6) On 3 October 2013 the respondents notified the appellant that the application for the refund had been rejected.

(7) Subsequently, on 4 October 2013 the appellant requested that decision to be independently reviewed. The independent review was carried out on 18 November 2013, the respondents, by way of letter, informed the appellant that the review had upheld the decision to refuse the appellant's claim.

(8) On 16 December 2013 the appellant appealed against that decision.

The Law

6. To be eligible for a refund under the Scheme and, specifically, under section 35(1A)(a) of the VAT Act 1994 (the "**Act**"), a building subject to the claim must be "designed as a dwelling".

7. Section 35(4) of the Act makes clear that the notes to Group 5 of Schedule 8 to the Act shall apply for construing section 35.

8. The criteria which must be met for a building to be "designed as a dwelling", are set out in note 2 of Group 5 to Schedule 8 to the Act.

9. The criterion which is relevant to this appeal is that set out in note 2(c) which provides:

> "*A building is designed as a dwelling … 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 terms of any covenant, statutory planning consent or similar provision; …* "

Burden & Standard of Proof

10. The burden of establishing that he is entitled to a refund under the Scheme lies with the appellant. The standard of proof is the balance of probabilities.

Appellant's Case

11. The appellant puts forward the following grounds of appeal.

(1) The planning consent contains no prohibition on use which is the relevant test for note 2(c) purposes. There is a limitation in the consent but that relates only to occupation. The concepts of use and occupancy are different.

(2) The Upper Tribunal in the case of *Burton* (*HMRC v Richard Burton* [2016] UKUT 20) did not establish a relevant link between use and occupancy.

(3) HMRC have not followed their own guidance on the application of the occupancy conditions and whether they prohibit separate use.

(4) Planning policy provides that a need to provide accommodation to enable farm forestry or other workers to live at or near a place of work justifies the giving of consent for new isolated residential properties in the countryside. Whilst there is a need, as there was in the appellant's case, it is necessary to ensure that the dwellings are kept available for meeting that need, and planning permission should be made subject to an appropriate occupancy condition. This applies not just to farm or forestry workers but to anyone working in a rural based enterprise.

(5) The dwelling is to be used "in connection with the business" not "in the business" and this means there is no prohibition against separate use.

(6) An occupancy condition is not an absolute prohibition as evidenced by what happens should a business cease. Planning policy suggests that a dwelling subject to an occupancy condition can continue to be used notwithstanding cessation of the associated business. This would be impossible if the condition was an absolute prohibition on separate use.

12. The respondents submit as follows:

(1) The link between the use and occupation is dealt with in *Burton* and in *Shields* (*HMRC v Shields* [2014] UKUT 0453) and we are bound by those decisions.

(2) HMRC have followed their own guidelines. These show that an occupancy condition does not automatically prohibit separate use or disposal. But it does so where a restriction goes beyond identifying a particular class of person and ties use for a dwelling to, say, a commercial activity being carried on in another building. This is the position in the present case.

(3) There is a separate use prohibition and that is sufficient to reject the claim even if separate disposal is not prohibited.

(4) Condition 3 of the appellant's planning consent fits with the planning policy objectives; namely that conditions which tie the occupation of dwellings to that of a separate building should generally be avoided but exceptionally such conditions might be appropriate where there are sound planning reasons to justify them (for example where a dwelling has been allowed on a site where permission would not normally be granted). In these circumstances it is acceptable to grant permission subject to a condition that ties the occupation of the new house to the existing business. This is on all fours with the appellant's circumstances.

Discussion

13. The issue in this case is the relationship between use (the term used in the relevant legislation) and occupation (the term used in the planning consent); and more specifically, when can a planning condition which restricts occupation become a prohibition on use for the purposes of note 2(c).

14. Mr McDonald is absolutely right when he observes that note 2(c) does not mention the word occupation, only use. There is no express prohibition on use in the appellant's planning consent. The relevant condition reads

> "*The occupation of the dwelling shall be limited to a person solely or mainly working at the property currently known as St Audries Garage, West Quantoxhead as shown on Drawing No. 2365.04B and to any resident dependents.*"

15. But, as HMRC assert, and as is clearly set out in *Shields*, there is a link.

16. At [56] of *Shields*, the Upper Tribunal said:

> "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 247 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 schedule 8 to VATA 1994 and the dwelling is not, therefore, a building "designed as a dwelling" for VAT purposes."

17. In *Shields* the relevant planning condition was that:

> "*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 dependents.*"

18. In *Burton* the relevant planning condition was that:

> "*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*."

19. As can be seen in the conditions in *Shields* and *Burton*, the occupation was tied to a specific business. The same is true of the appellant's planning condition. Occupation is tied to occupation by a person who works at a specified location. In *Shields* it was 274 Bangor Road, in *Burton* it was Park Hall Lake Fishery, in the appellant's case it is St Audries Garage.

20. We disagree with Mr McDonald that *Burton* did not deal with a link between use and occupation, and, in particular, his assertion that paragraph 91 of the decision in *Burton* should have established the link between use and occupancy. To the contrary, in paragraph 91, Mr Justice Barling states

> "*91 …….. However, I do not understand the distinction between a "use" condition and an "occupancy" condition. Occupation of a dwelling is clearly a use of it. So the judge is clearly stating that use and occupancy are closely linked.*"

21. Mr McDonald could not distinguish the planning conditions in *Burton* and *Shields* from the planning condition to which the appellant was subject. We cannot either. They are materially identical. We agree with the sentiments expressed in the extract from *Shields* set out above.

22. The requirement that the occupation of the dwelling may only be by a person who works at St Audries Garage prohibits the use of that dwelling separately from that specified location. The dwelling at St Audries can only be properly used to provide accommodation for a person employed in the garage business carried on at St Audries Garage. Any use of that dwelling "separate from" that garage business is, in our view, prohibited by the appellant's planning permission. And that prohibition, which falls within the meaning of Note 2(c), means that the dwelling is not a building designed as a dwelling for the purposes of the scheme.

23. Furthermore we do not agree with Mr McDonald when he asserts that HMRC have not followed their own guidance. In our view they have, and that guidance reflects accurately the decisions in *Burton* and *Shields*. HMRC rightly accept that generally occupancy restrictions do not prevent the separate use or disposal of a dwelling but do so once the restriction goes beyond identifying a particular class of person, and "ties use of a dwelling to, say, a commercial activity being carried on in another building".

24. There is a line in the sand. Where the restriction applies to businesses generally, or to a broad geographical location, then separate use is not prohibited. But where the occupation is linked to a specific location, as is the case here, then a prohibition on occupation is also a prohibition on separate use.

25. It is our view that HMRC have acted consistently with their guidance.

26. We would also say that even if we thought they had not, we do not have a general supervisory jurisdiction to police the fairness or otherwise of decisions of HMRC. The appellant's redress would be by way or judicial review which could be brought only before the Upper Tribunal or the administrative court.

27. Mr McDonald has made a number of eloquent submissions in relation to planning policy. But for tax purposes, the matter boils down to the conditions in the appellant's planning consent rather than the reasons as to why those conditions were originally imposed.

Decision

28. For the forgoing reasons we dismiss this appeal.

Appeal rights

29. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 02 AUGUST 2017