



[2019] UKFTT 323 (TC)

**TC07151**

*VAT – DIY Housebuilders Scheme – Appellant claimed refund of VAT on the basis that the supply should have been zero-rated – Appellant not entitled to refund from HMRC of VAT wrongly charged by supplier – appeal dismissed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2017/07577**

**BETWEEN**

**MR IAN BUSHELL**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE KELVAN SWINNERTON  
MRS SONIA GABLE (MEMBER)**

**Sitting in public at Folkestone Magistrates Court on 18 April 2019.**

**Mr Bushell, the Appellant.**

**Mr Nicholson, litigator of HM Revenue and Customs' Solicitor's Office for the Respondents.**

## DECISION

### INTRODUCTION

1. This is an appeal against HMRC's decision of 13 July 2017 confirmed on review on 12 September 2017 that the Appellant, Mr Bushell, is not eligible for a refund of VAT in the sum of £28,861.96 charged on works undertaken at a residential property under the DIY Housebuilders' Scheme set out at s.35 of the Value Added Tax Act 1994 ("VATA 1994").

### BACKGROUND

2. Mr Bushell is a retired bricklayer who lives at Mead House, Church Road, Smeeth, Kent, TN25 6SA ("Mead House"). Formerly, he was a director along with his brother of a longstanding local building company called Brighter Homes (Folkestone) Limited which they founded. Mr Bushell and his brother had each owned 50% of Brighter Homes (Folkestone) Limited until, for reasons of ill-health, Mr Bushell ceased being a director of the company and left the company in or about late 2013. Brighter Homes (Folkestone) Limited continues to be operated by Mr Bushell's brother and is the same building company that was involved with the works at Mead House.

3. In November 2006, planning permission was obtained from Ashford Borough Council with respect to Mead House for the extension of the existing dwelling with recladding and remodelling of the external elevations. The works commenced in 2006. The nature of those works evolved and the property had to be demolished to ground level and rebuilt such that the project became a new build. The letter dated 20 June 2016 from Ashford Borough Council refers to the walls of the existing building being removed to ground level with new foundations provided for the external walls of the new structure.

4. Mr Bushell submitted a 'VAT refunds for DIY housebuilders claim form for new houses' that was received on 6 June 2016. It states that 24 March 2016 was the date of occupation of the property that is being claimed for. The claim was for a refund of VAT totalling £28,861.69 and related to four invoices. HMRC wrote to Mr Bushell on 22 August 2016 informing him that it was unable to refund the VAT explaining that the goods/materials and services supplied had been provided in the course of a new qualifying dwelling and no VAT should have been charged. It was further explained that HMRC was unable to repay incorrectly charged VAT and that it was the supplier who must make the correction.

5. Mr Bushell replied on 27 September 2016 stating that he understood the explanation regarding the refund of VAT but that the invoices in respect of which he was seeking a refund of VAT related to the supply of materials alone. There were some communications between the Appellant's then agent (Carter & Co, Financial Accountants) and HMRC after which Mr Bushell contested the position of HMRC. In its letter of 13 July 2017, HMRC rejected the claim of Mr Bushell and referred to a lack of necessary planning permission for the demolition of an existing building and the construction of a replacement building.

6. In its review letter dated 12 September 2017, HMRC stated that Brighter Homes had supplied services in the course of the construction of a new dwelling that included the fitting of materials and that VAT should not have been charged by Brighter Homes as this was a zero-rated supply for VAT purposes. As the VAT was not properly chargeable, HMRC stated that it cannot be reclaimed under the DIY Housebuilders' Scheme.

## THE LAW

7. The DIY Housebuilders' Scheme is set out at s.35 of VATA 1994. That is the legislation upon which Mr Bushell relies for the refund of VAT charged to him on the construction work undertaken at his residential property.

8. *Section 35 (Refund of VAT to persons constructing certain buildings) 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 purpose 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 –*

- (a) the construction of a building designed as a dwelling or 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.*

*(1B) .....*

*(1C) Where--*

- (a) a person (“the relevant person”) carries out a residential conversion by arranging for any of the work of the conversion to be done by another (“a contractor”),*
- (b) the relevant person’s carrying out of the conversion is lawful and otherwise than in the course or furtherance of any business,*
- (c) the contractor is not acting as an architect, surveyor or consultant or in a supervisory capacity, and*
- (d) VAT is chargeable on services consisting in the work done by the contractor,*

*the Commissioners shall, on a claim made in that behalf, refund to the relevant person the amount of VAT so chargeable.*

9. Schedule 8, Part I to VATA 1994 contains an index to zero-rated supplies of goods and services. Schedule 8, Part II details Groups which includes ‘Group 5 – Construction of Buildings, etc’. Item 4 of Group 5 refers to the supply of building materials to a person to whom the supplier is supplying services within item 2 or 3 of this Group which include the incorporation of the materials into the building (or its site) in question.

## THE HEARING

10. Mr Bushell provided a bundle of documentation which included a statement of his case as well bringing photographs to the hearing of Mead House before the construction works had started and after the works had been completed. HMRC provided a bundle of documentation for the purpose of the hearing that consisted of 164 pages. Included within the documentation provided by HMRC were, amongst other things, the four invoices detailed in the claim form of Mr Bushell as well as a copy of the decision in the case of *Michael Roy Culverwell v HMRC [2009] UKFTT 276 (TC)*. HMRC also provided, at the hearing, a copy of the decision in the case of *Charles Denis Smith v HMRC [2016] UKFTT 0783 (TC)*.

11. Mr Bushell explained that he had become ill in 2007 although he had not been formally diagnosed with bowel cancer until several years later. He gave evidence that he had commenced the construction work on Mead House himself but that, due to his ill-health, he stopped working on the house in 2008/9 and Brighter Homes took on the work. Mr Bushell referred to having had surgery in 2011 and in 2012 and to having endured relapses in his advanced bowel cancer.

12. In relation to the four invoices from Brighter Homes (Folkestone) Limited included on the claim form submitted by Mr Bushell to HMRC, the invoice numbered 6307 is dated 26 June 2013. It details an invoice total of £175,108.69 and a total VAT amount of £29,184.78. Written in manuscript across the face of that invoice is 'Brighton homes Refunding this invoice' and it was accepted by Mr Bushell and HMRC that this invoice does not form part of the claim of Mr Bushell for a refund of VAT.

13. With respect to the remaining three invoices that do form part of Mr Bushell's claim, invoice numbered 0066 is dated 22 May 2009. It is stated to be Interim No.1 for Mead House, Smeeth and is for the sum of £1892.56 of which £246.86 represents VAT at 15%. Invoice numbered 727 is dated 11 November 2009 and states 'We apply for an Interim off above contract'. It details an invoice total of £143,984.21 and VAT amounting to £18,780.55. The third invoice, which is numbered 3303, is dated 10 November 2010 and refers to being 'Interim for works carried out'. It specifies an invoice total of £50,046.09 and VAT of £7453.67.

14. The total figure for VAT in respect of the three invoices that form part of the claim amounts to £26,481.08 and not to the higher figure of £28,861.96 that is claimed. That was a point raised in the review letter of HMRC. At the hearing, Mr Bushell explained that the figure of £28,861.96 had been arrived at by negotiation during a telephone call that Mr Bushell had with Mr Powell of HMRC although Mr Bushell did not recall when the telephone call took place and he did not have any note of what was said on the call. Mr Bushell stated that his claim for VAT was for a higher amount than the sum of £28,861.96 but that this figure had been reached by agreement with Mr Powell who had subsequently called him back the same day to inform Mr Bushell that a figure could not be agreed and that Mr Bushell would have to appeal to HMRC.

15. HMRC stated that the invoice numbered 6307 which is dated 26 June 2013 (and referred to above) was able to be adjusted and a reclaim of VAT made as it was within the period of four years allowed for the provision of the VAT return. HMRC contended that the three other invoices incorrectly charged VAT in the same way but were outside the allowable period of four years such that the VAT could not be reclaimed. HMRC also contended that the three invoices did not specify that they related to materials and that no separate, underlying invoices had been provided to demonstrate that the three relevant invoices related solely to materials.

## **FINDINGS OF FACT**

16. It was accepted at the hearing by HMRC and no longer in issue that Mr Bushell had the required planning consent to undertake the construction works at Mead House in light of the nature of the works having changed to a new build. We find that the works carried out at Mead House were legal and in accordance with the requirements of s.35 of VATA 1994 in that respect.

17. In relation to the amount of the VAT refund claimed which is £28,681.96, we note that the total amount of VAT charged on the three invoices relevant to the claim of Mr Bushell is not the figure of £28,681.96 but rather the lower figure of £26,481.08. Mr Bushell stated that this figure derives from a negotiation that he had with Mr Powell of HMRC by telephone although Mr Bushell did not know when in time that telephone call took place and there is no note of the call available from Mr Bushell.

18. HMRC made no reference to any telephone calls between Mr Bushell and Mr Powell. We noted that the claim of Mr Bushell is dated 23 May 2016 and that the claim contains the figure of £28,681.96. We noted also that the letter of Mr Bushell which is date stamped as received on 27 September 2016, about five months later in time than the date of the claim form, makes no reference to any telephone call with Mr Powell or to any negotiated figure of £28,681.96 resulting from a telephone call with Mr Powell. We find that the amount of VAT of £26,481.08, rather than the amount of £28,681.96 included on the claim form of Mr Bushell, is the correct amount of the claim based upon the figures contained in the three relevant invoices.

19. Mr Bushell readily acknowledged at the hearing that he may have been confused in respect of the dates of some events. We accept fully and with much sympathy that Mr Bushell has gone through a most difficult time for an extended period due to having suffered from advanced bowel cancer and that this may have contributed to confusion relating to the timing of certain events. We accept the evidence of Mr Bushell at the hearing that he became ill in 2007, that he had to stop working on Mead House at some point in 2008 or 2009 and that Brighter Homes (Folkestone) Limited then took over the work to be done at Mead House.

20. At the hearing, Mr Bushell was directed to the invoice numbered 3303 which is dated 10 November 2010 and he was asked why this invoice refers to works being carried out at Mead House if it only related, as Mr Bushell maintains, to materials being provided to him. Mr Bushell explained that Brighter Homes were doing other things at Mead House but were not doing work on Mead House and that the invoice related to a mixture of things. We are not persuaded by that explanation and do not accept it. We noted that the invoice numbered 3303 contains the same Job No (which is C4771) as the other two invoices in relation to which a refund of VAT is being claimed.

21. We noted also that no written contract was provided in relation to the new build works carried out by Brighter Homes at Mead House or in relation to any works or activity carried out by Brighter Homes at Mead House. We find that invoice numbered 3303 (which details a VAT figure of £7453.67) relates to works undertaken by Brighter Homes at Mead House and not to only materials provided by Brighter Homes for the purpose of the construction work being carried out by someone other than Brighter Homes, particularly as this invoice was dated a significant amount of time after Mr Bushell had stopped working on Mead House.

22. With respect to invoices numbered 0066 and 727, these are dated 22 May 2009 and 11 November 2009 respectively and neither invoice on its face states that it refers to the provision

of materials alone by Brighter Homes to Mr Bushell. Invoice numbered 0066 refers to Interim No.1 and, likewise, invoice numbered 727 refers to ‘an Interim off above contract’. Mr Bushell provided various pages of cost transactions by job and cost code but did not provide any of the underlying invoices referred to on those pages of cost transactions such that no invoices were provided to substantiate that the amounts detailed on invoices 0066 and 727 (and 3303) related to materials alone. We find that invoices 0066 and 727 did not relate to materials only but related to work carried out by Brighter Homes (and perhaps to materials associated with that work undertaken by Brighter Homes).

## **DECISION**

23. We agree with HMRC that VAT can only be refundable to the extent that VAT was properly chargeable under s.35 of VATA 1994.
24. We agree that VAT has not been properly charged and that the correct chargeable rate of VAT on the supplies made to Mr Bushell in respect of the three relevant invoices was zero per cent.
25. We agree with HMRC that any issue with VAT that has been charged at the wrong rate is an issue between Mr Bushell and Brighter Homes (Folkestone) Limited and that it is an issue of civil law between customer and supplier.
26. We have taken account that it is now too late for Brighter Homes (Folkestone) Limited to reclaim the wrongly charged output tax from HMRC given that the limit of four years under s.80(4) of VATA 1994 applies from the end of the accounting period when the supplies were made.
27. We dismiss the appeal of Mr Bushell.

## **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

28. 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.

**KELVAN SWINNERTON  
TRIBUNAL JUDGE**

**RELEASE DATE: 22 MAY 2019**