Neutral Citation: [2023] UKFTT 00387 (TC)

Case Number: TC08801

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/01382

VAT – DIY Housebuilders – whether supplies zero-rated – single or multiple supplies - HMRC v Gray & Farrar International LLP applied – appeal allowed in part

Heard on: 27 January 2023
Judgment date: 24 April 2023

Before

TRIBUNAL JUDGE FROST
CHRISTOPHER JENKINS

Between

STEVEN JAMES MORT

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Mort represented himself

For the Respondents: Dermot Ryder, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

Introduction

1. This is an appeal by Mr Steven James Mort against HMRC's decision to refuse a refund of VAT under the DIY Housebuilders Scheme (the "DIY Scheme") provided for in s 35 Value Added Tax Act 1994 ("VATA 1994").

Form of hearing and evidence considered

2. With the consent of the parties, the form of the hearing was V (video), using the Tribunal video hearing system.

3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

4. We were referred to a 290-page bundle of documents, a 296-page bundle of authorities, a skeleton argument for HMRC and a statement of case for Mr Mort.

5. Both Mr Mort and his wife, Tracy Mort, gave evidence and were cross-examined.

6. After the hearing, following a direction given in the course of proceedings, HMRC provided further written submissions on particular points.

Background facts

7. Mr Mort constructed a dwelling in Bury, which is the property subject to the disputed claim.

8. On the 26 March 2021 HMRC received Mr Mort's DIY Housebuilders Scheme Claim Form in the amount of £135,671.72.

9. On 16 August 2021, HMRC issued a decision letter setting out the amount of £68,954.39 as eligible for refund under the DIY Housebuilders' Scheme. The amount of £66,717.33 was refused.

10. On 14 October 2021, Mr Mort requested a review of HMRC's decision and attached invoices, together with reasons why the rejected invoices should be paid in full. Additionally, further information was supplied in relation to a supplementary claim.

11. On 20 December 2021, HMRC accepted a further £13,824.25 claimed by Mr Mort as part of his supplementary claim.

12. On 1 February 2021, HMRC issued their review conclusion letter. The decision to refuse a refund of the VAT on these invoices was upheld. Mr Mort appealed to the Tribunal on 20 February 2022.

13. The total sum of VAT originally under appeal was £37,439.82.

14. At the outset of the hearing, Mr Mort conceded his appeal in relation to an invoice from Electricity North West carrying VAT of £233.38. The appeal in relation to this invoice is therefore dismissed.

15. In the course of the hearing HMRC conceded its case in relation to invoices from Fountains and Features carrying VAT totalling £930.27. The appeal in relation to those invoices is therefore allowed.

The Law

16. The essential requirements of the DIY Housebuilders Scheme are provided for in s 35(1) VATA 1994, as follows:

> 35 Refund of VAT to persons constructing certain buildings
>
> (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 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.

17. Subsection 1A provides that the section applies to the construction of a building designed as a dwelling.

18. Therefore, a person lawfully constructing a building designed as a dwelling, outside the course of any business, can recover VAT properly charged on goods used for that construction. It should be noted that the scheme relating to the construction of a dwelling only provides for the recovery of VAT on supplies of goods, not services.

19. Subsection 1B restricts the VAT recovery to building materials, in the following terms:

> (1B) For the purposes of this section goods shall be treated as used for the purposes of works to which this section applies by the person carrying out the works in so far only as they are building materials which, in the course of the works, are incorporated in the building in question or its site.

20. Subsection 4 provides (subject to an exception that is not relevant here) that the notes to Group 5 of Schedule 8 shall apply for the purposes of construing s 35. We consider the relevant provisions of Group 5 further below.

THE ISSUES

21. There is no dispute that Mr Mort's construction of his house fell within the general ambit of the DIY scheme (being a non-business, lawful construction of a dwelling).

22. There were two issues between the parties:

(1) Whether some of the supplies should have been zero-rated (the "Zero-rating issue"); and

(2) Whether some of the goods supplied were not 'building materials' (the "Building materials issue")

THE ZERO-RATING ISSUE

The issue

23. HMRC submitted, and we accept, that the DIY Housebuilders scheme only empowers HMRC to refund VAT which is properly chargeable. In particular, s 35(1)(c) VATA 1994 provides that it is a requirement that "VAT is chargeable". Therefore, as VAT can only be refundable to the extent that it is properly chargeable, VAT charged at the wrong rate cannot be refunded under the DIY Housebuilders' Scheme.

24. HMRC submit that a number of the supplies which were the subject of Mr Mort's claim had been incorrectly standard rated by the supplier. HMRC argue that the supplies in question were in fact zero-rated supplies and that, as a result, the suppliers incorrectly charged VAT on them.

25. Mr Mort disputes HMRC's position and maintains that the supplies in question were correctly standard-rated.

The Tribunal's jurisdiction

26. Before proceeding to the substance of this issue, we first note that it may have been preferable for HMRC to consider whether they could have resolved the matter without the need for Tribunal proceedings.

27. The effect of HMRC's approach to these proceedings is to seek to retain VAT to which HMRC has no ultimate entitlement. This is inherently unsatisfactory.

28. HMRC's argument is that the supplies were properly zero-rated, and so HMRC should not have been paid any VAT by the supplier from the outset. Having received such erroneous payments from the supplier, the logical step would be to take steps to repay it (for example, by writing to the supplier to clarify the correct treatment of the supply and facilitating a reclaim).

29. However, HMRC take the position that, not only do they have no responsibility to make repayment to the supplier (it being entirely the responsibility of the supplier to make a reclaim), but that it is appropriate to expend resources on Tribunal proceedings to prevent onward payment to the DIY housebuilder.

30. From a commercial perspective, it should make no difference whether the supplies are correctly zero-rated (meaning HMRC do not receive the VAT in the first place) or are correctly standard-rated (meaning HMRC receive the VAT and then pass it on to the DIY housebuilder). HMRC appear to take a very narrow view of their obligations to both supplier and DIY housebuilder, rather than taking the straightforward steps open to them to ensure that the VAT ends up in the right place.

31. In essence, HMRC choose to expend resources in defending an appeal before this Tribunal as a means of retaining a windfall that they accept they ought not have received. The proceedings in relation to this issue would be entirely obviated by HMRC simply facilitating the repayment of incorrectly-charged VAT to the supplier.

32. Questions could legitimately be asked as to whether HMRC's approach accords with HMRC's collection and management obligations and the effective use of Tribunal time.

33. However, as we are reminded in *Foulser and another v Revenue and Customs Commissioners* [2013] UKUT 038 (TCC) (at [35]), this Tribunal does not have a judicial review jurisdiction to determine whether a public authority is abusing its powers in public law.

34. As such, our statutory function in relation to this issue is simply to determine whether the supplies in question are properly to be characterised as zero-rated or standard-rated. We have therefore addressed ourselves solely to that task.

The test to be applied

35. The relevant zero-rating provisions are set out at items 2 and 4 of Group 5 Schedule 8 VATA 1994:

> 2. The supply in the course of the construction of—
>
> (a) a building designed as a dwelling or number of dwellings ... of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity.
>
> ...
>
> 4. The supply of building materials to a person to whom the supplier is supplying services within item 2 of this Group which include the incorporation of the materials into the building (or its site) in question.

36. We will refer to these as “Item 2” and “Item 4” respectively.

37. HMRC’s argument is that, in relation to a number of supplies, they should have been either:

(1) Zero-rated as purely supplies of services under Item 2 (noting that supplies of services fall entirely outside the DIY Scheme in any event); or

(2) Supplies of goods in conjunction with a supply of services under Item 2, meaning those supplies of goods should have been zero-rated under Item 4.

38. Before we turn to the specific facts of each supply, we must first summarise the approach to follow when determining the treatment of a supply.

39. Item 4 applies only to the supply of building materials to whom the supplier is also supplying services. Therefore, if a supply is solely one of goods (and there is no separate supply of services) then it follows that Item 4 does not apply. In those circumstances the supply would (in the absence of any other applicable provision) be standard-rated and Mr Mort’s appeal would succeed.

40. HMRC’s position in relation to a number of the supplies primarily flows from the fact that the relevant invoices generally include wording along the lines of “Supply and installation of item X”. HMRC suggest that the words “and installation” indicate that there must have been concurrent supplies of Item 2 services and Item 4 goods.

41. However, the position is not quite so simple. Case law has established that, where a transaction consists of more than one element, it may nonetheless be treated as a single supply in some circumstances. Accordingly, if the supplies made to Mr Mort were properly treated as a single supply of goods for VAT purposes, then Item 4 would not apply to such supplies and it would follow that the supplies were properly standard-rated (and the VAT recoverable under the DIY Scheme).

42. This gives rise to 3 possibilities in relation to each supply:

(1) The supply is solely one of goods, in which case Mr Mort’s appeal must be allowed

(2) The supply is solely one of services, in which case Mr Mort’s appeal must be dismissed

(3) There are separate supplies of Item 2 services and of goods to which Item 4 applies, in which case Mr Mort’s appeal must be dismissed.

43. The case law on single and multiple supplies is voluminous. We have summarised a number of the leading cases below.

44. In *Card Protection Plan v C & E Comrs* (Case C–349/96) [1999] STC 270, the ECJ was asked to rule:

> “whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately.”

45. The Court held:

> “In this respect, taking into account, first, that it follows from art 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable

> person is supplying the customer, being a typical customer, with several distinct principal services or with a single service.
>
> There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied."

46. In *Levob Verzekeringen BV, OV Bank NV v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766 the ECJ concluded that:

> "where two or more elements or acts supplied by a taxable person to a customer, being a typical consumer, are so closely linked that they form objectively, from an economic point of view, a whole transaction, which it would be artificial to split, all those elements or acts constitute a single supply for purposes of the application of VAT."

47. In *Levob* the appellant supplied a computer program in a basic form and then installed it, customised it to the customer's requirements, and provided training. The Court held that the relevant single supply was one of customisation services, since:

> "it is apparent that the customisation in question is neither minor nor ancillary but, on the contrary, predominates; such is the case in particular where in the light of factors such as its extent, cost or duration the customisation is of decisive importance in enabling the purchaser to use the customised software."

48. The correct approach to take has recently been clarified by the Court of Appeal in *HMRC v Gray & Farrar International LLP* [2023] EWCA Civ 121. In that case the court ruled that 'the predominant element' test is mandatory and must be applied where it is possible to do so. That test requires an objective consideration of what the typical consumer considers is the predominant element in what they were acquiring, and an overall assessment of the relative qualitative and quantitative importance of the different elements being supplied. Therefore, in the case of each of the supplies below, we have applied that test.

FINDINGS OF FACT AND CONCLUSIONS ON THE ZERO-RATING ISSUE

49. We have set out below our findings in relation to each of the supplies. In each case we have sought to identify the predominant element of the supply, taking the view of a typical customer and considering the qualitative and quantitative importance of the different elements being supplied.

50. In the case of each supply, the supplier originally chose to standard-rate the supply. HMRC rejects the supplier's decision to standard-rate the supply and asserts that the supplies are zero-rated

51. We give no weight to the supplier's decision to standard-rate each supply as it is simply the opinion of the supplier. We have not had the benefit of any submissions or evidence on behalf of the suppliers which might provide some assistance in determining the correct treatment of each supply.

52. The burden of proof in this appeal lies upon Mr Mort. In the case of each supply we were provided with copies of the relevant invoice and Mr and Mrs Mort gave oral evidence on the specifics of the supply. We were also provided with photographs in relation to some of the supplies.

Norman Ashworth Ltd

53. These are supplies evidenced by two invoices for the supply of "Surfacing of footpath and driveway entrance". The invoices carried total VAT of £1,266.

54. We find that this was a supply of the tarmac driveways and footpaths to the property in question.

55. Mr Mort estimated (and we find) that the cost breakdown between the materials and the laying of the tarmac was about 50/50.

56. Mr Mort suggested that this should be seen as primarily a supply of tarmac. We do not accept this suggestion and we find that the predominant element of what was being supplied was the service of laying the tarmac. The tarmac itself was generic construction material which could not be said to have been the predominant element of what Mr Mort was acquiring.

57. As a result, we find that these supplies were purely of services and should have been zero rated under Item 2. The supplies were also outside of the scope of the DIY scheme (which only applies to supplies of goods).

58. Mr Mort's appeal in relation to these supplies is therefore dismissed.

Aspiration Blinds

59. These are supplies evidenced by two invoices for (i) the supply and installation of external roller screen and roof system and (ii) the supply and installation of internal shutters. The VAT involved amounts to £9,320 (£8,320 for the roller screen and roof system, £1,000 for the shutters).

60. We were supplied with photographs of the items in question. From those photographs we find that the roller screen and roof system consists of a number of large glass panels around 2m high and around 1.5m wide (forming walls when connected together), with a roof system installed on top. The roof system opens and closes to allow light and air in. It was installed as an external 'garden room' attached to the property. We find that the completed product is a substantial structure and effectively amounts to a glass-walled room in its own right.

61. The internal shutters could be described as typical 'plantation-style' shutters. Each shutter is manufactured to fit a specific window and then screwed into a frame to keep it in place.

62. These were items of significant value. Mr Mort estimated (and we find) that in each case the cost breakdown between installation and the goods themselves was 80/20 in favour of the goods.

63. We find that the predominant element of each supply was the goods element. In each case Mr Mort (and, we find, any typical customer) was contracting for a high-value physical item – being the glass-walled garden room or a number of internal shutters. It was necessary that the goods were installed in order to make proper use of them (and the installation was undoubtedly skilled work). However, the installation was not so significant (either quantitively or qualitatively) so as to be the predominant element of the supply (or a separate supply for VAT purposes).

64. As a result, these supplies are to be treated as standard-rated supplies of goods and Mr Mort's appeal in relation to these supplies is allowed.

Girling Engineering Ltd

65. These are supplies evidenced by two invoices for (i) "The fabrication, supply and installation of steel roof beams" and (ii) "To supply labour and steelwork". To fabricate and install box section bay window". The total VAT at stake under these invoices is £652.

66. Mr Mort estimated (and we find) that the breakdown between labour and materials was around 50/50. He described the supplies as primarily the supply of steel roof beams. The size and weight of steelwork meant that the labour involved in installation is significant.

67. In this case we find that these supplies were not predominantly of goods. The labour element was economically too significant and the goods element was qualitatively of relatively generic materials. We find that the supplies were a combination of supplies of services under Item 2 and goods falling under Item 4 (and therefore to be zero rated). As such Mr Mort's appeal in relation to these supplies is dismissed.

Hi tec controls

68. These were supplies evidenced by two invoices for the supply and fitting of two automated gates. The VAT at stake is £1,172.

69. These were custom-made security gates for the property. A track is fitted into the ground alongside steel posts. Controlling electronics are also installed. A set of custom gates are fabricated and then installed onto the steel posts.

70. The costs breakdown on the face of one of the invoices prices the installation element at £750, against a total cost of £3,135. This puts the installation element at around 24% of the total cost. The other invoice does not include a breakdown but notes that (i) the ground works were 'undertaken by customer' and (ii) that the installation was re-using the existing access control and power supply. This indicates that the labour element on the second invoice was likely to be less than that on the first. On this basis we find that the labour element was at most 24% of the total cost.

71. We find that these were predominantly supplies of security gates. The installation was undoubtedly specialist work but a typical customer would consider that they were predominantly buying the gates rather than the installation and commissioning service.

72. It was not suggested to us that the electronic element of the gates was such as to disqualify the gates from being treated as building materials for these purposes and we do not find that to be the case.

73. We therefore find that these supplies were a standard-rated supply of goods and Mr Mort's appeal is allowed in respect of these supplies.

Bespoke Interiors

74. These were supplies evidenced by two invoices for supplies that break down on the face of the invoices as follows:

(1) Manufacture and supply skirting, £2,000.99 + VAT

(2) Manufacture and install staircase components, £12,550.71 + VAT

(3) Manufacture and supply fire doors and architrave, £21,886.98 + VAT

75. In relation to the first and last item above, there does not appear to be any suggestion of a services element. We note that to fall within Item 4, the materials must be supplied alongside services which "include the incorporation of the materials into the building". There appears to have been no service of incorporation of these materials. As a result, we find that

the first and third items above were freestanding standard-rated supplies of goods. Mr Mort's appeal therefore succeeds in relation to these items.

76. In relation to the second item above, Mr Mort explained (and we find) that the cost related to the supply of staircases for the property. Mr Mort estimated (and we find) that the installation of the staircase would be around 15% of the total cost.

77. A staircase is a large physical item. We find that, in a qualitative sense, a customer would generally consider that what they were paying for would be that large physical item. We also find that the process of measuring up and manufacture inherent in producing a staircase to fit a given aperture does not predominate over the finished item that the customer expects to receive. Furthermore, given the relatively small economic impact of the installation service, we consider that the predominant element of the supply was the physical goods. This therefore constitutes a standard-rated supply of goods.

78. As such, Mr Mort's appeal succeeds in relation to all of these supplies, with VAT totalling £4,898.94 falling to be recovered.

BSP services Ltd

79. This was a supply of leak repair services by a plumber. Mr Mort suggested the goods element of the supply would have been around half the cost. VAT at stake is £50.

80. We find that the predominant element of the supply was of services. Mr Mort (and any typical customer) was contracting for the supply of plumbing services. As such Mr Mort's appeal in relation to these services is dismissed.

Portman doors Ltd

81. This is to supply and fit an insulated garage door and associated electrical operation mechanism. VAT at stake is £362.60.

82. Mr Mort estimated, and we accept, that the split between materials and installation cost would have been around 80/20.

83. We find that the predominant element of the supply (both qualitatively and quantitively) for a typical customer would be the door itself. The installation was not so significant as to constitute a separate supply. The supply was therefore a single standard-rated supply of goods. Mr Mort's appeal on this supply is therefore allowed.

Tottington House

84. This is for supplies evidenced by an invoice to "prepare basement floors and to supply and fit wooden flooring". VAT at stake totals £2,200.

85. Mr Mort estimated, and we find, that the breakdown between materials and installation would have been about 70/30 in favour of materials. He indicated (and we find) that the floor preparation would have taken around two days and the laying of the floor would have taken around a week.

86. We find that the predominant supply was for the laying of flooring. Although the material costs were significant, the flooring material is an 'off the shelf' component and not qualitatively dominant. The typical customer would have been expecting to contract to have flooring put down to a professional standard.

87. As a result, we find that the supply was a single supply of zero-rated Item 2 construction services. Mr Mort's appeal therefore fails on this point.

THE BUILDING MATERIALS ISSUE

88. HMRC contended that a number of supplies were supplies of furniture. On the basis of Sch 8, group 5, note 22 VATA 1994, HMRC suggested that these supplies would not be of building materials, and would therefore fall outside the scope of the DIY scheme.

89. Schedule 8, group 5, note 22 VATA 1994 states that the definition of building materials does not include "finished or prefabricated furniture, other than furniture designed to be fitted in kitchens" or "materials for the construction of fitted furniture, other than kitchen furniture".

90. We accept HMRC's position on the treatment of furniture (as defined in note 22). The issue to be determined is whether or not the supplies in question fall within the note 22 definition of furniture set out above.

91. The supplies in question are evidenced by six invoices from two suppliers (three from each). The supplies are described bedroom furniture, including wardrobes.

92. HMRC conceded that wardrobes which it described as 'basic wardrobes' would not be treated as furniture for this purpose. The concept of a 'basic' wardrobe seeks to distil the notion encapsulated in case law (see e.g. *Customs and Excise Commissioners v McLean Homes Midland Limited* 1993 STC 335) that where a wardrobe was formed using the walls of a house, with the addition of wardrobe doors, shelving, and hanging rails, it did not constitute 'furniture' within the ordinary and popular meaning of the word. In other words, there is a distinction to be drawn between a wardrobe that is in essence a door covering an alcove, and a wardrobe that is an item of furniture in its own right.

93. Mr Mort's case on this point relied heavily on HMRC's use of the word 'basic' to describe such wardrobes. He submitted that the wardrobes were 'not luxurious' and were basic in nature.

94. We were supplied with copies of the invoices and a number of photographs of some of the items in question.

95. The description in the invoices is for the manufacture and installation of furniture. This includes "Furniture, headboard, bedside cabinets, mirrored wall and master dressing room furniture including lighting to wardrobes".

96. From the images we can see that the wardrobes and other items appear considerably more sophisticated than a simple covering over an alcove or other 'basic' wardrobe. We find that the wardrobes consist of complex combinations of shelving, rails and drawers.

97. We also accept Mr Ryder's submission on behalf of HMRC that the substantial cost of the furniture (VAT of £16,354.63, and a total VAT-inclusive cost of around £80,000) is a strong indicator that the furniture was more than 'basic'.

98. We are not persuaded that these supplies were not supplies of furniture, within the meaning of note 22. As a result, these were not building materials and Mr Mort's appeal on this point is dismissed.

CONCLUSION

99. The appeal is allowed in part, for the reasons set out above. Mr Mort is entitled to recover additional VAT amounting to £16,683.81.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

100. 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.

MALCOLM FROST
TRIBUNAL JUDGE

Release date: 24th APRIL 2023