TC02499

Appeal number: TC/2011/3605

VAT – alterations to listed building – Item 3 Group 6 Sch 8 VATA – replacement of windows with new triple glazed windows – not repair or maintenance; costs – whether HMRC acted unreasonably in defending appeal.

FIRST-TIER TRIBUNAL
TAX CHAMBER

LESLIE WALLIS	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**
ENVOYGATE (INTALLATIONS) LIMITED, trading as THE ORIGINAL BOX SASH WINDOW CO	**Second Respondents**

TRIBUNAL: JUDGE CHARLES HELLIER
KAMAL HOSSAIN

Sitting in public at Bedford Square WC1B 3DR on 7 September 2012

The Appellant in person

Mr Robinson for the First Respondents
The Second Respondent was not represented

DECISION

Absence of the Second Respondent.

1. We proceeded in this appeal in the absence of the second respondent. Mr. Fernandez, one of its directors, had been suffering from ill health and had written to the tribunal before the hearing saying that he was unable to attend. We thought it was just to proceed in the absence of representation for the company since (1) the determination of the proper VAT rating for its supplies had already been conceded by HMRC and would not adversely affect it, and (2) the company's actions in relation to the appeal before this tribunal consisted only of agreeing to be added as a party: in relation to this appeal there was no prospect of our awarding costs against it because it had done nothing else in the appeal either reasonable or unreasonable.

Background

2. Mr. Wallis replaced the Windows in his house. The old windows did not need repair. They were replaced by new state-of-the-art triple glazed windows The object of the change was to achieve better insulation. His house was a listed building and he obtained consent to the replacement from his local planning authority.

3. In March 2011 Mr. Wallace wrote to HMRC requesting a ruling that the work was zero rated within item 3 group 6 Schedule 8 VAT Act 1994. He set out clearly the nature of the operations.

4. Mr. Wallace needed the ruling in order to persuade the supplier of the new window installation not to charge VAT on the supply. The supplier is the second respondent in this appeal.

5. On 8 April 2011 Mrs Cullender of HMRC replied. She concluded, by reference in part to HMRC's published guidance that the works were repair and maintenance (or incidental thereto) and were therefore not zero rated by item 3 group 6.

6. On 5 May 2011 Mr Wallis made an appeal to this tribunal against HMRC's decision. In his notice of appeal he set out very clearly his reasons for his belief that the ruling was wrong.

7. The tribunal replied on 27 May 2011 indicating that it would invite the supplier to join the appeal. Mr. Wallace consented to this on 28 May. The tribunal invited the supplier to be joined on 15 July and on 18 July 2011 the supplier indicated that it did not object to being joined. The supplier was joined as second respondent by a direction of the tribunal given on 25 October 2011.

8. On 5 September 2011 Mrs Ratnett of HMRC sent HMRC's statement of case to the tribunal. That she noted that the planning application stated that "no alteration to the layout or appearance of the building is proposed... outwardly the new windows

will be identical to the existing windows. The existing external render is not disturbed by these proposals." She then said:

> "5.10 The respondents contend that the relevant question is not the repair of the particular constituent part in isolation but the repair and maintenance of the building as a whole. The work of replacing the old windows with outwardly identical but more energy-efficient windows is for the purpose of the maintenance of the building as a whole.
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> 5.11 If there was any alteration in respect of the aperture being widened slightly in order to accommodate the hardwood frame, this was incidental to the repair work and still excluded from zero-rating."

9. Then the parties set about the preparation for the hearing. But on 27 October Mr. Wallace wrote to HMRC noting that HMRC had corrected their original guidance, and requested HMRC to reconsider their ruling, expressing the hope that in the light of the change a hearing might be avoided.

10. On 23 November 2011 Mrs Ratnett wrote to Mr. Wallis to say that HMRC did not intend to defend the appeal. On 24 November Mr. Wallis wrote to the tribunal expressing the wish that the hearing took place formally to record HMRC's change of interpretation,and to deal with interest on the VAT wrongly collected and his costs in pursuing the appeal.

11. On 5 December 2011 the supplier wrote to Mr. Wallis seeking payment of £500 plus VAT for its involvement in the appeal and the correspondence with Mr Wallis relating thereto. On 5 March 2012 Mr. Wallis wrote to the tribunal to say that in relation to the £3481.69 of the VAT charged by the supplier (which should not have been charged because the supply was now accepted as being zero rated) he had reached a compromise with the supplier and had received £2804.31. He would plainly wish to recover the difference from HMRC as costs of his appeal.

The parties' submissions.

12. Before us and in his statement of case Mr. Wallis seeks the following result:

> "1. Indicative costs
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> | | |
> |---|---|
> | Interest on the VAT incorrectly collected | £250 |
> | Reasonable expenses incurred in bringing this case | £500 |
> | Total costs | £750. |
>
> 2. That [the Second Respondent] be instructed to cancel its invoice number 12249 dated 7/03/2011 in the sum of £600 (inclusive of VAT) and refrain from issuing further invoices for the period 7 March 2011 to the date of the hearing."

13. Mr. Wallis says that the legislation is clear: "alteration", "repairs" and "maintenance" are straightforward words in common English usage; and that the works he paid for were clearly alterations and not repairs and maintenance. He says that it was unreasonable for HMRC not to interpret the words correctly or to apply the

legislation to his facts correctly. His correspondence with the supplier as a result of HMRC's actions had been costly and protracted.

14. Mr. Robinson said that HMRC's position had hinged upon its internal guidance. When the appellant pointed out the change in that guidance Mrs Ratnett indicated that HMRC would not defend the appeal and the supplier was notified. The supplier reclaimed VAT and refunded Mr. Wallis. HMRC's actions during the conduct of appeal had been reasonable. The tribunal, he said, could award costs only if HMRC had acted unreasonably in the conduct of the appeal.

Discussion

(1) The applicable rate of VAT.

15. On the facts as we understand them the fitting of the new windows to Mr. Wallis' house was an alteration to that house. Mr Wallis said, and we accept, that the windows which were replaced were no more than 15 years old and in good repair. Their replacement with new windows was not in our view repair or maintenance but was an alteration of the building. The supply made by the supplier therefore fell within item 3 Group 6 Schedule 8 VAT Act 1994 and was zero rated. HMRC were right to withdraw their defence of the appeal.

(2) Extent of our jurisdiction

16. This tribunal is given jurisdiction in relation to VAT appeals by section 83 VAT Act 1994. By paragraph (b) that jurisdiction includes that in relation to an appeal against a decision made by HMRC in relation to the VAT chargeable on a supply. Thus we have jurisdiction in relation to the appeal Mr Wallis makes against HMRC's decision. Pursuant to that power we have made the decision in the preceding paragraph. That jurisdiction extends to costs in the proceedings (see (3) below) but no further.

17. We understood Mr. Wallace's frustration in relation to the initial decision of HMRC and the difficulty he had in getting the price payable under his contract with the supplier reduced; further, on the limited material before us we thought that the supplier might perhaps have been more cooperative and might perhaps taken some initiative of its own in relation to the incidence of VAT on supplies of this nature. But we have no jurisdiction in relation to the relationship between Mr. Wallace and his supplier. Whether Mr. Wallace was bound to make payment of £500 plus VAT sought by the supplier, and whether or not the supplier should refrain from issuing further invoices is not a matter for us. The relationship between Mr. Wallace and his supplier is a matter for the civil courts. The remedy sought by Mr. Wallace in item 2 of para[12] above is not something which we can consider.

18. Likewise we have no jurisdiction in relation to the interest cost which Mr Wallis may have suffered as a result of having to pay more than he ought to have paid for the replacement of the windows because VAT was wrongly charged.

(3) Costs

19. Section 29 of the Tribunals, Courts and Enforcement Act 2007 provides that subject to a tribunal's rules, the "costs of and incidental to...proceedings in the First Tier tribunal" shall be in the discretion of the tribunal. Rule 10 of this tribunal's rules provides:

> "(1) The tribunal may only make an order in respect of costs (or, in Scotland, expenses)-
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> (a) under section 29 (4) of the 2007 Act (wasted costs);
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> (b) if the tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting proceedings; or
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> (c) if [the case is a Complex case and the taxpayer has not sought exclusion of potential liability of costs]."

20. It will be seen that these rules mean that there are only three circumstances in which the tribunal can award costs.

21. The first (para (a)) is wasted costs. This, by section 29 of the 2007 Act (the Tribunals, Courts and Enforcement Act 2007), relates to the "improper, unreasonable or negligent act or omission" of a party's representative. The tribunal may disallow the recovery of such costs (where a party is seeking to recover his costs from another) – not relevant in this case - or award costs directly against the representative. It seems clear to us that HMRC's representative, Mrs Ratnett, did not act improperly or negligently; so far as acting unreasonably is concerned that question is discussed in relation to para (b) after the following paragraph. But Mr Wallis has not sought an order that Mrs Ratnett or Mr Robinson pay the costs personally and we would not think it fair in this appeal so to order. This paragraph therefore is not relevant in this appeal.

22. The third (para(c)) applies where a case is a Complex Case. This case is not such. This heading does therefore not apply.

23. Thus our jurisdiction in relation to costs in this appeal is limited to para (b) and we may make the order sought by Mr Wallis only if we consider that HMRC or the supplier was unreasonable in either (i) defending or (ii) conducting the appeal (plainly neither HMRC nor the supplier were "bringing" the appeal).

24. Because the 2007 gives us power in relation to the costs of "proceedings" we do not have power to award costs in relation to actions which took place before proceedings started. Those actions might affect whether defending the appeal was reasonable, but the costs which may be awarded are limited to those of the proceedings. Thus costs incurred by Mr Wallis before he gave his notice of appeal must be excluded from our considerations.

25. So far as the supplier is concerned, it was not defending an appeal. The only possible ground on which we could award costs against it would have been if it was unreasonable in its conduct of the appeal. But we cannot say that the supplier has in these proceedings acted unreasonably – for these proceedings related to the determination of the correct rate of VAT, not to questions of payment or cooperation

with Mr Wallis or HMRC. It did, and needed to do, almost nothing in the proceedings.

26. That brings us to the question of whether an order for costs should be made against HMRC. In this context we note that Mr Wallis put his case cogently and very clearly in his notice of appeal, and that his argument is now accepted by HMRC as correct.

27. It seems to us that it cannot be that any wrong assertion by a party to an appeal is automatically unreasonable. After all the result of any appeal is that one party is found to be wrong. The rules clearly do not intend that just because a party is wrong that party should be ordered to pay the other's costs (otherwise the specific provision for Complex cases would make no sense). In our judgement before making a wrong assertion constitutes unreasonable conduct in an appeal that party must generally persist in it in the face of an unbeatable argument that he is wrong. Thus for example a party who persists in a legal argument which is precisely the same as one recently dismissed by the Supreme Court and which has been drawn to his attention, or who proceeds on the basis of facts which that party accepts, or can only reasonably accept, are wrong, could be acting unreasonably in defending or conducting the appeal. Unreasonable conduct of the appeal is in our view more likely to be found in the way in which an appeal is pursued – in for example the unnecessary examination of witnesses or the lengthening of an appeal with irrelevant or unnecessary evidence or behaviour.

28. In this case HMRC put forward in its statement of case an argument which could possibly, had the facts and been found to be slightly different, have turned out to have been right. That argument might have succeeded, for example, if the tribunal had not accepted that the old windows were in good condition. It also possible that an argument may have been put which had some slim chance of success that the maintenance of a building included upgrading its energy efficiency or that there was no real alteration to the building. We are therefore not persuaded that HMRC were unreasonable (or that Mrs Ratnett acted unreasonably) for the purposes of Rule10 when they chose, by supplying their statement of case, to defend the appeal.

29. Nor do we consider that HMRC were unreasonable in their conduct of the appeal thereafter. Mrs Ratnett acted reasonably quickly to withdraw HMRC's defence after Mr Wallis drew to her attention HMRC's change of guidance.

30. We therefore conclude that we should not make a direction that HMRC pay Mr Wallis' costs in these proceedings.

31. The appeal however is formally allowed.

32. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 23 January 2013