[2019] UKFTT 496 (TC)

Value Added Tax – zero rating – recovery of tax – taxpayer granted planning permission for construction of new dwelling and detached garaging – first floor of garage includes sitting/dining area with kitchen units, two bedrooms and bathroom – planning permission has condition that accommodation on first floor of garage shall be brought into ancillary use solely for purposes incidental to enjoyment of dwelling house – whether planning permission condition prohibits separate use or disposal of building – VAT Act 1994, s 35(4), Schedule 8 Group 5 Note 2(c) – appeal allowed – bathroom cabinets screwed to wall with lights attached to mains are not fittings and do not qualify for VAT refund

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07299

Appeal number: TC/2018/06717

BETWEEN

DARREN LUKE **Appellant**

-and-

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

TRIBUNAL: JUDGE ALASTAIR J RANKIN
MR DEREK ROBERTSON

Sitting in public at Tribunals Service – Tax, Centre City Tower, 5-7 Hill Street, Birmingham, B5 4UU on 29 July 2019 at 10:00 AM

Mr Andrew McDonald of Self Build VAT for the Appellant and the Appellant

Miss Sharon Hancox, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal by Mr Luke against a decision by HMRC dated 23 May 2018 to reject £7,807.85 of a claim submitted by him on 28 July 2017 for a refund of VAT totalling £64,659.25. The claim was made under the DIY builders and converters scheme (DIY Scheme) referred to in section 35 of the Value Added Tax Act 1994 (VAT 1994). The appeal was brought under section 83(1)(g) of VAT 1994.

2. The appeal concerns two matters:

   (1) Whether the accommodation above a detached garage meets the conditions to be 'designed as a dwelling' and so is eligible for a claim under the DIY scheme. HMRC contends that it does not meet the conditions and have refused the associated claim for a refund of £7,238.65.

   (2) Whether three mirrored bathroom cabinets qualify as 'building materials' ordinarily incorporated into the building. Again HMRC contends that they do not qualify as 'building materials' and have refused the associated claim for a refund of £569.20.

BACKGROUND

3. On 23 April 2015 Mr Luke was granted planning permission by Wychavon District Council for the 'demolition of existing dwelling and stable block and erection of new dwelling and detached garaging' at The Stews, Broughton Green. The planning permission included the following condition:

   "7. On the first occupation of the replacement dwelling at 'The Stews' Broughton Green, the accommodation on the first floor of the detached garage, hereby permitted, shall be brought into ancillary use solely for purposes incidental to the enjoyment of the dwelling house and for no other purpose."

4. Mr Luke proceeded to build a garage with accommodation on the first floor comprising a sitting/dining area with kitchen units, two bedrooms and a bathroom. This is where he lived while building the replacement dwelling. He then built the dwelling in accordance with the planning permission.

5. On 27 July 2017 Mr Luke signed a form VAT1431NB – VAT refunds for DIY house builders Claim form for new houses which was received by HMRC on 10 August 2017. The claim was for a refund of VAT totalling £64,659.25.

6. Following an enquiry from HMRC, Mr McDonald sent a copy of an email from the planning department dated 6 November 2017 which after reciting the wording of condition 7 stated:

   "This condition prevents the use of the replacement dwelling and the first floor of the detached garage as two separate dwellings once the replacement dwelling is occupied. The planning permission permits only one dwelling on the site. The accommodation above the garage must be used solely for uses ancillary to the dwelling house and not for any other purpose."

7. On 27 November 2017 HMRC wrote two letters to Mr Luke regarding the apportionment of the claim advising that he could not claim VAT back on materials and services incurred on the construction/conversion of:

   "annexes [such as 'granny' annexes] – that cannot be disposed of or used separately from another dwelling because the annexe is not 'designed as a dwelling' in its own right."

The second letter, quoted from Revenue and Customs Brief 13 (2016): VAT, the liability treatment of a dwelling formed from more than one building – GOV.UK:

> "Where a building, designed as a dwelling, has been constructed at the same time as another building and jointly the two are not to form a single dwelling but rather to form a dwelling and an unattached annexe (which is identified as such on the planning documents) zero-rated relief will be restricted to the building that is a dwelling."

Mr McDonald replied on 21 December 2017 stating among other things:

> "Please note the garage and house were covered by the same planning permission and completion certificate and built simultaneously. The Council allowed the garage to be occupied so our client could live there whilst building; the project was demolition of existing dwelling and erection of replacement dwelling and garage."

8. HMRC decided the claim by letter dated 15 February 2018. They disallowed five items totalling £8,783.02 including the two matters under appeal. Mr McDonald replied by letter dated 12 March 2018 disputing four of the five disallowed amounts. He reiterated the fact that the garage and house were covered by the same planning permission and restated condition 7. He pointed out that at no point did the planning permission refer to an annexe as the garage was not separate annexe accommodation. Mr McDonald pointed out that the Council allowed the garage to be occupied first so Mr Luke could live there whilst building the dwelling for security reasons due to the rural location. Condition 7 was included to ensure there was no misunderstanding – the garage must not be used as separate accommodation to the main dwelling house. Mr McDonald continued by claiming that Brief 13 did not apply to Mr Luke's claim as it says "…constructed …jointly the two are not to form a single dwelling but rather to form a dwelling and an unattached annexe (which is defined as such on the planning documents)'. Mr Luke's garage is not an unattached annexe, is not defined as such in the planning documents and so does not fall into the category that this point in Brief 13 is capturing.

9. In response HMRC by letter dated 23 May 2018 allowed one of the five claims that they had previously disallowed but they disallowed the other four claims under appeal as VAT431NB notes state 'buildings that do not qualify include, anexes (sic), extensions, any for (sic) of ancillary structure or building which cannot be disposed of or used separately'.

10. Mr McDonald requested a review by letter dated 21 June 2018. He claimed the three mirrored bathroom cabinets all had built in lights and shaver points and so were fixed. Mirrors and lights are allowed under the scheme. He further claimed that section 13 of VAT431NB was in respect of planning permissions that prevent the separate use or disposal of the new building and there was no such restriction on Mr Luke's new dwelling and garage.

11. HMRC's Reviews & Litigation Unit upheld the decision to refuse the four repayment claims by letter dated 3 October 2018. The Unit said the claim for the rooms above the garage failed due to planning permission condition 7 and Note 2(c) to Group 5 of Schedule 8 of VAT 1994. The claim for the three bathroom cabinets failed as they did not constitute building materials within the context of the scheme.

12. Mr Luke appealed to this Tribunal by Notice of appeal dated 29 October 2018 largely reiterating the arguments which he had put forward to HMRC.

THE LEGISLATION

13. Section 35 VAT 1994 allows for the reclaim of VAT incurred in certain circumstances.

(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.

14. Section 35(1A) then states:

"The works to which this section applies are –

(a) The construction of a building designed as a dwelling or number of dwellings;"

15. Section 35(4) then states that the notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group.

16. Note 2 to Group 5 of Schedule 8 states:

"A building is "designed as a building" or a number of buildings where in relation to each dwelling the following conditions are satisfied:

(a) The dwelling consists of self-contained living accommodation;

(b) There is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;

(c) The separate use, or disposal of the dwelling is not prohibited by the terms of any covenant, statutory planning consent or similar provision; and

(d) Statutory planning consent has been granted in respect of that dwelling and its construction or conversion has been carried out in accordance with that consent."

17. Note 2 continues:

"The construction of, or conversion of a non-residential building to, a building designed as a dwelling or a number of dwellings includes the construction of, or conversion of a non-residential building to, a garage provided that -

(a) The dwelling and garage are constructed or converted at the same time; and

(b) The garage is intended to be occupied with the dwelling or one of the dwellings."

18. Section 35(1)(c) is the relevant section for the claim concerning the three bathroom units. It states:

"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."

19. Note 22 to Group 5 of Schedule 8 states:

"Building materials", in relation to any description of a building, means goods of a description ordinarily incorporated by builders in a building of that description, (or its site), but does not include –

(a) Finished or prefabricated furniture, other than furniture designed to be fitted in kitchens;

(b) Materials for the construction of fitted furniture, other than kitchen furniture;

(c) Electrical or gas appliances, unless the appliance is an applicable appliance which is

(i) Designed to heat space or water (or both) or to provide ventilation air cooling, air purification, or dust extraction; or

(ii) Intended for use in a building designed as a number of dwellings and is a door-entry system, a waste disposal unit or a machine for compacting waste; or

(iii) A burglar alarm, a fire alarm or fire safety equipment or designed solely for the purpose of enabling aid to be summoned in an emergency; or

(iv) A lift or hoist;

(d) Carpets or carpeting material."

CASELAW

20. The Authorities Bundle provided by HMRC included six tribunal decisions. Miss Hiscox referred us to the Upper Tribunal decision in *Revenue and Customs Commissioners v Lunn* [2009] UKUT 244 (TCC) where HMRC appealed against a decision of the First-tier Tribunal which had allowed an appeal by Lunn for zero-rating VAT where the planning permission included a condition that the development shall only be used for purposes either incidental or ancillary to the residential use of the property known as Radbrook Manor and shall not be used for commercial purposes. The Upper Tribunal, allowing the appeal, held that the planning restriction meant that the building could not be sued separately from that of the manor and note 2(c) was not satisfied. Mr McDonald argued that this case was not relevant as the planning permission was for a new building being constructed within the curtilage of an existing building - a conversion of a former cottage and pigsty next door. This example was like an extension to an existing property many years after the original planning and construction whereas Mr Luke's claim was for one new dwelling and garage.

21. In *Shields v Revenue and Customs Commissioners* [2014] UKUT 453 the planning permission included the requirement that the occupation of the dwelling should be limited to a person solely employed by the equestrian business at the property and any resident dependents. The Upper Tribunal held that this condition resulted in the prohibition in Note 2(c) applying. Mr McDonald argued that this decision could be distinguished from Mr Luke's position as the condition related to an employee of the equestrian business.

22. A similar decision was made by the Upper Tribunal in *Burton v Revenue and Customs Commissioners* [2016] UKUT 20 (TCC) where condition 4 of the planning permission stated that the occupation of the dwelling was limited to a person solely or mainly employed or last employed in Park Hall Lake Fishery or a widow or widower of such person. The Upper Tribunal held that the limitation in the condition was in sufficiently mandatory and clearly defined terms to be capable of amounting to a prohibition within the terms of Note 2(c). Mr McDonald argued that this case should also be distinguished as the planning permission was for a new dwelling on a fishery site and there was not a similar condition in Mr Luke's planning permission.

23. We were also referred to the First-tier Tribunal decision in *Mark Catchpole v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKFTT 309 (TC) which held that two or more buildings could comprise one dwelling. Miss Hiscox informed the Tribunal that HMRC now accepted this as being correct.

24. Turning to the appeal concerning the three bathroom cabinets, Mr McDonald referred the Tribunal to the Upper Tribunal decision in *Taylor Wimpey and The Commissioners for Her Majesty's Revenue and Customs* [2017] UKUT 0034 (TCC) where at paragraph 112 the Tribunal stated:

> "That leaves the question of the criteria that should be applied in order to determine if an item, which is not a fixture, is installed as a fitting. The test must be such as to be consistent with the statutory language of incorporation in a building. Without setting a prescriptive test, there must in our view be a material degree of attachment to the

building, albeit less than the degree of annexation required for something to be a fixture. In our judgment mere attachment to an electricity supply by a removable plug is not, on its own, sufficient for the item to be regarded as installed as a fitting, or incorporated. Some other feature or features of installation is necessary, whether by housing the item in a particular structure, or by fixing the item in a manner designed to be other than temporary either to a physical part of the structure or to a supply of electricity, gas or water or means of ventilation or drainage."

25. At the hearing Mr Luke confirmed the walls behind the cabinets were tiled and the screws fixing the cabinets to the walls were drilled through the tiles. An electrician had connected the cabinets to the mains electricity.

DECISION

26. HMRC accepts that, following the decision in *Catchpole,* the dwelling and garage (excluding the living accommodation on the first floor) are eligible for a VAT refund. Mr Luke's planning permission is in respect of one new dwelling constructed and to be used by Mr Luke and his family. Planning condition 7 simply ensures that the garage accommodation cannot be used separately. HMRC Brief 13 refers to a dwelling and an unattached annexe as outlined in the planning documents. This is not the case with Mr Luke as there is no unattached annexe.

27. The Tribunal agrees with Mr McDonald that the cases of *Shields* and *Burton* referred to at paragraphs 21 and 22 can be distinguished as the planning conditions refer to who should occupy the buildings. We are also able to distinguish the decision in *Lunn* as the planning permission granted to Mr Luke was for one new dwelling with planning condition 7 merely a reminder of this fact upon occupation of the main dwelling and applies to the entire dwelling. The planning permission in *Lunn* was in connection with a cottage and pigsty within the curtilage of an existing building. As a result all four of the conditions in Note 2 are satisfied.

28. We therefore allow Mr Luke's appeal against HMRC's decision to refuse his claim for a VAT refund of £7,238.65.

29. Turning to the claim for a refund of the VAT on the three bathroom cabinets we are not satisfied that the claim should be allowed. Although they are fixed to the wall and are wired in to the mains electricity it would be a simple task to disconnect the electricity and unscrew the cabinets from the wall. Only the screw holes would then be visible as well as the electricity cables which could easily be attached to wall sockets.

30. Accordingly the three cabinets do not fall within the exception to Note 22(c) Group 5, Schedule 8. We agree with HMRC's interpretation contained in Public Notice 708 paragraph 13.5.3 – "All other finished or prefabricated furniture and materials for the construction of fitted furniture are not building materials for VAT purposes, such as :

- Elaborate vanity units
- Wall units, such as bathroom cabinets

31. Mr Luke's appeal is allowed in part. HMRC should repay him VAT of £7,238.65.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

Alastair J Rankin
TRIBUNAL JUDGE

Release date: 31 JULY 2019