



TC04251

Appeal number: TC/2014/03873

VAT – Penalty Schedule 24 Finance Act 2007 para 15(1); error in claiming a refund of VAT under the DIY Housebuilder’s scheme (Schedule 35 VAT Act 1994); whether the use of the wrong form fell within the scope of the penalty provisions of para 1 Schedule 24 FA 2007 (Error in Taxpayer’s document)-no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

C J PALAU & R C LOUGHRAN

Appellants

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE CHRISTOPHER HACKING
MR JOHN ROBINSON**

Sitting in public at Southampton on 16 December 2014

David Brooks of Brooks Butler Limited, Accountants appeared for the Appellants.

Leslie Bingham, a Higher Officer of HMRC, appeared for the Respondents

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DECISION

Concerning the appeal

5 1. This appeal concerns a penalty of £1,408.49 imposed on the Appellants under Paragraph 1(1) Schedule 24 Finance Act 2007. The penalty relates to an alleged error in a document submitted by the Appellants who were seeking a refund of VAT paid on the construction of flats under the DIY Housebuilder's Scheme.

10 *The facts*

2. The facts can be simply stated and are not in dispute.

15 3. The Appellants owned property which they decided to convert into two separate flats which they then planned to sell on in the hope of making a profit.

4. As the Appellants already owned the property to be converted they understood that they would likely be eligible to apply for a rebate of VAT incurred in the works of conversion under the provisions of the DIY Housebuilder's Scheme (established under Section 35 Value Added Tax Act 1994) ("the Scheme").

25 5. That belief was based on a reading of advice contained in a document circulated to landlords of property (RLA Landlord News Hub). That advice was of a generalised nature. It did not deal specifically with the Scheme but suggested that landlords acting as developers would be entitled to VAT at a zero rate for new build properties.

30 6. The Appellants say, and it was not disputed by the Respondents, that they contacted the Respondents advice line stating their wish to apply the DIY Housebuilder's Scheme following which an application form and accompanying notes were sent out to them for completion.

35 7. The relevant form was duly completed (form VAT431NB), signed by both Appellants and dated 6 January 2013 although this must be a mistake and is understood to refer to 6 January 2014 as full details of relevant expenditures and the VAT reclaimed covering a period from June 2013 to October 2013 appear in the form at pages 3 and 4.

40 8. From the stamp appearing on the first page of the form it would appear that the form was received by the Respondents on 28 January 2014.

45 9. The Appellants were asked whether they had read the accompanying notes concerning the Scheme. They told the tribunal that they had looked at them but found them to be rather complicated and admitted that they had been largely guided in the matter by the advice referred to above.

10. At the time the form was submitted the Appellants were not advised by their present or indeed any accountants as indicated in a reply to a question asking for

details of any agent or accountant with whom the Respondents might discuss the claim (Q. 24 of the form).

11. The claim form VAT431NB is itself quite straight forward. It is divided into sections headed “A Personal details”; “B Are you eligible to claim?”; “C Details of the property that has been constructed”; a number of further sections which have no application to this appeal and, finally, a section “F Sending in your claim” which contains the following warning and declaration:

10 “If you give incomplete or inaccurate information in this claim, we may charge you a financial penalty or prosecute you.”

I declare that:

- 15 • I am only reclaiming VAT which was correctly charged to me and which I paid on goods I bought or imported from a VAT registered supplier
- All the details and information on this form and any accompanying documents are correct
- I have read the attached guidance notes

20 12. The declaration goes on to deal with VAT registered persons and Charity builders neither of which applied to the Appellants at the time (although as later noted the Appellants did subsequently register for VAT and in fact recovered rather more of the input VAT they had laid out in the costs of the conversion than they had applied for under the Scheme).

25 *The Respondents’ argument*

13. It is the Respondents’ position that the Appellants were not entitled to make use of the Scheme as their intention to resell the converted flats rendered the development ineligible under the Scheme. This is not disputed.

14. In its Statement of Case the Respondents state as follows:

35 “19. Paragraph 1(1) of Schedule 24 FA 2007 states that a penalty is payable by a person (P) where:

1(1)(a) P gives HMRC a document of a kind listed in the table below, and
(b) conditions 1 and 2 are satisfied

40 1(2) Condition 1 is that the document contains an inaccuracy that amounts to, or leads to-

- (a) an understatement of a liability to tax
- (b) a false or inflated statement of a loss, or
- (c) a false or inflated claim to repayment of tax

45 1(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P’s part”

50 20. The Table referred to at paragraph 1(1)(a) states that in respect of VAT ‘a document of a kind listed’ can be a “Return, statement or declaration in connection with a claim”

21. The Respondents say that the VAT431B received by them on 28 January 2014 is clearly ‘...a document of a kind listed in the Table’ being a ‘...declaration in connection with a claim’.

5 22. The Respondents say that Condition 1 referred to at paragraph 1(1)(b) is satisfied in that the document amounts to ‘a false or inflated claim to repayment of tax’ as per paragraph 1(2)(c).

23. The Respondents say that Condition 2 referred to at paragraph 1(1)(b) is satisfied because the inaccuracy was careless as defined at paragraph 3(1)(a) due to the Appellants’ failure to take reasonable care.

10 24. The Respondents therefore say that the Appellants are liable to a penalty under Part 1 Schedule 24 FA 2007”

The Appellants’ case

15 15. The Appellants’ case as contended by their accountant, David Brookes, was that, whilst agreeing that the Appellants had wrongly identified the Scheme as applicable to their proposed development, nevertheless there had been no loss to the Revenue as the Appellants had subsequently registered for VAT and had quite properly recovered input VAT in excess of that claimed in the incorrectly submitted VAT form relating to the Scheme.

20 16. In the Appellants Notice of Appeal prepared for the Appellants by their accountant the following is stated:

25 “HMRC are seeking a penalty based on 15% of potential lost revenue of £9,389.98. Their reasoning being the client filled in the wrong form (DIY Builders and Converters Refund Scheme) rather than registering for VAT for a one-off project. When the clients received the letter from HMRC with the penalty on it they approached us for help.

30 We have since registered them for VAT and submitted a VAT return. HMRC undertook a review of that return (Peter Lemorvan – Higher Officer) and once satisfied issued a cheque to the client for £10,887.54. At no time had the client tried to deceive HMRC and had made an honest mistake. As HMRC can appreciate VAT on buildings is a very technical and complex area.”

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The Tribunal’s consideration of the appeal

40 17. As suggested above the claim form VAT431NB is itself quite straightforward. Although there is a question mark following the title heading “B Are you eligible to claim?” there is no question directly addressing that issue in those terms. What in fact follows is a series of questions which are no doubt designed to ensure that the qualifying conditions of the Scheme are met. These include:

45 “9. Is the property that you have built a new build? [answered by Appellants-Yes]
10 Is your claim for the fit out and finish of a building shell? [answered-Yes]
11. Has the work been done on a completed dwelling purchased from a developer, builder or private vendor? [answered-No]
12. Has Planning Permission been granted for your new build? [answered Yes]
50 13. Do the terms of your Planning Permission (or similar permission) prevent the separate disposal, or separate use, of the new building from any other pre-existing building? [answered-No]

14. Has a Building Regulation Completion Certificate been granted by the local authority or by an approved inspector registered with the local authority building control? [answered- Yes]

15. Have you got your approved plans from your Local Authority? [answered-Yes]

16. Are you intending to live in the property you are claiming for? [answered-No]

5 "If No, provide the address of the new build and explain why you have carried out the work"

The Appellants included the following in response to the above:

"12 Wickam Road

Bournemouth

10 BH7 6JX

For re-selling purposes"

17. Are you claiming for any other building(s)? [answered- No]

15 18. Mr Bingham was asked by the tribunal the purpose of question 16 above in particular. He said that this question was included to ensure that applicants were entitled to claim under the Scheme. He concluded from the reply that the Appellants in this appeal were not entitled as they were intending to sell the converted flats on completion rather than occupying them themselves as would be required by the
20 Scheme.

19. Mr Bingham agreed with the tribunal that the answers provided by the Appellants to each of the questions included in the section dealing with eligibility to claim under the Scheme had in fact been correct. It was, however, the position
25 adopted by HMRC, having referred the matter to its technical department, said Mr Bingham, that the submission of the form, a claim form relating to the Scheme, constituted the inaccuracy of which complaint was made and for which the penalty had been imposed.

30 20. Paragraph 1 (1)(c) of Schedule 24 however provides that a penalty is payable where a document of the type described "**contains** an inaccuracy which amounts to or leads to a ...false or inflated claim to repayment of tax" (*emphasis added*)

35 21. Where the document concerned is one which is designed to ascertain or confirm eligibility to make the claim itself and which, because it has been accurately and honestly completed by the claimants must necessarily result in the claim being disallowed, it is difficult, if not impossible, to argue that the requirements for the offence contemplated by paragraph 1 (1)(c) are satisfied.

40 22. It is equally difficult to argue that in light of the reply to Question 16 and the statement that it was intended to sell the converted property there could have been any real likelihood of loss to the public purse. The implications of the Appellants' reply to question 16 had been promptly picked up by HMRC in accordance with the design of the form and the claim had, quite properly, been disallowed.
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23. It is clear to this tribunal that the form has done nothing more than to serve the purpose for which it was designed. It had on scrutiny by HMRC identified the Appellant's claim as one which did not meet the conditions of the Scheme.

24. Had the Appellants chosen not to include the accurate response they gave to question 16 but instead stated an intention to reside at the properties themselves when this was not intended that would indeed have amounted to an inaccuracy falling within the scope of the penalty provisions sought to be asserted in this appeal. That is not the situation however.

25. No authority or line of argument was advanced by Mr Bingham to support the Respondents' contention that the use of the wrong form could by itself engage paragraph 1(1)(b) of Schedule 24. This cannot in the finding of the tribunal properly be said to amount to the submission of a document which constitutes 'a false or inflated claim to repayment of tax' as required in paragraph 1(2)(c) as the Respondents have submitted at paragraph 22 of their Statement of Case.

26. The Respondents' argument produces the logical absurdity that the Appellants accuracy in the completion of a form designed to check eligibility under the Scheme gives rise to a penalty for inaccuracy.

27. In the view of the tribunal this is a misreading of the relevant legislation which quite clearly addresses the issue of inaccurate replies in a form which cause loss to the Revenue and not accurate replies which simply disentitle the claimant to participate in the Scheme.

28. Accordingly for the reasons stated above we allow this appeal. The penalty is set aside. Costs reserved.

29. This document contains full findings of fact and reasons for the decision set out above. Any party dissatisfied with either of the decisions has a right to apply for permission to appeal against it/them 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.

CHRISTOPHER HACKING

TRIBUNAL JUDGE

RELEASE DATE: 27 January 2015