[2016] UKFTT 0374 (TC)

TC05128

Appeal number: TC/2015/06528

VAT – refund for DIY housebuilders – planning conditions at time of application – subsequent removal of conditions – otherwise than in the course or furtherance of any business – separate use not prohibited by statutory planning consent

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICHARD AKESTER **Appellant**

- and -

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

TRIBUNAL: JUDGE ALASTAIR J RANKIN
MR DEREK ROBERTSON

Sitting in public at City Exchange, 11 Albion Street, Leeds, LS1 5ES on 16 May 2016 at 10.00 am

Mr Piers Hill BL for the Appellant

Mrs Ann Sinclair, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Mr Richard Akester against the decision by HMRC to refuse his claim for a VAT refund under a DIY builders claim made in accordance with Section 35 of the VAT Act 1994. Mr Akester claimed a refund of £31,833.11.

2. This is a revised decision as a result of the Tribunal receiving correspondence from Mr Richard Akester following the release of the original decision. In accordance with paragraph 40(1) of The Tribunal Procedure (First-Tier Tribunal)(Tax Chamber) 2009 Rules the Tribunal requested further written observations from the parties.

Agreed Facts

3. Mr Akester is an unregistered private individual. On 14 April 2015 he submitted a claim dated 7 April 2015 under the heading 'Claim for new houses' in respect of his property at Rose Cottage. The claim indicated the certified date of completion of the building was 16 March 2015 and the date Mr Akester occupied the building was 25 March 2015 according to his claim form.

4. By letter dated 15 April 2015 HMRC wrote to Mr Akester informing him that the conditions had not been met as 'to obtain a refund you must provide evidence that the works are lawful and you must provide a copy of the Planning Permission'. HMRC continued by advising Mr Akester that his planning permission relates to the 'Erection of a log cabin to form holiday and short term business letting accommodation'. These conditions would not allow the dwelling to be used as a permanent residence.

5. The original planning permission obtained by Mr Akester included the following conditions:

> '2. Notwithstanding the description of the proposed development, the log cabin on the site shall be occupied for tourism purposes only and shall not be occupied on a permanent basis.
>
> 3. The log cabin on the site shall not be occupied as a person's sole, or main place of residence.
>
> 4. The site owners/operators shall maintain an up-to-date register of the names of all owners/occupiers of the log cabin on the site, and of their main home address, and shall make this information available at all reasonable times to the Local Authority.'

6. The letter continued by quoting from Section 1 of the VAT 431 Claim form and notes for New Houses:

> 'You are not eligible to use this Scheme if you … have constructed a property that either you, or your relatives, do not intend to live in yourselves but intend to

> sell or let or use for any other business purpose – a business purpose also includes a dwelling built because you need to live where you work.'

The same letter also stated that obtaining retrospective planning permission after the works had been completed would not have made the claim eligible under the DIY scheme.

7. Mr Akester sent an email to HMRC dated 17 April 2015 attaching a copy of a letter from East Riding of Yorkshire Council acknowledging receipt of his application for the removal of conditions 2, 3 and 4.

8. By a further letter dated 20 April 2015 HMRC advised Mr Akester that despite the further information he remained ineligible to apply for a VAT refund. HMRC acknowledged that Mr Akester had applied for removal of the three conditions but stated that the planning consultation available online suggested that it was highly unlikely that the conditions would be removed. By letter dated 23 April 2015 Mr Akester asked HMRC to carry out a review by an officer not previously involved or consulted. By letter dated 11 June 2015 Mrs S Hanrahan, a Review Officer of HMRC advised Mr Akester that she upheld the original decision by HMRC to refuse his claim on the grounds that the non-business use had not been met.

9. By Notice of Appeal dated 27 October 2015 Mr Akester appealed to this Tribunal including the following statement in his Grounds for appeal:

> 'Having obtained planning permission on the 23rd December 2011, notwithstanding the description in the planning proposal we were granted permission for a residential log cabin, with conditions 2/3/4 … Business use being refused from original proposal, condition 2 now applies. After four further planning approvals see attached Rose cottage was built instead of a log cabin. In 2013/4 we sold the family home … renting a house in the village … later staying with friends … while approval on the 6th October 2015, occupying Rose cottage as our permanent address on the 8th October 2015. During the early stages of constructing Rose Cottage we decided we wanted to live permanently at Rose Cottage instead of being the family holiday home, in advise we applied to have conditions 2/3/4 removed retrospectively from the original date of the planning application 23rd December 2011 to include works already completed at the time, the conditions were removed on the 6th October 2015.'

10. The Notice of Appeal also referred to the decision in *Maurice Francis and The Commissioners for Her Majesty's Revenue & Customs* [2012] UKFTT 359 (TC) where Mr Francis succeeded in obtaining his VAT refund following the granting of retrospective planning permission. A further ground for appeal was the fact that condition 2 of the original planning permission stated that the occupation of the log cabin shall be for tourism, business use was not granted.

The Law

11. Section 35 of the VAT Act 1994 states:

‘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, 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.

(1A) The works to which this section applies are –

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

(2) The Commissioners shall not be required to entertain a claim for a refund of VAT under this section unless the claim –

(a) is made within such time and in such form and manner, and

(b) contains such information, and

(c) is accompanied by such documents, whether by way of evidence or otherwise, [as may be specified by regulations or by the Commissioners in accordance with regulations.]

(4) The notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group

12. Section 94 of the VAT Act 1994 states:

‘Meaning of “business” etc

(1) In this Act “business” includes any trade, profession or vocation”.’

13. Note (2) to Group 5 of Schedule 8 of the 1994 Act provides:

‘(2) A building is designed as a dwelling or a number of dwellings 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 term 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.'

The arguments on behalf of HMRC

14. The issue of the prescribed documentation required at the time that a claim is made was considered by the Upper Tribunal in the case of *The Commissioners for Her Majesty's Revenue & Customs and Asim Patel* [2014] UKUT 0361 (TCC) where the Tribunal confirmed that HMRC can only accept documentation provided to them of the works actually carried out and have no discretion to extend the time limit to obtain any retrospective permission. Judge Colin Bishopp stated:

> 'The regulation is clear; when he makes his claim the claimant must provide documentary evidence that planning permission has been granted. This can only mean the correct permission, meaning permission relating to the works carried out; in that we agree with Mr Brown. As we have said, Mr Patel was not in a position to do that in 2011, since it was not until 2012 that the retrospective permission was granted. The requirements of the regulation are framed in mandatory terms; HMRC are allowed no discretion to accept something less than the prescribed documentation, nor to extend the time limit, and it is equally not open to the FTT or to us to do so.'

15. Mrs Sinclair emphasised the point that the planning permission in place for Rose Cottage at the time of the claim was insufficient for the strict requirements of the legislation. HMRC had no discretion to extend the time limit to accept the amended planning permission.

16. In the Upper Tribunal case of *The Commissioners for Her Majesty's Revenue & Customs and Richard Burton* [2016] UKUT 0020 (TCC) Mr Justice Barling stated:

> 'Thus, in construing a condition in a planning permission, the whole consent falls to be considered, and a strict or narrow approach is to be avoided, in favour of one which is benevolent, applies common sense and, where appropriate, takes account of the underlying planning purpose for the condition as evidenced by the reasons expressed.'

17. Mrs Sinclair continued that Mr Akester's planning permission expressly stated that the approval was in accordance with the terms and details as submitted and subject to the conditions. At the time of the original planning application Mr Akester knew that he would not obtain planning permission for a permanently occupied dwelling.

18. HMRC considered that a refund is only due where the works are 'otherwise than in the course or furtherance of any business'. The heading to the planning permission granted on 23 December 2011 states that the proposal was the 'Erection of a log cabin

to form holiday and short term business letting accommodation'. At the time of Mr Akester's application for a refund HMRC maintain that the various restrictions contained in the original planning permission were still extant and therefore the conditions in the Notes to Group 5 of Schedule 8 of the Act apply for the purposes of construing section 35. In particular HMRC contended that Note 2(d) had not been complied with as Rose Cottage could only legally be used as a holiday and short term business letting accommodation.

19. In correspondence between the parties Mr Akester had sought the view of HMRC on the statement in its Guidance VCONST24350: Change of intention – business to non-business:

> 'A person who changes his intention part way through a project so that he intends to use the property for non-business purposes is entitled to use the Refund Scheme.'

20. Mrs Sinclair concurred with this advice but argued that any change of intention must be reflected in the planning permission although Mr Hill argued that there was no authority for this view. In support of her view Mrs Sinclair referred to correspondence in 2013 and 2014 between the Council and Mr Akester when he was advised that he was constructing holiday let accommodation subject to conditions. By this time Mr Akester had decided he wanted to live in Rose Cottage permanently but no explanation was offered as to why he only applied for removal of the conditions in February 2015.

The arguments on behalf of Mr Akester

21. Mr Akester in his evidence to the Tribunal confirmed that he had never carried out any business at Rose Cottage nor had he ever intended to do so. He was fortunate that a change in planning policy for the village enabled him to apply in February 2015 to have the three conditions attached to the original planning permission removed. The original planning application had been submitted by his agent who advised him that at the time he would only obtain planning permission for use of Rose Cottage as a holiday letting or short term letting.

22. Mr Hill argued that the only point at issue was whether the works at Rose Cottage were carried out "otherwise than in the course or furtherance of any business" and that as Mr Akester had not carried on any business at Rose Cottage the refusal by HMRC to allow his claim for repayment of VAT was incorrect. At no time had HMRC asked Mr Akester for business accounts or for the register.

23. The VAT Tribunal case of *Hugh William Flynn* (LON/99/1161) Decision Number 16930 explored the intention of the person constructing the building. Mr and Mrs Flynn had obtained planning permission to erect a dwelling house … with bed and breakfast facility. Mrs Flynn admitted to that Tribunal that if the application for planning permission had not been advanced in these terms they had been advised that the application would have been unsuccessful. Due to the delicate health of one of their children Mrs Flynn could not contemplate taking guests on a general basis but

they had in fact taken guests and a copy of the register had been made available to that Tribunal. The Tribunal Chairman John McKee, while expressing considerable sympathy for Mr and Mrs Flynn, decided that 'we find overwhelming evidence of the Appellant's intention at the material time namely to construct the dwelling house for his family but also to do so with a view to providing therein a bed and breakfast facility.

24. Mr Hill argued that there was no evidence that Mr Akester ever started a business at Rose Cottage and even if he had so intended at the outset he very soon changed his mind. Mr Akester, having decided that he wanted to live in Rose Cottage as his principle residence, was entitled to wait until planning policy and a change in the character of the area made it more likely that an application to remove the three conditions would be successful. The delay in making the application and the consequent delay in making any use of the building at all neither rendered the building works unlawful nor provides any evidence that the works were carried out in the course or furtherance of a business.

The Decision

25. The legislation clearly provides that several requirements must be met before a claim for a refund of VAT can be successful. First the works must be 'lawful and otherwise in the course or furtherance of any business'. No evidence was produced to the Tribunal that any business has been carried out at Rose Cottage. Accordingly this first requirement is satisfied subject to our comments in paragraph 29 below..

26. Secondly VAT must be chargeable on the supply, acquisition or importation of any goods used by Mr Akester for the purposes of the works. Although HMRC indicated they had not looked at the detail of the claim the Tribunal presumes that at least some of the claim would be allowed if the appeal is successful.

27. Thirdly Rose Cottage must be designed as a dwelling. In the absence of any evidence to the contrary the Tribunal presumes this requirement has been met.

28. Fourthly the claim must be made within such time and in such manner, contain such information and be accompanied by such documents whether by way of evidence or otherwise as may be specified by regulations or by HMRC. Again in the absence of any evidence to the contrary the Tribunal presumes this requirement has beenmet.

29. Fifthly the notes to Group 5 of Schedule 8 are to be applied for construing the above requirements. Of particular relevance to Mr Akester's application for a refund is Note (2) subsections (c) and (d). Subsection (c) states that the 'separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision'. While Mr Hill argued on behalf of Mr Akester that the removal of the planning conditions in October 2015 gave Mr Akester retrospective permission to use Rose Cottage as his principle residence the Tribunal is unable to accept this argument as the decision made by HMRC which Mr Akester is appealing was made in April 2015.

30. Subsection (d) requires statutory planning consent to have been granted and for the building to have been constructed in accordance with that consent. While the Tribunal accepts that Rose Cottage was constructed in accordance with the planning permission at the time of the decision by HMRC it was not being used by Mr Akester in accordance with that consent. Mr Akester has supplied two different dates as to when he occupied Rose Cottage: the former, 25 March 2015 would have been in breach of the then planning conditions while the latter, 8 October 2015 was after the removal of the conditions. The former date is contained in Mr Akester's application and is referred to in HMRC's skeleton argument dated 8 January 2016 at paragraph 4. In a letter to HMRC dated 23 April 2015 Mr Akester said:

> "yes we stated we moved in on date in application, this resulted in us being liable for council tax and enabled all the family to enjoy occupancy as per the planning permission present."

31. In his grounds of appeal Mr Akester stated:

> "During the early stages of constructing Rose Cottage we decided we wanted to live permanently at Rose Cottage instead of being the family holiday home."

32. In his written submission to the Tribunal dated 18 June 2016 Mr Akester accepts that occupying Rose Cottage as a main place of residence prior to the removal of the conditions would have constituted a breach of the then planning conditions. At the hearing Mr Akester confirmed that he had not kept a register of the names of all owners/occupiers of the Rose Cottage as required by condition 4.

33. The Tribunal finds that 'enabling all the family to enjoy occupancy' between 25 March 2015 and 8 October 2015 would amount to more than occupying Rose Cottage for tourism purposes and therefore be in breach of condition 2 of the planning permission.

34. Mr Hill has persuaded the Tribunal that no business was ever carried out by Mr Akester at Rose Cottage and therefore HMRC was wrong to refuse his claim on the grounds that he intended to use Rose Cottage for business purposes in April 2015. However, when HMRC refused Mr Akester's claim for repayment of VAT the requirements of Note 2(c) and (d) of Group 5 of Schedule 8 had not been satisfied. The Tribunal adopts the words of Judge Colin Bishopp in Patel – 'The requirements of the regulation are framed in mandatory terms; HMRC are allowed no discretion to accept something less than the prescribed documentation, nor to extend the time limit.'

35. This Tribunal distinguishes this decision from that in the persuasive case of *Maurice Francis and The Commissioners for Her Majesty's Revenue & Customs* [2012] UKFTT359 on the grounds that retrospective planning permission was granted to Mr Frances to enable him to comply with all the requirements of the legislation before HMRC made its final determination. In addition the original planning permission granted to Mr Francis became impossible to follow as during the course of construction it became apparent that his original plan was not feasible. It was

therefore necessary for Mr Francis to apply for a new planning permission which that Tribunal decided was granted with the intention of standing in the shoes of the original permission. Mr Akester has accepted that removal of the planning conditions was not retrospective.

36. The appeal is therefore dismissed as the requirements of Note 2(c) and (d) of Group 5 of Schedule 8 had not been satisfied either at the date of the original decision of HMRC nor at the date of review. As Mr Akester indicated his intention to seek costs if successful the tribunal does not have to address this aspect of his appeal.

37. 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: 16 AUGUST 2016