[2017] UKFTT 0199 (TC)

TC05687

Appeal number: TC/2015/06934

VALUE ADDED TAX – DIY Housebuilders Scheme – construction of new build house – whether designed as a dwelling for purposes of subsection (35)(1A)(a) and Note (2)(c) to Group 5 of Schedule 8 to VAT Act 1994 – whether Section 75 agreement amounted to a prohibition – yes – appeal refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

JAMES REDMAN **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: IAN SHEARER

Sitting in public at George House, 126 George Street, Edinburgh on Friday 17 February 2017

Having heard the Appellant in person and Mr G Hilton, Presenting Officer of HMRC, for the Respondents

DECISION

Introduction

1. This is an appeal against the decision of the respondents ("HMRC") dated 28 August 2014 and upheld on review on 7 November 2014 to refuse the claim for a refund of VAT under the DIY Housebuilders Scheme in terms of Section 35 of the Value Added Tax Act 1994 ("VATA"). That claim was in the sum of £12,544.

The facts

2. The facts in this case are not in dispute. Mr Redman purchased a Croft on which he constructed his family home. The total area of the house and land does not exceed 2.5 acres and is one unit. He describes it as the minimum legal size of croft. Of course, he had to apply for planning permission for the construction of the house and that was granted subject to a number of conditions. The decision approval notice included an appendix which stated that the application required an obligation under Section 75 of the Town and County Planning (Scotland) Act 1997 (as amended) and that the reason why planning permission had been approved was because "there is a genuine demonstrated need for the dwellinghouse as the land is a bareland croft and the applicant has demonstrated a five year croft development plan."

Section 75 agreement

3. The Section 75 agreement stipulated in paragraph FIRST that:-

> "The Owners hereby undertake that the Development shall not be sold, leased, disponed, or otherwise alienated separately from the Croft and that the Development and the Croft shall only ever be disposed of as a single unit in all time coming. The Owners further undertake that the said dwellinghouse shall not at any time be occupied by anyone other than the crofter or other person or persons engaged in working the Croft …".

That provision is described as an 'occupancy restriction'. That Section 75 agreement was signed on 21 June 2012.

4. At all times Argyll & Bute Council made it explicit that the Section 75 agreement was necessary because "The application is for the erection of a dwellinghouse on a bareland croft within an area where permission for residential development would otherwise normally not be permitted; the exception being under the provisions which apply to croft land."

The Law

5. The relevant provisions of Section 35 VATA read as follows:-

> 35(1A) – The works to which this section applies are—
>
> (a) the construction of a building designed as a dwelling or number of dwellings;
>
> (b) the construction of a building for use solely for a relevant residential purpose … and
>
> (4) - The notes to Group 5 of Schedule 8 shall apply for construing this section …".

6. The relevant provisions of the notes to Group 5 of Schedule 8 read as follows:-

> (2) A building is designed as a dwelling … where … 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 ….".

7. HMRC relied on *HMRC v Burton*[1] and in particular on paragraph 91 thereof which reads as follows:-

> "Occupation of a dwelling is clearly a use of it."

Discussion

8. It is not in dispute that Mr Redman satisfies the provisions of Note 2(a), (b) and (d). The problem is paragraph (c). The planning permission which was granted on 2 July 2012 was undoubtedly granted subject to Mr Redman entering into a Section 75 agreement. That agreement makes it absolutely explicit that the house is intrinsically linked with the land and that it is a croft for occupation and use for that purpose. The language is unequivocal and there is no doubt that "the separate use, or disposal of the dwelling", being the words of Note 2(c), is precisely prohibited by the Section 75 agreement which forms part of the statutory planning consent.

9. Accordingly the claim simply cannot qualify for a refund under the DIY Scheme. If there had been no Section 75 agreement then it appears that the claim would have qualified.

10. This is a very unfortunate set of circumstances in that the consequence of Argyll & Bute's requirement for a Section 75 agreement before planning permission was granted meant that there was no possibility that Mr Redman could satisfy the requirements of the DIY Housebuilders Scheme in order to reclaim VAT.

11. Mr Redman argued that he knew other crofters who had been able to reclaim the VAT notwithstanding the fact that they too had Section 75 agreements in place. We cannot look at the position of other taxpayers.

12. We have sympathy with Mr Redman and the unexpected position in which he finds himself where he has suffered severe financial hardship with its attendant consequences. However, we can only apply the law to the facts found and we have no discretion.

13. For the reasons stated the appeal is dismissed.

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[1] 2016 UKUT 0020 (TCC)

14. 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.

JUDGE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 24 FEBRUARY 2017