[2017] UKFTT 0213 (TC)

TC05704

Appeal number:TC/2016/04078

VALUE ADDED TAX – DIY Housebuilders – section 35 VATA 1994 – whether certain works lawful and materials incorporated into the site – whether VAT charged at incorrect rate can be refunded - appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

PHILIP HARGREAVES **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MR PHILIP JOLLY

Sitting in public in Manchester on 1 February 2017

The Appellant appeared in person

Mr G Hilton of HM Revenue & Customs appeared for the Respondents

DECISION

Background

1. This is an appeal against a decision of HMRC refusing part of a claim for repayment of VAT made pursuant to the DIY Housebuilders Scheme ("the Claim"). It relates to work done by the Appellant on premises which were part of South View Farm, Treales Lancashire. Mr Hargreaves claimed a VAT refund of £38,339. We understand that the sum in dispute in this appeal is approximately £5,460.

2. Before making our findings of fact we set out the following summary of the statutory provisions which are relevant to the Claim and the issues which arise on this appeal.

Legislation

3. Section 35 Value Added Tax Act 1994 ("VATA 1994") makes provision in certain circumstances for a refund of VAT incurred by persons constructing a building designed as a dwelling. It is generally known as the DIY Housebuilders Scheme. The works carried out must be lawful and otherwise than in the course of a business. Where various conditions are satisfied the VAT chargeable on goods supplied and used for the purposes of the works shall be refunded on a claim being made to HMRC. Section 35(1) provides as follows:

> " (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."

4. Section 35(1A) provides that the section applies to certain types of works including *"a residential conversion"*, which is the conversion of a non-residential building into a building designed as a dwelling.

5. Section 35(1B) provides as follows:

> " 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."

6. More generally, section 29A and Schedule 7A Group 6 VATA 1994 provide for a reduced rate of VAT of 5% on the supply of certain qualifying services and building materials in the course of a qualifying conversion. A qualifying conversion includes the conversion into a single dwelling of a building not previously used as a dwelling.

Findings of Fact

7. We heard oral evidence from Mr Hargreaves. Based on that evidence and the documentary evidence before us we make the following findings of fact.

8. In September 2008 planning permission was granted by Fylde Borough Council to convert a redundant barn at South View Farm, Treales near Preston into a single dwelling ("the Barn"). The Appellant subsequently purchased the Barn with the benefit of that planning permission. He then set about carrying out the necessary works. The planning permission included conditions concerning landscaping works to be carried out in accordance with a scheme and programme to be approved by the council.

9. The Barn was located off a public highway. A plan before us showed that it was bounded to the left by the private garden of a neighbour and to the right by a cobbled driveway owned by the Appellant beyond which there was the property of another neighbour. Further up the driveway there were two smaller barns which were demolished. Demolition of the two smaller barns left the Barn partially without any boundary feature such as a fence or wall. The Appellant used reclaimed cobbles in wire cages to form a boundary.

10. Work on the Barn was completed in or about February 2016, and a completion certificate was issued on 9 February 2016. The Appellant submitted the Claim on 2 March 2016. Initially a repayment of £24,315 was made by HMRC followed by a subsequent repayment of £1,371. There were a number of invoices from suppliers where HMRC refused repayment of VAT because the supplier ought to have charged VAT at the reduced rate of 5% rather than the standard rate of 20%. In some cases the Appellant was able to obtain a credit from the supplier for the VAT incorrectly charged and HMRC repaid his claim on the basis of amended invoices showing VAT at the rate of 5%.

11. The decision to refuse part of the Appellant's claim for a refund was upheld following a review dated 1 July 2016. The review did identify the possibility of HMRC repaying VAT at 5% on supplies from two suppliers, Aerial Angels and Poulton Bespoke Joinery Ltd on a concessionary basis. Following the review HMRC agreed to repay those parts of the claim.

12. The amount in dispute in this appeal is approximately £5,460 comprising VAT charged by the following suppliers:

M J Thompson

13. There was one invoice from this supplier where the VAT reclaim was refused by HMRC. It was dated 23 March 2016 and related to supplies of electrical cables and components installed in a car port and other areas external to the Barn itself. The invoice was for £1,145 plus VAT at 5% amounting to £57.25.

14. Initially there were issues as to whether this supply had been made within 3 months of completion of the conversion. In the event the reason this claim was

refused was that HMRC contended that it did not form part of the eligible building work. HMRC conceded this aspect of the appeal prior to the hearing.

Enviromesh

15. There was one invoice from this supplier where the VAT reclaim was refused by HMRC. It was dated 22 March 2016 and described as an invoice. Under payment terms it had the narrative "*** Proforma Only ***". Enviromesh supplied coated wire cages designed to hold stones or in this case cobbles. Payment due for the supply was £445 plus VAT at 20% amounting to £89. This was the only invoice issued and the Appellant paid it by telephone at the time he placed the order.

16. The reason HMRC refused this claim was because the invoice was expressed to be a pro forma invoice and was therefore not a VAT invoice. Further, HMRC considered that it related to a landscaping scheme which had not been approved by the local authority.

17. During the course of his evidence the Appellant produced correspondence between himself and the local planning authority dated 29 and 30 October 2011. That correspondence did not deal with the caged cobbles the Appellant intended to use in landscaping the site. However, the Appellant told us and we accept that he had conversations with the planning officers about his intention to build the caged wall and that they were agreeable. They came to the site following completion and were satisfied that everything had been done in accordance with the planning consent.

Aerial Angels

18. Aerial Angels supplied television cabling, an aerial and an amplifier for the Barn. There were 3 invoices where the VAT reclaim was refused by HMRC. These were dated in 2013 and 2015 and totalled £769 plus VAT at 20% amounting to £153.80.

19. The reason HMRC refused repayment of this VAT was because the supplier ought to have charged VAT at the reduced rate of 5% rather than the standard rate of 20%. HMRC have however subsequently refunded VAT at the rate of 5% leaving a sum of £115.35 which has been refused.

20. The Appellant contacted Aerial Angels in March 2016 inviting them to credit the 15% VAT and issue an amended invoice. He explained that HMRC would permit them to adjust their next VAT return accordingly. The proprietor replied to say that he was unable to do as requested because he had de-registered for VAT in 2015.

Poulton Bespoke Joinery Limited

21. Poulton Bespoke Joinery Limited supplied all the timber used in converting the Barn, including staircases, door and window frames, doors and associated ironmongery. There were various invoices and payment receipts included in the

evidence from 2011 and 2012. We were told that the VAT in dispute had been charged at 20% and amounted to £6,933.82.

22. At least one of the reasons HMRC refused payment was because the supplier ought to have charged VAT at the reduced rate of 5% rather than the standard rate of 20%. HMRC have subsequently repaid VAT at 5% on these invoices and we understand that the VAT in dispute is therefore £5,200.

23. The Appellant attempted to obtain a credit for the 15% VAT incorrectly charged together with amended invoices. This was not possible because Poulton Bespoke Joinery was placed into liquidation on 15 November 2013 and was subsequently dissolved.

Reasons

24. We can summarise the grounds of appeal as follows:

(1) That VAT on the Enviromesh invoice related to building materials incorporated into the site pursuant to an approved landscaping scheme.

(2) In relation to Aerial Angels and Poulton Bespoke Joinery the Appellant stated that he had relied on his suppliers as professional tradesmen to charge the correct rate of VAT. He had acted in good faith. The fact that he was unable to obtain a credit for the additional VAT charged and obtain amended invoices showing VAT at 5% was beyond his control.

25. The Appellant also criticised HMRC's failure to warn people who might make a claim under the DIY Housebuilder Scheme as to the implications of suppliers charging an incorrect rate of VAT and subsequently de-registering or becoming insolvent.

26. In relation to the Enviromesh invoice, Mr Hilton accepted that if the works done and materials used to build the caged cobbles were in accordance with the planning permission and incorporated into the site then HMRC would have repaid the claim in relation to that invoice. He relied on section 35(1) and 35(1B) VATA 1994 which require the works to be lawful and the building materials to be incorporated in the building or its site.

27. We are satisfied on the basis of the Appellant's evidence that the caged cobbles were incorporated into the site, which for this purpose we consider extends to the area under construction including any associated landscaping to the grounds. We are also satisfied from the Appellant's evidence that the caged cobbles were incorporated into the site pursuant to a landscaping scheme approved by the local authority. In those circumstances the Appellant was entitled to a refund of the VAT charged by Enviromesh.

28. In relation to Aerial Angels and Poulton Bespoke Joinery HMRC's case is that they are only required to refund VAT which was properly chargeable on supplies to

the Appellant. Mr Hilton submitted that the VAT chargeable on the supplies by these two suppliers was chargeable at the reduced rate of 5% pursuant to Schedule 7A VATA 1994.

29. It was not disputed that VAT was chargeable by Aerial Angels and Poulton Bespoke Joinery at the reduced rate of 5%. We are satisfied that was the case. The invoices and payments made by the Appellant were in respect of qualifying services in the course of a qualifying conversion.

30. Mr Hilton relied on a decision of the VAT Tribunal (Tribunal Chairman Kenneth Mure QC) in *Legge v Commissioners for HM Revenue & Customs (Decision 20964)*. In a short decision the Tribunal concluded that a claim under section 35 could not be made because the conversion was for business purposes, to turn a barn into two holiday lets. The works therefore were not otherwise than in the course of furtherance of a business and therefore fell outside section 35. The tribunal noted that the appellant had paid VAT at the standard rate when it could have "negotiated" a reduced rate with the suppliers. The tribunal stated that the remedy in those circumstances was against the suppliers and not HMRC, even where HMRC appeared to have been enriched.

31. The decision in Legge is therefore not relevant to the present appeal. The Appellant is entitled to make a claim under section 35. The issue is the extent to which he is entitled to be refunded sums charged as VAT by the suppliers.

32. Mr Hilton also referred to a decision of the F-tT in *Hall v Commissioners for HM Revenue & Customs [2016] UKFTT 0632 (TC)* (Judge Geraint Jones QC and Mr John Robinson). In that case as in this appeal the appellant claimed a refund under section 35 in relation to VAT which had been incorrectly charged at the standard rate instead of the reduced rate. At [11] the F-tT said this:

> " Section 35 Value Added Tax Act 1984 provides that where a person carries out self-build work on a new dwelling (even if it completely replaces a pre-existing dwelling) and VAT is chargeable on the supply of any goods used for the purposes of the works, then if an appropriate claim is made, the amount of VAT so chargeable will be refunded. Miss Ashworth contended that that provision has the effect that no VAT is repayable in respect of a "supply and fit" contract where the supply and fit should have been zero rated because the statutory provision provides that the refund is "the amount of VAT so chargeable", and the amount of VAT chargeable on a supply and fit in respect of new build is zero (because the appropriate VAT rate is 0%). That is a correct proposition of law."

33. We respectfully agree with that conclusion. It is a condition under Section 35(1) that VAT is chargeable on the supply and it is "the amount of VAT so chargeable" that is to be refunded. That must mean the amount of VAT properly chargeable on the supply, rather than simply the amount of VAT charged or purported to be charged.

34. It is notable that where a VAT registered trader charges an amount of VAT which is not properly chargeable on a supply, either because he applies the wrong rate

or fails to treat a supply as exempt, then the trader is still bound to account for the sum so charged as a debt due to the Crown. Paragraph 5 Schedule 11 VATA 1994 provides as follows:

> " (1) VAT due from any person shall be recoverable as a debt due to the Crown.
>
> (2) Where an invoice shows a supply of goods or services as taking place with VAT chargeable on it, there shall be recoverable from the person who issued the invoice an amount equal to that which is shown on the invoice as VAT or, if VAT is not separately shown, to so much of the total amount shown as payable as is to be taken as representing VAT on the supply.
>
> (3) Sub-paragraph (2) above applies whether or not—
>
> (a) the invoice is a VAT invoice issued in pursuance of paragraph 2(1) above; or
>
> (b) the supply shown on the invoice actually takes or has taken place, or the amount shown as VAT, or any amount of VAT, is or was chargeable on the supply; or
>
> (c) the person issuing the invoice is a taxable person;
>
> and any sum recoverable from a person under the sub-paragraph shall, if it is in any case VAT be recoverable as such and shall otherwise be recoverable as a debt due to the Crown."

35. Paragraph 5(3)(b) refers to an amount shown as VAT on an invoice "whether or not … (b) [it] is or was chargeable on the supply". It is clear therefore that VATA 1994 describes an amount incorrectly shown as VAT on an invoice as not being VAT chargeable on the supply, although it is still recoverable by HMRC.

36. We fully accept that the Appellant relied on his suppliers as reliable tradesmen to charge the correct rate of VAT and that he acted in good faith. In our view the remedy for the Appellant would be to recover the VAT overcharged by the suppliers. We sympathise that for reasons outside the Appellant's control he is unable to do that, at least in a straightforward manner. In relation to Poulton Bespoke Joinery the company is in liquidation and the Appellant would have to contemplate making a claim in the liquidation which it seems is impractical. In the case of Aerial Angels he would have to contemplate bringing proceedings against the proprietor of the business. Those businesses in turn would need to claim a repayment from HMRC pursuant to section 80 VATA 1994 which requires HMRC to credit VAT overpaid by the person who has accounted for it, subject to a time limitation which has now expired. There is no provision other than section 35 VATA 1994 which permits or requires HMRC to credit or repay VAT paid by a housebuilder.

37. If HMRC considered that they had been unjustly enriched in the sense that the suppliers had accounted for VAT at 20% when the liability was only 5% then they might consider exercising their discretion to make an ex gratia payment. However, this tribunal has no jurisdiction over that discretion. Further Mr Hilton indicated to us that he was not aware whether the suppliers had accounted for and paid VAT on these transactions.

38. The Appellant also relied on the fact that HMRC failed to warn people who might make a claim under these provisions as to the implications of suppliers charging an incorrect rate of VAT and subsequently de-registering or becoming insolvent. Again, that is not something over which this tribunal has any jurisdiction. In any event HMRC's guidance notes for making a claim do state that if a claimant has been wrongly charged VAT then it cannot be reclaimed from HMRC. It is a matter between the claimant and the supplier. We do not consider that HMRC should be expected to go further and advise potential claimants that they may be unable to recover overcharged VAT if their supplier de-registers or becomes insolvent.

Conclusion

39. In all the circumstances and for the reasons given above we allow the appeal to the extent of the invoices from M J Thompson which HMRC conceded prior to the hearing and in relation to the invoice from Enviromesh. Otherwise we must dismiss the appeal.

40. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 7 MARCH 2017