TC02510

Appeal number: TC/2012/00956

VALUE ADDED TAX – Do It Yourself Builders Scheme – Whether terms of planning prohibited the separate use and disposal of the property – no – conditions for zero rating satisfied – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NICK BULL **Appellant**

- and -

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

TRIBUNAL: JUDGE LADY J C MITTING
MR T D BAYLISS FFA FAIA

Sitting in public in Birmingham on 6 November 2012

The Appellant appeared in person

Bernard Hayley, Officer of HMRC, for the Respondents

DECISION

1. This appeal arises out of the construction of a dwelling by the Appellant, Mr Nick Bull. Mr Bull appeals against the decision of the Commissioners, dated 12 October 2011 and upheld on review dated 28 November 2011, to refuse him a refund of VAT incurred in the construction in the sum of £10,568.38 under the "Do It Yourself Builders Scheme" governed by Section 35 Value Added Tax Act 1994.

The Legislation and the issue before the Tribunal

2. The effect of Section 35 is to put those undertaking building and construction work for themselves in a similar position to commercial developers by allowing them, subject to certain conditions, to recover the input tax which they have incurred in the purchase of materials used in the construction.

3. The relevant legislative provisions are as follows:

Section 35 (1A) The works to which this section applies are-

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

Section 35 (4) states that

> (4) The notes to group 5 of schedule 8 shall apply for construing this section as they apply for construing that group.

Note 2 to group 5 of schedule 8 to the VAT Act 1994 provides as follows:

> 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.

4. It was accepted by the Commissioners that conditions (a), (b) & (d) of Note 2 had been met by Mr Bull but not condition (c), therein lying the issue between the parties and before the Tribunal.

Public Notice 719

5. We were referred by the parties to Public Notice 719, entitled "VAT Refunds for "do it yourself" builders and converters". Although subsequently withdrawn, this Notice was in force at all times material to the issue before us. We should at this stage point out, in response to a point made by Mr Bull, that the Notice is of no statutory effect. It is not "the law" but the Commissioners' interpretation of the law and based on that, their very full guidance to the scope of the scheme. The withdrawal of the Notice in August 2009 and its replacement with guidance in a different format and differently worded, does not therefore denote any change in the law or the statutory provisions which we are applying.

6. Paragraph 4.2.2 reads as follows:

> **4.2.2 Is an occupancy restriction a prohibition on separate use or disposal?**
>
> No. Occupancy restrictions are not prohibitions on separate use or disposal and do not affect whether a building is 'designed as a dwelling'. Common examples of occupancy restrictions include those that limit the occupancy to people:
>
> - Working in agriculture or forestry, or
> - Over a specified age.

The facts

7. The facts were not in dispute and we find to be as follows. Mr Bull and his wife run an equestrian centre on a site in Habberley, Shewsbury. They purchased the site in February 2003 at which time it consisted of five stables, a large barn, a tarmac drive and a static caravan into which Mr & Mrs Bull moved. Since acquisition, the Centre has been quite considerably developed to now include twelve stables, a horse walker, an all weather surface and adjoining grazing land. At the time of purchase, the property came with outline planning permission for the erection of a single storey three or four bedroomed dwelling, to be built in the footprint of the static caravan. Mr & Mrs Bull applied for full planning permission on 22 July 2005 and were granted on 25 August 2005 permission for the "erection of a single storey dwelling with integral double garage to replace the existing static park home". The permission was subject to certain conditions, the relevant one being at No 5 and in the following terms:

> 5. The occupation of the dwelling shall be limited to a person or persons employed in the operation of the adjoining equestrian centre.
>
> Reason: The provision of a dwelling for unrestricted residential purposes on an isolated rural site would be contrary to planning policy.

Building commenced approximately four years ago and was signed off in October 2011 and the house is now lived in by Mr & Mrs Bull.

Submissions

8. Mr Bull's oral submissions were very brief but we have read all the representations which he had made previously in writing both in his Notice of Appeal and in correspondence to the Commissioners and we treat all of these as being his contentions in support of his appeal. His submission was that condition (c) had been met. He cited paragraph 4.2.2 of the Notice 719 that an occupancy condition does not constitute a prohibition on separate use or disposal. The condition imposed by the planning consent related to the category of person occupying the property and in no way restricted its separate use or disposal. He drew a distinction with, for example, a granny annex which by definition was tied to the pre-existing dwelling with the effect that there was still only one dwelling. He, on the contrary, had created a quite separate and new dwelling. He saw the condition as imposing a restriction on the person living in the property not the property itself. He produced in evidence an email dated 23 May 2012 from his planning officer in the following terms:

> "I can confirm that the condition relates to occupation of the dwelling rather than restricting sale of part or whole of the property. Providing the person(s) who occupied the dwelling work on the adjoining equestrian centre that will suffice".

9. Mr Hayley's equally brief contention was that condition (c) was not met because of the planning restriction. The presence of this restriction meant that the necessary criteria had not been met. The dwelling could not be separated from the equestrian activities because the occupier of the dwelling had to be employed in the equestrian centre.

Case Law

10. We were referred by the parties to the following cases:

Margaret Elizabeth Wendels v HMRC TC 00737

Adrian Richard Railton Holden and Jane Elizabeth Holden v HMRC TC 02043

11. Mr Bull relied squarely on *Wendels* and Mr Hayley on *Holden*. In *Wendels*, the Tribunal allowed Mrs Wendels' appeal in relation to the construction of a dwelling subject to a very similar planning restriction to that in issue before us, the business in question there being that of a cattery. Mr Hayley accepted that "swapping cats for horses" there was little distinction between the cases of Mrs Wendels and Mr Bull. Mr Hayley however said that he preferred to rely upon the Tribunal decision in *Holden* in which the Tribunal was concerned with a "live-work" unit, permission for which was granted subject to the condition that "the flat hereby permitted shall be occupied only in conjunction with the operation of the photographic studio…..". The Tribunal dismissed Mr & Mrs Holden's appeal on the basis that the planning condition required the residential and business accommodation to be in common occupation. Disposal of the one without the other would be unlawful and condition (c) was therefore not met.

Conclusions

12. We begin by looking at the two cases sited to us by the parties. They are both First-tier Tribunal decisions, both were decided on their facts and we are bound by neither. We do not view them in any way as conflicting decisions as they are clearly distinguishable. In *Holden*, the condition permitted occupation of the flat for which planning permission had been sought "only in conjunction with the operation of the …. studio……" This wording binds the flat and the studio together to the extent that in that sense they lose their independence. As found by Judge Bishopp, the residential and business accommodation had to be in common occupation. Neither could be lawfully disposed of without the other. In *Wendels*, the planning condition provided that "the occupation of the dwelling hereby permitted shall be limited to a person solely or mainly employed or last employed in the cattery business….. or a widow or widower of such a person, or any resident dependent". Judge Tilsley OBE found that that condition was no more than an occupancy condition. It did not create any greater bond than that between the cattery and the dwelling.

13. The condition imposed on Mr Bull's construction was, as was expressly conceded by Mr Haley, virtually on all fours with than in *Wendels*. It stipulated who should occupy the dwelling but went no further than that. It placed no prohibition on the separate use or disposal of the property. And, as contended by Mr Bull, it did not tie the dwelling to the equine centre as for example a granny annex would be tied to the property of which it formed part. Throughout the review letter, the Commissioners refer to the planning condition as "linking" the property and the equestrian centre and "closely connecting" them. It refers to the property and the business as not being independent from each other. We do not view the planning condition as doing any such thing. It does no more than stipulate the category of person who should be an occupier of the dwelling. It does not impose any stronger link than that between the house and the business. It does not prohibit or restrict the separate use and disposal of the property. This approach would be consistent with the interpretation adopted by the Commissioners in Notice 719.

14. We therefore find that the planning condition constituted an occupancy restriction and did not prohibit the separate use or disposal of the dwelling. For these reasons, the appeal is allowed.

15. 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.

LADY J C MITTING
TRIBUNAL JUDGE

RELEASE DATE: 1 February 2013