TC01521

Appeal number: TC/2010/6491

VAT – DIY builders scheme – construction of building comprising two residential units – s 106 agreement prohibiting separate disposal – building not in accordance with planning permission – conditions for DIY relief not met

FIRST-TIER TRIBUNAL

TAX

SHEILA ANNE SEARLE **Appellant**

- and -

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

TRIBUNAL: Mrs B Mosedale (Tribunal Judge)
Mr J Robinson (Tribunal Member)

Sitting in public at Barrack Block, Southampton on 11 October 2011

Mr S Taylor of Pearce Taylor Taxation for the Appellant;

Mr H O'Leary, Officer of HMRC, for the Respondents

DECISION

1. Mrs Searle, the Appellant, made a claim on 15 January 2010 for a refund of VAT of £25,260.93 under the DIY Builders scheme provided for in s 35 Value Added Tax Act 1994 ("VATA"). HMRC initially refused the claim on 22 January. After Mrs Searle provided more information on 1 February, it was refused again on 12 February 2010. Following a review, HMRC upheld their decision and notified this to Mrs Searle by letter on 9 June 2010. The Appellant's then representative wrote to HMRC with further information by letter of 20 July but HMRC did not revise their decision.

2. The Appellant lodged her appeal on 10 August 2010. This appeal is therefore out of time but in the circumstances HMRC took no objection to this and we formally admitted the appeal.

The facts

3. The facts were not in dispute and we accept the evidence of Mrs Searle.

4. Mrs Searle bought a property on Botley Road Southampton adjacent to a house she already owned and occupied. Her intention was to provide accommodation for her adult daughters. It was a very long term project. The property was acquired in the early 1980s and vacant possession of it obtained in the mid-1990s. Planning permission was not obtained until 7 December 2000. Completion of construction did not occur until December 2009.

5. Mrs Searle had two daughters and, as it was a large plot, wanted to build two separate or semi-detached houses on it. The Council would not agree to give planning permission for two units of accommodation.

6. Eventually planning permission was forthcoming for "Erection of chalet style bungalow to provide two residential units for two related families." The planning permission contained some 13 conditions, none of which are relevant to this appeal. However, as is standard, what it gave permission for was construction "in accordance with your application and the plans and particulars submitted in connection therewith."

7. The plans submitted with the application show that essentially two residential units in a single building would be constructed. The East of the property at the rear ground floor comprised an open plan kitchen, dining and living room with two bedrooms, two bathrooms, a utility and store room. The West of the property, at the front ground floor comprised an entrance lobby, utility and cloakroom with an open plan kitchen, dinning and living area. There were stairs which gave access to three bedrooms and two bathrooms. The residential unit at the back had, Mrs Searle estimated about 1/3rd of the floor space while the residential unit at the front had about 2/3^{rds} of the total floor space.

8. The intended void above the open plan area of the rear (East) unit which was shown on the plans was converted into a third bedroom for the rear unit with a flight of stairs rising from the open plan area below.

9. The plans showed that there was to be an internal access door between the two residential units. There was a door shown from the store room in the rear unit into the open plan area of the front unit. Mrs Searle's evidence, which we accepted, was that this doorway had been constructed and existed for the first 7 years of construction. However, when the rear unit was ready for occupation and her daughter Kerry moved in with her family, the door had been blocked up. This was to prevent Kerry's young children gaining access to the front unit which was at that time still a building site. Three years later the front unit was completed and Mrs Searle's other daughter, Victoria, moved in with her family but the doorway was left blocked up. We were shown photographs and there is now no sign that there was ever a door between the two units. It has been plastered over.

10. Mrs Searle was not sure whether or not the council knew that the interconnecting door was not part of the building as finally constructed: they had certainly not taken any enforcement action in respect of it.

11. As a condition for obtaining planning permission, Mrs Searle entered into a s106 agreement with her local authority. This included a covenant by Mrs Searle that "the Replacement Dwelling" would only be occupied as two independent dwellings by herself and her family (as defined) and that if either or both ceased to be occupied by her self and members of her family it would from then on only be used as a single dwelling; and that neither dwelling would be let or sold separately.

The law

12. Section 35 of the Value Added Tax Act 1994 ("VATA") provides:

> "(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 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 that person the amount of VAT so chargeable."

13. Section 35(1A) sets out what are the "works" to which section 35(1)(a) applies.

> "(1A) The works to which this section applies are –
>
> (a) the construction of a building designed as a dwelling or a number of dwellings,
>
> (b) the construction of a building for use solely for a relevant residential purpose or relevant charitable purpose; and
>
> (c) a residential conversion."

….

(4) The notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group but this is subject to subsection (4A) below."

14. The Appellant constructed a new building so (if it was within any section) it was within s 35(1)(a). To be within this section Mrs Searle had to construct a building designed as a dwelling or as a number of dwellings.

15. The phrase "designed as a dwelling" is one with a statutory definition. This is contained in the notes to Group 5 of Schedule 8, which under s35(4) applies as much to the DIY Builders scheme as it does to Group 5. Note (2) to Group 5 of Schedule 8 provides as follows:

> "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."

Appellant's submissions

16. The Appellant's submissions were the property that was erected was a single dwelling which could be occupied by two families. Mr Taylor's view was that it was the same as constructing a new house which happened to incorporate a granny annex.

17. Further it was clear that the council would not give planning permission for two separate houses and so it should be seen as a single dwelling. In any event, if the planning permission and s106 agreement were read, it seems the Council itself in some places referred to it as a single dwelling. Mr Taylor pointed to condition 10 of the planning permission which said "in front of the proposed dwelling…."

Decision

18. The word "dwelling" itself is not defined in the legislation. We take it that it has its ordinary meaning as somewhere people live. It is explicit in the legislation that a dwelling must be self-contained living accommodation and implicit in the legislation that each unit of self contained living accommodation is a separate dwelling. If this were not the case, Note (2)(b) and (c) would be meaningless. In other words, a "dwelling" is a single unit of self contained living accommodation: more than one unit of self contained living accommodation is a collection of dwellings (such as a block of flats).

19. Mr Taylor considers that the building should be seen as a single dwelling. He bases this on his assertion that the Council gave permission for, and regarded it as, a single dwelling.

20. We are unable to agree that the Council did regard it as a single dwelling. On the planning permission the heading describes it as "erection of chalet style bungalow to provide two residential units for two related families" and thereafter, apart from the quote from condition 10, describes it as "each dwelling" (condition 6), "the dwellings" (condition 12) and "either of the dwellings" (condition 13). The reference in condition 10 to "dwelling" , taking the above consistent reference to "dwellings" may simply be an error or it may be because it is referring to the front of the property onto which only one of the residential units faced.

21. So far as the s106 agreement is concerned, Mr Taylor submitted that the Council saw the building as a single dwelling as in this s106 agreement they described it as "the Replacement Dwelling." We are unable to agree. "The Replacement Dwelling" was merely a defined term in the agreement. It was the definition given to the "replacement dwelling…that will initially be constructed so as to form two separate but inter linked dwellings." We find that the council saw the building as comprising two dwellings while it was occupied by Mrs Searle and her family up to the point they decided to occupy it as a single dwelling or sold it on to new owners, when it had to be used single dwelling.

22. In any event, we consider that the meaning of "dwelling" for the purpose of planning is not necessarily the same as its meaning for the VAT Act. As far as the VAT Act at least is concerned it takes its normal meaning, although "designed as a dwelling" has a defined meaning. And as we have said the normal meaning of "dwelling" would be a place of residence, or a residential unit.

23. So far as the VAT Act is concerned we find that what Mrs Searle built comprised two dwellings. Of course they shared a party wall but they were two independent units of residential accommodation and they were occupied as such. They could be compared to a block of flats with shared car parking spaces. But the actual domestic accommodation comprised two entirely separate and independent areas, each with their own entrance, living, cooking, dining, washing and sleeping facilities.

24. Ordinarily either or both units would be eligible for DIY builders' VAT relief as long as they were erected otherwise than in the course of a business (as these were). However, Condition (c) of Note (2) of Group 5 to Schedule 8 prevents relief where the separate use, or disposal of the dwelling is prohibited by the term of any covenant, statutory planning consent or similar provision. The separate disposal of these two dwellings was prohibited by the s 106 agreement. A s 106 agreement, being part of the process by which planning permission is obtained and without which would not have been granted as in this case, is both a "covenant" and "similar provision". Therefore, the prohibition in the s106 agreement on the disposal of one of the dwellings without the other means that neither of the two dwellings which comprised the building were eligible for relief.

25. The claim for relief also fails under condition (b) of Note (c) as we find that there is *provision* for direct internal access from either of the dwellings to the other. This is because, although the door was blocked and sealed over before the building was completed, nevertheless the building for which planning was given included that doorway and it could be legally reinstated at any point without the need for permission and indeed the council might take enforcement action to have it reinstated. There is therefore "provision" for internal access even though it currently does not exist.

26. We note that our decision would have been the same even if the doorway had not been closed up before construction was completed. If the doorway existed, that would not change our view that what was constructed were two dwellings. Although we agree with Mr Taylor that there is a single dwelling where within a dwelling's confines an extra self contained area is created such as a granny or nanny annex, this is not what happened here. It may simply be a matter of degree but neither property could be said to be an annex to the other. Both were three-bedroom flats with kitchen, dining, and living accommodation. Neither was built as an annex and neither were used as an annex. Even if they had an internal linking door this would not convert them into a single dwelling house.

27. Even if we were wrong to say that the building constructed by Mrs Searle comprised two dwellings, Mrs Searle would still not succeed in her appeal. This is because whether the building is seen as one or two units, condition (d) of Note (2) to Group 5 is failed. This condition provides that the construction of the building has to be carried out in accordance with the planning consent. Permission was given for construction in accordance with the attached plans: the attached plans showed a connecting door. That door was not there when the construction was completed and the building was therefore not constructed entirely in accordance with the planning consent. It may be that the Council may never take enforcement action against Mrs Searle but that is a different question: it may be a relatively minor infringement but it is still a failure to abide by the consent. And the claim therefore fails on this ground too.

28. It is not relevant that Mrs Searle may have had a very good reason for blocking up the door (the safety of her grandchildren). The only proper way of blocking up the door would have been to apply to the Council for a change to the planning consent. Although, as we have said, that would not have enabled her to obtain VAT relief as we have found that the claim fails in any event because the property was two dwellings the separate disposal of which was prohibited.

29. We sympathise with Mrs Searle but we are bound by the legislation. If Mrs Searle had constructed a single dwelling and assuming the planning consent was complied with, DIY builders' relief would probably have been available. Because she wished to provide for both daughters and because the Council would not permit two dwellings, unfortunately the law applies in such a way to deny her relief for either of the two units.

30. We dismiss the appeal.

31. 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.

TRIBUNAL JUDGE
RELEASE DATE: 26 October 2011