[2017] UKFTT 132 (TC)

TC05626

Appeal number: TC/2013/00910

VAT – DIY self-build scheme – section 35A VATA94 and note 2(c) to Group 5, Schedule 8 VATA94 – whether the separate disposal of the dwelling was prohibited by the terms of a covenant under section 106 Town & Country Planning Act 1990 – terms of covenant considered – held they prohibit a separate disposal of the dwelling – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICHARD SWINDELL **Appellant**

-and-

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

TRIBUNAL: JUDGE KEVIN POOLE
IAN ABRAMS

Sitting in public in Nottingham on 7 December 2016

M J Shapcott FCA of Shapcotts Chartered Accountants for the Appellant

Sharon Hancox, Presenting Officer of HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This appeal concerns a claim for a refund of VAT under the DIY self-build scheme. The main point at issue is whether a particular provision in an agreement under section 106 Town & Country Planning Act 1990 had the effect of prohibiting the separate disposal of the relevant dwelling, such that note 2(c) to Group 5 of Schedule 8 Value Added Tax Act 1994 ("VATA94") prevented the dwelling in question from qualifying.

The facts

2. The facts were brief, and were not contested.

3. The appellant inherited 19.7 hectares of farmland at some time during or before 1999. There were no buildings on the land, apart from a barn. The appellant wished to farm the land and wished to build a farmhouse on it to live in. He applied for planning permission on 7 April 1999 and on 21 September 1999 the local planning authority (Derbyshire Dales District Council) resolved to approve the application, subject to the appellant entering into an agreement with them under section 106 Town & Country Planning Act 1990 ("TCPA90") in a specified form. Ultimately planning permission was granted on 23 June 2000 and the "Planning Obligation Agreement" ("the Agreement") was completed on 26 June 2000. At that time, the land was still bare (apart from the pre-existing barn).

4. The planning permission contained a provision limiting the occupation of the dwelling to:

> "a person solely or mainly working, or last working, in the locality in agriculture or in forestry, or a widow or widower of such a person, and to any residential dependents".

5. Somewhat strangely, the Agreement contained an obligation in similar, though not the same, terms; it limited occupation of the dwelling to:

> "a person solely or mainly employed or last employed (prior to retirement) at the property described in the Schedule or in the locality in agriculture as defined in section 336 of the Town and Country Planning Act 1990 (including any dependants of such a person residing with him) or a widow or widower of such a person PROVIDED that this sub-clause shall not apply in respect of any time during which a planning condition to the like effect is suspended by virtue of Section 33 of the Rent (Agriculture) Act 1976".

6. Neither of these provisions is in issue in the present appeal (HMRC accepting that they do not amount to a prohibition on the "separate use" of the dwelling in question).

7. The Agreement however contained the following further provision:

"The Owner[1] HEREBY COVENANTS with the Council that no part of the property described in the Schedule nor any of the buildings erected or existing thereon shall be sold assigned conveyed leased or sub-let except as one parcel with the property described in the Schedule PROVIDED ALWAYS that it shall be permissible for the Owner to let up to twenty five per cent of the land associated with the holding at any one time for terms not exceeding twelve months in duration."

8. The Schedule to the Agreement described the property in question as "Agricultural land in the Parish of Hognaston known as Badger Moor Farm in the County of Derby having an area of 19.7 hectares or thereabouts shown edged blue on the plan annexed hereto".

9. The appellant appears to have taken some time to build the new house. His VAT refund claim was submitted to HMRC on 24 August 2012, recording that he had occupied the building on 1 June 2012. The various items for which refund was claimed covered the period from 20 June 2002 up to 20 January 2012. The total refund claimed was £30,142.09.

10. HMRC rejected the claim on 7 September 2012, on the basis that the provisions of the Agreement amounted to a prohibition on the separate disposal of the dwelling, disqualifying the claim by reference to Note 2(c) to Group 5 of Schedule 8 VATA94. Following a statutory review, their rejection of the claim was confirmed in a formal letter dated 20 December 2012. This letter had been incorrectly addressed, but once it was returned undelivered and re-issued to the appellant at the correct address, an appeal to the Tribunal was received on 1 February 2013.

11. The appeal was stayed pending the release of the Upper Tribunal decision in *HMRC v Burton*, which was finally released on 26 January 2016 under reference [2016] UKUT 0020 (TCC) and which would, it was hoped, provide some guidance that would assist in determining this appeal. In fact, there was nothing in that decision to which either party referred us, dealing as it did with a dispute about "separate use" rather than "separate disposal" of the relevant dwelling.

The Law

12. The entitlement to a refund arises out of section 35 VATA94, which provides, so far as relevant, as follows:

"**35 Refund of VAT to persons constructing certain buildings**

(1) Where –

(a) a person carries out works to which this section applies,

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[1] The appellant was described in the agreement as "the Owner", though by virtue of clause 4, it was provided that "the expression 'the Council' and 'the Owner' shall include their respective successors in title and assigns".

(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,

5 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 number of dwellings…

10 …

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

13. The relevant note to Group 5 of Schedule 8 VATA reads, so far as relevant, as follows:

15 "(2) A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied –

…

(c) the separate use, or disposal of the dwelling is not
20 prohibited by the term of any covenant, statutory planning consent or similar provision"

The Arguments

14. The appellant's grounds of appeal were originally two-fold:

(1) First, he argued that Note 2(c) should be construed as only disqualifying
25 the claim if both the separate use and the separate disposal of the dwelling were prohibited. This ground of appeal was not persisted with, rightly in our view, and we feel no need to say any more about it.

(2) Second, he argued that the proviso to the prohibition meant that the dwelling could be separately disposed of by way of lettings for periods of up
30 to twelve months; this was on the basis that "disposal of a property can be sale or lease/rent for any specified period. It may also be argued that letting of the property also allows for separate use."

15. In relation to this remaining ground of appeal, Mr Shapcott argued that the proviso at the end of the restriction in the Agreement was what saved the appellant; he
35 could at any time let up to 25% in total of the land, and that meant that he could

dispose of the dwelling (which obviously comprised far less than 25% and was, as a matter of law, part of "the land") "separately" from the rest of the property.

16. Alternatively, he had previously argued that the farm and associated farmland ought to be regarded as a single composite entity (much like a normal house and garden) and as the prohibition did not prevent the appellant from selling the whole, it did not fall foul of Note 2(c) at all.

17. Finally, he had argued that the appellant's human rights were breached if he was unable to build a house as a farmer with the benefit of a VAT refund whereas other non-farming house builders could do so. He repeated this point at the hearing, but without developing it any further.

18. Ms Hancox's argument was essentially quite short. In her submission, read without the proviso, the restriction in the Agreement would quite clearly fall foul of Note 2(c), because the separate disposal of the dwelling (i.e. the house) was not permitted – only a disposal of the whole 19.7 hectares (including the new house) as one entire property was permitted. As to the proviso to the restriction, HMRC did not consider it "rescued" the position for the appellant; the appellant had to show that the Agreement did not prevent him from making a "separate disposal" of the house, and at most all that the proviso permitted was the granting of a short tenancy of part of the land. It was HMRC's view that something much more substantial than a short tenancy was required to amount to a "disposal" – and their general approach was to accept that whilst a full freehold sale was not necessary, they would require at least a disposal equivalent to a "major interest" (as defined in section 96(1) VATA) – i.e. a lease of more than 21 years (or, in Scotland, of not less than 20 years). Whilst Mr Shapcott had indicated there was nothing to stop the appellant from granting 21 or more successive 12 month tenancies of the house, thus amounting to the "required" 21 year term, Ms Hancox argued that this was going too far – 21 short leases did not equate to a "disposal" for these purposes.

19. Finally, Mr Shapcott sought to argue that because Note (13) to Group 5 of Schedule 8 VATA would not prevent the grant of an interest in the appellant's house falling within Item 1 of that Group, that gave a strong indication that Note 2(c) should be interpreted to achieve a similar result in the present case. Ms Hancox considered Note (13) to be irrelevant to the exercise facing the Tribunal in this appeal, and we agree with her.

Discussion and decision

20. We can dispose fairly shortly with Mr Shapcott's brief submission under the Human Rights Act. If the legislation denies the appellant the right to a refund of VAT, it does so not because he is a farmer, but because of a particular type of restriction on his ability to dispose of his house. That restriction (and any associated denial of a VAT refund) would apply whatever his occupation. We do not see any scope for arguing that the restriction as a whole should be interpreted under section 3 Human Rights Act so as not to apply to the situation of this appellant: Parliament has seen fit to limit the right to a refund to a particular class of situations and even if we

considered that to be an interference with the appellant's right to peaceful enjoyment of his possessions (which we do not), it is to be remembered that Article 1 of the first protocol to the European Convention on Human Rights contains a specific exemption "to secure the payment of taxes". Mr Shapcott did not develop this line of argument in any detail, but we see nothing in it.

21. As to Mr Shapcott's argument at [16] above, we consider it misses the point. Note 2(c) is concerned with whether "the separate… disposal of the dwelling" is prohibited by the restriction in the Agreement. Subject only to arguments about the effect of the proviso (as to which, see below), the effect of the restriction is clearly to prevent the appellant from disposing of the house separately from the rest of the 19.7 hectares of land in which it stands. This is the case, whether or not the farmland is regarded as ancillary to the house.

22. The only remaining area of dispute revolves around the proviso to the restriction contained in the Agreement.

23. The proviso allows the appellant "to let up to twenty five per cent of the land associated with the holding at any one time for terms not exceeding twelve months in duration". In this context, we consider the reference to "the land associated with the holding" relates to the farmland associated with the farmhouse and not to the farmhouse itself. This would be a common sense interpretation, as the apparent intention of the proviso is to allow short term lettings of less than 25% of the farmland, probably to other farmers, should the appellant not have the wish or ability to farm it all himself in a particular year (or indeed succession of individual years). We therefore do not consider that the proviso would permit the appellant to let the dwelling house itself whilst retaining at least 75% of the remainder of the holding. If this interpretation is correct, it is clearly fatal to the appeal.

24. But if that interpretation is wrong, and the appellant is indeed permitted to grant successive tenancies of the house on its own, each tenancy for a period of up to a year, what then? The question still remains as to whether the "separate… disposal of the dwelling" is prohibited by the Agreement, even assuming the ability to grant successive short tenancies of it. That leads to an examination of the meaning of the word "disposal" in the context of Note 2(c). It is clear that in some contexts, "disposal" can have a very broad meaning; see for example sections 21 and 22 Taxation of Chargeable Gains Act 1992 or section 61 Capital Allowances Act 2001, where the concept of "disposal" is extended, either specifically or by necessary implication. However, the context of Note 2(c) is much more open, there being no particular guidance to be gleaned from it as to the intended meaning. We note that the relevant definitions of "disposal" in the Oxford English Dictionary are:

> "The action of disposing of, putting away, getting rid of, settling, or definitely dealing with."
>
> "The action of bestowing, giving or making over; bestowal, assignment"
>
> "Alienation, making over, or parting with, by sale or the like."

25. A common feature of all of these definitions is a sense of the "absoluteness" of the disposal, without any significant partial retention. To put it another way, if someone had granted a twelve month lease of their house, it would not generally be said that they had "disposed" of it. The fact that they might grant a number of successive twelve month leases would not change that.

26. In the round, therefore, we consider that even if our interpretation of the effect of the proviso (as set out at [23] above) is incorrect, that would still not assist the appellant. This is because in our view, the granting of a lease of the house for a period of twelve months or less (or even a succession of such grants) would not amount to a "disposal" for the purposes of Note 2(c); accordingly the restriction in the Agreement (even if interpreted liberally as referred to at [23] above) would only permit transactions which did not amount to a separate disposal of the dwelling within the meaning of that Note.

27. It follows that the appeal must be DISMISSED.

28. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 1 FEBRUARY 2017