

DIY SCHEME – Dwelling house – Builder agreed to construct dwelling house for Appellant – Appellant contracted to buy dwelling house on completion – Prior to completion Appellant contracted as principal with separate suppliers for provision of laminated flooring, cooker hood and paint – Whether Appellant a person carrying out works of construction of dwelling house – No – Appeal dismissed – VAT Act 1994 s.35(1)(a) and (1A)

LONDON TRIBUNAL CENTRE

**CATHAL McALISTER - Appellant
- and -**

THE COMMISSIONERS OF CUSTOMS AND EXCISE - Respondents

Tribunal: STEPHEN OLVIER QC (Chairman)

JOAN WHITESIDE OBE

Sitting in public in Belfast on 30 January 2003

The Appellant in person

Alison Graham-Wells of the Solicitors Office of the Customs and Excise, for the Respondents

© CROWN COPYRIGHT 2003

DECISION

1. Cathal McAlister appeals against a decision refusing his claim for repayment of tax under the "DIY House Builders Scheme". The decision is in a letter dated 22 April 2002. The amount in dispute is £338.48 and it represents the VAT charged by the suppliers on laminated flooring, a cooker hood and paint.
2. The DIY House Builders Scheme was established pursuant to section 35 of the VAT Act 1994. The question for us, essentially, is whether (as Mr McAlister contends and the Commissioners dispute) he was a person who carried out works comprising the construction of a building designed as a dwelling.
3. Mr McAlister presented his own case and gave evidence. From that and from the documents provided by both sides we make the following findings of fact.
4. In 2000 Mr McAlister agreed to purchase a house to be built by a firm of builders called Wallace Contracts. The house was on a residential development owned by a third party. Mr McAlister chose the site and the design for the house from a brochure produced by some estate agents. A site reservation fee of £500 was paid. The total agreed price to be paid by Mr McAlister was £107,000. The

brochure contained certain specifications (e.g. a garage, oil-fired heating, a driveway and a ten year NHBC warranty).

5. The house was to be built according to plans already drawn up by architects; these covered the structural works but did not extend to all the detailed fittings. The brochure referred to "P C Sums from Nominated Suppliers Only". In the case of the house chosen by Mr McAlister these came to £3,000 in aggregate. They broke down to £1,200 for "Kitchen", £1,000 for "Sanitary Ware" and £400 for each fireplace.

6. Our understanding of the expression "P C Sum" is that this expression gives the purchaser the right to choose the relevant fitments from the nominated supplier up to the stated prices. The obligation to install the fitments falls on the builder. If the purchaser chooses fitments that overtop the stated amount, the excess will be charged to him as an extra and added to the total contract price for the building.

7. The brochure required the prospective purchaser to sign the "Building Agreement" and the "Contract Documents" within a specified time. We were provided with a copy of the Building Agreement between Wallace Contracts (as "the Builder") and Mr McAlister (as "the Employer"). We quote the first three clauses:

"1. The Builder shall build and finish in a good and workmanlike manner for the Employer ... one dwelling-house ... in accordance with plans and specifications lodged by the Builder ... for the Contract price

2. The Dwelling house shall be built, erected and finished in accordance with the plans and specifications lodged ...

3. The Employer agrees to pay the Contract price as stipulated in the Schedule and on payment to the Builder of the balance the Contract price together with the price of any extras. The Employer will be given possession of the dwelling-house."

The Schedule stated £10,700 as the Contract price and £96,300 as the balance payable on completion making £107,000 as the "total Contract price".

8. Prior to completion (which took place on or about 15 March 2001) Mr McAlister chose from nominated suppliers the items of sanitary ware, fireplaces and some (but not all) of the kitchen installations. The invoices for all these were sent to Wallace Contracts and Wallace Contracts, as builder, arranged to install them. The amounts charged by the suppliers were between £8,000 and £9,000; they therefore came to nearly three times the "P C Sums". The excess over £3,000 was charged to Mr McAlister on completion over and above the total Contract price.

9. Also prior to completion Mr McAlister ordered two of the items to which this appeal relates –

(i) A cooker and a cooker hood from Alcomm Kitchens; the VAT on the hood (which is zero-rated) came to £132.55. The cooker hood was outside the P C Sums arrangements. Mr McAlister paid the full amount and Alcomm installed these for him.

(ii) Mr McAlister ordered 71 yards of laminated wooden flooring from Glasker Carpers; the VAT on this came to £160.11. This was laid over the flooring already installed by the builders. This also was not within the P C Sums. Mr McAlister paid the full amount and the suppliers laid it by arrangement with Wallace contracts.

After completion, i.e. after he was in possession of the house, Mr McAlister made four purchases of paint from Homebase and B&Q. This cost him £307.69 plus £45.83 of VAT. These purchases were made on 24 March 2001 and in June 2001.

10. When legal completion was imminent Wallace Contracts sent Mr McAlister a "Final Account" dated 12 March 2001. This specified £107,000 as the "Sale Price" of the house. There were then listed 22 items of goods or building services which were separately priced. The three largest items were those falling within the "Kitchen", "Sanitary Ware" and "Fireplace" headings applicable to P C Sums. We have already identified those in paragraph 8 above. The aggregate amount of the Final Account came to £117,456. After deduction of deposit and reservation fee (£10,700 plus £500) and the P C Sums (£3,000) Mr McAlister was left with £103,256 to pay on completion on or about 15 March 2001.

11. We understand that the third party landowner had retained title to the land on which the house stood throughout the building works, When legal completion was due title was transferred by way of sub-sale from landowner to Wallace Contracts to Mr McAlister.

12. On 15 March 2001 Mr McAlister went into occupation of the house.

13. A Certificate of Completion was issued on 7 August 2001. The delay in its issue had been caused by the absence of ventilation fans when legal completion took place. Their installation was needed before a certification could be issued.

14. On 11 September 2001 Mr McAlister submitted the VAT 341 forms applying as a DIY Builder for payment of the £338.48 for VAT on the cooker hood, the laminated flooring and the paint. The decision letter of 22 April 2002 refusing the claim stated as the reason that Mr McAlister had bought a completed house from the builder and that he could not claim for extra work done by him.

The statutory provisions

15. VAT Act 1994 section 35 provides, so far as material –

"(1) Where –

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

(b) his carrying out of the work is lawful and otherwise than in the course or furtherance of any business, and

(c) VAT is chargeable on the supply ... 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.

(1A) The works to which this section applies are –

(a) the construction of a building designed as a dwelling ..."

The arguments

16. Mr McAlister, in a careful and well-presented argument, contended that as a matter of economic reality he should be regarded as the person carrying out the works of construction of the dwelling house. He had specified the materials for the kitchen and bathroom. He had chosen the fireplace and the cooker plus the cooker hood. He had agreed the price and the period of delivery for all of these items. He had bought the paint. All of those, and not just the cooker hood, the laminated floor and the paint (to which the claim related), amounted to works of construction of the dwelling house. All of them had been supplied to the house and so in reality to him as the person committed to pay the builder for all the installation. Alison Graham-Wells for the Commissioners argued that Mr McAlister could not on the facts of the case be regarded as the person carrying out the relevant works and construction. The items to which the claim related could not be regarded as works of substance in the construction of the house. Mr McAlister had contracted to buy the constructed house. The disputed items were really extras.

17. Moreover, it was argued for the Commissioners, Mr McAlister was out of time in his claim. Regulation 201(a) of the VAT General Regulations requires the claim form to be submitted within three months of completion. The dwelling had been completed when Mr McAlister moved in on or about 15 March 2001 and not at the later date when the Certificate of Completion had been issued.

Conclusion

18. Whether a person is carrying out work amounting to the construction of dwelling house, for the purposes of section 35, is a matter of fact and degree. The decided cases provide illustrations, but no more. Here, it seems to us, there are three key features.

19. First, there was a building contract here and that committed the builder (Wallace Contracts) to "build and finish" the dwelling house in accordance with the plans and specifications. That, it seems to us, covers the project which was to be the responsibility of the builder. The works covered by the "P C Sums" are, as we have already explained, the responsibility of the builder; the choice of the particular items of kitchen, sanitary ware or fireplace, lies with the buyer who has to pay an addition to the total contract price if he chooses items over and above the P C Sums. Moreover, the supplier of those items actually contracts with the builder who has the responsibility to pay the supplier for them; and on that basis it seems to us that the supply of those items by the supplier is to the builder and not to Mr McAlister. Thus Mr McAlister's involvement in choosing and accepting prices for those P C items cannot we think be construed as amounting to his carrying out of the relevant works.

20. Second, the nature of the buyer's interest in the land will be relevant, though not determinative. Here Mr McAlister's interest is derived from his contract; he has no title and no rights of possession and entry. The builder (Wallace Contracts) gets those from the third party landowner. Mr McAlister's limited

rights, which do not become those of owner until physical completion and the transfer of title to him, militate against Mr McAlister being properly described as the person carrying out the works of construction.

21. Third, and of perhaps greatest significance here, we need to look at the nature of the works carried out by Mr McAlister or at his initiative. There was nothing structural about the laminated flooring. It was designed to be laid over the existing floorboards. It seems to us to be more of a finishing than a work of construction. Nor in our view can the installation of the cooker hood be properly described as a work of construction. The paint was purchased after the main construction works had finished. It cannot, we think, be seen as a purchase by a person carrying out works of construction to a dwelling house.

22. With those features in mind we are driven to conclude that Mr McAlister has not satisfied us that he qualifies for repayment of the tax on the three items specified in his claim under the DIY Builders Scheme.

23. That is sufficient to dispose of the appeal. We should add that Mr McAlister's circumstances are significantly different from those present in the *McElroy* decision of this tribunal (1977) VAT dec 490. There the taxable person had purchased a partly built house from a developer after the builder had become bankrupt. The external walls and the internal partitions have been completed. The roof carcass had been finished and the roof tiling nearly completed. A large amount of work still had to be done to make the structure into a dwelling house fit for habitation. That was sufficient to satisfy the tribunal that Mr McElroy was carrying out works of construction when he completed these works. He qualified for repayment under the Scheme. We were also referred to *Simister* (1994) VAT dec 12715. It seems to us that every case in this area falls to be decided on its own facts and here, as in *Simister*, the appellant did not satisfy the tribunal that he was carrying out works of construction of a dwelling house within the meaning of those words in section 35.

24. For those reasons we dismiss the appeal. We do not have to decide whether Mr McAlister's claim for repayment was out of time.

25. The Commissioners did not ask for their costs.

STEPHEN OLIVER QC

CHAIRMAN

RELEASED:

LON/02/408