[2015] UKFTT 0557 (TC)

TC04709

Appeal number: TC/2014/02141

Value Added Tax - DIY Builders Scheme - claim for refund of VAT under DIY scheme - VATA 1994 s35 - Schedule 8 Group 5 notes 16 and 18 - Regulation 201 of VAT Regulations 1995 - incremental alterations and extensions to property exceeded those permitted by planning consent - the property being almost totally rebuilt - whether regularising retrospective building regulation approval for "replacement building" allowed the works to be regarded as a "new build" for VAT purposes - no - the refund application did not comply with Regulation 201 VAT Regulations 1995 - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THOMAS BRENNAN **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER TONY HENNESSEY FCA

Sitting in public at Mays Chambers, 73 May Street, Belfast, BT1 3JL, on 3 June 2015

Mr Damian Diamond, Accountant of CD Diamond & Co, for the Appellant

Mrs Sharon Spence Officer of HMRC for the Respondents

DECISION

The Appeal

1. This is an appeal by Thomas Brennan ("the Appellant") against a decision of the Commissioners of Her Majesty's Revenue & Customs ("HMRC") to refuse the Appellant's claim for a refund of Value Added Tax ("VAT") in the sum of £107,023.72. The claim was brought under the DIY Builders Refund Scheme ("the Scheme") and the decision was made pursuant to s 35 of the Value Added Tax Act ("the Act").

Factual background

2. The Appellant's address is 58 Deramore Park South, Belfast BT9 5JY. He has been registered for the purposes of VAT with effect from 1 November 1989 under VAT number 517 2363 59. The DIY VAT claim subject to this appeal has however been made by the Appellant in his capacity as an unregistered private individual.

3. On 3 April 2009 the Appellant obtained planning consent for a "two-storey extension to the side of dwelling and single-storey extensions to side and rear" at 58 Deramore Park South Belfast ("the Property").

4. On 27 May 2010 the Appellant obtained a further planning consent for "extensions and alterations to dwelling" (by reference to various drawings lodged with the application) at the Property.

5. Extensive alterations and other works were undertaken to the Property, some of which exceeded those authorised as shown on the drawings and Building Regulation application, which effectively resulted in the Property being almost entirely rebuilt.

6. The alterations were completed on 12 March 2013.

7. Following an inspection by Belfast Building Control, a Notice of Approval and a Full Plan Completion Certificate were issued on 14 May 2013, for a "Replacement Dwelling" confirming that the requirements of the Building Regulations had been satisfied.

8. On 8 November 2013, HMRC received the Appellant's VAT reclaim claim made under the DIY Scheme in the total sum of £107,023.72. The claim was made under cover of claim form VAT431NB in respect of the construction of a dwelling at the Property. No further documentation was lodged with the claim.

9. On 11 November 2013, HMRC wrote to the Appellant and requested that he provide confirmation from the Planning Department that the works carried out were for a "replacement dwelling".

10. The Appellant, on the advice of his architects, decided that an application for retrospective planning consent was not needed. He replied on 27 November 2013, enclosing a letter from his architects McCann Moore Architects Ltd, who advised -

i. "The original planning approval (application Z/2008/2486/F granted by the Planning Service on 3 April 2009) was for a significant extension to the rear and side of the existing property involving the demolition of most of the rear wall and partial demolition of the gable wall.

ii. After the works had commenced a second application was made (application Z/2009/1762/F granted by the Planning Service on 27 May 2010).

iii. The second application was for the roof to be replaced and raised and an increase to the size of the rear dormer.

iv. As a result of the new roof and large rear dormer, the whole of the first floor was demolished and a significant amount of steel was installed to support the new structure.

v. New steel beams were to be inserted in the existing ground floor walls to support steel uprights, however it was found that the existing internal walls were built using lightweight "cinder" blocks which were not adequate.

vi. As a result, the existing walls either side of the entrance hall and the wall between bedroom 1 and 2 had to be rebuilt using dense concrete blocks.

vii. There were further internal revisions involving the location of the family bathroom, utility room and en suite — as a result of these changes, these walls were demolished and rebuilt.

viii. The gable wall adjacent to bedrooms 1 and 2 was rebuilt when the new roof was being added.

ix. The existing fire in the living room was changed to a gas fire resulting in the existing chimney having to be rebuilt to accommodate the new wider flue which resulted in this wall being demolished and rebuilt.

x. The external wall to bedroom 2 (facing onto the rear) was rebuilt to accommodate the extended dormer.

xi. All of the existing walls have been demolished 'incrementally' to accommodate the changing brief. The project did not start out as a new build but, whilst the house still sits on roughly the same footprint as the original, 'in our opinion' all the walls are new and as such Building Control were happy to assess the project as a new build house."

11. The Appellant also provided:

i. A letter dated 25 September 2012 from the building contractor, SC Developments Ireland Limited, which states:

> "The original house was built with clinker block and due to the weight of the new roof and steel beams that had to be installed we had to change the walls to concrete block. Please note the outside exterior walls also had to be modified to suit all load points, again this was due to support the roof structure."

ii. Two certificates from Building Control; a 'Notice of Approval' and 'Full Plan Completion Certificate', both dated 14 May 2013, which approved the works as a 'replacement dwelling', for Building Regulation purposes.

12. On 6 December 2013 HMRC rejected the claim, not being satisfied that the works carried out were lawful or that the construction qualified as a 'new build'. HMRC said that the works exceeded and were not undertaken in accordance with the consents of 3 April 2009 and 27 May 2010, regardless of what was confirmed on the Building Regulation Completion Certificate in 2013.

13. HMRC said that the eligibility of a claim is determined at the time of construction. Obtaining consent afterwards does not make the claim eligible. HMRC referred to the case of *Bond & Baxter v HMRC* (TC 00539) which involved the grant of retrospective planning permission. In that case the Tribunal agreed with HMRC that this did not make the claim eligible. At the time when they were carried out the works were not 'lawful' and therefore did not meet the requirements of s 35 VATA.

14. On 23 December 2013, the Appellant's representative requested a reconsideration of the decision on the basis that, contrary to HMRC's assertion, the works were lawful. They stated that the Planning Permission of 27 May 2010 was in respect of the authorised additional works involving the removal of the old walls and detailed the precise works to be undertaken, which work which had been carried out and amounted to a new build.

15. HMRC responded that either more information had to be provided, so that the claim could be reconsidered, or a statutory review requested.

16. On 31 January 2014 the Appellant's representative requested a review of HMRC's decision and reiterated that the amended Planning Consent granted in May 2010 was of such a nature to qualify the works as a replacement dwelling for VAT purposes, in so far as the walls of the existing house were all replaced and this constituted a new dwelling.

17. On 6 March 2014 HMRC upheld the decision to reject the claim, not being satisfied that the works carried out were lawful or that the construction qualified as a new build. HMRC said that it was apparent from the planning consents and McCann Moore's statement that the combined planning consents granted on 3 April 2009 and 27 May 2010 only covered the extensions (which involved the demolition of some walls) and the raised roof and rear dormer. They did not give permission to demolish and replace the remaining walls in the dwelling necessitated by the new roof and changes to internal layout.

18. On 30 March 2014, the Appellant lodged a notice of appeal with the Tribunal.

The evidence

19. The Appellant did not attend to give evidence. The factual background and associated documentation relating to the appeal were however not in dispute. The bundle prepared by HMRC included the Appellant's completed DIY reclaim form, VAT 431NB, his notice of appeal, the disputed decision and the subsequent exchange of correspondence between the parties. Also included were drawings of the property showing the extent of the alterations, copy planning consents and building control completion certificates.

Relevant legislation

20. The principle underlying the DIY builders VAT refund scheme is that self-builders under the scheme should not be disadvantaged as against VAT registered residential property developers who are able to recover input tax and dispose of properties zero rated. The principle legislation is the Value Added Tax Act 1994. The following provisions of the Act are relevant to the appeal and the issues before the Tribunal:

Section 35 provides so far as relevant:

"(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 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;

…

(2) The Commissioners shall not be required to entertain a claim for a refund under this section unless the claim -

(a) is made in such time and in such form and manner, and contains such information, and

(b) is accompanied by such documents, whether by evidence or otherwise, as may be specified by regulations or by the Commissioners in accordance with regulations …

[(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].

Schedule 8 Group 5 of the Act: NOTES

(2) A building is designed as a dwelling … the following conditions are satisfied —

(a) the dwelling consists of self-contained living accommodation;

…….

(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.

(16) For the purpose of this Group, the construction of a building does not include—

(a) the conversion, reconstruction or alteration of an existing building; or

(b) any enlargement of, or extension to, an existing building except to the extent the enlargement or extension creates an additional dwelling …

(c) …

(18) A building only ceases to be an existing building when:

(a) demolished completely to ground level; or

(b) the part remaining above ground level consists of no more than a single facade or where a comer site, a double facade, the retention of which is a condition or requirement of statutory planning consent or similar permission."

21. The Regulations to which s 35(2) refer are the Value Added Tax Regulations 1995 (SI 1995/2518), of which reg 201 is material in this case. It provides (so far as relevant):

"A claimant shall make his claim in respect of a relevant building by -

(a) furnishing to the Commissioners no later than 3 months after the completion of the building the relevant form for the purposes of the claim containing the full particulars required therein and

(b) at the same time furnishing to them—

(i) a certificate of completion obtained from a local authority or such other documentary evidence of completion of the building as is satisfactory to the Commissioners,

(ii) an invoice showing the registration number of the person supplying the goods, whether or not such an invoice is a 35 VAT invoice, in respect of each supply of goods

> on which VAT has been paid which have been incorporated into the building or its site, …
>
> (iv) documentary evidence that planning permission for the building has been granted.…"

22. Section 73A of the Town and Country Planning Act 1990 makes provision for the grant of Planning Permission for works carried out before the date of the application, either without permission or without complying with a condition imposed by permission which has been granted. Subsection (3) provides that -

> "Planning permission for such development may be granted so as to have effect from— (a) the date on which the development was carried out; or (b) if it was carried out in accordance with planning permission granted for a limited period, the end of that period."

The Appellant's grounds of appeal

23. The Appellant's grounds of appeal as disclosed by the Notice of Appeal is:

> "HMRC have stated that building works carried out at 58 Deramore Park South, Belfast are "unlawful" whereas full planning permission has been obtained for all works carried out. The VAT claim has been refused due to their classification of works as unlawful."

24. At the hearing Mr Diamond for the Appellant, said that HMRC had not raised any deficiencies in the Appellant's planning consents, and that in planning terms the development had been lawful as reflected by the confirmation of Building Regulation Notice of Approval and the issue of a Full Plan Completion Certificate. Furthermore the works which had been undertaken were entirely consistent with the building of a new dwelling.

25. Mr Diamond said that the planning consent granted in May 2010 authorising 'extensions and alterations to dwelling' was wide enough in scope to include the demolition of additional parts of the property not specifically detailed in the drawing submitted with the application and that the alteration of internal walls did not require planning permission. In any event, it would have been possible to obtain retrospective planning consent had that been necessary, and such consent would have had the effect of deeming any previously unauthorised works to be lawful at the time they were carried out. In the event it had been decided after discussions with the planning authority that retrospective planning permission was unnecessary.

26. Mr Diamond said that HMRC had not been able to establish that the original building had not been entirely demolished during the works, and that such works amounted to a new build rather than alterations or a conversion.

HMRC's case

27. Sections 35(1) and 35(1A) of the Act provide that, where a person carries out works of "construction of a building designed as a dwelling" and his carrying out of the works "is lawful", the amount of VAT chargeable on the supply of goods shall be refunded.

28. Section 35(4) of the Act specifies that the Notes to Group 5 of Schedule 8 of the Act apply for the purpose of construing s 35. Note (2)(d) of Schedule 8, Group 5 requires that statutory planning consent must be granted in respect of the dwelling and its construction or conversion has been carried out in accordance with the consent.

29. Note (16) of Schedule 8, Group 5 provides that, "for the purpose of the Group, the construction of a building does not include the conversion, reconstruction, alteration, enlargement or extension of an existing building".

30. Note (18) of Schedule 8, Group 5 provides that a building only ceases to be an existing building when "demolished completely to ground level" or that any remaining part is only retained as a condition/requirement of statutory planning permission.

31. The works carried out by the Appellant do not meet the requirements of s 35(1)(b) of the Act which requires that where a person carries out works his carrying out of the works is lawful.

32. Further the works carried but by the Appellant cannot be said to meet the requirements of s 35(1)(b) or the related Notes to Sch 8 Group 5 of the Act because the combined Planning Permissions granted on 3 April 2009 and 27 May 2010 only cover works of extension and alteration to the building; they do not give permission for the building to be demolished and replaced by a new dwelling.

33. The Appellant has suggested that he could have applied for retrospective Planning Permission. HMRC contend that the present tense used in s 35(1)(b) makes it clear that the works must be lawful at the time they are carried out. If retrospective Planning Permission could fulfil the legislative condition, then in theory a claim for refund could be made many years after the completion of the works - which cannot have been an intended consequence of the legislation.

34. If contrary to HMRC's assertions, the Appellant does meet the requirements of s 35(1)(b) and the related Notes to Sch 8 Group 5 of the Act, the Appellant does not meet the conditions in s 35(1A)(a) and related Notes to Schedule 8 Group 5.

35. To come within s 35(1A)(a) the works must be "the construction of a building designed as a dwelling". Note (16) provides that "the construction of a building does not include the enlargement of, or extension to, an existing building except to the extent the enlargement or extension creates an additional dwelling".

36. Furthermore, the Appellant does not meet the requirements of Note (18) of Schedule 8, Group 5 because, the natural meaning of the expression "demolished

completely" means "demolished completely in one operation" rather than in a piecemeal fashion as in the Appellant's case.

37. The works carried out by the Appellant cannot be said to meet the conditions in s 35(1A)(a) and Notes (16) & (18) to Group 5 Sch 8 because:

i. According to the Planning Permission the works carried out were extensions and alterations.

ii. The building was, not at any stage, "demolished completely" to ground level within the meaning of Note 18; rather any demolition was done incrementally as the project developed. Therefore it follows that the Appellant did not construct "a building designed as a dwelling" within the meaning of s 35(1A)(a).

iii. Whilst it is accepted that the extensions and alterations were extensive, it is not clear whether every part of the building (above the ground) was at one time or another demolished and replaced. Whether or not this is the case is in any event of no consequence as, at each stage during the works, parts of the building were intact and therefore the works can only amount to the alteration or extension of an existing building.

38. It was only after works had commenced and the second Planning Permission was granted that the decision was taken to demolish further internal and external walls. The Architects have made it clear that the walls were demolished incrementally and the project did not start out as a new build.

39. HMRC referred to a number of VAT Tribunal cases which had similarities to the circumstances of this project:

In the case of *Mark Tinker v HMRC* (VTD 18033), a house was replaced in two phases with planning permission being initially granted to create an extension. After the work was carried out a further planning permission was granted and additional works carried out to replace the rest of the house. The appeal was rejected as the Tribunal considered the works to be alterations of an existing building.

In the case of *AA Bugg v HMRC* (VTD 15123), planning permission had been obtained for extensions to a bungalow. After work had commenced it was established that the existing walls had been badly affected by damp. The external walls were replaced along with the roof and then the internal walls demolished. The necessary planning permission had been obtained and the works were "lawful" in planning terms. However it was decided that as the additional works involved attaching to the initial extension this constituted alterations or additions to an existing building.

40. The Tribunal considered the provisions of Note 18, Group 5, Schedule 8 of the VAT Act 1994, and the question was whether paragraph (a) applied ("demolished completely to the ground"). The Judge commented that this:

"..in turn depends on whether "demolished completely" means "demolished completely in one operation" rather than piecemeal. In my view the former is the natural meaning. The Appellant was not in a position to demolish the original bungalow in one operation and in my view he did not demolish it "completely" to ground level within the meaning of note 18. It follows that he did not construct "a building designed as a dwelling" within the meaning of s.35(1A)(a)."

41. The Tribunal held that as the bungalow had never been "demolished completely to ground level", as required by Note 18, Group 5, Schedule 8, it did not cease to be an existing building and the claim had to be rejected.

42. HMRC also referred to the case of:

Sam Bond & Sarah Baxter v HMRC [TC 2009/10160], where a DIY claim for a refund pursuant to s 35 was decided to be ineligible. The case concerned a residential conversion of a non-residential building into dwellings (within the meaning of s 35 (1D). The basis of the Tribunal's decision to refuse the Appellant's claim for a refund was that the works were not carried out lawfully because the development did not have the benefit of planning permission at the time the works were undertaken and therefore works had been undertaken which were, in planning terms, unlawful at the time they were carried out. Following completion of part of the development works the local planning authority had concluded that the works, as constructed, were not strictly in accordance with the terms of the planning consent and therefore required the developer to make an application for an amended retrospective planning permission which was subsequently granted. HMRC said that retrospective planning permission did not change the eligibility of the Appellant's claim as planning consent had to be in place at the time the works were undertaken. The Tribunal agreed saying that the works could not be regularised by retrospective permission. The Tribunal decided that it was bound by the words of the statute, saying 'section 35(1) requires that "where a person carries out works…his carrying out the works is lawful". The present tense used in this section makes it clear that the work must be lawful at the time it is carried out.'

43. We were also referred to the Upper Tribunal decision of *HMRC v Patel*, [2015] STC 148. In that case, the taxpayer undertook DIY building works and made a claim for repayment of VAT under s 35. HMRC rejected the claim on the basis that planning permission had not been obtained for the works undertaken and that the requirements of s 35 of VATA were therefore not satisfied. Originally, the taxpayer had sought planning permission to extend an existing dwelling but was advised that it would be necessary to demolish and replace the dwelling. The council had been aware of building works and building regulations consent for the work had been granted, but the taxpayer did not obtain planning permission to demolish the property and build a new dwelling.

44. Regulation 201(b)(iv) of the Value Added Tax Regulations 1995, SI 1995/2518 stipulates that a copy of the relevant planning permission should accompany any claim for repayment of VAT.

45. The taxpayer appealed to the FTT, arguing that although he did not have planning permission for the demolition, he had carried out the work with the knowledge and approval of the council. HMRC indicated that they would not accept the retrospective planning permission (which the taxpayer said he would try to obtain) as their view was that the works had to have been lawful at the time they were carried out and that retrospective approval was not sufficient. The FTT granted a postponement to enable the taxpayer to obtain retrospective planning permission, which was granted. The FTT consequently allowed the taxpayer's appeal, against which decision HMRC appealed.

46. The Upper Tribunal held that although the FTT had referred to the requirements of reg 201(b)(iv) of the 1995 Regulations, it did not seem to have considered the point any further, and in particular to have addressed the question whether the production, after the expiry of the three-month time limit, of retrospective planning permission covering the work actually undertaken was sufficient to satisfy those requirements. The failure of the FTT to take the requirements of reg 201(b)(iv) into account in that way was wrong. Regulation 201 was clear: when he made his claim for a refund, the claimant had to provide documentary evidence that planning permission had been granted. That could only mean the correct permission relating to the works actually carried out. The taxpayer was not in a position to do that since the retrospective planning permission had only been obtained after the three-month time limit for making a claim had expired. The requirements of the regulation were framed in mandatory terms; HMRC were allowed no discretion to accept something less than the prescribed documentation, nor to extend the time limit, and it was equally not open to the FTT or to the UT to do so. It followed that the FTT had erred. The UT accordingly allowed HMRC's appeal.

Conclusion

47. The provisions of s 25 VATA and Schedule 8 Group 5 are clear:

- The works must be lawful (s 35(1)(b))
- The refund application must be accompanied by documentary evidence that the works were lawful (s 35(2)(b))
- The statutory planning permission must have been granted in respect of the planning and construction carried out in accordance with that consent (Schedule 8 Group 5 – Note 2(a))
- The construction of a building does not include the reconstruction or alteration of an existing building or any enlargement of an extension to an existing building unless the enlargement or extension creates an additional dwelling (Schedule 8 Group 5 – Note 16(a))
- The building only ceases to be an existing building when it is demolished completely to ground level

We concur with HMRC that the Appellant has not satisfied any of the above requirements. It is also plain from the wording of s 35 and Schedule 8 Group 5 that the works must be lawful at the time they are undertaken.

48. The Appellant in our view did not set out to construct a new dwelling. It cannot have been in his contemplation at the outset that he would be entitled to make a DIY VAT refund claim under s 35 on completion of the works as permitted by the 2009 and 2010 planning consents. The virtual reconstruction of the dwelling happened for various reasons, as explained by the architect, but there was never any intention either at the outset or during the course of alteration works to demolish the dwelling and build an entirely new one, as contemplated by s 35 and the Notes to Schedule 8 Group 5. It seems to us that the application for a s 35 DIY refund was an afterthought which, given the strict requirements of the legislation, was bound to be fundamentally flawed.

49. Under s 73A TCPA 1990 it is possible to obtain retrospective planning permission. However, even if the Appellant had obtained such retrospective permission, that would not have been sufficient to render the works "lawful" at the time of the claim. This point was not specifically argued before us and the Upper Tribunal in *Patel* did not express a view on the matter. However, as HMRC argue, if retrospective planning permission could fulfil the legislative requirement in that regard, in theory a claim for refund could be made after completion of the works and in some cases many years thereafter, which cannot have been the intended consequence of the legislation.

50. The Appellant did not satisfy the provisions of regulation 201 VAT Regulations 1995 when submitting his VAT 431NB refund claim and this in itself rendered his claim invalid. As stated by the Upper Tribunal in *Patel* the regulation is quite clear. When a claimant submits his claim, he must provide documentary evidence that planning consent has been granted. This can only mean the correct permission, meaning permission relating to the works actually carried out. The Appellant was not in a position to do that and indeed retrospective planning consent was never granted for the work. As the Upper Tribunal said in *Patel* the requirements of regulation 201 are framed in mandatory terms; HMRC are allowed no discretion to accept something less than the prescribed documentation in order to extend the time limit and it is equally not open to this Tribunal to do so. It should be noted that in the claimant's completed VAT 431NB he states "yes" in answer to the question "Is the property that you have built a new build (by new build we mean a building which has been constructed from scratch which does not incorporate any part of an existing building)." In our view the answer which the claimant gave was clearly incorrect. Further the Appellant answered "yes" to the question "Has planning permission been granted for your new build? (To obtain a VAT refund you must provide evidence that the works are lawful and send us a copy of the planning permission)." Clearly the Appellant's answer to this question was also wrong.

51. For the above reasons we dismiss the appeal.

52. 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.

MICHAEL CONNELL

TRIBUNAL JUDGE
RELEASE DATE: 6 NOVEMBER 2015