[2019] UKFTT 573 (TC)

TC07367

VAT - DIY House Builders Scheme - application for Refund - definition of completion for purposes of Regulation 201 of the 1995 Regulations - time limit – absolute - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/00274

BETWEEN

STEWART FRASER **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at George House, Edinburgh on Thursday 5 September 2019

Stuart Millar, for the Appellant

Gordon Hume, Officer of HMRC, for the Respondents

DECISION

INTRODUCTION

1. The sole issue for the Tribunal was whether or not the appellant's claim for a refund of Value Added Tax ("VAT") incurred during the construction of a new dwelling was timeously made. No decision had been made on quantum.

Background

2. On 10 July 2018 the appellant submitted a claim in the sum of £17,707.84 for VAT incurred during the construction of a new dwelling.

3. Planning permission had been granted on 29 August 2014 and the application for building warrant dated 17 October 2014 was granted on 10 April 2015. The first invoice was rendered on 4 August 2015.

4. The appellant occupied the property from 23 December 2015. The Lothian Joint Valuation Board Notice of Council Tax Banding was issued on 3 June 2016 with an effective date for council tax of 23 December 2015.

5. On 21 January 2016, the appellant applied for a completion certification but that application was refused. The refusal was on the basis that the requirements of the CIRIA C735 guidelines (published in August 2014) had not been met. Those guidelines are entitled: "Good practice on the testing and verification of protection systems for buildings against hazardous ground gases".

6. In June 2016, new fans for ventilation were installed. Correspondence and meetings ensued with Environmental Health, the architect, the structural engineer and the building standards surveyor about the need for a validation report in relation to the gas membrane which had been installed during the early stages of construction. The appellant considered it unnecessary, and expensive, to furnish a report at the level required by the Council.

7. A validation report was submitted on the appellant's behalf on 17 March 2017 but the external consultants employed by Environmental Health for peer review deemed it inadequate and it was rejected.

8. On 17 October 2017, in response to an enquiry from a Councillor on behalf of the appellant, the Council wrote stating:

> "At the time of completion of the dwelling house we requested a validation report in relation to the installation of the gas membrane and venting, the information we received initially was not sufficient in terms of the CIRIA C735 requirements."

9. On 14 December 2017, the Council wrote again to the Councillor confirming that they were in discussion in order to find a way forward to finalise the outstanding requirement of the gas membrane. They explained:-

> "As part of the Building Warrant application process, the house owners/architects agreed to both install a gas protection membrane and to validate this installation by providing a validation report, photographs etc. During construction this validation process was not followed and now, at completion, they are trying to retrospectively demonstrate that the membrane has been installed correctly...
>
> At a recent meeting … various options were discussed on how this validation could be achieved … the house owner has concerns over the costs (£2,500) and we have concerns that, should gas be found, then further work would still be required to show the gas membrane would protect any future residents."

10. The dispute with the Council was resolved in April 2018 when the appellant instructed (and paid £2,130 for) further validation and the certificate of completion was issued on 16 April 2018.

11. The claim for a refund of VAT was submitted to HMRC on 10 July 2018 and further information was requested by HMRC on 26 July 2018.

12. On 24 September 2018, having considered the response received from the appellant's agent which confirmed amongst other things that the only work done on the property since the date of occupation was the change in the fans in June 2016, HMRC rejected the claim on the basis that it was time barred. HMRC stated that it was

> "…fair and reasonable to consider that the property was likely complete by the end of 2016. Alternative forms of completion evidence could have been submitted in 2016 to obtain a VAT refund."

13. The appellant appealed on the basis that the building was only completed when the completion certificate was issued and therefore the claim had been made timeously.

The Law

14. Section 35 of the Value Added Tax Act 1994 ("VATA") reads:-

> "(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 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,
>
> the Commissioners shall, on a claim made in that behalf, refund to that person the amount of VAT so changeable.
>
> […]
>
> (2) The Commissioners shall not be required to entertain a claim for a refund of VAT under this section unless the claim —
>
> (a) is made within such time and in such form and manner, and
>
> (b) contains such information, and
>
> (c) is accompanied by such documents, whether by way of evidence or otherwise.
>
> as may be specified by regulations or by the Commissioners in accordance with regulations."

8. Regulation 201 of the Value Added Tax Regulations 1995 ("the 1995 Regulations"), specifies the method and the time-limit for making a claim under what is popularly known as the DIY Scheme. It reads:-

> "**201 Method and time for making claim**
>
> 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 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,

(iii) in respect of imported goods which have been incorporated into the building or its site, documentary evidence of their importation and of the VAT paid thereon,

(iv) documentary evidence that planning permission for the building has been granted, and

(v) a certificate signed by a quantity surveyor or architect that the goods shown in the claim were or, in his judgment, were likely to have been incorporated into the building or its site."

Summary of the appellant's arguments

9. The appellant argues that he was unable to apply for a completion certificate until such time as validation of the gas membrane was accepted by the Council and that was a matter that was beyond his control. The building was not completed until that point.

Summary of HMRC's arguments

15. HMRC argue that the property was completed by the time the appellant moved into it on 23 December 2015. The only works completed since occupying the property were the change of fans in June 2016 and the appellant could have furnished other information such as the council tax banding. There was no requirement to await the issue of a completion certificate.

16. HMRC argue that the time limit is absolute and that there is no discretion.

Discussion

17. Since the appellant was not present and Mr Millar did not know the answer, I do not know why there was a failure to comply with CIRIA C735 but that is clearly the cause of the problem underpinning this appeal.

18. It is certainly true that Regulation 201 of the 1995 Regulations does not define the word completion. Therefore in accordance with the usual rules on statutory interpretation it should bear its ordinary meaning.

19. It seems to me that there are two issues in this appeal, namely:

(a) When was the construction of the property finished?

(b) Why was the completion certificate not issued in 2016?

When was the construction of the property finished?

20. What is clear is that the appellant thought that the house was complete and the work finished in December 2015 and that was why he first applied to the Council for a completion certificate in January 2016.

21. It is equally clear from the letter to the Councillor from the Council (see paragraph 8 above) that the Council also thought so.

22. Certainly in 2017, the appellant should have been in no doubt that that is what the Council thought.

23. I do not accept Mr Millar's argument that, in their decision letter, HMRC had chosen an arbitrary date for completion of December 2016. I have deliberately quoted that section of the decision letter at paragraph 12 above. It is clearly a typographical error in the first sentence and should have read "2015". The following sentence can only make sense in that context.

24. Apart from the change in the fans in June 2016, no work was done on the house after 2015. I find that the change in the fans was simply the rectification of a defect and the house had been completed by the end of 2015.

25. Even if I am wrong in that it was certainly completed by June 2016 since no further work was done thereafter.

26. It is a red herring to argue that if the validation had established that the gas membrane was not fit for purpose then extensive work would have had to have been done on the house and therefore the house could not have been considered to be completed until the results of the testing were known.

27. There is no doubt that substantial works would have been required since the membrane, by definition, is embedded in the fabric of the building. However, that would not be completion of the building, that would be rectification of a very serious defect. It would be the equivalent of a claim against a developer under an NHBC warranty.

Why was the completion certificate not issued in 2016?

28. The answer to that is simple. Although the works had been completed the appellant had failed to produce acceptable evidence that the property, as constructed and completed, met the relevant safety guidelines.

The purpose of Regulation 201(a) and (b)(i)

29. This is written in clear and unambiguous language. Where a building has been completed, as this one was, and for some reason a completion certificate is not available then other documentation, that is satisfactory to HMRC, will suffice.

30. Whilst I certainly agree with Judge Poon at paragraph 38 in *Farquharson v HMRC*[1] ("Farquharson") that HMRC's guidance is simply their view of the matter and it has no force in law, nevertheless it makes it clear that in this case, as HMRC point out, the Notice of Council Tax Banding would have sufficed. It also confirms that HMRC would have accepted that the time limit would run from the date of its issue which, in fact, is approximately when the fans were changed.

31. As the Upper Tribunal pointed out at paragraph 21 in *HMRC v Patel*[2] ("Patel") neither HMRC nor this Tribunal has any power to extend the time limit regardless of the circumstances. There is no discretion.

32. Mr Millar sought to rely on *Farquharson* as authority for the proposition that in terms of this Regulation the three months could only run from the date of issue of the completion certificate because a completion certificate had in fact been issued.

33. Firstly, the decision in *Farquharson* is not binding on this Tribunal but secondly, and more importantly, it was decided on the basis of radically different facts. As I pointed out, at paragraph 55, Judge Poon made it explicit that, in that case, although a completion certificate had been issued, the property most certainly was very far from complete. The reverse is the position in this case. Lastly, it is not known whether leave to appeal has been sought in that case.

Decision

34. Clearly, for whatever reason, and since he was not present I do not know why, the appellant thought that he could not apply for the VAT refund until he had a completion certificate. That is not what either the law or the HMRC guidance states.

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[1] [2019] UKFTT 0425 (TC)
[2] [2014] UKUT 0361 (TCC)

35. He could, and should, have applied in the three months from June 2016. For the reasons set out I dismiss the appeal. It follows that the appellant's claim for a refund of the VAT that he incurred must fail. Like Mr Hume, I have some sympathy for him as, like the appellant in *Patel,* he seems to be the victim of nothing more than a lack of awareness. However, as the Upper Tribunal said in *Patel* *"…*the requirements are strict and it is not open to us to waive or modify them even if they lead to what appears to be an unfair result."

36. I too have no discretion.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

37. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 12 SEPTEMBER 2019