TC08011

VALUE ADDED TAX – DIY Housebuilders' Scheme – Retrospective Planning Permission obtained after claim for VAT refund submitted –whether work lawful – whether building designed as a dwelling – whether claim valid - Section 35 Value Added Tax Act 1994 – Note 2 of Group 5 in Schedule 8 to Value Added Tax Act 1994 – Regulation 201 Value Added Tax Regulations 1995 – whether the Tribunal can take into account HMRC conduct – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/09355

BETWEEN

MARTYN LONG
MARILYN LONG **Appellants**

-and-

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

TRIBUNAL: JUDGE ROBIN VOS

The hearing took place on 15 January 2021 by way of a remote video hearing using the Tribunal's video platform.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

The Appellants appeared in person.

Ms Laura Castle, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellants, Mr and Mrs Long are in their seventies. In 2016 they decided to convert a former agricultural building in Hempstead, near Saffron Walden into a bungalow which would be their home for the rest of their lives.

2. Planning permission was obtained in 2017 and the work was completed in early 2019. Mr and Mrs Long expected to be able to reclaim the VAT which they had paid in respect of the materials used in the building of the house under the DIY Housebuilders' Scheme and duly submitted a claim for £18,958.40.

3. Unfortunately, during the course of the building work it had proved necessary to demolish the previous agricultural building so that the project had turned into the construction of a new house rather than the conversion of an existing building into a dwelling. However, the planning permission obtained in 2017 gave permission for a conversion, not for the building of a new house. This led to the Respondents, HMRC, refusing the refund claim.

4. Despite the fact that, on the advice of HMRC, Mr and Mrs Long obtained retrospective planning permission for the building of the new house, HMRC's decision to refuse the claim was upheld on review.

5. Mr and Mrs Long now appeal against HMRC's refusal of their VAT refund claim. The main complaint they make is the way in which HMRC handled the refund claim. However they also rely on the fact that the local authority were fully aware of, and authorised, the change in the nature of the project and that retrospective planning permission was obtained.

DIY HOUSEBUILDERS – THE LEGAL FRAMEWORK

6. The ability to reclaim VAT paid in respect of the materials used in the construction of a new house is contained in s 35 Value Added Tax Act 1994 ("VATA"). The relevant extracts are as follows:

> "**35 Refund of VAT to persons constructing certain buildings**
>
> (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 chargeable.
>
> (1A) the works to which this section applies are –
>
> (a) the construction of a building designed as a dwelling…
>
> …
>
> (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.

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

7. Three points emerge from this section:

(1) The construction work must be "lawful".

(2) The building must be "designed as a dwelling".

(3) The refund claim must be made in accordance with the relevant regulations.

8. Note 2 to Group 5 of Schedule 8 VATA explains when a building is "designed as a dwelling". To the extent relevant, it provides:

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

…

(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."

9. Turning to the requirements for making a VAT refund claim, these are contained in regulation 201 of the Value Added Tax Regulations 1995 ("VATR"). The requirements (to the extent relevant) are as follows:

"**201 Method and time for making a claim**

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

(a) furnishing to the Commissioners no later than three 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 –

…

(iv) documentary evidence that planning permission for the building has been granted…"

RELEVANT FACTS

10. There is no dispute about the facts which, to the extent relevant, are as follows.

11. Mr and Mrs Long obtained planning permission for the "proposed conversion of former agricultural building to new dwelling" on 29 March 2017.

12. Once the work had started, it soon became clear that the existing building would need to be demolished and new foundations built. The council's building regulations inspector was kept informed about this and agreed to the change as long as the footprint of the building remained unchanged.

13. The building completion certificate was issued by the council on 21 January 2019. The details of work carried out were described as "conversion of barn to dwelling". The

certificate was signed by Mr Gordon Glenday who was responsible both for building regulations and planning applications.

14. Mr and Mrs Long submitted their VAT refund application on 10 April 2019. It was received by HMRC on 15 April 2019. The application was accompanied by a copy of the planning permission granted in 2017 and the completion certificate issued in January 2019. The application form stated that the property was a new build and that planning permission had been granted for the new build.

15. There followed correspondence between HMRC and Mr and Mrs Long clarifying that the works related to the building of a new dwelling rather than the conversion of an existing building. This was of course prompted by the fact that the completion certificate and the planning permission both referred to a conversion whilst the refund application was made on the basis that the project had ended up as being the construction of a new building.

16. As part of this correspondence, HMRC, on 28 May 2019, asked Mr and Mrs Long to "provide evidence from the local planning department such as planning permission that a replacement building was authorised instead of a barn conversion".

17. In response to this, Mr and Mrs Long obtained a new completion certificate from Mr Glenday which now described the work as "rebuild of barn to create new dwelling".

18. Whilst HMRC now accepted that the work involved the construction of a new dwelling, they continued to ask for evidence that the local planning department were aware of the changes, suggesting on 20 June 2019 that Mr and Mrs Long should provide "any updated planning permission or correspondence from the local planning department (not building control) to confirm that the changes were authorised".

19. As a result of this, Mr and Mrs Long obtained an email from one of the planning officers at the local council (which is undated but which must have been produced some time between 20 June 2019 – 26 June 2019) which rather cryptically stated that "as advised during the construction phase the building was not converted but re-built. As this is the case a retrospective planning application will [be] required to resolve this matter."

20. On 15 August 2019, HMRC wrote to Mr and Mrs Long refusing their claim for the VAT refund. The refusal was on the basis that the house did not fall within the definition of "designed as a dwelling" and also that the works did not appear to have been carried out "lawfully", in each case as the works carried out did not correspond to the planning permission which had been granted. HMRC accepted in this letter that building control were aware of the changes but took the view that the planning authorities were not aware of the changes given that the recent email from the planning officer did not say that the changes were authorised and stated instead that an application for retrospective planning permission should be made.

21. On the same day as he received the letter, Mr Long spoke to an individual at HMRC to discuss how he should proceed following the refusal of the claim. As a result of this, Mr and Mrs Long decided to obtain retrospective planning permission and to apply for a review of HMRC's decision.

22. Retrospective planning permission was granted on 31 October 2019. However, on 18 November 2019, the reviewing officer wrote to Mr and Mrs Long upholding the original decision to refuse the claim. This was on the basis that, although retrospective planning permission had been obtained, this could not be accepted as it was provided outside the three month time limit provided for in Regulation 201 VATR. The claim therefore had to be considered on the basis of the planning permission in force when the claim was made and, based on this planning permission, the works were not lawful and the building did not meet

the definition of one which was "designed as a dwelling". The reviewing officer noted that HMRC would allow a claim where retrospective planning permission is obtained within three months of completion.

23. Following receipt of the review conclusion letter, Mr and Mrs Long notified their appeal to the Tribunal.

WERE THE REQUIREMENTS OF REGULATION 201 VATR SATISFIED?

24. Ms Castle, representing HMRC, submits that the requirements of Regulation 201 VATR were not satisfied and that, as a result, HMRC could not allow the claim.

25. Her reason for this is that Regulation 201(b)(iv) VATR requires the claimant, at the same time they make the claim, to provide documentary evidence that planning permission for the building has been granted. This, she says, means the correct planning permission for the work which was actually carried out.

26. In support of this, Ms Castle refers to the decision of the Upper Tribunal in *HMRC v Patel* [2014] UKUT 0361 (TCC). In that case, Mr Patel had obtained planning permission to enlarge a property but ended up demolishing the property and building a new one. Retrospective planning permission was obtained after the time limit for making a VAT refund claim.

27. Ms Castle relies in particular on the Upper Tribunal's interpretation of Regulation 201. Their conclusion at [21] was as follows:-

> "The regulation is clear; when he makes his claim the claimant must provide documentary evidence that planning permission has been granted. This can only mean that the correct permission, meaning permission relating to the works actually carried out; in that we agree with Mr Brown. As we have said, Mr Patel was not in a position to do that in 2011, since it was not until 2012 that the retrospective permission was granted. The requirements of the regulation are framed in mandatory terms; HMRC are allowed no discretion to accept something less than the prescribed documentation, nor to extend the time limit, and it is equally not open to the FTT or to us to do so."

28. Mr and Mrs Long argue that their claim should be allowed as HMRC never made it clear that, in order for the claim to succeed, they would have to produce planning permission for the construction of a new building. For example, they point out that, in their letter of 28 May 2019, HMRC only asked for evidence from the local planning department "such as" planning permission and that, in their letter of 20 June 2019, HMRC referred to "updated planning permission or correspondence from the local planning department (not building control) to confirm that these changes were authorised."

29. It is, they say, clear that the local planning authority was aware of, and had approved, the changes. They argue that this is apparent from the completion certificate which lists the numerous site visits and inspections carried out by the local authority, the fact that the completion certificate was signed by Mr Glenday who was responsible for both building regulations and for planning applications and that Mr Glenday was happy to provide an amended completion certificate referring to the fact that the work involved a rebuild rather than a conversion without the need for any further planning application.

30. Mr Long gave evidence that, based on his previous dealings with the council, he was quite satisfied that there was no prospect of them taking any enforcement action in relation to

the works which had been carried out so that, from his point of view, there was no reason to apply for retrospective planning permission.

31. I am entirely satisfied based on the evidence before me that both the building regulation and planning sections of the council were aware of, and content with, the change in the works from a conversion to a rebuild. I am also satisfied that Mr and Mrs Long provided sufficient evidence to HMRC that this was the case. However, unfortunately, this is not enough for their claim to succeed.

32. The terms of Regulation 201 are tightly drawn and, as decided by the Upper Tribunal in *Patel*, are mandatory. It is necessary for the claimant to provide evidence that planning permission for the work which was actually carried out has been granted. This evidence must be provided at the time the claim is made which must be no more than three months after the date of the completion of the building.

33. The only planning permission which was then in existence and which had been provided to HMRC was the planning permission granted in 2017 for a conversion rather than a rebuild. This does not satisfy the requirements of Regulation 201 as the works which were carried out were different to the works for which planning permission had been granted in 2017.

34. Based on the authority of *Patel*, which I must follow, neither the FTT nor HMRC have any discretion to waive or modify the requirements of Regulation 201. For that reason alone, this appeal must fail.

35. I should mention that Mr Long criticised the unsatisfactory nature of a law which resulted in their claim being refused despite the fact that they had done nothing wrong, had been completely transparent with both the local authority and with HMRC and had done everything they were asked to do. He suggested that, in these circumstances, there must be something wrong with the law, noting that in three of the four cases dealing with refund claims which had been included by HMRC in their bundle of authorities (*Patel*, *Brennan v HMRC* [2015] UKFTT 557 (TC), *Williams v HMRC* [2017] UKFTT 846 (TC) and *Stewart v HMRC* [2020] UKFTT 65 (TC)), the judges had expressed sympathy with the appellant's position as the appeals in each had to be disallowed.

36. I have a great deal of sympathy with this argument. Many people would, I think, consider that Mr and Mrs Long's claim has failed on the basis of a technicality. There must be a case for amending Regulation 201 to allow a successful claim to be made where it can be shown that the work has been carried out with the knowledge and approval of the local planning authorities in circumstances where, as the project has developed, there have been deviations from the original planning permission.

37. However, as the law stands, the position is clear. The claim must be accompanied by the correct planning permission and must be made within the relevant three month time limit. As this was not the case with Mr and Mrs Long's claim, their appeal must be dismissed.

WERE THE WORKS "LAWFUL"?

38. In order to qualify for a refund, s 35(1)(b) VATA requires the carrying out of the works to be lawful.

39. Ms Castle submits that the works were not lawful as, when they were carried out, they were not in accordance with the planning permission which had been granted.

40. This argument was accepted by the Tribunal in *Brennan* at [47] and [49].

41. I do not need to make a decision on this point given that, for the reasons set out above, the appeal must be dismissed in any event. I only note that, in circumstances where the

building regulation and planning departments of the relevant council have approved the works (albeit that revised planning permission has not been granted), it seems to me that there must at least be an argument that the works are lawful. I am also not convinced that, although rejected by the Tribunal in *Brennan*, the grant of retrospective planning permission could not render the works lawful.

42. I do stress however, that these points were not fully argued and that I make no decision on them.

WAS THE BUILDING "DESIGNED AS A DWELLING"?

43. Clearly the building was designed as a dwelling in the sense that it was always intended to be a house. However, to fall within the definition in note 2 to Group 5 of Schedule 8 VATA it is necessary that "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."

44. Ms Castle's position was that these requirements must be satisfied both at the time the building was completed and at the time the refund claim is made. In support of this, she referred to the decisions of the First-tier Tribunal in *Williams* at [89] and *Stewart* at [24]. However, *Williams* was dealing with a different issue (where work carried out prior to the grant of planning permission should have been zero-rated) and in *Stewart*, there was never any application for, or grant of, retrospective planning permission.

45. Again, this point was not fully argued before me and it is not necessary for me to determine the point in order to resolve this appeal. My only observation would be that there is nothing in note 2 which prescribes when the relevant planning permission must be granted. It may well be the case that the condition is satisfied where retrospective planning permission has been granted.

46. That this is believed by HMRC to be the case, both in relation to the question as to whether the building falls within the definition of one which is "designed as a dwelling" and also in relation to the question as to whether the work was lawful may perhaps be inferred from the comments of the review officer in this case that a claim would be allowed if retrospective planning permission is obtained within three months of the date of the completion of the building (i.e. the time limit for submitting a claim within Regulation 201 VATR).

UNFAIRNESS

47. Mr and Mrs Long complained that the way in which HMRC dealt with their claim was unfair. They say that they are elderly people who were simply trying to do their best in an honest and straightforward way both in their dealings with the local council and with HMRC and that, in these circumstances they fell within the category of customers who need extra help. They argue that this should have included HMRC telling them at the outset that they needed to provide planning permission for the construction of a new dwelling rather than leading them to believe that some other evidence might be sufficient or that the claim might be allowed if they were to obtain retrospective planning permission.

48. Far from receiving extra help, they say that they were not only poorly advised by HMRC but actively misled by what they were told by HMRC. This has led to a great deal of stress and anxiety both in providing the information which HMRC suggested might be helpful (but which turned out to make no difference at all) as well as having to deal with the review and the appeal to this Tribunal.

49. Mr and Mrs Long also complained that the result of HMRC's failure to tell them the correct position is that they may have lost the opportunity to claim any VAT refund on the

basis that they carried out a conversion (as set out in the original planning permission and the original completion certificate) and so they will be left in a position where they are unable to claim any refund at all.

50. Based on the evidence before me, I would accept that Mr and Mrs Long were misled or, at least, given false hope both by HMRC's requests for evidence (other than planning permission) that the council's planning department had authorised the works and also by the encouragement to apply for retrospective planning permission. Whilst Mr Long was warned that, even if retrospective planning permission was obtained, any review might well still be unsuccessful, he was clearly led to believe that there was a chance that it could be successful. HMRC however must have known that the claim was bound to fail given the decision of the Upper Tribunal in *Patel* which was of course referred to by the reviewing officer in upholding HMRC's decision.

51. HMRC's response to this is that, whether or not these complaints are justified, they cannot affect the outcome of the appeal as the Tribunal has no jurisdiction to consider whether HMRC have acted unfairly or created any expectations. Instead, the job of the Tribunal is simply to decide whether HMRC have applied the law correctly.

52. Ms Castle relies on the decision of the Upper Tribunal in *HMRC v Hok Limited* [2012] UKUT 363 (TCC).

53. The Upper Tribunal confirmed that the First-tier Tribunal has no general judicial review powers and only has the powers given to it by statute. In relation to incorrect advice from HMRC, the Upper Tribunal said at [39]:-

> "Ordinarily challenges to administrative actions of government departments for which no clear avenue of appeal is provided must be made by way of judicial review: so much was made quite clear by the Court of Appeal in *Asplin v Estill* [1987] STC 723, in which the taxpayer argued that he should not be assessed to tax (which he accepted was due as a matter of law) because of advice he maintained he had been given by the Inland Revenue. At that time, judicial review was a comparatively rarely used remedy, and the jurisprudence was at an early stage of development. On this point, however, it has remained constant. The reasoning was given by Nicholls LJ at p727c:
>
> > 'The taxpayer is saying that an assessment ought not to have been made. But in saying that, he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review.'"

54. The Upper Tribunal's conclusion at [57] was that:

> "Parliament must be taken to have known, when passing the 2007 Act, of the difference between statutory, common law and judicial review jurisdictions. The clear inference is that it intended to leave supervision of the conduct of HMRC and similar public bodies where it was, that is in the High Court, save to the limited extent it was conferred on this Tribunal."

55. It is clear from this that I have no jurisdiction to allow Mr and Mrs Long's appeal based on the way in which HMRC dealt with their claim. If they wish to take this aspect further, they would either need to apply for permission to bring a judicial review claim (which I suspect they would be unlikely to be successful given the strict time limits which normally apply) or to make a formal complaint (which I understand they have already made through HMRC's normal complaints procedure) including, if necessary, to the Adjudicators Office.

CONCLUSION

56. As in some of the other cases referred to, I have considerable sympathy for Mr and Mrs Long. They carried out works which clearly had the approval and support of the local authority. They made their claim in time and supplied all of the documents which they had. However they were thwarted by the fact that the planning permission did not correspond with the works which were actually carried out and that the strictness of the requirements in Regulation 201 VATR did not allow that to be cured by subsequently obtaining retrospective planning permission.

57. For that reason, this appeal fails and HMRC's refusal of Mr and Mrs Long's VAT refund claim is upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

58. 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.

ROBIN VOS
TRIBUNAL JUDGE

Release date: 28 JANUARY 2021