[2016] UKFTT 187 (TC)

TC04973

Appeal number: TC/2014/01803

VAT – DIY Builders Refund Scheme – refund claim rejected by HMRC on grounds that valid planning permission not in place at time works carried out – retrospective planning permission obtained 11 months after work completed – strict requirements of Reg 201 not satisfied – Upper Tribunal decision in Asim Patel applied - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SCOTT KERNOHAN **Appellant**

- and -

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

TRIBUNAL: JUDGE ZACHARY CITRON
MISS PATRICIA GORDON

Sitting in public at the Royal Courts of Justice, Belfast on 21 October 2015

Mr David Kernohan, the Appellant's brother, for the Appellant

Ms Sharon Spence, Officer of HMRC, for the Respondents

DECISION

1. This case concerns whether HMRC were correct to reject a claim under the DIY builders VAT refund scheme (the "Scheme"), where the planning permission originally obtained for the building work proved invalid, due to a change in the plans, and valid planning permission was retrospectively obtained, nearly a year after the work was completed.

The appeal

2. The appellant's claim under the Scheme, in the amount of £6,566.68, was received by HMRC on 6 August 2013. The claim was in respect of work carried out at a residential property in Ballymena, Northern Ireland (the "site"). By letter dated 11 December 2013, HMRC rejected the claim on the grounds that planning permission for the work had not been granted at the time it was carried out. The decision was upheld on review by letter dated 20 February 2014. The appeal was made by notice dated 15 March 2014.

Evidence

3. We had three bundles: documents, relevant legislation and authorities, and HMRC guidance. We also had a copy of Ms Spence's speaking notes.

4. The appellant had informed the Tribunal prior to the hearing that he would not be able to attend due to serious illness, and that his brother, Mr David Kernohan, would represent him at the hearing.

5. There was no dispute as to the facts and accordingly no witnesses were called at the hearing.

Facts

6. The appellant obtained planning permission for a proposed development at the site - described as "alterations to existing bungalow to provide 1.5 storey dwelling with rear extension" - on 16 December 2009.

7. The appellant subsequently had discussions with the local Council Building Control Service and it was agreed that it would be better for the stability of the house to clear the existing bungalow and rebuild it, with the finished building matching the plans already passed by the Planning Service.

8. The Council sent the appellant a notice of passing of building regulation plans on 16 February 2011; the proposed works at the site were "replacement chalet dwelling and new double garage." The work went ahead on that basis; the appellant

was not aware that planning permission was required for the altered plans, and so did not seek it.

9. The Council issued a Building Regulation Completion Certificate on 8 May 2013 referring to the works at the site as "replacement chalet dwelling and new double garage". It certified that the works satisfied the requirements of the Building Regulations.

10. Following enquiries by HMRC, the South Antrim Area Planning Office stated in a letter to HMRC of 3 December 2013 that

(1) The planning permission obtained by the appellant did not cover the complete demolition of the existing dwelling and the erection of a new replacement dwelling on its site

(2) Planning permission is required for such works

(3) The Department of the Environment had not been informed of the demolition and therefore intended to open an enforcement investigation.

11. On 5 December 2013 the appellant wrote to HMRC stating that he was in the process of obtaining final planning permission for the replacement dwelling at the site and requesting that HMRC complete his application as soon as he had obtained the appropriate certificate from the Planning Office

12. The applicant was granted retrospective planning permission for "replacement of dwelling with new build and double garage" at the site by the Department of the Environment on 1 April 2014.

The law

(References to sections are to the Value Added Tax Act 1994; references to regulations are to the Value Added Tax Regulations 1995 (SI 1995/2518)

13. Section 35 (Refund of VAT to persons constructing certain buildings), so far as relevant to this appeal, provides:

"(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 or a number of dwellings;

(b) the construction of a building for use solely for a relevant residential purpose or relevant charitable purpose; and

(c) a residential conversion.

…..

(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 ….”

14. Note (2) to Group 5 (Construction of buildings etc) of Schedule 8 provides (so far as relevant to this appeal):

“A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied –

(a) …

(b) …

(c) …, and

(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.”

15. Part XXIII of the Regulations deals with “Refunds to ‘Do-It-Yourself’ Builders”. Regulation 201 (in that Part) (Method and time for making claim) provides (so far as relevant to this appeal):

“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) …

(ii) …

(iii) …

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

(v) ….

16. Under s83(1)(g), "the amounts of any refund under s35" is one of the matters with respect to which an appeal lies to this Tribunal.

Appellant's arguments

17. Mr David Kernohan emphasised the following facts:

(1) The appellant did not realise that planning permission ceased to apply when the plans for the building work at the site changed.

(2) As soon as the appellant realised this (which was in the course of correspondence with HMRC), he made efforts to rectify the situation (and obtained retrospective planning permission).

(3) Others involved in the building work, such as the Council's Building Control Service and the appellant's architect, were aware of the change in plans but did not alert the appellant to the need for new planning permission. The appellant's dyslexia made him particularly dependent on the advice of others in this regard.

18. The appellant's notice of appeal submitted that the letter and spirit of the relevant regulations had been adequately met.

HMRC's arguments

19. Ms Spence submitted that the works carried out by the appellant did not meet the requirements of s35(1)(b) (which requires that where a person carries out works "his carrying out of the works is lawful") and note 6(2)(d) of Sch 8 Group 5 (which requires that works must be carried out in accordance with statutory planning consent, in order for the works to be "designed as a dwelling" as required by s35(1A)(a)) because, at the time they were carried out, the appropriate planning permission was not in place. Ms Spence contended that the present tense used in s35(1)(b) means that the works must be lawful at the time they are carried out.

20. Furthermore, the mandatory conditions imposed by Reg 201(b)(iv), read in conjunction with Reg 201(a), mean that at the time when a claimant makes his claim, he must provide documentary evidence that planning permission has been granted. This can only mean the correct permission, meaning permission relating to the works actually carried out. Here, the correct planning permission was not obtained until almost a year after the works were completed – and some eight months after the time limit for making the claim had expired. HMRC said that their position was supported by the Upper Tribunal decision in *Asim Patel* [2014] UKUT 0361 (TCC). They contended that the present case falls squarely within *Asim Patel* in that the correct planning permission was not available within the three month time limit for making a claim under Reg 201; and that it was of no consequence that appropriate retrospective planning permission was later granted.

21. Ms Spence referred to a number of statements in HMRC's Construction Manual concerning the Scheme. These included the following (at VCONSTR24550):

> "Refund Scheme claims must be made within three months of the date of completion. However, exceptionally, claims may be accepted on an individual basis if there is a reasonable excuse for the delay.
>
> The claimant must explain in writing why a claim is being submitted late. If no satisfactory explanation is received, the claim must be refused.
>
> Examples of reasonable excuse may include:
>
> - compassionate reasons
> - Negligence of a professional adviser
> - Circumstances outside a claimant's control, such as difficulty in obtaining invoices or completion certificates"

22. Ms Spence said that HMRC did not consider that the appellant had a reasonable excuse for the delay in getting correct planning permission and therefore did not apply the practice described above. Ms Spence further submitted that enforcement of this practice is non-statutory and outside the bounds of the Tribunal's jurisdiction.

Discussion

23. In *Asim Patel*, as in this case, the taxpayer made a claim for a refund under the Scheme in circumstances where the original planning permission had been for alterations to a building but, due to a change in the plans, the works as carried out involved demolition of a building; building regulation consent was obtained in advance for the amended plans but planning permission was not; and, following HMRCs rejection of the claim under the Scheme, retrospective planning permission for the works as actually carried out was obtained, about a year after the works were completed. The Upper Tribunal allowed HMRC's appeal in *Asim Patel* on the grounds that the taxpayer had not satisfied the requirement of Reg 201(b)(iv): at the time of making his application for refund of VAT, the taxpayer had not furnished HMRC with evidence that planning permission for the building work, as actually carried out, had been granted. In the Upper Tribunal's words (at [21]):

> "The regulation [Reg 201(b)(iv)] is clear; when he makes his claim the claimant must provide documentary evidence that planning permission has been granted. This can only mean the correct permission, meaning permission relating to the works actually carried out … As we have said, Mr Patel was not in a position to do that in 2011, since it was not until 2012 that 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 [First-tier tribunal] or to us to do so."

24. We find that the same can be said for the appellant in this case: he was not in a position to submit the correct planning permission in 2013, since it was not until 2014 that retrospective permission was granted. As the appellant's circumstances are

substantially the same as those of Mr Patel, we are bound to follow the Upper Tribunal's conclusion in that case, although we share its feelings as expressed in their concluding sentence (at [23]):

> "We have some sympathy with [Mr Patel], since he seems to be the victim of nothing more than a lack of awareness, but as we have said 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."

25. The HMRC practice as regards the 3 month time limit set out in HMRC's Construction Manual and described at paragraph 21 above is clearly extra-statutory since, as the Upper Tribunal made clear in *Asim Patel*, the law gives neither HMRC nor the tribunals power to vary the requirements of Reg 201. This Tribunal's jurisdiction is limited to deciding the amount of any refund under s35 in accordance with the law and decisions of the higher courts, including the Upper Tribunal; we do not have jurisdiction to review HMRC's exercise of an extra-statutory practice of this kind.

Conclusion

26. The appeal is dismissed; no VAT refund is due to the appellant under the Scheme.

27. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

RELEASE DATE: 15 MARCH 2016