



[2020] UKFTT 0085 (TC)

**TC07579**

*VALUE ADDED TAX – DIY builders - claim under Section 35 of the Value Added Tax Act 1994 to recover VAT on goods and services supplied in relation to the construction of a dwelling where the revised planning permission referring to the new dwelling was granted after some of the goods and services were supplied but before completion of the building – held that (a) VAT properly arising in respect of supplies of goods made after the revised planning permission was granted could in theory be recovered but that no VAT did properly arise in respect of those supplies because they should all have been zero-rated for VAT purposes and (b) no recovery could be made of (i) VAT properly arising in respect of supplies of goods made before the revised planning permission was granted or (ii) VAT properly arising on supplies of services whether made before or after the revised planning permission was granted*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2018/08352**

**BETWEEN**

**GAVIN FRANKS AND ALEXANDRA FRANKS**

**Appellants**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE TONY BEARE**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 6 January 2020**

**Mr Gavin Franks represented the Appellants**

**Mr Koyes Uddin, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents**

## DECISION

### INTRODUCTION

1. This decision relates to an appeal against a refusal by the Respondents to make a refund of value added tax (“VAT”) which has been incurred in connection with building work carried out by the Appellants at their home, Friars Cottage, 38 Fulmer Road, Gerrards Cross, SL9 7EE (the “Property”).

### PRELIMINARY MATTER

2. Before I describe the background to the appeal, there is a preliminary matter to address and that concerns the identity of the party or parties who should properly be treated as making the appeal. The notice of appeal in this case was given to the First-tier Tribunal by Mr Gavin Franks alone. However, the VAT which is the subject of the appeal relates to work carried out at the Property, which is jointly owned by both Appellants. Moreover:

(1) a number of the invoices to which that VAT relates were addressed to both Appellants; and

(2) the original claim for the VAT which is in dispute was made by both Appellants – see the letter from the Respondents to Mr and Mrs Franks of 21 March 2018 acknowledging receipt of the claim.

3. Rule 9 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “Tribunal Rules”) allows the First-tier Tribunal to add, substitute or remove a party as an appellant or a respondent and to give any such consequential directions as it considers appropriate.

4. In the circumstances, it seems to me that, notwithstanding that the notice of appeal in this case purported to be given by Mr Franks alone, Mrs Franks is also a person who has incurred some of the disputed VAT and who therefore should also be treated as an appellant. Accordingly, I hereby direct that that shall be the case.

### THE FACTS

5. There is no dispute in relation to the relevant facts in relation to the appeal, which are as follows:

(1) on 30 June 2015, planning permission was granted by the local planning authority for the extension of the Property;

(2) in March 2016, work on the Property commenced;

(3) in the course of the development work, it became clear that the only practical course of action was in fact to demolish and rebuild the relevant part of the Property instead of implementing the original planning permission and accordingly, on 24 June 2016, the Appellants were advised by the local planning authority that the original planning permission was incapable of being implemented and that the Appellants should apply for a revised planning permission on the basis of demolition and replacement instead of extension;

(4) on 27 October 2016, the revised planning permission on that basis was granted by the local planning authority;

(5) on 1 August 2017, the Appellants took occupation of the completed building;

(6) on 21 December 2017, the local planning authority issued a certificate of completion;

(7) on 9 March 2018, the Respondents received the Appellants' claim for a refund of £45,590.39 of VAT which the Appellants had incurred in demolishing and replacing the relevant part of the Property;

(8) on 4 July 2018, the Respondents wrote to the Appellants to inform them that £24,496.95 of their claim had been rejected and that £19,671.99 of that amount had been rejected on the basis of "Reason Code 1" – namely, that no VAT should have arisen in respect of the relevant supplies because they were zero-rated for VAT purposes. It is the claim for that £19,671.99 of VAT which is the subject of the present appeal;

(9) on 17 July 2018, the Appellants requested a review of the Respondents' decision;

(10) following two extensions of the statutory review period which were requested by the Respondents, on 30 November 2018, the Respondents confirmed their decision to deny £19,671.99 of the Appellants' claim for the reason described in paragraph 5(8) above; and

(11) on 28 December 2018, the Appellants gave notice of their appeal to the First-tier Tribunal of their appeal against the refusal by the Respondents to deny their claim.

6. In addition, it is common ground that:

(1) as a result of the operation of Section 73A(1) of the Town and Country Planning Act 1990 (the "TCPA"), the revised planning permission on the basis of demolition and replacement instead of extension which was granted by the local planning authority on 27 October 2016 had the effect of retrospectively authorising the works which had been carried out prior to the time when the revised planning permission was granted;

(2) to the extent that VAT which is the subject of the Appellants' claim relates to supplies of goods, those goods were all "building materials which, in the course of the works, [were] incorporated in the building in question or its site" for the purposes of both Item 4 of Group 5 of Schedule 8 to the Value Added Tax Act 1994 (the "VATA") and Section 35(1B) of the VATA, applying the notes set out in Group 5 of Schedule 8 to the VATA, and therefore the supplies of those goods were both potentially capable of qualifying for zero-rating under Item 4 of Group 5 of Schedule 8 to the VATA and potentially capable of falling within Section 35 of the VATA; and

(3) to the extent that VAT which is the subject of the Appellants' claim relates to supplies of services, none of those services were provided by "an architect, surveyor or any person acting as a consultant or in a supervisory capacity" and therefore the supplies of those services were potentially capable of qualifying for zero-rating under Item 2 of Group 5 of Schedule 8 to the VATA.

## **THE LEGISLATION**

7. There are two sets of VAT provisions which are relevant to this appeal.

8. The first set is the provisions which govern the circumstances in which supplies of goods and services in the course of the construction of a new dwelling qualify for zero-rating.

9. Section 30 of the VATA provides as follows:

"30. Zero-rating

(1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section-

(a) no VAT shall be charged on the supply; but

(b) it shall in all other respects be treated as a taxable supply;  
and accordingly the rate at which VAT is treated as charged on the supply shall be nil.

(2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified...”.

10. Group 5 is the part of Schedule 8 of the VATA which relates to the construction of new dwellings. The relevant provisions of Group 5 of Schedule 8 to the VATA are as follows:

“GROUP 5-CONSTRUCTION OF BUILDINGS, ETC.

1. The first grant by a person -

(a) constructing a building—

(i) designed as a dwelling or number of dwellings; or

(ii) intended for use solely for a relevant residential or a relevant charitable purpose; or

(b) converting a non-residential building or a non-residential part of a building into a building designed as a dwelling or number of dwellings or a building intended for use solely for a relevant residential purpose,

of a major interest in, or in any part of, the building, dwelling or its site.

2. The supply in the course of the construction of—

(a) a building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose or a relevant charitable purpose; ...

of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity.

4. The supply of building materials to a person to whom the supplier is supplying services within item 2 ... of this Group which include the incorporation of the materials into the building (or its site) in question.

Notes:

(1) “Grant” includes an assignment or surrender.

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

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

(b) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;

(c) the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision; 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....

(10) Where—

(a) part of a building that is constructed is designed as a dwelling or number of dwellings or is intended for use solely for a relevant residential purpose or relevant charitable purpose (and part is not); or

(b) part of a building that is converted is designed as a dwelling or number of dwellings or is used solely for a relevant residential purpose (and part is not)—

then in the case of—

(i) a grant or other supply relating only to the part so designed or intended for that use (or its site) shall be treated as relating to a building so designed or intended for such use;

(ii) a grant or other supply relating only to the part neither so designed nor intended for such use (or its site) shall not be so treated; and

(iii) any other grant or other supply relating to, or to any part of, the building (or its site), an apportionment shall be made to determine the extent to which it is to be so treated.

(11) Where, a service falling within the description in items 2 ... is supplied in part in relation to the construction or conversion of a building and in part for other purposes, an apportionment may be made to determine the extent to which the supply is to be treated as falling within items 2 ..

(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 or dwellings; or

(c) ... the construction of an annexe to an existing building....

(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 corner site, a double facade, the retention of which is a condition or requirement of statutory planning consent or similar permission...

(20) Item 2 ... [does] not include the supply of services described in paragraph 1(1) or 5(4) of Schedule 4....

(22) “Building materials”, in relation to any description of building, means goods of a description ordinarily incorporated by builders in a building of that description, (or its site), but does not include—

(a) finished or prefabricated furniture, other than furniture designed to be fitted in kitchens;

(b) materials for the construction of fitted furniture, other than kitchen furniture;

(c) electrical or gas appliances, unless the appliance is an appliance which is—

(i) designed to heat space or water (or both) or to provide ventilation, air cooling, air purification, or dust extraction; or

(ii) intended for use in a building designed as a number of dwellings and is a door-entry system, a waste disposal unit or a machine for compacting waste; or

(iii) a burglar alarm, a fire alarm, or fire safety equipment or designed solely for the purpose of enabling aid to be summoned in an emergency; or

(iv) a lift or hoist;

(d) carpets or carpeting material.

(23) For the purposes of Note (22) above the incorporation of goods in a building includes their installation as fittings.”

11. The second set of relevant provisions is the provisions which govern the circumstances in which a person who is not carrying on a business can recover VAT incurred on the construction of a new dwelling.

12. In that regard, Section 35 of the VATA provides 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 or number of dwellings;...

(1B) For the purposes of this section goods shall be treated as used for the purposes of works to which this section applies by the person carrying out the works in so far only as they are building materials which, in the course of the works, are incorporated in the building in question or its site.

(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...”.

13. In addition to the relevant VAT legislation, there is a relevant piece of planning legislation, Section 73A of the TCPA, which provides as follows:

“73A Planning permission for development already carried out.

(1) On an application made to a local planning authority, the planning permission which may be granted includes planning permission for development carried out before the date of the application.

(2) Subsection (1) applies to development carried out—

(a) without planning permission;

(b) in accordance with planning permission granted for a limited period; or

(c) without complying with some condition subject to which planning permission was granted.

(3) 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.”

14. It may be seen that Section 73A distinguishes between a planning permission which merely has the incidental effect of ratifying works which have been carried out before the planning permission is granted – Section 73A(1) – and a planning permission which is granted on terms that it is deemed to take effect from an earlier date – Section 73A(3). In the former case, the planning permission has retrospective effect in that it renders lawful that which, prior to the granting of the relevant planning permission, was unlawful. In addition, the former case arises automatically as a consequence of the granting of planning permission after works have been carried out. In contrast, in the latter case, the planning permission is formally expressed to apply with effect from an earlier date and it requires express language to that effect in the relevant planning permission. We are here concerned with the former case. However, it is worth noting that both sections operate by according retrospective effect to a subsequently-granted planning permission. Neither section deems a subsequently-granted planning permission to have been granted on a day before it actually was granted.

## **DISCUSSION**

### **Introduction**

15. The issue which needs to be determined in relation to the appeal is the extent to which the Appellants are entitled to recover under Section 35 any VAT which was properly chargeable in respect of the supplies made to them in the course of the construction.

16. In addition, to the extent that the Appellants do have such a right, it is necessary to determine the extent to which VAT was properly chargeable in respect of the relevant supplies.

17. In answering those questions, the VAT which forms the subject of the Appellants’ appeal can usefully be divided into two categories as follows:

(1) amounts incurred on supplies of goods and services made before the time when the revised planning permission on the basis of demolition and replacement instead of extension was granted by the local planning authority on 27 October 2016; and

(2) amounts incurred on supplies of goods and services made after that time.

18. The reason for that division is that, at the time when the supplies falling within the first category were made, the revised planning permission on the basis of demolition and replacement had not yet been granted whereas, at the time when the supplies falling within the second category were made, the revised planning permission on the basis of demolition and replacement had been granted.

19. In addition to the division which is mentioned in paragraph 17 above, each of the two categories of supplies can usefully be divided into two sub-categories as follows:

- (1) supplies of goods; and
- (2) supplies of services.

This is because, on its face, Section 35 appears to apply only to supplies of goods. As a result, the Appellants' claim to recover VAT which they have incurred on supplies of services made to them in connection with the development raises issues which are additional to the issues arising in relation to the Appellants' claim to recover VAT which they have incurred on supplies of goods made to them in connection with the development.

#### The arguments of the parties

##### *Supplies of goods made before the revised planning permission was granted*

20. In respect of supplies of goods falling within the first of the two categories set out in paragraph 17 above, Mr Uddin contended that those supplies had been made at a time when the only extant planning permission was the original planning permission (which related to the extension of the Property and not demolition and replacement). Mr Uddin accepted that, pursuant to Section 73A of the TCPA, the revised planning permission which was granted by the local planning authority on 27 October 2016 on the basis of demolition and replacement covered any works which had been carried out prior to that time. However, he said that, whilst the revised planning permission made the works carried out before that time compliant for planning law purposes, no right of recovery could arise under Section 35 in respect of supplies of goods falling within the first category because:

- (1) the language used in Note (2)(d) to Group 5 of Schedule 8 to the VATA showed that, in order for a building "to be designed as a dwelling" for the purposes of Section 35(1A)(a), the planning permission for the construction of the new building had to be in place before the works in question were carried out. This was because, in that note, which applied for the purposes of Section 35 as well as for the purposes of Group 5 of Schedule 8 to the VATA, the reference to the grant of planning permission was in the past tense and the reference to the construction work's being carried out "in accordance with" that planning permission clearly implied that the construction work needed to have followed the granting of the planning permission; and
- (2) the mere fact that, once the revised planning permission had been granted, the construction works became lawful did not mean that those works were lawful at the time when they were carried out. Since the conditions in Section 35(1) were couched in the present tense, the works in question needed to be lawful at the time when they were carried out and the works carried out before the revised planning permission was granted were unlawful at that point.

21. In contrast, Mr Franks submitted that, as the revised planning permission which was granted by the local planning authority on 27 October 2016 covered any works which had been carried out prior to the date of the application it followed that, when viewed in retrospect at the time when the Appellants' claim was made:



(1) the works in question all related to the construction of a new dwelling and not to the extension of the existing building and therefore Section 35(1A)(a) of the VATA was satisfied; and

(2) the carrying out of the works had been lawful and therefore Section 35(1)(b) of the VATA was satisfied.

*Supplies of goods made after the revised planning permission was granted*

22. In respect of supplies of goods falling within the second of the two categories set out in paragraph 17 above, Mr Uddin accepted that, in principle, the VAT arising in respect of those supplies was recoverable by the Appellants but he said that, as the relevant supplies should all have been treated as zero-rated for VAT purposes, no such VAT arose. The appropriate remedy for the Appellants in that case was to ask their suppliers to claim back the VAT for which they had wrongly accounted to the Respondents in respect of those supplies and then to account to the Appellants for the amounts recovered.

23. Mr Franks accepted that that was the case but pointed out that it was proving difficult to persuade all of the Appellants' suppliers to do this.

*Supplies of services*

24. As regards supplies of services, whether made before or after the revised planning permission was granted, Mr Uddin submitted that, since Section 35 on its terms related only to supplies of goods, the Appellants were not entitled to recover from the Respondents any VAT in respect of those supplies.

25. Mr Franks did not deny that, as worded, Section 35 related only to supplies of goods, but he pointed to an extract from the Respondents' guidance in relation to Section 35 in which the right to recover under the section was said to apply to both supplies of goods and supplies of services. Mr Franks said that this gave rise to a legitimate expectation on the part of the Appellants that supplies of services could be included in a claim under the section.

26. In response, Mr Uddin said that the First-tier Tribunal had no jurisdiction to decide appeals on the basis of public law principles such as legitimate expectation and that, in any event, if Mr Franks had followed the links in the relevant guidance, he would have seen that only supplies of goods were mentioned in relation to the section and therefore Mr Franks should have known that VAT on supplies of services fell outside the section.

The approach in this decision

27. As supplies of services raise slightly different considerations in this context from supplies of goods, I propose to deal with the two distinct categories of supplies separately in this decision.

Supplies of goods

Supplies of goods made after the revised planning permission was granted

28. It was common ground that:

(1) in principle, VAT properly arising on supplies of goods made after the revised planning permission was granted was recoverable by the Appellants; but

(2) as all such supplies of goods qualified for zero-rating for VAT purposes, no VAT properly arose in respect of those supplies and the appropriate remedy for the Appellants in respect of those supplies was to ask their suppliers to claim back the VAT for which they had accounted to the Respondents in respect of the relevant supplies and then to account to the Appellants for the amounts recovered.

29. I agree with the parties in relation to those conclusions. Since all of the goods which are the subject of this appeal were “building materials which, in the course of the works, [were] incorporated in the building in question or its site” for the purposes of both Item 4 of Group 5 of Schedule 8 to the VATA and Section 35(1B) of the VATA, applying the notes set out in Group 5 of Schedule 8 to the VATA, the supplies of those goods qualified for zero-rating under Group 5 of Schedule 8 to the VATA, with the result that no VAT properly arose in respect of supplies of goods which were made to the Appellants after the revised planning permission was granted on 27 October 2016. It follows that, to the extent that this appeal relates to VAT in respect of supplies of goods which were made to the Appellants after the revised planning permission was granted on 27 October 2016, this appeal fails.

30. The appropriate course of action for the Appellants in relation to that VAT is to pursue a contractual claim against the relevant suppliers for wrongly requiring the VAT to be paid and then for the relevant suppliers to make a claim to the Respondents in respect of their overpayments because it is the suppliers and not the Appellants who have technically paid the VAT to the Respondents and therefore it is they and not the Appellants who have the remedy set out in Section 80 of the VATA (see Section 80(7) of the VATA).

31. For completeness, I should add that there are circumstances in which persons such as the Appellants can bring proceedings against the Respondents directly for VAT paid under mistake of law in respect of which the Appellants have borne the economic burden as a result of the contractual payments made to their suppliers but that right arises only where recovering the amounts in question from the suppliers is “impossible or excessively difficult” – see *The Commissioners for Her Majesty’s Revenue and Customs v Investment Trust Companies (in liquidation)* [2017] UKSC 29.

#### Supplies of goods made before the revised planning permission was granted

32. Turning then to the supplies of goods falling within the first of the two categories set out in paragraph 17 above, the question I need to address is whether the Appellants are correct in submitting that they are entitled to make a claim for VAT incurred on supplies made to them prior to the time when the revised planning permission was granted on 27 October 2016 on the basis that the retrospective effect of the revised planning permission means that, by the time that they made their claim, the building in question was “designed as a dwelling” for the purposes of Section 35(1A)(a) of the VATA and the construction work was lawful for the purposes of Section 35(1)(b) of the VATA.

#### *The relevant case law*

33. There have been a considerable number of cases which have addressed the impact that the revision of a planning permission having retrospective effect has on supplies made prior to the time at which the revised planning permission was granted. Some of those cases relate to claims under Section 35 of the VATA and others relate to the ability of supplies of construction goods and services to qualify for zero-rating.

34. Since we are here concerned (initially at least) solely with the proper application of Section 35, and not with the question of whether the supplies of goods and services which were made to the Appellants prior to the time at which the revised planning permission was given on 27 October 2016 could retrospectively qualify for zero-rating, I will start by noting that I have identified only two decisions of the Upper Tribunal which pertain to the impact of a revised planning permission with retrospective effect on the ability of a taxpayer to recover under Section 35 the VAT paid in respect of supplies of goods. Those are *Patel v The Commissioners for Her Majesty’s Revenue and Customs* [2014] UKUT 361 (TCC) (“*Patel*”) and *Shields v The Commissioners for Her Majesty’s Revenue and Customs* [2014] UKUT 453 (TCC) (“*Shields*”). The remaining decisions in relation to the impact of a retrospective revised

planning permission on claims made under Section 35 were all at first instance and are therefore not binding on me although they are of course instructive insofar as they have some relevance to the present decision.

*The Upper Tribunal decisions*

35. In *Patel*, the appellant had obtained a planning permission which was expressed to have retrospective effect but had done so only after he had had his initial claim under Section 35 rejected by the Respondents on the ground that he did not have planning permission to construct a dwelling. The Upper Tribunal rejected Mr Patel's appeal on the basis that, because the retrospective planning permission had been obtained only after the expiry of the time limit for producing with his claim documentary evidence of planning permission covering the work, his claim must fail. However, the Upper Tribunal declined to address the question of whether, had the retrospective planning permission been granted before the time limit, that permission would have been effective to allow the claim to succeed. *Patel* is therefore of no assistance in the present case.

36. In *Shields*, the question which the Upper Tribunal was asked to address was whether a condition in a planning permission which limited the occupation of the building to a person solely employed by a specified business (and his or her dependants) failed the condition in Note 2(c) of Group 5 of Schedule 8 to the VATA, with the result that the building was not "designed as a dwelling" for the purposes of Section 35(1A)(a) and therefore the claim under Section 35 could not succeed. The Upper Tribunal held that the planning permission condition did indeed fail the condition in Note 2(c) and therefore the appellant's appeal failed.

37. The decision is important in terms of its analysis of the types of restriction which would fall foul of Note 2(c) but its only relevance to the present appeal is to be found in paragraph [40] of the decision. That paragraph arose out of the fact that the planning permission condition which was in issue had in fact been removed by the local planning authority, albeit some time after the appellant's claim had been made. In that paragraph, the Upper Tribunal said as follows:

"40. Mr Donaldson did not dispute that the removal of the occupancy condition in 2012 is irrelevant to the claim under appeal. We consider that is correct. Whether or not Mr Shields was entitled to recover VAT incurred in constructing the dwelling under section 35 VATA94 must be considered in the light of the facts when the construction or conversion has been carried out and the claim is made (see section 35(1)(c) and (1B) and Note 2(d) to Group 5 of Schedule 8 VATA94). The construction of the dwelling and the claim in this case pre-dated the new planning permission (reference X/2011/0368) which was not retrospective and only removed the condition with effect from 13 February 2012."

38. Taken at face value, this paragraph appears to be saying that the validity of a claim under Section 35 needs to be tested only after the construction works have been completed and the claim has been made and not at the time when relevant works are carried out. However, I think that it is important to note that:

- (1) as the matter which was in issue in *Shields* was not whether the removal of a planning permission condition following the making of a claim under Section 35 could validate the claim but rather whether the planning permission condition which existed at the time when the claim was made meant that the condition in Note 2(c) was not satisfied, the views of the Upper Tribunal on the precise time at which the satisfaction of the conditions in Note 2 of Group 5 of Schedule 8 to the VATA needed to be determined were obiter. The appellant had effectively conceded that the retrospective removal of the planning permission condition following the making of the claim did not assist him; and
- (2) perhaps more significantly, the passage in question does not shed any light on the views of the Upper Tribunal in relation to the point in time at which the lawfulness of the

works for the purposes of Section 35(1)(b) needs to be gauged. It is true that the Upper Tribunal say that the claimant's entitlement "must be considered in the light of the facts when the construction or conversion has been carried out and the claim is made" but it is unclear whether, in considering the facts at that time, it is the lawfulness of the works at the time when the works were carried out or the lawfulness of the works at the time when the claim is made and the facts are being considered which is the relevant fact to be taken into account in the determination of the claim.

39. Thus, neither of the two Upper Tribunal decisions provides an answer to the present question.

#### *The First-tier Tribunal decisions*

40. I have uncovered four First-tier Tribunal decisions which are potentially relevant to the question of whether a revised planning permission obtained after works have been carried out can justify a claim under Section 35 in respect of VAT on those works which was incurred before the revised planning permission was granted - *Michael James Watson v The Commissioners for Her Majesty's Revenue and Customs* [2010] UKFTT 526 (TC) ("Watson"), *Maurice Francis v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKFTT 359 (TC) ("Francis"), *Thomas Brennan v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKFTT 557(TC) ("Brennan") and *Sam Bond and Sarah Baxter v The Commissioners for Her Majesty's Revenue and Customs* [2010] UKFTT 242 (TC) ("Bond").

41. With the exception of the decision in *Bond*, those decisions also do not shed particular light on the question.

42. In *Watson*, the taxpayer applied for the revised planning permission under Section 73A(1) of the TCPA only after the relevant building had been completed and the taxpayer had made his claim under Section 35. The planning permission which was in place when the relevant building was completed (and at the time when the taxpayer made his claim under Section 35), contained a condition on usage which prevented Note 2(c) from being satisfied. In addition, counsel for the Respondents submitted that the fact that the works in question had preceded the revised planning permission meant that they could not be "in accordance with" that revised planning permission and therefore Note 2(d) was not satisfied.

43. In dismissing the taxpayer's appeal, the First-tier Tribunal accepted the arguments of counsel for the Respondents to the above effect. The building failed to satisfy either of Note 2(c) or Note 2(d) at the time when it was completed and was therefore not "designed as a dwelling".

44. However, the First-tier Tribunal went on to say that, if the local planning authority had exercised its power under Section 73A(3) to express their revised planning permission to have retrospective effect to a date falling prior to the commencement of the works, then both of the defects noted above would have been cured and the taxpayer would have succeeded in his appeal.

45. In *Francis*, the facts were, to all intents and purposes the same as the facts in *Watson*. Once again, the application for the revised planning permission was made only after the works had been completed and after the taxpayer had made the claim under Section 35.

46. The First-tier Tribunal in *Francis* adopted precisely the same line of reasoning as had the First-tier Tribunal in *Watson* but reached the conclusion that the taxpayer's claim should be allowed because it construed the correspondence which had passed between the taxpayer and the local planning authority as containing a confirmation that the local planning authority intended the revised planning permission to take effect from the date when the original

planning permission had been obtained – in other words, that the local planning authority had exercised its discretion under Section 73A(3) to give the revised planning permission retrospective effect - see paragraph [22] in *Francis*.

47. In fact, it would seem from the terms of the email which is recorded at paragraph [16](3) of the decision that the local planning authority had not exercised - or intended to exercise - its right under Section 73A(3) to express the revised planning permission to take effect from a date falling before the date when the revised planning permission was granted. Instead, it merely pointed out to the taxpayer that the effect of Section 73A(1) was that the result of its providing the revised planning permission was to grant “permission for what [had] already been built”.

48. Thus, curiously, the position of the taxpayer in *Francis* was no different from the position of the taxpayer in *Watson* in that the lawfulness of both sets of works depended on the application of Section 73A(1) when the revised planning permission was granted and yet the taxpayer in *Francis* succeeded where the taxpayer in *Watson* had failed.

49. In *Brennan*, unlike *Watson* and *Francis*, no application had been made for a revised planning permission. Instead, the taxpayer in that case argued that the works which he had actually carried out in accordance with the two planning permissions that had been obtained amounted to the construction of a new dwelling.

50. Whilst he failed in that argument on the basis that the First-tier Tribunal considered the works not to amount to the construction of a new dwelling, of greater relevance to the present appeal is the conclusion by the First-tier Tribunal that, even if the taxpayer had applied for a revised planning permission with retrospective effect, that would not have entitled him to recover the VAT on the goods supplied to him as part of the works because it would not have rendered the works lawful at the time when the claim was made - see paragraphs [47] and [49].

51. Although the First-tier Tribunal in those passages referred to unlawfulness at the time of the claim - as opposed to at the time when the works were carried out - it is not safe to conclude from that fact that it had concluded that the relevant time at which the works needed to be lawful was the former instead of the latter. This is because, on the facts in that case, the works were unlawful at both of those times and it was therefore unnecessary for the First-tier Tribunal to draw a distinction between the two. The decision therefore cannot fairly be seen as authority to the effect that, as long as works are lawful by the time that the claim is made, the fact that they were unlawful when they were carried out would not be fatal to the claim.

52. The same is not true of the decision in *Bond*. In that case, the central issue was whether the fact that the works carried out by the appellants were part of a larger development which had been carried out in breach of the prior planning permission meant that, even though the works carried out by the appellants themselves had been effected in accordance with the prior planning permission, the appellants were not entitled to a repayment. The First-tier Tribunal concluded that, because the prior authorities showed that, subject to some exceptions which were not relevant in *Bond*, the rule was that a planning permission stands or falls as a whole, the other breaches of the prior planning permission which had occurred meant that all of the works carried out under that prior planning permission were unlawful and that therefore the appellants’ claim failed.

53. However, on the facts, the larger development as it had actually been carried out was given retrospective planning permission after the vast majority of the work carried out by the appellants had been completed and some 6 months before the appellants made their claim. Thus, the decision can be seen as an example of a case where the facts were similar in all material respects to the facts in the present case. In effect, the decision in *Bond* can be summarised as saying that no repayment is due in respect of VAT on works which were

unlawful when they were carried out but have become lawful by the time that the claim is made. In that regard, the First-tier Tribunal noted that “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” (see paragraph [60]).

*The principles emerging from the relevant case law*

54. A number of interesting points which are of relevance to the present appeal arise out of the above cases.

55. First, in reaching their decisions in *Watson* and *Francis*, both First-tier Tribunals clearly considered that the only form of retrospective planning permission which could validate a claim in respect of works previously carried out required the local planning authority to have exercised its right under Section 73A(3) to express the revised planning permission to take effect from a date falling before the commencement of the works. The First-tier Tribunals did not consider whether the automatic retrospective effect of Section 73A(1) which applied in both of those cases might have sufficed. However, it is not apparent to me why the automatic retrospective effect of Section 73A(1) did not also suffice for that purpose. In both cases, once the relevant planning permission was granted, the works in question were rendered lawful retrospectively. Moreover, at the hearing, both parties accepted that the effect of the revised planning permission granted on 27 October 2016 was retrospectively to render lawful the works that had been carried out prior to that time in breach of the original planning permission. Mr Uddin did not take the point that, because that was pursuant to the operation of Section 73A(1) and not pursuant to an express direction under Section 73A(3), it was somehow deficient in rendering lawful that which was previously unlawful.

56. Secondly, the First-tier Tribunals in both of those cases appear to have assumed that, as long as the local planning authority expressed the revised planning permission to have taken effect from a date falling before the works commenced, then it would be clear that the language in Note 2(d) was satisfied. However, it seems to me that, as was noted by the First-tier Tribunal in *Williams* at paragraphs [89] to [92], there is a significant difference between, on the one hand, a planning permission which has effect from an earlier date and, on the other hand, a planning permission which is deemed to have been granted on an earlier date. In the former case (which is of course how both Section 73A (1) and Section 73A(3) apply), there must at least be a question as to whether the mere fact that the planning permission takes effect retrospectively is sufficient to satisfy the language in Note 2(d). In that instance, is it clear that the timing envisaged by the note is fulfilled and that the works can be said to have been carried out “in accordance with” the planning permission when the planning permission was actually granted only after the works were completed?

57. Thirdly, the First-tier Tribunals in both of those cases appear not to have focused at all on the fact that the relevant taxpayer in each case applied for and obtained the revised planning permission only after the works had been completed and he had submitted his claim. This meant that, even if the local planning authority had exercised its discretion under Section 73A(3) to express the revised planning permission to take effect from a day falling before the commencement of the works, there would still have been a period before the revised planning permission was granted (which encompassed both the day when the works were completed and the day when the claim was made) when the building in question was not “designed as a dwelling” by virtue of failing the condition in Note 2(c) (in the case of *Watson*) and the condition in Note 2(d) (in both cases). The First-tier Tribunal in *Brennan* thought that this would be fatal to a claim notwithstanding the retrospective effect of the revised planning permission.

58. Whilst the last of the above points has no relevance on the facts in the present appeal because of the time at which the revised planning permission was obtained, the first two points

do. And, if I were to follow the reasoning in *Watson* and *Francis*, I would be bound to conclude that the revised planning permission in the present appeal would need to have been expressed to take effect from a date falling before the commencement of the works if it was going to be effective in allowing the VAT on the supplies made before the time when the revised planning permission was granted to be recovered under Section 35.

59. Finally, the facts in the present case are similar to those which pertained in *Bond* in that, there, the revised planning permission with retrospective effect was given after the vast majority of the works had been completed but before the claim under Section 35 was made. So, in this case, if I were to follow the reasoning in *Bond*, the Appellants' appeal to the extent that it related to VAT incurred on supplies made prior to 27 October 2016 would necessarily fail because of the unlawfulness of the works at the time when they were carried out.

*Conclusion in relation to supplies of goods made before the revised planning permission was granted*

60. I should start by saying that I agree with both parties that there is no difference in this context between the automatic retrospective effect of Section 73A(1) and an express direction made pursuant to Section 73A(3) to the effect that a later revised planning permission is to have retrospective effect. In both cases, that which was previously unlawful becomes lawful at the time when the later revised planning permission is granted. I therefore differ in my view from the approach taken in *Watson* and *Francis* on that question.

61. However, the consequence of my view is to leave open the question of what impact the retrospective nature of the later revised planning permission should have on supplies of goods made before the later revised planning permission was granted.

62. In relation to that question, I can understand why the Appellants consider that, in this case, the VAT which they paid on supplies of goods made before the revised planning permission was granted is susceptible to recovery under Section 35 of the VATA. There are a number of reasons for thinking that that might be the right conclusion.

63. First, there is the fact that, by the time that the claim was made, the revised planning permission had been granted and it had retrospective effect, with the result that, when viewed at the time when the claim was made:

- (1) the carrying out of the works was lawful; and
- (2) the works arguably related to a dwelling.

I say "arguably" in relation to the latter point because, by the time that the claim was made, the revised planning permission for the dwelling had been granted and the construction work which had been carried out was consistent with the terms of that revised planning permission. Thus, if "in accordance with" in Note (2)(d) can properly be read as saying "in a manner consistent with", then each of the conditions in Note (2) would have been satisfied by the time when the claim was made.

64. Secondly, I don't think that Mr Uddin can be right when he says that whether or not works amount to "the construction of building designed as a dwelling" for the purposes of Section 35(1A)(a) needs to be determined when the works are carried out and cannot be left to be determined only at the time when the claim is made. As the Upper Tribunal noted in the extract from *Shields* set out above, it is not possible to establish that a building is designed as a dwelling until construction is completed because it is only then that the ability of the building to satisfy each of the conditions in Note (2) – and in particular Note (2)(d) – can be tested. I am therefore inclined to believe that the language used in Section 35(1A)(a) and Note (2)(d) tends to support Mr Franks' position that whether or not works amount to "the construction of building designed

as a dwelling” for the purposes of Section 35(1A) should be determined only at the time when the claim is made and not at the time when the relevant goods were supplied.

65. However, on balance, I have concluded that I agree with Mr Uddin’s position on this issue. In other words, I think that, even though it is only at the time when the claim is made that one must consider whether the conditions for making a successful claim are satisfied and therefore whether the works in question amount to “the construction of building designed as a dwelling” for the purposes of Section 35(1A)(a), the fact that VAT which is the subject of the claim related to supplies of goods on works which were not lawful at the time when the relevant goods were supplied needs to be taken into account in determining the validity of the claim.

66. My main reason for saying this is that, when one turns to the precise language which is used in Section 35, it is to my mind noteworthy that Section 35(1) uses the present tense, and not the past tense, in describing the various conditions which need to be satisfied before recovery can be made under the section. In other words, it appears to be contemplating the situation as it stood at the time when the VAT which is the subject of the claim arose and not the situation when viewed in hindsight when the claim is made. This suggests to me that VAT incurred on goods supplied at a time when no planning permission had yet been granted for the relevant works does not satisfy the condition set out in Section 35(1)(b) – because the carrying out of the works was not lawful at that time – even if, when considered at the time when the claim is made, those works have become lawful by virtue of a revised planning permission having retrospective effect. In this respect, I agree with the First-tier Tribunal in *Bond*.

67. I do not think that this is inconsistent with the views of the Upper Tribunal set out in paragraph [40] in *Shields*, even if those views had formed part of the ratio of the decision. This is because, even if the right of the Appellants to recover the VAT in question “must be considered in the light of the facts when the construction ...has been carried out and the claim is made”, so that it is by then clear that the carrying out of the works is lawful, it will still be the case at that point that the carrying out of the works was not lawful at the time when the works were carried out.

68. Moreover, this conclusion is consistent with the language used in the second limb of Note (2)(d) to the effect that the construction in question must have been carried out “in accordance with” the planning permission which has been granted. Whilst, as I have observed in paragraph 63 above, it is arguable that that phrase is capable of being construed in such a way that works carried out prior to the grant of the revised planning permission can be said to be “in accordance with” the revised planning permission merely because they are consistent with the terms of the revised planning permission, the more natural construction of the phrase “in accordance with” is that that language is satisfied only if the works have been carried out after the revised planning permission has been granted.

69. For these reasons, I have concluded that the Appellants are not entitled to recover the VAT which they incurred on supplies of goods made to them before the revised planning permission was granted on 27 October 2016.

70. I have reached this conclusion with considerable reluctance because I have no doubt that the Appellants have at all times acted honestly and in good faith in carrying out the development and making their claim to recover the VAT. The planning authority were fully informed of the nature of the works at all times and, from as early as 24 June 2016, everyone associated with the development was aware that the works were going to need retrospective revised planning permission. So it is not as if the Appellants were trying to get away with secretly building something which was contrary to the original planning permission and had to seek retrospective permission when this was discovered.



71. However, whilst fairness suggests that the Appellants should be entitled to recover the VAT in question, I cannot see how this is permitted by the terms of the legislation, for the reasons which I have set out above.

*Consequence of the conclusion*

72. The consequence of the above conclusion is that it is, strictly speaking, unnecessary for me to express any view on the extent to which the supplies of goods which were made to the Appellants prior to the time that the revised planning permission was granted on 27 October 2016 should have been zero-rated.

73. However, given that that question has some relevance to the issue which I have addressed above, I should conclude my analysis with a brief word on it.

74. Whilst the position in relation to the zero-rating of supplies might technically seem to be irrelevant in considering the language in Section 35, Section 35 is clearly intended to operate in a manner which is complementary to the zero-rating provisions in Group 5 of Schedule 8 to the VATA. In other words, as noted by Judge Rupert Jones in *Williams*, “[the] purpose of the section 35 VAT Act 1994 legislation is to put a person constructing a new dwelling themselves ... in the exact same position as an individual having a new dwelling constructed by a building contractor”.

75. That purpose emerges from a number of features in the relevant provisions, not least that the same notes apply to both sets of provisions, that no recovery can be made under Section 35 of VAT on supplies of services and that the goods in respect of which recovery of VAT can be made under Section 35 are the same goods as those in respect of which zero-rating applies under Item 4 of Group 5 to Schedule 8 of the VATA ( see Section 35(1B) and Notes (22) and (23)). The above suggests to me that the two sets of provisions should operate so far as possible on the same basis. It follows that, if I were to conclude that the supplies of goods and services which were made to the Appellants prior to the time when the revised planning permission was granted were capable of being zero-rated by virtue of the retrospective effect of the revised planning permission, then that might cast some doubt on the conclusion which I have reached above in relation to the application of Section 35.

76. There have been two zero-rating cases – *Williams* and *Quitie Limited* [2017] UKFTT 206 (TC) (“*Quitie*”) – in which the First-tier Tribunal has addressed the question of whether a revised planning permission having retrospective effect granted during the course of construction but after certain supplies had been made could have the effect of turning those supplies from standard-rated supplies into zero-rated ones.

77. In *Williams*, the First-tier Tribunal held that this was not the case because the tax points for the relevant supplies had already occurred prior to the date when the revised planning permission was granted and a subsequent change in circumstances could not change the nature of the relevant supplies. It observed that “the relevant time to examine for the purposes of VAT liability is the time at which the supplies were made” and that “the state of affairs as of the date of supply is therefore determinative for the purposes of VAT liability and not the state of affairs at the date of completion of construction nor at any other time such as the date of the claim for refund of any VAT”.

78. No authority was cited for this proposition although the First-tier Tribunal made the practical point that, were that not to be the case, a claim for a refund of VAT could be made many years after the supplies took place. It also referred to the views expressed in *Northside Management Limited v The Commissioners for Her Majesty’s Revenue and Customs* [2012] UKFTT 647 (TC) to the effect that proceeding on any other basis “would enable... a tax planning exercise to be pursued ex post facto, to the substantial benefit of the taxpayer. While supervening legal developments can affect a tax liability, supervening factual changes such as a retrospective variation of a planning permission should not. If the assessment cannot be challenged as at the date when it is made,

that must surely be resolute of the matter. Retrospective changes of facts and circumstances would not alter that, we consider”.

79. In contrast to the decision in *Williams*, the First-tier Tribunal in *Quitie* had no difficulty in concluding that the nature of the relevant supplies could be affected by the subsequent change in circumstances, although it too cited no authority to support that proposition.

80. Although this is also a difficult question, I am inclined to agree with the views of the First-tier Tribunal in *Williams*. My reason for saying this is that, whilst I have found various provisions in the VAT legislation which deal expressly with situations where the amount of VAT arising in respect of a supply might change after the date when the supply is made, by reason of various circumstances such as where the consideration for a supply is unknown at the time of supply and is only subsequently determined, or the consideration for a supply is subsequently adjusted, or the treatment for VAT purposes of a supply is subsequently varied because of a change in law or a change in VAT rates – see, for example, Sections 80 and 88 of the VATA and paragraphs 15, 28, 37, 38 and 90(3) of the Value Added Tax Regulations 1995 – references to circumstances where the change in the amount of VAT arising in respect of a supply is attributable to a change in the nature of the supply as a result of a change in factual circumstances after the date when the supply is made are conspicuously absent. If the VAT legislation had been intended to operate in the manner suggested by the First-tier Tribunal in *Quitie*, then I believe that some reference to those circumstances would have been included in the legislation.

81. I accept that the consequence of the above conclusion is that VAT which has been paid by the Appellants in respect of goods acquired in the course of constructing the dwelling before the revised planning permission was granted cannot be recovered, either by the Appellants under Section 35 or by the Appellants asking their suppliers to make a claim for repayment under Section 80 of the VATA, but unfortunately I believe that this is the way that the legislation operates.

#### Supplies of services

##### Supplies of services made after the revised planning permission was granted

82. It follows from the fact that none of the supplies of services which were made after the revised planning permission was granted were provided by “an architect, surveyor or any person acting as a consultant or in a supervisory capacity”, that all of those supplies should properly have been zero-rated for VAT purposes under Item 2 of Group 5 of Schedule 8 to the VATA.

83. Accordingly, the position in relation to those supplies is identical to the position referred to in paragraphs 28 to 31 above in relation to supplies of goods which were made after the revised planning permission was granted.

##### Supplies of services made before the revised planning permission was granted

84. It follows from the conclusions which I have reached in paragraphs 32 to 71 above that, even if the right of recovery in Section 35 were to extend to services as well as goods, the Appellants would be unable to recover VAT on supplies of services which were made to them before the revised planning permission was granted on 27 October 2016 because, at the time when the services were supplied, the works in question were not lawful.

85. It also follows from those paragraphs that, in my view, any VAT for which the Appellants’ suppliers have already accounted to the Respondents in respect of those supplies of services has not become recoverable by the suppliers by virtue of the fact that the granting of the revised planning permission with retrospective effect made those supplies lawful but that is, in any event, not a matter for this decision.

Conclusion in relation to supplies of services

86. The conclusions which are set out in paragraphs 82 to 85 above necessarily mean that the appeal fails both as regards VAT on supplies of services made after the revised planning permission was granted and as regards VAT on supplies of services made before the revised planning permission was granted and that this would be the case even if the Appellants were entitled to rely on public law principles to establish that, in principle, their right of recovery under Section 35 extended to VAT incurred on supplies of services as well as VAT incurred on supplies of goods.

87. I have therefore decided that I do not need to address the merits of the parties' respective arguments on that question in this decision.

**CONCLUSION**

88. For the reasons set out above, this appeal fails.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

89. 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 Rules. 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.

**TONY BEARE  
TRIBUNAL JUDGE**

**RELEASE DATE: 11 FEBRUARY 2020**