



**TC01804**

**Appeal number TC/2010/08141**

*VAT -Section 35 VAT Act 1994 – the DIY Refund Scheme- HMRC refused the claim by the Appellants for a VAT refund on the grounds that at the time the development took place the correct statutory planning permission was not in place – Appellants had done all that was required of them but the planning permission produced by the council was inadequate – appeal dismissed.*

**FIRST-TIER TRIBUNAL**

**TAX**

**MR and MRS KENNETH JONES**

**Appellants**

**- and -**

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

**Respondents**

**TRIBUNAL: S.M.G.RADFORD (TRIBUNAL JUDGE)  
J.R CHERRY**

**Sitting in public at 45 Bedford Square, London WC1 on 1 December 2011**

**Mr Alan Ogilvie for the Appellants**

**Mr Philip Rowe for the Respondents**

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## DECISION

1. This is an appeal against HMRC's decision dated 22 July 2010 that the Appellants' claim for a refund of VAT under the DIY Refund Scheme ("the DIY Scheme") should not be allowed.
2. The Appellants claimed that HMRC had seized on a technicality to deny the claim.
3. Mr Jones gave evidence on behalf of the Appellants.

### **Background and facts**

4. Mr Jones gave evidence that the Appellants had bought a bungalow in Kent as a retirement home with the intention of demolishing it and rebuilding.
5. Their London solicitor assisted with the sale of their London house and the purchase of the Kent bungalow.
6. The solicitor was aware of their intention to demolish the bungalow and rebuild it and put them in touch with a London architect who prepared the plans and sent them to Swale Borough Council ("SBC") for planning permission.
7. The SBC approved the plans on 29 March 2006 and the Appellants presumed that all was well. However although the SBC frequently referred in subsequent correspondence to "replacement of 3 bed dwelling at 6 Shurland Avenue", all that the planning permission stated was "to increase ridge height of roof, side and rear extension and front bay windows".
8. All of the old building was demolished and the Appellants lived in a caravan in the garden while the work was being carried out. Each stage of the work was monitored by the building control department of the SBC.
9. At one point a dispute on a new window arose and the SBC issued a stop notice.
10. Nothing however was mentioned about a lack of planning permission for the demolition.
11. An invoice for a site inspection fee for the "replacement 3 bed dwelling" was produced by SBC and paid by the Appellants on 11 May 2007.
12. A completion certificate was issued in respect of a "replacement 3 bed dwelling" on 14 May 2010.
13. The Appellants submitted a claim for a refund of VAT under the DIY Scheme. It was submitted by Buchanans Accountancy Services on behalf of the Appellants. The form was dated 24 June 2010. The form was incomplete and was returned to the Appellants by HMRC on its date of receipt, 25 June 2010. It was only then that it was realised that nowhere did the original planning permission mention the demolition.

14. In a letter dated 6 July 2010 Buchanans informed HMRC that a planning irregularity had come to light and the Appellants required retrospective planning permission.

5 15. A further letter dated 19 July 2010 was received from Buchanans enclosing a letter from building control relating to the planning consent which stated that it was confirmed that a new property had been constructed on the same site as the previously fully demolished bungalow.

10 16. On 22 July 2010 HMRC refused the Appellants' claim on the grounds that relevant planning permission was not in place at the time the demolition and new build took place.

17. On 13 August 2010 the Appellants requested a review. The review upheld HMRC's decision.

18. On 13 September 2010 retrospective planning permission valid from 26 July 2010 was granted by SBC.

15 19. In February 2011 the Appellants asked SBC to concede that the effective date of the planning permission was prior to the work on the bungalow commencing. They referred the SBC officer to the similar case of *Watson v HMRC* in which the judge had stated that the "to succeed the Appellant would have needed the council to use its powers under Section 73A of the Town and Country Planning Act 1990 to backdate the consent".  
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20. However the planning officer refused and claimed that Section 73A(3)(a) did not mean that planning permission could be granted from a date before the development was carried out.

### **The Legislation**

25 21. Section 35 (1) of the VAT Act 1994 ("VATA") states:

(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

30 (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

35 22. Schedule 8, Group 5 of VATA Note 2 states:

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
- 5 (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.

23. Schedule 8, Group 5 of VATA Note 16 states:

- For the purpose of this Group, the construction of a building does not include—
- 10 (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) subject to Note (17) below, the construction of an annexe to an existing building.

15 24. Schedule 8, Group 5 Note 18 states:

- 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
  - 20 requirement of statutory planning consent or similar permission

25. The Town and Country Planning Act 1990 Section 73A states:

**Planning permission for work already carried out**

- 25 (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
  - 30 (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—
  - 35 (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.

## **Appellant's Submissions**

26. Mr Ogilvie submitted on behalf of the Appellants that the Appellants had meticulously followed all the relevant procedures and had not realised that it was essential that the word demolition appeared on the statutory planning permission.

5 27. The Appellants had been guided at all times by the officers of the SBC and the word demolished clearly appeared on the building plans.

28. He submitted that he regarded the word "replacement" as meaning something that takes the place of another and therefore as it appeared on the SBC stamp this should be sufficient to satisfy HMRC.

10 29. He submitted that if the SBC had issued a stop notice for a minor variation such as a window it would clearly have issued a stop notice if the demolition and consequent new build had not been approved.

15 30. He submitted that it had been open to the SBC to backdate the permission to the date on which the development had been carried out in accordance with Section 73A of the Town and Country Planning Act and the statement made in the case of *Watson v HMRC*.

31. He submitted that the Appellants should not be refused their refund because of a mistake made by the council and their officer's failure to accept that the law allowed the backdating of the permission to the date of the development.

## 20 **HMRC's Submissions**

32. Mr Rowe stated that HMRC had never doubted that the Appellants had acted in good faith, doing exactly what the officers of the SBC had told them to do.

33. The SBC had produced an inadequate planning permission which the inexperienced Appellants had not realised was not suitable.

25 34. Whilst the planning permission could not be backdated to before the development was carried out, if the SBC had conformed to Section 73A and backdated the retrospective planning permission to the date the development was carried out this would have solved the problem.

30 35. However the council had not done so and therefore HMRC had no option but to refuse the claim for the refund. At the time that the development was carried out there was no statutory planning consent in place for the demolition of the building and a new build in accordance with Note 2(d) of Schedule 8 Group 5 of VATA.

## **Findings**

35 36. We found Mr Jones's evidence to be honest and sincere. It was clear from correspondence with his solicitor which he produced which went right back to 2004 that from the start the intention was to demolish the house and create a new build.

37. We found that the Appellants had done everything correctly. They employed an architect to produce plans for submission to the SBC and a local architect to conform to the building regulations.

5 38. SBC had produced an incorrect planning permission which did not accord with the plans submitted. Their correspondence frequently referred to a replacement building and even when on inspection they picked up a minor infraction in respect of a window which did not conform to the permission they did not comment on the demolition obviously believing that it was covered by their permission.

10 39. We had every sympathy with the Appellants and in particular with the fact that the SBC officer refused to correct the council's mistake and backdate the permission which could have been done when the permission was made retrospective. It was disturbing that the SBC did not take account of the legislation which allowed the permission to be backdated to the date the development was carried out.

15 40. However we found that at the time that the development took place there was no statutory planning permission in place for the demolition contrary to Note 2(d) of Schedule 8 Group 5 of VATA.

20 41. As a result of the strict requirements of the VAT legislation unfortunately we must therefore dismiss the Appellant's appeal but it is a matter of great concern to us that as a result of the failings by SBC, the Appellants have been put to a great deal of trouble, worry and expense. It is hoped that these failings will be recognised by the SBC and appropriate steps taken to remedy the situation.

### **Decision**

42. The appeal is dismissed.

25 43. 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)"  
30 which accompanies and forms part of this decision notice.

35 **TRIBUNAL JUDGE**  
**RELEASE DATE: 8 February 2012**