[2016] UKFTT 0574 (TC)

TC05323

Appeal number: TC/2016/00733

VAT – DIY Housebuilders Scheme – Planning permission granted for alterations and extension – Property demolished and rebuilt – Completion Certificate issued 20 May 2015 – Claim for refund of VAT – Retrospective planning permission granted for demolition and rebuilding 13 November 2015 – HMRC v Patel [2015] STC 148 applied – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARIE REYNOLDS **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
NORAH CLARKE

Sitting in public at Swansea Civil Justice Centre, Caravella House, Swansea on 10 August 2016

The Appellant in Person

Jane Ashworth, of HM Revenue and Customs, for the Respondents

DECISION

1. Miss Marie Reynolds appeals against a decision of HM Revenue and Customs ("HMRC"), upheld on 13 January 2016 following a review, to refuse an £11,871.78 refund of VAT under the DIY Housebuilders Scheme. HMRC say that this is because at the time the works were undertaken they were not "lawful" in that they did not comply with the relevant statutory provisions. However, before considering these provisions, it is convenient to first set out the (undisputed) background to this appeal.

2. On 19 February 2008 Pembrokeshire County Council (the "Council") granted Miss Reynolds planning permission for "alterations and extension" to her property in Llanstadwell, Milford Haven (the "Property"). On 9 April 2008 F B Fisher Associates Surveyors and Development Consultants, made a Building Regulations application, on behalf of Miss Reynolds, (under the Building Act 1984 and Building Regulations 2000) to the Council in respect of the Property. The covering letter to the application explained:

> The original intention was to extend the property at the rear and construct a first floor above the existing structure. An exploratory investigation to the front elevation found that the existing structure had been constructed on an old stone wall without an adequate foundation. Mr Paul Phillips [of the Councils' Building Regulations Department] examined the foundations and agreed that the existing situation was unsatisfactory. Further investigation at the rear of the property found a worse situation as the foundation of the building was virtually non existent.
>
> Considering the minimal amount of the existing structure that would have been retained the existing building will be demolished and rebuilt strictly in accordance with the approved plans.

3. The application was given conditional approval by the Council on 28 May 2008 and the Property was demolished and rebuilt in accordance with the submitted plans. A Completion Certificate was issued by the Council on 20 May 2015.

4. On 8 June 2015 Miss Reynolds submitted a claim to HMRC for a refund of £11,871.78 being the VAT chargeable on the demolition and rebuilding the Property. This claim was date stamped as having been received by HMRC on 8 July 2015. There is no explanation for the delay but, after requesting and receiving further information from her, HMRC wrote to Miss Reynolds on 27 July 2015 asking her to:

> … submit a letter from Planning Department of your Local Authority regarding the demolition of the [Property].

The letter continued:

> As Planning Permission was not granted for the demolition, the Planning Department would need to be aware that the description of the works changed and before you went ahead with the demolition that their permission was granted.

5. On 28 September 2015 a retrospective application to change "alteration and extension" in the planning permission granted on 19 February 2008 to "demolition and rebuilding" of the Property was made to the Council. On 14 October 2015 Miss Reynolds wrote to HMRC enclosing a letter, also dated 14 October 2015, regarding the demolition and rebuilding which had been sent from the Council to F B Fisher Associates, the surveyor acting for Miss Reynolds. This confirmed that an application for retrospective planning permission had been received and:

> … that the application has been made entirely voluntarily. It was not submitted in response to any investigation by the Planning Enforcement Team, who was not aware of the demolition and rebuilding of the Property before it was raised by yourself.

6. This is consistent with a letter sent to the surveyor by the Development Management Section of Council on 6 August 2015 in response to emails of 31 July and 3 August 2015 which confirmed that:

> … the planning application submitted [in respect of the Property] received on 4 December 2007, was for the alteration & extension of the existing dwelling and not for a replacement dwelling. I cannot find any information within the planning application relating to a replacement dwelling or any request to amend the description of the proposal to allow for a replacement dwelling, prior to the formal decision notice being issued on 19 February 2008. Furthermore no subsequent planning applications have been received by the Local Planning Authority for a replacement dwelling at this location.
>
> In this instance the Local Planning Authority cannot issue a letter to the applicant confirming that they were aware that the application was for a replacement dwelling.

7. In a letter to Miss Reynolds of 15 October 2015 F B Fisher Associates explain that:

> At the time of the demolition two Building Control Surveyors were involved with the scheme and both were aware and insisted that the Property had to be demolished because of inadequate or non-existent foundations. The planning section was not informed and as the Building Control Surveyors are in the same department of the Council I assumed (erroneously) that they had kept their colleagues informed.

8. Having considered the information provided, on 4 November 2015 HMRC wrote to Miss Reynolds refusing her claim for a VAT refund on the basis that as statutory planning consent had not been granted for the demolition and rebuilding of the property at the time this was undertaken the works were not "lawful". Also, any retrospective planning application could not be accepted because it was obtained more than three months after completion of rebuilding of the Property.

9. On 13 November 2015 the Council granted retrospective planning permission to allow demolition and rebuild of the Property. On 28 November 2015 Miss Reynolds wrote to HMRC requesting a review of the decision to refuse her claim. However, in a

letter dated 13 January 2016 HMRC upheld the decision to refuse to make a VAT refund to Miss Reynolds who, on 5 February 2016, appealed to the Tribunal.

10. We now turn to the applicable legislation.

11. Under s 35 of the Value Added Tax Act 1994 ("VATA") a person constructing a building designed as a dwelling can claim a refund of VAT from HMRC provided that the work undertaken is "lawful and otherwise than in the course or furtherance of any business". For such a claim to be "lawful" it must have been carried out in accordance with "statutory planning consent" that has been granted in respect of that dwelling (see note (2)(d) Group 5 schedule 8 VATA applicable by virtue of s 35(4) VATA).

12. A claim for a refund of VAT must be made in accordance with regulation 201 of the Value Added Tax Regulations 1995 ("VAT Regulations") which, insofar as it applies to the present case, provides:

> 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][1] 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 had been granted, …

13. Section 34 VATA and regulation 201 of the VAT Regulations were considered by the Tax and Chancery Chamber of the Upper Tribunal (Judge Bishopp and Judge Powell) in *HMRC v Patel* [2015] STC 148. In that case Mr Patel had had sought planning permission to extend an existing dwelling but was advised that it was necessary to demolish and replace it. The council had been aware of building works and building regulations consent for the work had been granted but Mr Patel did not obtain new planning permission. Notwithstanding the lack of planning permission Mr Patel appealed against the refusal by HMRC to refund the VAT on the basis that he had carried out the work with the knowledge and approval of the council. The First-tier Tribunal ("FTT") adjourned the hearing to enable Mr Patel to make an application for retrospective planning permission which was subsequently granted. However, in allowing the appeal the FTT did not consider the effect of regulation 201(b)(iv) of the VAT Regulations.

14. In a decision which is binding on us the Upper Tribunal said, at [21]:

> "In our judgment the failure of the FTT to take the requirements of reg 201(b)(iv) into account in this way was wrong. 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 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. HMRC's appeal must succeed on this ground."

15. For HMRC Mrs Jane Ashworth contends that the demolition and re-building of the Property was not "lawful" when it was carried out as the planning permission in force at that time only permitted its extension and alteration. In any event, she says, retrospective planning granted on 13 November 2015 was not, and could not have been, provided to HMRC within three months of completion of the Property as required by regulation 201 of the VAT Regulations.

16. Miss Reynolds, who we found to be honest and truthful, says that HMRC's decision is wrong in that it does not properly take her circumstances into account, in particular she is not a property developer but a private individual who put her trust in the hands of her surveyor and planning and building inspectors. She refers to the lack of communication between the Planning and the Building department of the Council which was fully aware that the Property had been demolished and rebuilt. Understandably, having been open and honest with everyone concerned, Miss Reynolds feels that she has been unfairly treated.

17. However, she accepts, as she must, that the demolition and rebuilding of the Property was not in accordance with the planning permission then in force and that the retrospective planning permission was not provided to HMRC within three months of completion of the Property as specified by regulation 201 of the VAT Regulations.

18. As the Upper Tribunal in *Patel* recognised, the legislative requirements for claiming a VAT refund are strict and HMRC are allowed no discretion to accept something less than the prescribed documentation, neither can they extend the time limit. Equally it is not open to us to waive or modify these requirements, even if they lead to what appears to be an unfair result. As a Tribunal created by statute the FTT, unlike the High Court does not have an inherent jurisdiction, rather its jurisdiction is defined and limited by legislation and it does not extend to the power to override a statute (or supervise the conduct of HMRC). This is clear from the decision, which is binding on us, of the Tax and Chancery Chamber of the Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TC).

19. As such, although we do understand and sympathise with Miss Reynolds, we have no alternative but to dismiss the appeal.

20. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 15 AUGUST 2016