[2017] UKFTT 0846 (TC)

TC05571

Appeal number: TC/2016/02037

VAT – Zero-rating – Schedule 8 to VAT Act 1994 – Note 2(d) to Group 5 - Construction of new build home – building designed as a dwelling – retrospective planning permission - whether planning permission granted at the time of supply – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NIGEL WILLIAMS **Appellant**

- and -

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

TRIBUNAL: JUDGE RUPERT JONES

Sitting in public at Fox Court on 11 December 2016

David West of Booker Associates, tax adviser, for the Appellant

Bruce Robinson, Presenting Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Mr Nigel Williams ('the appellant') against a decision of HMRC contained in a letter dated 21 October 2015 to Oakdene Builders Chidham Ltd ('Oakdene').

2. HMRC decided that services undertaken on construction of the appellant's new dwelling could only be zero rated for VAT purposes from 10 August 2015 on which retrospective planning permission was granted. The dwelling in question is Little Hoyle, Hoyle Lane, Heyshott, West Sussex GU29 0DX ('the property').

3. The appellant contends that the zero rating should take from the earlier date from which planning consent was to be effective, namely the beginning of the construction of the property in March 2015.

The correct party to the appeal

4. The appellant is Mr Nigel Williams, the owner of the property. The appeal was initially accepted by the tribunal as being lodged by Oakdene with Mr Williams acting on its behalf. In July 2016, the tribunal reallocated Mr Williams as the appellant and wrote to him in those terms.

5. As will become apparent, there is no financial consequence to Oakdene of the tribunal's decision. However, if the zero-rating begins from the earlier date then Oakdene would be entitled to adjust its VAT return and zero-rate its supplies and the appellant would be able to re-claim from Oakdene the VAT he has paid them between March and August 2015.

6. Therefore, while HMRC's decision was issued to Oakdene and not to the appellant, both HMRC and Tribunal have accepted that the appellant is the proper party to the appeal. To the extent it is formally required therefore, I substitute the appellant as a party for Oakdene under Rule 9 of the Tribunal Rules.

The issue

7. The date from which the zero-rating of services undertaken by Oakdene on the construction of the property should begin turns upon the proper construction of Item 2 (a), Group 5 of Schedule 8 to the Value Added Tax Act 1994 (VATA 1994) and Note (2) (d) to Group 5.

8. Item 2 to Group 5 provides zero rating of "*The supply in the course of the construction of –*

(a) a building designed as a dwelling…..

of any services related to the construction…."

9. Under Note (2) to Group 5, for a building to qualify as being "*designed as a dwelling*" several conditions must be met, of which the one relevant to this appeal is:

"(d) statutory planning consent has been granted in respect of that dwelling and its construction …. has been carried out in accordance with that consent."

10. The issue in this appeal concerns the interpretation of the date that "*planning consent has been granted*". Is this the date the consent was granted or any earlier date that the consent was to be effective from?

The facts

11. The Tribunal heard supplementary oral evidence from Mr Williams in addition to the written material received from both parties. The facts were not in dispute.

12. The Representative in this appeal for the appellant, and previously for Oakdene, is Booker Associates ("Booker") of 4 Kimbers, Petersfield, Hampshire GU32 2JL.

13. Oakdene Builders Chidham Ltd ("Oakdene") was registered for VAT effective from 1 September 2009 under VAT Registration Number 977 9337 48.

14. A new planning application for extensions to the property was submitted on 26 August 2014 and the South Downs National Park Authority granted this planning permission (SDNP/14/04370/HOUS) on 17th November 2014**.**

15. On 2 March 2015, Oakdene, the contractors which the appellant had appointed in January 2015, started on site to undertake preparatory work for the extensions including demolition of sections of the existing structure.

16. On 12 March 2015, the Building Inspector drew attention to shortcomings in the remaining structure that made it inadvisable to build an extension onto it. The appellant appointed Sutcliff Consultants Ltd, engineering consultants, to confirm the Building Inspector's view.

17. Between the 13 and 15 March 2015, there were discussions between the appellant, the building inspector, the building surveyor appointed (Andrew Sutcliff)) and Oakdene that resulted in the decision to demolish the whole of the previous dwelling to ground level.

18. Following the complete demolition of the previous dwelling on the site, Oakdene, the contractor, commenced the construction of a completely new residential dwelling ('the property'). However, the existing planning consent only envisaged Little Hoyle being extended and the appellant did not at that time have planning permission to construct a new replacement dwelling on the site. The appellant's planning consultant, Steven Jupp, advised that the Town and Country Planning Act 1990 provided for this situation whereby planning permission for a development could be obtained retrospectively under Section 73A of the Act.

19. Therefore, the appellant decided that a new planning application should be made and the new planning consent would stand in the shoes of the original planning

consent dated 17 November 2014 i.e. the original planning consent would be superseded. Based on this information, and with the building contractor already on site, it was decided that the building work to construct a new replacement dwelling would commence immediately while a retrospective planning permission application was submitted.

20. In the period 16 to 18 March 2015, the existing building on the site was demolished to ground level and the site cleared to allow the new dwelling to be constructed.

21. A Planning Access and Design Statement ("the Planning Statement") dated May 2015 was prepared by Stephen Jupp MRTPI of 348 Chichester Road, Bognor Regis PO21 5EX in respect of an application for planning permission for Little Hoyle**.**

22. The Planning Statement was prepared on behalf of the applicant for planning permission, the owner of the site, Mr Nigel Williams. The Planning Statement was entitled, *"Little Hoyle, Heyshott Retention of Replacement Dwelling. Alternative approach to extensions to original dwelling permitted under SDNP/14/04370/HOUS."*

23. As set out above, the background to this was that initially planning permission was sought to alter and extend the property. Planning Statement section 2 set out the "*Relevant Planning History*" as follows:

- *SDNP/14/00614/HOUS – Single and two storey extensions and alterations. Approved 15.4.14*
- *SDNP/14/04370/HOUS - Single and two storey extensions and alterations. Approved 17.11.14*
- *SDNP/15/01498/DCOND – Discharge of condition 3 of planning permission SDNP/14/04370/HOUS – Details and samples of materials. Approved 28.4.14*

24. The proposal made in the Planning Statement was for the existing dwelling on the site to be demolished and completely rebuilt.

25. This was based on an "*Engineers Report*" dated 27 March 2015 prepared by Sutcliff Consultants Ltd, Chartered Building Engineers of Crossbush Cottage, 11 Crossbush Road, Felpham, Wet Sussex PO22 7LS and incorporated with the Planning Statement.

26. The Building Engineers' report followed a visit made by them to the site on 12 March 2015, by which date work had been started to alter and extend the dwelling by the Oakdene, which had been instructed by the appellant to carry out the works.

27. A planning application was submitted to South Downs National Park Authority ("South Downs") dated 29 May 2015. The description of the proposal at Section 3 of the application is as the title of the Planning Statement i.e. "*Retention of Replacement*

Dwelling. Alternative approach to extensions to original dwelling permitted under SDNP/14/04370/HOUS" i.e. to retain the new dwelling. The date when the work was to be started was stated to have been 1 April 2015.

28. The appellant contends that the work on the construction of a new building commenced when Oakdene came on site on 2 March 2015 rather than on 1 April 2015 because the preparatory work for the demolition was as much preparatory to construction of the new building as it would have been to the extensions originally proposed.

29. From the commencement of the work in March 2015, Oakdene commenced to charge the appellant VAT at the 20% rate provisionally pending him obtaining retrospective planning permission and the resolution of the VAT position.

30. Oakdene continued to work on site from March 2015 until completion of the building in December 2015. Between 2 March and 16 July 2015 the firm invoiced the appellant for the supply of their services inclusive of VAT. Oakdene gave the appellant invoices for various staged payment for works to Little Hoyle between 2 March and 16 July 2015 totalling £220,000 with VAT in the sum of £44,000 based on 20%. Each invoice described a different stage of works such as 'DPC', 'roof ready for tiling', 'roof tiled' and 'plastered shell stage'.

31. The invoices, amounts and descriptions were largely in accordance with the schedule of payments listed in a document dated 16 January 2015 at which time the extensions were proposed. The Schedule was not amended following the decision to completely demolish the structure: the milestones previously agreed remained appropriate.

32. On 10 August 2015 planning consent granted by South Downs under reference SDNP/15/02641/FUL.

33. On 12 August 2015 an email exchange took place between Mr Jupp and Rafael Grosso Macpherson of Chichester District Council (which acted in partnership with South Downs) in which:

- Mr Jupp sought confirmation that the planning consent, "*…grants retrospective permission for works for the erection of a dwelling, works which commenced on 1st April 2015.*"

- Mr Macpherson replied, "*Permission was granted on the 17 November 2014 for the erection of a house. On the 20 July 2015 that permission was granted with some amendments, such the proposed solar panels. Therefore, they constitute retrospective permission for the works…*"

34. From other documents this information appears to be incorrect. The 17 November 2014 permission still concerned alteration and extension of the original dwelling. The further permission granted on 10 August 2015 was for a new dwelling.

35. Booker Associates wrote to HMRC Written Enquiries Section on 8 September 2015 (following an earlier email enquiry on 24 August 2015) seeking clarification of the correct VAT treatment of building works carried out by Oakdene on behalf of the appellant on the property.

36. After considering the above information Officer Fiona Beckford of HMRC's Clearances Team issued the decision to Oakdene under appeal on 21 October 2015.

37. Booker Associates requested a review of the decision on 26 October 2015 and made further representations including reference to Mr Macpherson's email of 12 August 2015 regarding the planning consent being retrospective.

38. Officer Beckford treated the request as a reconsideration, confirmed her decision stood and offered a statutory review of her decision in a letter of 24 November 2015.

39. On the 6th December 2015, the appellant moved into the new dwelling when it was practically complete.

40. The offer of a statutory review was taken up by Booker by letter dated 17 December 2015, enclosing in support of their Client' case the Decision in *Mr Maurice Francis* [2012] UKFTT 359 (TC) and a letter from South Downs dated 8 December 2015.

41. The letter from South Downs dated 8 December 2015 clarified the basis of the planning consent given on 10 August 2015. It stated:

> "*Therefore this planning permission supersedes the planning permission granted in respect of this property on the 17th November 2014 (SDNP/14/04370/HOUS). The 10th August 2015 decision also back dates the planning permission to the commencement of the works to construct the new dwelling, therefore satisfying Section 73A(3) of the Act." **
> *The Town and Country Planning Act 1990.

42. The letter of 8 December 2015 enclosed a re-issued planning permission document dated 10 August 2015 which concludes with Informative Notes which stated:

For the avoidance of doubt this planning permission has been determined under the provisions of section 73A of the Town and Country Planning Act 1990 (Planning permission for development already carried out).

43. Officer Sharon Hanrahan carried out the review and wrote to Oakdene on 10 March 2016 upholding HMRC's decision**.**

44. Mr Williams notified an appeal to the Tribunal on 8 April 2016.

45. Thereafter there was correspondence with the tribunal in order to reallocate the appeal in the appellant's name, it having previously been registered as an appeal lodged by Oakdene.

The Law

46. Section 30(2) of VAT Act 1994 ("VATA") provides that a supply of services is zero-rated if the services are of a type specified in Schedule 8 to the Act.

47. Section 35 VATA provides (so far as relevant):

"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;

(*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 the Commissioners may by regulations prescribe or, in the case of documents, as the Commissioners may determine in accordance with the regulations.

…

(4) The notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group but this is subject to subsection (4A) below."

48. Item 2 to Group 5 of Schedule 8 provides for zero rating of "The supply in the course of the construction of –

(a) a building designed as a dwelling…..

of any services related to the construction…."

49. The Notes to Group 5 of schedule 8 to VATA include the following:

"(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.

…

(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*) subject to Note (17) below, 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."

50. Section 73A Town & Country Planning Act 1990 ("s 73A") provides:

"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."

51. In *Michael James Watson and the Commissioners For Her Majesty's Revenue & Customs* [2010] UKFTT 526 (TC) ("*Michael Watson*") Tribunal Judge Gort considered Note 2(d) to Group 5 of Schedule 8 to VATA. The Judge dismissed an appeal by appellant claiming zero rating on construction where retrospective planning permission did not extend to a time before the relevant work in respect of which VAT was reclaimed had begun to be carried out on a property.

52. She stated at paragraph 35 of her decision:

In my judgment Mr Zwart's reasoning as set out above is impeccable and therefore Mr Watson cannot succeed in this appeal. For Mr Watson to have succeeded he would have needed the Council to have used its powers under s.73A at the time it issued the retrospective planning consent to backdate the consent to 25 August 2005, so that he would have a valid planning permission at a time before the work began, this was not done by the Council for the reasons set out above. That they might have done it unfortunately does not avail Mr Watson in this appeal.

53. In *Mr Maurice Francis and the Commissioners For Her Majesty's Revenue & Customs* [2012] UKFTT 359 (TC) ("*Maurice Francis*") Tribunal Judge Kempster stated at paragraph 19 of his decision:

As conveyed to the parties at the conclusion of the first hearing (see ¶ 14 above), we agree with the conclusion of the Tribunal in *Watson* (quoted above) that, "For [the taxpayer] to have succeeded he would have needed the Council to have used its powers under s.73A at the time it issued the retrospective planning consent to backdate the consent …, so that he would have a valid planning permission at a time before the work began …".

54. In *Northside Management Ltd and the Commissioners For Her Majesty's Revenue & Customs* [2012] UKFTT 647 (TC) ("*Northside Management*") Tribunal Judge Kenneth Mure QC stated at paragraphs 80 to 93 of his decision:

80. Mr Puzey then addressed us on the effect of Sections 73A TCPA in the context of the VAT provisions under discussion. There was in his view an illogicality and unfairness in Mr Zwart's approach. If years later zero-rating became applicable, a refund could not necessarily be made to the party entitled and an undeserved windfall could result. Limitation provisions could preclude a repayment. The past tense used in Note number (2)(d) pointed to the time of construction, unaffected by later events.

81. Finally, Mr Puzey reviewed the authorities cited. He founded particularly on *Harris* [Mr and Mrs Harris v HMRC [2004] UK VAT V18822], the circumstances of which bore to be similar to those of the present appeal. There in relation to a property conversion a VAT repayment was due if it could be used as a separate dwelling. That condition had to be satisfied at completion not some later date –

82. "[24] Our decision …. is that the condition (that the separate use is not prohibited by the term of any planning consent) has to be satisfied at the time of completion of the building and not at any later time".

83. The illogicality of relying on a later date was commented on –

84. [23] …… (a) any relevant conditions have to be satisfied at the time of the design of the building (that is, at the date of the planning consent) and not later. We are confirmed in our view by the fact that, if a later planning consent could fulfil the condition, then in theory a claim for a refund could be made many years after the completion of the building, which could not have been intended".

85. While *Roper* [Alan Roper & Sons Limited (MAN/96/1169)] related to the somewhat distinct context of a Listed Building it affirmed the same principle in Mr Puzey's view –

86. "… VAT is concerned with the making of a supply – in this case, the carrying out of the works – and it seems to me that authority for carrying out the works must be in existence at the time the supply is made if the benefit of zero-rating is to be available. One must consider the circumstances which pertained when the supply was made. At that time the Appellant did not have written listed building consent: ….. Later developments cannot alter the circumstances at the time of supply".

87. So too, in *Lamming* [*Keith Lamming v HMRC* [2009] UKFTT 44 (TC)] the Judge concluded –

88. "It comes down to the fact that a new dwelling requires specific planning permission and in this case there was no such specific planning permission. Even were there to be a retrospective planning permission granted, the relevant time for HMRC to consider whether a building is to be zero-rated is at the time of completion. There was at no time planning permission for an independent dwelling, and the new building does not fall within the exemption provided by Group 5 of Schedule 8 of the VATA".

89. While the comments by the same Judge in *Watson* at paras 33(b) and 35 might 10 seem to add support to Mr Zwart's argument, these were made obiter and bore to conflict with her reasoning in Lamming. Mr Puzey urged us to disregard them as being in conflict with basic principles of VAT.

90. Ultimately none of these decisions was binding and there was no higher court authority. Only HMRC had been represented (coincidentally by Mr Zwart) in *Lamming, Haigh and*

Watson. There seemed to be a conflicting decision in principle between *Lamming and Watson*. The appropriate course for this Tribunal, Mr Puzey submitted, was to be guided by fundamental principles. Liability to the tax should not be subject to changes of principle once liability was established. So far as Section 73A TCPA was concerned, planning law principles should not be conclusive for VAT, *esto* there had been a backdating of Planning Permission (which Mr Puzey did not concede). The 2009 consent did not bear to remove retrospectively the residential restriction. Neither did it specify a particular earlier date (Mr Zwart could only suggest alternative dates of November 2004 or October 2005). The significance of time of supply became meaningless if it could be changed years later by the taxpayer unilaterally, Mr Puzey argued. There had been no supervening enactment or emerging evidence which rendered the decision to assess in 2007 wrong.

91. DECISION

92. We consider that the approach of Mr Puzey is correct.

93. This dispute involves the basic structural pattern of VAT. Put simply, the charge to VAT arises in the event of a taxable supply being made, and the date of that supply is the date when liability is determined. Here, in our view, the supply was made in about October 2005 when the Leases were granted. It would follow that that is the date when liability arises, and critically that is when the categorisation of the supply for tax purposes should be made. It is in our view strained and fanciful to suggest, as Mr Zwart does, that that date can be varied and the nature of the supply changed subsequently by the unilateral act of the taxpayer. Mr Zwart seeks to show that the wording of Notes 2 and 13 of Item no 1 contemplates the categorisation of the supply now and by reference to the current circumstances prevailing. That argument must, in our view, be flawed: it would enable (as here) 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 planning permission should not. If the assessment cannot be challenged as at the date when it is made, that must surely be resolutive of the matter. Retrospective changes of facts and circumstances would not alter that, we consider.

55. In *HMRC v Asim Patel* [2014] UKUT 0361 (TCC) Mr Patel had appealed to the FTT against HMRC's refusal to refund input tax incurred on building works claimed under section 35 VATA94. HMRC refused Mr Patel's claim on the ground that the planning permission obtained did not relate to the works undertaken. Mr Patel had obtained planning permission for an extension to an existing dwelling but it became clear when the building works started that it would be necessary to demolish and rebuild the dwelling. The planning authority did not object to the revised works and Mr Patel did not obtain a new planning permission. Mr Patel appealed to the FTT. The appeal was stayed to allow Mr Patel to obtain retrospective planning permission for the works, which he did. Following the grant of retrospective planning permission, the FTT held that the input VAT was repayable and allowed Mr Patel's appeal. HMRC appealed to the UT which held that retrospective planning permission did not assist in that case because Mr Patel had not obtained it until after the time limit for making a claim under section 35 VATA had expired. The UT did not express any view on whether the claim would have been upheld if the retrospective planning permission had been given in time to make a claim.

56. In *Thomas Brennan and the Commissioners For Her Majesty's Revenue & Customs* [2015] UKFTT 647 (TC) ("*Thomas Brennan*") Tribunal Judge Michael Connell stated at paragraphs 48 and 49 of his decision:

48. The Appellant in our view did not set out to construct a new dwelling. It cannot have been in his contemplation at the outset that he would be entitled to make a DIY VAT refund claim under s 35 on completion of the works as permitted by the 2009 and 2010 planning consents. The virtual reconstruction of the dwelling happened for various reasons, as explained by the architect, but there was never any intention either at the outset or during the course of alteration works to demolish the dwelling and build an entirely new one, as contemplated by s 35 and the Notes to Schedule 8 Group 5. It seems to us that the application for a s 35 DIY refund was an afterthought which, given the strict requirements of the legislation, was bound to be fundamentally flawed.

49. Under s 73A TCPA 1990 it is possible to obtain retrospective planning permission. However, even if the Appellant had obtained such retrospective permission, that would not have been sufficient to render the works "lawful" at the time of the claim. This point was not specifically argued before us and the Upper Tribunal in *Patel* did not express a view on the matter. However, as HMRC argue, if retrospective planning permission could fulfil the legislative requirement in that regard, in theory a claim for refund could be made after completion of the works and in some cases many years thereafter, which cannot have been the intended consequence of the legislation.

Submissions

Submissions on behalf of the appellant

49. Mr West, on behalf of the appellant, made extensive and persuasive submissions on behalf of the appellant. I hope I do them no disservice by summarising them as follows:

50. He submitted that in line with the Tribunal decision in *Maurice Francis* the condition set by Note 2 (d) of Group 5, schedule 8 VATA 1994 is satisfied for zero-rating to be applied from March 2015 for the following reasons:

51. South Downs exercised its powers under Section 73A of the Town and Country Planning Act 1990 on 10 August 2015 when it granted planning permission for a new dwelling to be constructed. The 10 August 2015 decision backdates the permission from the commencement of the works to construct the new dwelling, which satisfies Section 73A (3) of TCPA 1990.

52. The Planning Department's letter of 8 December 2015 is in error in stating that the works commenced on 1 April 2015 as they began on 2 March 2015. The planning permission was granted during the course of construction works as the dwelling was completed and occupied on 6 December 2015.

53. The effect of the South Downs decision is that the 10 August 2015 permission "*…stands in the shoes of the 17 November 2014 Permission…*"

54. Therefore, Oakdene was entitled to zero-rate all supplies of services to construct the new dwelling from March 2015 onwards.

55. Mr West submitted that HMRC's decision is not consistent with its own guidance in Notices 708 and 700/45, where for example a taxpayer has to issue a zero-rating certificate after work has already begun. Where the certificate has been issued late HMRC's guidance is that the contractor can make the appropriate adjustments to the VAT charged and refund overcharged VAT to its customer.

56. He submitted that HMRC have not followed their own published Guidance in Notice 708 Sections 3 and 14 and at VCONST14160.

The relevance of the effective date of the planning permission arises from the fact that the contractor charged VAT at the 20% rate from the commencement of the project until planning permission was confirmed on the 10th August.

57. It was the appellant's contention that the grant of planning permission from the commencement of the project, albeit retrospectively, should enable this to be corrected and any VAT paid during this provisional period to be refunded to the appellant.

58. Mr West submitted that Note 2(d) to Group 5 of Schedule 8 is not time sensitive, as HMRC claim, as the legislation in Note 2(d) only requires that "statutory planning consent has been granted in respect of that dwelling". The legislation is in the "past tense" as HMRC contend. However, if the drafters of the VAT legislation had intended that zero-rating only applied from the date of the planning permission decision, then the legislation would state, for example, "statutory planning consent has been granted in respect of that dwelling but only from the date of the planning decision".

59. Mr West submitted that because the legislation does not have this additional wording the Note 2(d) test is in fact satisfied and there is no VAT legislation preventing the ability of the building contractor to make legitimate adjustments to the amount of VAT charged in the period from the commencement of the works to 9th August 2015.

60. Therefore, he submitted, Oakdene is entitled to take corrective action to refund the VAT charged in the period from the commencement of the works to 9th August 2015.

61. Mr West sought to distinguish the *Northside* decision as focusing on the impact of retrospectively removing a particular planning permission prohibition i.e. Note 2(c) and Note 13 tests and not Note 2(d). It was the appellant's contention that the *Northside Management* decision does not demonstrate that the Respondents argument in this present case is correct. This is because in the first instance the case concerned Northside Management's VAT treatment of its supplies to 4 third parties and not the VAT treatment of the building contractor's supplies when the 4 properties were being constructed. The issue of the correct VAT treatment of the building contractor's charges when the 4 properties were built was never considered by the Tribunal

presumably because they were constructed as holiday accommodation and any VAT charged by contractors would have been recovered in full throughout the duration of the development. The fact is the retrospective planning permission date would have been ineffective with regards to the building contractor's charges because the removal of a prohibition (a Note 2(c) test) even retrospectively has no effect on the VAT treatment of the supply that has already taken place. He submitted that HMRC's guidance confirms this. It states the following:

> The purpose of the VAT legislation under item 2(a) Group 5 Schedule 8 VAT Act 1994 is to zero-rate construction services of new dwellings. This is provided the Note 2 tests are all passed. The purpose of the Section 35 VAT Act 1994 legislation is to put a person constructing a new dwelling themselves (referred to a DIY VAT refund claim) in the exact same position as an individual having a new dwelling constructed by a building contractor i.e. a person constructing a new dwelling can only claim input tax on goods purchased and used to construct the new dwelling.

62. It was the appellant's contention that a "purposive" approach is supposed to be adopted with regards to VAT legislation not a "literal" approach. Mr West argued that a "purposive" approach was adopted in both the *M J Watson* and *Maurice Francis* cases in that the Tribunals recognised that if the planning permission decision was granted under Section 73A of the Town and Country Planning Act 1990, the planning permission had retrospective effect. This meant that the decision covered the whole project from commencement to completion.

63. It was the appellant's contention that to fulfil the intent of the original drafters of the VAT legislation, the approach must be to recognise that the project from start to finish has to pass the Note 2(d) test i.e. "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" and as such all the construction supplies qualify to be zero-rated. Thus the purpose of the VAT legislation is properly fulfilled i.e. zero-rating all the construction work to create a new dwelling. HMRC's argument, in the appellant's view, produces an absurd result in that the Appellant's development passes all the Note 2(d) tests but VAT is still chargeable at the 20% rate on part of the development (prior to 10th August 2015). This is at complete odds with the purpose of the VAT legislation regarding the correct VAT treatment of new dwellings.

HMRC

64. Mr Robinson, on behalf of HMRC, submitted that a distinction needed to be made between:

- On the one hand, the effects of retrospective grants of planning permission on the lawfulness of building developments for planning law purposes; and
- On the other hand, the VAT consequences of such retrospective changes to planning permission.

65. HMRC maintain that when retrospective planning consent is given, it affects the VAT supply from the date it is issued. As the planning permission was not in

existence when construction of the new dwelling was started the zero rating cannot apply to any services supplied before the date that planning permission was granted.

66. Whilst South Downs National Park Authority might accept that the planning consent granted on 10 August 2015 supersedes that of 17 November 2014, in accordance with Section 73A (3) of the Town and Country Planning Act 1990, HMRC submitted that such retrospective planning permission does not satisfy the requirements of Note 2(d), Group 5, Schedule 8 of the VATA 1994.

67. Crucially, HMRC submit that Note (2) (d) to Group 5, Schedule 8 has been drafted in the past tense. It states "statutory planning **has been granted** in respect of that dwelling and its construction or conversion **has been carried out in accordance with that consent."** HMRC contend that the legislation does not provide for future planning consent to approve retrospective works.

68. As regards the decision in *Maurice Francis*, Mr Robinson submitted that the facts of that case can be distinguished from those of the instant appeal, not least because it concerned the DIY scheme. He also submitted that as a First-tier Tribunal decision it was not binding. In any event, HMRC submitted that *Maurice Francis* was wrongly decided.

69. Mr Robinson contended that the grant of planning permission, for the purposes of the application of VAT, goes forward from a specific date and confers legality on the works from that date for tax purposes. The Local Planning Authority subsequently taking take no further action in respect of the earlier development is not relevant so far as VAT is concerned. The legality, for VAT legislation purposes, hinges on the *'carrying out of the works'* which HMRC have consistently interpreted as being in the present tense.

70. HMRC could not agree with the decision reached in *Maurice Francis* and relied upon instead the First-tier decisions in *Northside* and *Thomas Brennan*.

71. HMRC could not agree that the decision is inconsistent with their own guidance in Notice 708 and VCONST14260. Mr Robinson submitted that the issue is not one of zero-rating as opposed to standard rating of a whole project, but one concerning at which point supplies can be zero-rated, by reference to planning consent.

72. Zero rating could apply to the construction of the dwelling from the date that the retrospective planning consent was issued, which was the 10th August 2015. If there were invoices still to be issued after that date, then their tax point would fall after the planning permission had been granted.

73. As regards cases concerning DIY claims, the law at Section 35 (1) (b) Value Added Tax Act 1994 requires that the carrying out of the works on the dwelling being claimed for are lawful at the time of the claim.

74. HMRC guidance at VCONST14160 also states – "Should the removal of a prohibition be effective from a time before completion, then works from that point to completion satisfy the Note. However, the practical effect of removing the condition

before completion is that supplies of building work **up to the time it is removed** (HMRC emphasis) are not in respect of a building designed as a dwelling and will not be eligible for the zero rate or reduced rate."

75. Mr Robinson submitted that retrospective planning permission makes the property lawful as regards planning law but does not affect the VAT chargeable on supplies that have already taken place. The time of supply has already passed. The time of supply is dictated by EC Directive 2006/112, Article. 63 – *"The chargeable event shall occur when the goods or the services are supplied."*

76. He submitted that this is enacted in UK law in Regulation 93(1) of the VAT Regulations 1995/2518:

– Where services, or services together with goods, are supplied in the course of the construction, alteration, demolition, repair or maintenance of a building or any civil engineering work under a contract which provides for payment for such supplies to be made periodically or from time to time, those services or goods and services shall be treated as separately and successively supplied at the earliest of the following times –

> **(1)** each time that a payment is received by the supplier, or (b) each time that the supplier issues a VAT invoice…..

Discussion and decision

77. Deciding this case is not straightforward.

78. There exist two conflicting sets of decisions from the First-Tier Tribunal. Although these decisions largely concentrate upon the DIY scheme, which is not applicable to this case, the points of principle are persuasive. I respectfully prefer to follow the line of reasoning contained in the decisions of *Northside* and *Thomas Brennan* to that of *Watson* and *Francis*.

79. The Tribunal must always begin by analysing the statutory language and attempting to discern its ordinary and natural meaning.

80. Item 2 to Group 5 of Schedule 8 to VATA provides for zero rating of

"The supply in the course of the construction of –

a building designed as a dwelling…..

of any services related to the construction…."

81. The Notes to Group 5 of Schedule 8 to VATA include the following:

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

…..; 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.

82. Read together, the effect of the relevant requirements for the zero rating of a supply is that it is made:

in the course of the construction…..of a building designed as a dwelling…where…statutory planning consent has been granted…and its construction has been carried out in accordance with that consent.

83. The Tribunal is of the view that the use of the past tense in '*has been granted*' and '*has been carried out*' is not determinative of the interpretation. The language does not explicitly state the point in time at which the consent must have been granted or the construction have been carried out. Is it at the time of the supply of the services, the completion of the construction, the time at which a VAT return is due or may be adjusted, or some other time?

84. On the appellant's argument, the planning consent for the property has been granted on 10 August 2015 retrospectively but it begins from the commencement of the work. Thus it covers the supplies between March 2015 and 10 August 2015 which should therefore be zero-rated. The appellant would and does say that planning consent has been granted, it was granted in the course of construction, to have effect from its commencement, and its construction has been carried out in accordance with that consent.

85. Therefore, there is a persuasive argument made by the appellant, that the supplies were made in the course of construction of a dwelling for which planning permission has been granted. It is an attractive line of reasoning and it might be easy for this Tribunal to follow the decisions in *Watson* and *Francis*, and find that retrospective planning permission, whenever granted, would be sufficient to satisfy Note 5, item 2(d) and render the building designed as a dwelling for the purposes of zero-rating.

86. Indeed, the appellant would not require this Tribunal to go so far as holding that retrospective planning permission, even if granted after the construction of the property, would satisfy the statutory requirements.

87. The appellant would and does say that his case is factually distinct from other decided cases. Planning consent for the appellant's property has been granted prior to the completion of its construction, in fact mid-way through the construction which took place between March and December 2015. Therefore, it is argues, so long as planning permission has been granted 'in the course of construction' and the permission applies in respect of the commencement of the works in question then this suffices to fall within Note 2(d).

88. However, the Tribunal not consider this to be the correct interpretation of the statutory provisions.

89. The statutory language in Note 5, item 2(d) of Schedule 8 to VATA speaks of planning consent being 'granted', not 'being in effect'. The Tribunal asks itself the simple question, when was the planning permission was granted? The answer must be that it was granted on 10 August 2015 and had not been granted on the earlier date, being the commencement of the works in March 2015.

90. The Tribunal agrees with HMRC's submissions that it is important to distinguish between legislation concerning VAT and that concerning Planning. The Tribunal should be cautious to read across planning legislation into tax legislation. Having said that, the planning legislation does not necessarily assist the appellant. Section 73A(3) of TCPA provides for retrospective planning permission to 'be granted so as to have effect from' an earlier date than the application. It does not speak of the planning permission being retrospectively 'granted' from an earlier date.

91. The appellant was granted planning permission to have retrospective effect from the commencement of the works but he was not granted planning permission on or before March 2015. He was granted planning permission on 10 August 2015.

92. When the work was carried out between March and 9 August 2015 and the supplies were made in the course of construction, no planning permission had been granted or was in effect.

93. Furthermore, even were the Tribunal to be relying too heavily on a narrow interpretation of the statutory language, a purposive approach does not necessarily assist the appellant.

94. The Tribunal agrees with the submissions of HMRC that the relevant time to examine for the purposes of VAT liability is the time at which the supplies were made. The time of supply is dictated by EC Directive 2006/112, Article. 63 – "*The chargeable event shall occur when the goods or the services are supplied.*"

95. This interpretation is entirely consistent with the statutory language of zero rating for 'supply of services in the course of construction of a building designed as a dwelling where planning permission has been granted and the construction carried out in accordance with that permission.' The Tribunal considers that the ordinary and natural meaning of the statutory wording is that the planning permission has been granted at or before the supply of the services.

96. The Tribunal therefore concludes 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 the construction nor at any other time such as the date of the claim for the refund of any VAT.

97. As the decisions in *Northside* and *Thomas Brennan* observe, were an appellant able to claim a refund to VAT based on a retrospective grant of planning permission, whether before or after completion of construction, this may mean the claim occurring many years after the supplies took place (it goes without saying some construction may take many years to complete).

98. I agree with the reasoning of Judge Kenneth Mure QC at paragraphs 80 to 93 of his decision in *Northside* as set out above. Therefore, it does not suffice for the purpose of zero-rating that the permission has been granted in the course of construction (whether prospectively or as in this case, part prospectively and part retrospectively) and the completion of the construction has been carried out in accordance with that permission.

99. In particular, at paragraph 93 of *Northside* the Judge stated:

> This dispute involves the basic structural pattern of VAT. Put simply, the charge to VAT arises in the event of a taxable supply being made, and the date of that supply is the date when liability is determined. Here, in our view, the supply was made in about October 2005 when the Leases were granted. ……. That argument must, in our view, be flawed: it would enable (as here) 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 planning permission should not. If the assessment cannot be challenged as at the date when it is made, that must surely be resolutive of the matter. Retrospective changes of facts and circumstances would not alter that, we consider.

100. There may yet be some room for argument as to whether the grant of retrospective planning permission is a supervening factual or legal change to the nature of the supply or simply a change to the nature of the conditions surrounding the supply. Equally in this appeal the supervening change to grant planning permission was not an act of the taxpayer, supplier or recipient of the services but an act of a third party, namely the council, although brought about at the appellant's request. However, I do not think such nuances can assist the appellant in this case.

101. The supplies of construction services to the appellant by Oakdene between March and 9 August 2015 were subject to VAT at the time they were made. Any assessment by HMRC against Oakdene, had it failed to account for VAT, could not have been challenged if it had been made at the time. The retrospective grant of planning permission is a supervening factual or legal event. The nature of the supplies when made were not ones subject to zero-rating because no planning permission had been granted.

102. Even though planning permission was later granted, in part prospectively for the remaining works between August and December 2015 and in part retrospectively for the works conducted between March and August 2015, this does not change the VAT position. Those supplies following the grant of planning permission were properly zero-rated and those supplies prior to the grant were and are subject to VAT.

103. The supply of the various services to construct the dwelling cannot be considered one supply but a series of individual supplies as separately invoiced and described at the time. The Tribunal relies upon the variously described invoices and staged payment plan. Indeed, Regulation 93 of the VAT Regulations 1995 requires each supply to be treated separately as invoiced. Therefore the appellant could not, and does not, argue that the supply of services was one continuous supply up until the conclusion and completion of the construction by which time planning permission had been granted. It is not sufficient for VAT purposes that planning permission is in

place prior to the completion of the construction. On the facts of this case the construction was made up of a set of individual supplies rather than one continuous supply.

104. The Tribunal understands that this result may seem hard on the appellants. The purpose behind the zero rating for VAT is to encourage the construction of new homes. The appellant properly paid for VAT on the construction services performed by Oakdene between March and August 2015. All of the VAT was paid up front by the appellant as required and only thereafter did the appellant, on behalf of himself and Oakdene, seek to query the VAT position. On the appellant's case, had Oakdene held off invoicing the appellant until after 10 August 2015 rather than invoicing the appellant contemporaneously, then there may have been an argument that these supplies could have been zero-rated. However, on the tribunal's analysis any invoice submitted would have to reflect the VAT status as at the time of supply.

105. All that can be said is that the appellant must accept he took a risk in beginning the construction of his property at a time at which he did not have planning permission in place. Indeed, he only applied for planning consent over two months after construction begun. He placed himself at a far greater risk than simply the liability to pay VAT on invoices from Oakdene. He risked the refusal of planning permission and potential destruction of the property itself.

106. For the reasons set out above, and despite the Tribunal having some sympathy for the appellant's position, this appeal must be dismissed.

107. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 21 DECEMBER 2016