



TC07489

Appeal number: TC/2019/00516

Value Added Tax - Repayment claim under DIY Builders' and Converters' VAT Refund Scheme - claim refused by HMRC - whether VATA s 35 and VAT Regulations 1995 reg 201 satisfied - no - claim failed to meet reg 201 requirements - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SATISH CHANDER ARORA & SUNITA ARORA Appellants

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
 MEMBER SONIA GABLE**

**Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester on 24
October 2019**

Mr Satish Arora for the Appellants

Mr Conner Fallon, Officer of HMRC, for the Respondents

DECISION

The Appeal

1. This is an appeal by Mr Satish Chander Arora and Mrs Sunita Arora (“the appellants”) against HMRC’s decision under s 35 of the Value Added Tax Act 1994 (“the Act”), originally made on 10 October 2018, which was upheld upon review by a letter dated 18 December 2018, to refuse their Value Added Tax (“VAT”) refund claim made under the DIY Housebuilders Scheme, on the ground that the application was deemed to be out of time. The total amount of the claim under appeal is £25,276.70.

2. The sole point at issue is whether the appellants’ claim was submitted within the time limits imposed by s 35(2) VATA 1994 and regulation 201 VATR 1995.

Background

3. On 20 December 2011 a planning application was submitted by the appellants to Bury Council (Planning, Environmental and Regulatory Services Division) [“Bury Council”] for approval of the demolition of an existing bungalow and erection of a new two storey 5 bedroom dwelling, at 4 Higher Croft, Whitefield, Manchester, M45 7LY.

4. On 6 February 2012 Bury Council granted full planning permission, pursuant to Section 91 Town and Planning Act 1990, for the development works. Building Regulation Approval was granted on 20 November 2012.

5. The appellants provided a schedule of 327 VAT invoices, mainly in chronological form, of goods supplied, dated from around March 2012 and finishing for the most part in November 2015. The nature of the goods supplied follows an expected pattern, building materials, steelwork, timber, roofing, window frames and glazing which continued through 2013 and 2014. In 2015 invoices principally related to plastering, heating and plumbing, electrical works, lighting, flooring, tiling, bathroom fitments and internal decoration. Some of the invoices in 2015 related to outside work such as paving and building materials for the driveway. There were some invoices in early 2016 but these appear to have related to post completion work.

6. By the end of June 2015 the property was fit for habitation. On 1 July 2015 the property was registered for and became liable to Council Tax. The appellants occupied the property in August 2015.

7. The appellants acknowledge that almost all the work had been completed by the end of 2015 and that all snagging and various items of minor works had finished by December 2016.

8. Paragraph 16 of the VAT claim form for new houses (VAT431NB) states;

“A building is normally considered to be completed when it has been finished according to its original plans. Remember that you can only make one claim no later

than three months after the construction work is completed. The three months will usually run from the date of the document you are using as your completion evidence.”

9. HMRC guidance in VCONST02530 states that:

5 “There is no one factor that will always dictate whether building works are complete: as circumstances will vary from project to project. As a general rule, a building is regarded as being in the course of construction until all main elements for it to function for its intended purpose are in place.”

10. Paragraph 14 of VAT431NB [VAT refunds for DIY Housebuilders Claim form - New Houses] states:

10 “If you do not have a completion certificate yet we will accept one of the following documents

- a habitation letter from the local authority...
- in England and Wales, a VOA: Notice of making a New Entry into the Valuation List

15 A building is normally considered to be completed when it has been finished according to its original plans. The three months will usually run from the date of the document you are using as your completion evidence.”

11. Section 3.3.2 of VAT Notice 708 Buildings and Construction also states:

20 “Completion takes place at a given moment in time. That point in time is determined by weighing up the relevant factors of the project, such as:

- when a Certificate of Completion is issued that a property has been built in accordance with approved plans and specifications.
- the scope of the planning consent and variations to it.
- whether the building is habitable or fit for purpose.”

25

12. The appellants applied to Bury Council for a certificate of completion in December 2016, with the intention of submitting their DIY VAT reclaim.

30 13. In February 2017, the Council informed the appellants that their electrical installation certificate was not valid as it had to be registered online. By that time their electrician had retired and the certificate could not be issued as it had to be filed online within 60 days of the paper copy, which had been signed off on 14 April 2016. No other electrician could certify the installation and it was not until April 2018 that the appellants were able to obtain an electrical installation condition report by a qualified NIEIC approved contractor to sign off the installation and organise another
35 visit from a building regulations officer from the Council, which acknowledged some delay on its own part and agreed to issue a Completion Certificate.

14. On 24 April 2018 Bury Council issued a Certificate of Completion, with an effective date of 9 April 2018.

15. On 23 July 2018 HMRC received the appellants' 'Refunds for DIY Housebuilders Claim' form, VAT431N13, dated 18 July 2018.

16. On 7 August 2018, HMRC acknowledged receipt of the claim and requested further detailed information from the appellants, as below:

- 5
- The date of occupation of the property.
 - The completion date of the works undertaken at the property.
 - Clarification of information given on the claim form.

10 17. On 7 September 2018 the appellants responded to the information request. They provided:

- 15
- Confirmation that the property was occupied in August 2015.
 - Confirmation that the property was completed on or around November 2016, apart from some lighting, decorating and outside paving.
 - The information requested. Work completed between the property being occupied and November 2016 included two bathrooms, the main kitchen, decorations, bedrooms, wardrobes, cabinets and fixed furnishings.

20 18. On 10 October 2018 HMRC rejected the appellants claim on the grounds that the property was deemed to have been completed more than three months before the submission of the VAT refund application.

25 19. On 6 November 2018 the appellants requested a review of the rejection decision. At the same time they provided supplementary evidence [that had been requested by the Council before the issue of the completion certificate] namely an Air Tightness Test Sheet, a Building Leakage Test and an Electrical Certificate and Electrical Installation Condition Report.

20. In the same letter the appellants said;

"Back in 2015, we submitted all required gas, electrical etc. as advised [by the Council] to obtain the occupation certificate, which was granted, though the building was not complete.

30 We occupied the house in August 2015 and started living there. The construction work was still going on.

In April 2016 on a routine visit, the regulation officer suggested we should also submit an air tightness certificate and an electrical installation certificate, to sign off completion.

35 We completed the rest of the work and submitted the required certificates in December 2016.

40 After not hearing back from the council for a couple of months we enquired, why we had not yet received our completion certificate. The council pointed out that our electrical installation certificate was not valid because the ... certificate should have been registered online."

21. On 18 December 2018 HMRC's review conclusion decision upheld the original decision to reject the VAT reclaim.

22. On 14 January 2019 the appellants submitted an appeal to the Tribunal Service.

The Evidence

5 23. Both parties provided bundles of documents, which included the appellants' VAT refund claim, the VAT refusal decision and the appellants' response to the decision, planning consent for the property, an occupation certificate, the Bury Council completion certificate, correspondence between the parties, relevant legislation and case law authorities. Mr Arora provided oral evidence.

10 **Burden of Proof**

24. The burden of proof rests with the appellants to show that their claim is a valid one. The standard of proof is the civil standard, on the balance of probabilities.

Legislation

25. Section 35 of VATA provides (so far as relevant to this appeal) as follows:

15 "(1) Where -

(a) a person carries out works to which this section applies,

(b) his carrying out of the works is lawful and otherwise in the course or furtherance of any business, and

20 (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;

25 (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 under this section unless the claim -

30 (a) is made in such time and in such form and manner, and contains such information, and

(b) is accompanied by such documents, whether by 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....”

The Note (2)(d) to Group 5 of Schedule 8 is the only Note relevant in this case. It reads as follows:

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

(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.”

26. The Regulations to which s 35(2) refer are the Value Added Tax Regulations
10 1995 (SI 1995/2518), of which reg 201 is material in this case. It provides (so far as relevant) as follows:

“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
15 building the relevant form for the purposes of the claim containing the full particulars required therein and

(b) at the same time furnishing to them-

(i) a certificate of completion obtained from a local authority or such other
documentary evidence of completion of the building as is satisfactory to the
Commissioners,

20 (ii) an invoice showing the registration number of the person supplying the goods, whether or not such an invoice is a VAT invoice, in respect of each supply of goods on which VAT has been paid which have been incorporated into the building or its site, ...

(iv) documentary evidence that planning permission for the building has been
25 granted....”

27. Regulation 17 of the Building Regulations 2010 sets out requirements imposed on a Local Authority to issue a Certificate of Completion in respect of a building.

“Completion certificates

30 17. (1) A local authority shall give a completion certificate in accordance with this regulation and as provided for in paragraph (2) where -

(a) they receive a notice under regulation 16(4) or (5) that building work has been completed, or, that a building has been partly occupied before completion; and

(b) they have either -

35 (i) been notified, in accordance with regulation 14(4), that the building is a building to which the Regulatory Reform (Fire Safety) Order 2005 applies, or will apply after the completion of the work; or

(ii) been requested, in accordance with regulation 14(5), to give a completion certificate.

5 (2) Where in relation to any building work or, as the case may be, to any part of a building which has been occupied before completion, a local authority have been able to ascertain, after taking all reasonable steps, that the relevant requirements specified in the certificate have been satisfied, they shall give a certificate to that effect.

(3) In this regulation “relevant requirements” mean -

(a) in a case mentioned in paragraph (1)(b)(i), the applicable requirements of regulation 38 and Part B of Schedule 1 (fire safety); and

10 (b) in a case mentioned in paragraph (1)(b)(ii), any applicable requirements of regulations 26 (target CO₂ emission rates for new buildings), 29 (energy performance certificates), 36 (water efficiency of new dwellings) and Schedule 1.

(4) A certificate given in accordance with this regulation shall be evidence (but not conclusive evidence) that the requirements specified in the certificate have been complied with.”

15 **Appellants’ Case**

28. The appellants’ grounds of appeal are that they have complied with s 35(2) VATA and regulation 201 VATR 1995, having submitted their VAT refund claim timeously, that is within 3 months of receipt of a Completion Certificate issued by Bury Council, which they say had been delayed due to circumstances beyond their
20 control. The appellants assert that a property is not ‘completed’ until a completion certificate is issued by the relevant Local Authority. The completion certificate was issued on 24 April 2018 and their VAT Refund claim was submitted to HMRC on 18 July 2018.

25 29. The appellants say that until they received the certificate of completion, they had no other evidence of completion of the dwelling to give to HMRC. They say that the local authority should have issued the completion certificate within eight weeks of their application, and that the delay in the certificate being issued was outside their control. They filed their DIY VAT reclaim in accordance with information available to them on the web, which says that only one claim can be made and that the claim
30 should be made within three months of the date of the completion certificate. They say they could not have made their claim any sooner.

30. **HMRC’s Case**

31. By virtue of Section 35(1)(b) of the VATA 94, the appellants, having erected a new build property, were able to submit a VAT new builder’s claim form to HMRC.
35 HMRC do not seek to challenge the lawfulness of the constructed building.

32. Regulation 201(a) of the VAT regulations 1994 states that the three month period in which the claimant must make their application starts at the point the building work is considered as being complete. However, it does not state that a certificate of completion obtained from the local authority will, in all cases, indicate
40 the definitive date that a project has been completed.

33. Regulation 201(b) merely indicates that a certificate of completion obtained from a local authority is one form of evidence that can be provided to show that the building work is complete. Indeed, the claimant is not required to obtain a certificate of completion, and in some cases, a local authority may never issue a certificate.

5 *Habitation of Property*

34. The property was occupied in August 2015 and Council Tax rated on 1 July 2015, at which date the property was habitable and functional for its intended purpose. There was a steady flow of purchases from the date of occupation, August 2015, until November 2016 when bathroom, main kitchen, decorations, bedrooms, wardrobes, cabinets and fixed furnishings were completed. The works completed after 2016 were post practical completion. The property therefore appeared complete at the end of 2016 at the latest.

35. Works such as furniture, decorations, blinds, curtains and wardrobes are not part of the construction of a dwelling. Paving, railings, gates and garden work would not prevent the dwelling from being habitable. There is no evidence to show that the property was not habitable or fit for purpose by end of 2016 at the latest.

36. In the case of *SA Whiteley* [1993] TC11292 at paragraph 7, Judge Brice stated:

“For practical purposes, a building is normally regarded as still under construction up to the time of first occupation by the client. Where a client does not occupy a building himself, but either leases or sells it, the building is regarded as under construction up to the time of first occupation by any lessee or purchaser.”

37. HMRC submit that the appellants occupied the property in August 2015. Some work continued on the property after this date, as the last purchase invoice is dated 17 November 2016, and therefore the appellants should have submitted their claim by 17 February 2017 at the latest.

Evidence of the completion date

38. The appellants contend that there was a delay in obtaining the Certificate of Completion. However, the appellants sought to obtain a Certificate of Completion from Bury Council in December 2016, which evidences that the house was complete from that date.

39. The appellants contend in the letter of 6 November 2018:

“We completed the rest of the work and submitted the required certificates in December 2016, to pursue for completion.”

40. It is submitted that, by the appellants’ own admission, the property was completed as of December 2016. Despite the actual Certificate of Completion being delayed, the date the works were actually completed according to their original plans was December 2016.

Documentary evidence

41. In the case of *David Hewett* [2013] UKFTT 439 TC at paragraph 21 Judge J C Gort found that there was no documentary evidence to support the appellants' submission that the work to the premises had been finally finished in October 2011. 5 The appellants' oral evidence was contrary to the last invoice issued in July 2011. The invoice date was accepted as being the date of completion, above the date prescribed on the Completion Certificate. In the decision, Judge Gort, in reference to Regulation 201 (a) VATR 1995, went on to find that the date on the invoice was "in any event [July 2011 is] outside the prescribed three months and therefore the application which 10 was made in November 2011 was too late".

42. Although the appellants seek to rely on the certificate of completion as evidence of the completion date, as in the case of *Hewett* weight should be given to the date of the last invoice, alongside the factor of the date of habitation preceding this date. This supports HMRC's contentions that the certificate of completion in isolation is not 15 indicative of the date of completion.

The Certificate of Completion

43. In the case of *Richard Hall* [2016] UKFTT 632 (TC) at paragraph 4 Judge Jones Q.C. determined the test as being:

20 "...a matter of fact and degree as to whether and when any particular building project has been finished and come to its actual completion. It will not necessarily be the date upon the completion certificate."

44. The appellants place great weight upon the Completion Certificate as evidence of when the property was completed. As decided in *Richard Hall*, the certificate of completion is not necessarily conclusive evidence of the completion date of a building 25 and it should not be read in isolation.

45. In the same case, Judge Jones Q.C. at paragraph 3 stated:

30 "A Certificate of Completion can be issued in respect of a dwelling house when the dwelling house satisfies the various criteria set out in the Building Regulations. That does not necessarily mean that the building works, for which planning permission has been granted in respect of a new dwelling, will have been completed."

46. The present case clearly demonstrates that just because a certificate of completion has been issued, it does not mean that the building is complete. The appellants seek to rely on the Completion Certificate as evidence when the building was completed. The Certificate may well have been the date the Council 35 acknowledged the building as being complete, however, this should not be read in isolation of the related facts.

47. The appellants sought first to obtain their Completion Certificate in December 2016. The certificate was not issued by the Council due to the invalid submission of the electrical installation certificate. The appellants' actions in seeking to obtain the

Completion Certificate at the time they did in 2016, is clearly indicative of their belief that the building was complete at that time. The appellants contend that it took them a while to engage another suitable electrician, however, this does not preclude the fact that they were occupying the property and took steps to obtain a Completion Certificate 2 years and 7 months before they were approved for one.

48. The Completion Certificate is not the only evidence which can be adduced as evidence of a completed building. After the three-month time limit the second requirement of regulation 201(b)(i) states:

“(b) at the same time furnishing to them -

(i) Certificate of completion obtained from a local authority or such other documentary evidence of completion of the building as is satisfactory to the Commissioners.”

49. The appellants could have adduced documentary evidence other than a Completion Certificate. They could have requested a habitation letter from the local authority. They could have forwarded to HMRC the notice of making a new entry onto the valuation list for rating purposes, either of which would have been acceptable to HMRC.

50. The dicta of the Upper Tribunal case *Asim Patel* [2013] UKUT 0361 apply to this case, wherein at paragraph 21, Judge Bishopp stated:

“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.”

51. There is no jurisdiction for the Tribunal to extend the time limit of three months as prescribed by law.

Conclusion

52. Unfortunately the provisions of regulation 201 VATR 1995, although clearly worded, can lead to a misunderstanding as to what is required by HMRC as evidence that a building has been completed for the purposes of the VAT DIY regulations.

53. The Tribunal has some sympathy with the appellants as it is clear from their correspondence with HMRC and from Mr Arora in giving evidence to the Tribunal, that they were simply trying to comply with their interpretation of guidance they had read on HMRC’s VAT DIY web link.

54. Regulation 201 of the VATR 1995 states that the claimant must make his DIY VAT claim no later than three months after the completion of the building and provide either a Certificate of Completion from a local authority or such other documentary evidence of completion of the building as is satisfactory to the Commissioners.

55. A completion certificate issued by a local authority is confirmation that the requirements of the Building Regulations have been complied with in accordance

with regulation 17 of the Building Regulations 2010 (as amended). Such a certificate of completion only relates to the works described in regulation 17, not to any work carried out to which the regulations may not on any particular occasion apply or to any work carried out and independently supervised under a Competent Person's Scheme (for example fenestration work). It confirms only that the regulation matters raised, identified during the building regulation inspection, have been resolved.

56. To determine when a building is complete, it is important to weigh all the evidence available. In essence, a building is deemed completed when the construction has been completed in accordance with the original plans, and as per HMRC's guidance in VCONST02530, "when all main elements for it to function for its intended purpose are in place". A completion certificate can sometimes be issued later than the date the property was actually deemed as habitable or fit for purpose, and therefore, whilst it can be used as evidence as to when a building was considered as complete, it is not the only factor which can be taken into consideration in determining whether the claim has been made in time.

57. Documentary evidence confirming completion of a new build property can take many forms. The property built by the appellants is a very substantial modern 5 bedroomed house, with integral garage. The appellants will have engaged the professional services of a builder and possibly an architect and surveyor. A new property will often have a ten year insurance warranty or guarantee covering structural defects, such as a NHBC Buildmark policy issued by a registered builder or a LABC self-build warranty, for which purpose inspections are carried out at appropriate intervals by the Institution that issues the policy which works closely with the building regulation department of the local authority. In other cases, an architect or appropriately qualified surveyor will carry out stage surveys and inspections in order to provide a certificate of practical completion. Such certificates are often required by a bank or building society providing mortgage finance. The RICS or other relevant regulatory body adopt certain practice standards which define "completion of construction work".

58. It is obviously necessary to determine the date of practical completion, if only for the purposes of establishing a defects liability period for the structure of the property or for example any installation (fenestration, electrical etc). If available, the appellants should have produced the documentation referred to in the previous paragraph, or as stated by HMRC, a habitation letter from the local authority or evidence that the property had been entered onto the valuation list, which was on 1 July 2015.

59. It is unclear why the appellants appear to think that they had to wait until a certificate of completion was issued by Bury Building Regulations department. The main builder's certificate of practical completion which would have been available at the time the appellants took beneficial occupation would have been sufficient evidence for HMRC to regard the provisions of regulation 201 VATR 1995 as having been complied with.

60. The appellants' letter of 4 September 2018 states that they occupied the property in August 2015. This supports the view that the property was habitable and fit for purpose as at that date.

5 61. The earliest invoice to which the appellants claim relates is dated 19 March 2012. The last invoice is dated 17 November 2016, which is more than a year before the date of the Completion Certificate. This again suggests that the property was completed substantially more than three months before the date that the appellants made their claim.

10 62. The completion certificate was not issued until April 2018 due to an issue with obtaining an electrical installation certificate. However, this does not alter the fact that the property was completed over two years before 24 April 2018.

15 63. Even if the completion certificate could be taken as evidence of when the property was completed, the claim would have been out of time. The certificate dated 24 April 2018 stated that the completion date was 9 April 2018, whereas the appellants' VAT431NB was submitted on 18 July 2018, which was more than three months after the completion date as per the certificate.

20 64. The appellants therefore failed to comply with the three-month time in accordance with Regulations 200 and 201 of the VATR 95. The appellants' VAT Refund request is therefore not in accordance with the law, as they are outside the time limits. The Tribunal has no discretion to extend the time limits as set down by s 35(2) VATA 94 and Regulations 200 and 201 VATR 95.

65. For the above reasons the appeal is dismissed and HMRC's decision to refuse the appellants' VAT refund claim under the Scheme in accordance with s 35 VATA is upheld.

25 66. 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
30 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

MICHAEL CONNELL

TRIBUNAL JUDGE

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RELEASE DATE: 03 DECEMBER 2019