[2019] UKFTT 0747 (TC)

TC07504

VALUE ADDED TAX – DIY House Builders Scheme – s 35 Value Added Tax Act 1994 – Regulation 201 Value Added Tax Regulations 1995 – date of the completion of the building – whether claim made within the relevant time limit – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/00941

BETWEEN

LIAM DUNBAR **Appellant**

-and-

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

TRIBUNAL: JUDGE ROBIN VOS
DEREK ROBERTSON

Sitting in public at The Tribunal Service, Manchester on 4 December 2019

Charles Dunbar and Chris Dunbar for the Appellant

Gareth Hilton, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellant, Liam Dunbar and his brother, Chris have each built a house in the grounds of the house in which their father, Charles Dunbar lives.

2. Liam has submitted a claim under the DIY House Builders Scheme for the refund of VAT on the building materials used to construct his house. Although the claim was submitted within three months of receiving a certificate of completion, HMRC have rejected the claim on the basis that the house was completed more than three months before the claim was made and so the claim is out of time.

3. Chris has also submitted a similar claim for a VAT refund but it appears that the papers relating to this claim have been lost. This appeal therefore only relates to the claim made by his brother, Liam. However, it may well be that the result of Liam's appeal will also be relevant to any claim which has been made by Chris.

NON-ATTENDANCE OF THE APPELLANT

4. Unfortunately, Liam was not able to attend the hearing as he was unwell. At his request, his father Charles and his brother Chris attended the hearing to present the case on his behalf.

5. It was clear that both Charles and Chris have been closely involved in the construction project and would be able to provide any necessary evidence if not already contained in the documents before the Tribunal.

6. The Tribunal therefore decided that it was in the interests of justice to proceed with the hearing in Liam's absence.

THE EVIDENCE AND THE FACTS

7. We had before us a bundle of documents produced by HMRC. During the course of the hearing, Charles and Chris also provided some oral evidence. They were not able to remember the exact dates of some of the events but their evidence was not challenged and, subject to this, we accept their evidence at face value.

8. There is no significant dispute about the relevant facts which can be stated fairly briefly.

9. In April 2015, Charles Dunbar obtained planning permission to build two houses in the grounds of his existing property. The intention was that Liam would live in one property and Chris in the other.

10. Materials for the construction of Liam's property were purchased between July 2015 and January 2017.

11. The property was given a council tax band on 8 July 2016.

12. Liam moved into the property on 1 March 2017. At that stage, the property did not have a permanent electricity or water supply. Instead, temporary supplies were being provided from Charles' house.

13. The permanent electricity supply was connected on 26 March 2017.

14. It is not clear when the permanent water supply was connected. Chris and Charles initially thought that this might be at the end of 2017. However, there is a letter from Liam to HMRC dated 14 August 2018 which states that the water supply is still temporary whilst they were waiting for a water meter to be fitted. Chris and Charles accepted that they could not remember the exact date that the water supply was connected. On the balance of probabilities, we find that this did not happen until sometime after 14 August 2018.

15. During 2017, an air permeability test in relation to Liam's property was undertaken which failed. The property was re-tested in December 2017.

16. Following the successful completion of this test, Charles applied for a certificate of completion in accordance with the relevant building regulations. This was issued on 19 February 2018.

17. Liam's VAT refund claim was sent on 8 May 2018 and was received by HMRC on 15 May 2018.

18. Following receipt of confirmation of completion of the house from their architect in June 2017, either Charles or Chris called HMRC's helpline to ask for guidance about making the VAT refund claim as the certificate of completion had not by then been obtained. They were reassured by the helpline that they should wait until they had received a certificate of completion and then make the claim within three months of that date.

19. Either Chris or Charles called HMRC's helpline again in September 2017 and were given the same advice.

20. Although HMRC only have a record of the call in September 2017, Chris and Charles were clear in their evidence that the earlier call in June had been made. This was not challenged by HMRC and Mr Hilton accepted that the fact that HMRC had not been able to track down any record of the call did not mean that it had not taken place.

21. At the time the certificate of completion was issued, there were some works which had still not been completed including external paving, garden walls and some internal decoration. Chris and Charles however accept that these works were relatively minor.

THE LEGAL FRAMEWORK

22. The ability to reclaim VAT on the purchase of materials used in the construction of a dwelling is provided for in s 35 Value Added Tax Act 1994 ("VATA"). The relevant parts of s 35 VATA read as follows:

> "(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
>
> (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 –
>
> the construction of a building designed as a dwelling or number of dwellings;
>
> (d) the construction of a building for use solely for a relevant residential purpose or relevant charitable purpose; and
>
> (e) a residential conversion…
>
> (2) The Commissioners shall not be required to entertain a claim for a refund under this section unless the claim –
>
> (a) is made in such time and in such form and manners, and contains such information, and

(b) is accompanied by such documents, whether by way of evidence or otherwise,

as may be specified by regulations or by the Commissioners in accordance with regulations…"

23. The Value Added Tax Regulations 1995 (SI 1995/2518) ("VATR") contain provisions which supplement s 35 VATA. In particular, regulations 201 and 201(A) provide as follows:

"**Method and time for making a claim**

201

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 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,

(ii) an invoice showing the registration number of the person supplying the goods, whether rot 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,

(iii) in respect of imported goods which have been incorporated into the building or its site, documentary evidence of their importation and of the VAT paid thereon,

(iv) documentary evidence that planning permission for the building has been granted, and

(v) a certificate signed by a quantity surveyor or architect that the goods shown in the claim were or, in his judgment, were likely to have been, incorporated into the building or its site.'

201A

The relevant form for the purposes of a claim is –

(a) form VAT 431 NB where the claim relates to works described in section 35 (1A) (a) or (b) of the Act; and

(b) form VAT 431 C where the claim relates to works described in section 35(1A)(c) of the Act."

24. In this case, there is no suggestion that there was any defect in Liam's VAT refund claim other than the fact that HMRC say that it was made more than three months after the completion of the building. This, says Mr Hilton, is fatal as the Upper Tribunal have decided in *HMRC v Asim Patel* [2014] UKUT 0361 (TCC) at [21] that:

"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."

25. With respect to the Upper Tribunal, we have some doubt as to whether it is right to say that HMRC have no discretion to extend the time limit. The Upper Tribunal seems to have reached this conclusion based solely on the wording of regulation 201(a) VATR and without any consideration of the provisions of s 35 VATA. In particular, s 35(2) VATA provides that the Commissioners "shall not be required to entertain a claim" unless the requirements of the regulations are satisfied. This carries quite a strong inference that HMRC may in fact allow a claim outside the time limit provided for by the regulations if they think it is appropriate to do so. If this were not the case, it might be expected that s 35(2) VATA would read "The Commissioners shall not entertain a claim".

26. It might also be inferred from the guidance notes to form VAT431NB that HMRC themselves believe that they have power to extend the time limit as the guidance notes state that:

> "The three months will usually run from the date of the document you are using as your completion evidence. If your claim is late you must send us a letter explaining the delay."

27. Similarly, HMRC's VAT manual says the following (VCONST24550):

> "**Three Month Time Limit**
>
> Refund Scheme claims must be made within three months of the date of completion. However, exceptionally, claims may be accepted on an individual basis if there is a reasonable excuse for the delay.
>
> The claimant must explain in writing why a claim is being submitted late. If no satisfactory explanation is received, the claim must be refused.
>
> Examples of reasonable excuse may include:
>
> - Compassionate reasons
> - Negligence of a professional advisor
> - Circumstances outside the claimant's control, such as difficulty and obtaining invoices or completion certificates."

28. However, even if we are right on this point, we accept that we are bound by the decision of the Upper Tribunal in *Asim Patel* and, in any event, the discretion to extend the time limit is one which is given only to HMRC and not to the Tribunal.

29. The key question therefore which we have to decide is what is meant by the phrase "the completion of the building" in regulation 201(a) VATR and whether Liam's claim was made within three months of the date of such completion.

THE COMPLETION OF THE BUILDING

30. Charles and Chris explained that they had looked at the guidance on HMRC's website about making VAT refund claims. It was apparent from this that only one claim could be made and that if there was anything wrong with the claim, it would be rejected. Liam was therefore concerned to get the claim right. This was why, in June 2017, when they received the architect's certificate, they contacted HMRC for guidance and were told that they needed to have the certificate of completion before they could make the claim. It did not therefore occur to them that completion was linked to the question as to whether or not the property was habitable. Indeed, they make the very fair point that Liam had no reason to delay making the

claim. Had they thought that completion had taken place at an earlier point, Liam would have made his claim earlier so that he would have got his money sooner.

31. Chris and Charles also argue that, although the property became habitable in March 2017, it was not complete until the permanent water supply had been connected sometime after 14 August 2018.

32. Mr Hilton referred first of all to the decision of the First-tier Tribunal in *Richard Hall v HMRC* [2016] UKFTT 632 (TC) where the Tribunal stated at [4] that:

> "It will always be 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."

33. He accepts that this may not have been part of the ratio of the decision in *Richard Hall* but derives further support from another First-tier Tribunal case, *Stewart Fraser v HMRC* [2019] UKFTT 0573 (TC).

34. Mr Hilton pointed out that there were some similarities between the facts in *Stewart Fraser* and in this case. For example, HMRC's view was that the property had been completed when the taxpayer moved in, a certificate of completion had not been obtained and the main reason for this was the need for various tests to be carried out before the certificate of completion could be issued. The Tribunal's conclusion at [34] was that:

> "… the Appellant thought that he could not apply for the VAT refund until he had a completion certificate. That is not what either the law or the HMRC guidance states."

35. The Tribunal in *Stewart Fraser* refers to the decision of the First-tier Tribunal in another case, *Stuart Farquharson v HMRC* [2019] UKFTT 425 (TC). In that case, the Tribunal reached a different conclusion on the meaning of the words in regulation 201 VATR, explaining its reasoning at [42] as follows:-

" 42 From the statutory wording, the Tribunal finds that the meaning of 'completion' under reg 201(a) is to be given the plain meaning as referential to a certificate of completion for the following reasons:

> (1) Applying the ordinary rules of statutory construction, the plain meaning of 'completion' under reg 201(a) is to be defined by the issue of a certificate of completion under reg 201(b)(i). It is a clear-cut definition for 'completion' that enables the claimant and the Commissioners to establish the common ground, and for the efficient administration of the refund scheme so that there is no cause for ambiguity or dispute such as the present case.
>
> (2) The primacy given to a certificate of completion is evident in the statutory wording; it is the *sine qua non* for the purposes of a VAT refund claim under the DIY Scheme. The statutory wording makes it clear that the preferred document is a certificate of completion, and it is only in the absence of which that the alternative should be provided in substitution.
>
> (3) It is only in the absence of a certificate of completion that the Commissioners would entertain a claim based on the alternative. What is satisfactory as an alternative is not specified by the statute in like manner as a certificate of completion. HMRC's guidance notes in relation to question 14 of the claim form then come in to fill the gap.

(4) 'If you do not have a Completion Certificate *yet*, we will accept one of the following documents', states the guidance notes (see §7). From the word 'yet', it can be inferred that the alternative documentation is one that can be obtained before the house builder is able to obtain a completion certificate. In other words, the alternative documentation to a completion certificate has the effect of enabling the house builder to bring forward the claim ahead of the issue of a completion certificate.

(5) Per the guidance notes, the alternative documentation that is satisfactory to the Commissioners are: a habitation letter or a Joint valuation Board Notice of Tax Banding (Scotland); a VOA (England and Wales); a District Valuer's Certificate of Valuation (Northern Ireland); or a letter from a certified lender in relation to a loan secured on the new-build.

(6) The alternative documentation is to serve as evidence of completion, to enable a claim for a VAT refund to be made *before* a new build has obtained its completion certificate.

(7) The provisions under reg 201(b)(ii) to (v) concern the validity of the input VAT being claimed, by reference to the valid invoice from a registered supplier, in relation to the goods being imported, and in relation to whether the goods so claimed are genuinely used in the making of the supply of a new dwelling. None of these provisions pertain to the meaning of 'completion' for any further possible meaning of completion to be drawn after reg 201(b)(i)."

36. Mr Hilton however, following the Tribunal in *Stewart Fraser*, distinguishes the decision in *Stuart Farquharson* on the basis that, as the Tribunal in *Stewart Fraser* pointed out at [33]:

> "It was decided on the basis of radically different facts. As I pointed out, at paragraph 55, Judge Poon made it explicit that, in that case, although a completion certificate had been issued, the property most certainly was very far from complete. The reverse is the position in this case."

37. Based on the proposition that whether or not the building has been completed must be approached on a case by case basis, Mr Hilton submits that Liam's house was completed on 26 March 2017 when the permanent electricity supply was connected. In support of this, he refers to the fact that Liam had moved in on 1 March 2017, the most recent invoice for materials used in the construction of the property is dated 11 January 2017 and that a council tax band had been assigned in July 2016.

38. Although Mr Hilton accepted that the water supply was still temporary, he makes the point that this did not prevent a certificate of completion being issued in February 2018 and so cannot have been relevant to the question as to whether or not the building was complete.

39. The delay in issuing the certificate of completion was, says Mr Hilton, due to the requirement to complete the safety tests (as in the *Stewart Fraser* case) but this does not mean that the completion of the building could not have taken place at an earlier date such as when the building work had been completed or when the property became habitable.

40. With respect to the Tribunal in *Stewart Fraser*, we have found the rather more detailed reasoning and analysis in *Stuart Farquharson* much more persuasive and we gratefully adopt the reasoning set out in paragraph [42] of that decision, set out above. We would however emphasise certain points.

41. First of all, regulation 201 VATR must be interpreted as a whole. This means that the phrase "the completion of the building" in regulation 201(a) cannot be interpreted in isolation.

It is necessary to look at the rest of regulation 201. Regulation 201(b)(i) requires the taxpayer to furnish HMRC with “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”.

42. It could not be clearer from this that the primary evidence of completion in the context of regulation 201 VATR is therefore the certificate of completion. It is only if the taxpayer does not have a certificate of completion that he is at liberty to produce other documents which are acceptable to HMRC to try to persuade them that the building is complete.

43. The fact that documents other than the certificate of completion may be used to evidence the completion of the building does of course mean that completion must be capable of occurring before any certificate of completion is issued. However, it is equally clear, as the Tribunal is *Stuart Farquharson* points out at [51(7)], that it is for the taxpayer to bring forward the date on which a building is deemed to be complete for the purposes of regulation 201 VATR and not for HMRC to argue that completion has taken place before a certificate of completion has been issued.

44. It must in our view be assumed that the regulations have been framed in a way which is intended to make it relatively straightforward for both the taxpayer and for HMRC to determine when completion of the building has taken place. If, as Mr Hilton contends, the date of completion depends on all of the facts and circumstances, it would be almost impossible to be sure when completion had taken place. Indeed, in *Stewart Fraser*, it is clear that the Tribunal itself was not sure when completion had taken place. The judge says at [24-25] that:

> “24. …...I find that the change in the plans was simply the rectification of a defect and the house had been completed by the end of 2015.
>
> 25. Even if I am wrong in that it was certainly completed by June 2016 since no further work was done thereafter.”

45. This leaves the taxpayer in an impossible position. If the Tribunal was right that completion had taken place at the end of 2015, a claim would have to have been made by the end of March 2016. However, if completion had only taken place in June 2016, a claim made in March 2016 would not be valid as the claim would have been made prior to the completion of the building (which is not permitted by regulation 201 VATR).

46. We would stress that the phrase “completion of the building” must be interpreted in its own specific legislative context. The phrase appears in other parts of the VAT legislation and it may well have a different meaning for those purposes. We express no view on this.

47. Our conclusion therefore is that, for the purposes of regulation 201 VATR, the completion of a building takes place when a certificate of completion is issued or, if there is no certificate of completion, on such other date as may be evidenced by documents produced to HMRC by the taxpayer and which HMRC are prepared to accept as satisfactory evidence of completion.

48. On this basis, Liam’s claim was made within the three month time limit and is therefore valid and this appeal is allowed.

49. Given our conclusion, we do not need to decide whether, if the completion of a building has to be looked at for the purposes of regulation 201 VATR on the basis of a facts and circumstances test, as proposed by Mr Hilton, Liam’s claim was made within three months of such completion. However, in case we are wrong in our main conclusion, we consider this briefly.

50. In order for Liam's claim to be made within the three month time limit, the building must have been completed sometime between February 2018 and May 2018 (the claim being made either on 8 May 2018 when it was submitted or 15 May 2018 when it was received by HMRC).

51. There is no evidence that anything happened during this period (other than the issue of the certificate of completion) which could have affected whether or not the building had been completed.

52. The position therefore is either that the building was complete sometime before February 2018 (as submitted by HMRC) or that, because the permanent water supply had not been connected, the building was still not complete until after August 2018. In either case, Liam's claim would not have been within the relevant time limit as it would either have been made more than three months after completion or it would have been made before completion.

53. Therefore, if we are wrong in our conclusion that the completion of the building for the purposes of regulation 201 VATR is linked to the issue of the certificate of completion, Liam's appeal would fail as his claim would not have been made within the relevant three month period.

DECISION

54. For the reasons set out above, Liam's house was completed for the purposes of regulation 201 VATR when the certificate of completion was issued. The claim was made within three months of this date and Liam's appeal is therefore allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

55. 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.

ROBIN VOS
TRIBUNAL JUDGE

RELEASE DATE: 13 DECEMBER 2019