



TC07659

Appeal number: TC/2019/00834

Value Added Tax – DIY House Builders Scheme – construction of a dwelling – claim for input VAT refund under s 35 VATA – occupation before Certificate of Completion issued – whether the claim time-barred – determination of ‘completion’ for the purposes of reg 201 of the 1995 Regulations – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BETWEEN

JOHN MCGARRY AND MONICA MCGARRY

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE ALASTAIR J RANKIN
MR DAVID MOORE**

**Sitting in public at Tribunal Room 2, Royal Courts of Justice, Chichester Street, Belfast,
BT1 3JF on 18 November 2019 at 14:00 PM**

We heard Mr Keith Buchanan MLA for the Appellant and Mr Gareth McKinley, Litigator of HM Revenue and Customs’ Solicitor’s Office for the Respondents.

BACKGROUND

1. HMRC has requested the Tribunal to issue a Full Decision having agreed at the hearing to a short decision. Although the request for a full decision was received well over one month after the expiration of the 28 day request period specified in the short decision I have decided in accordance with Rule 5(3)(a) of The Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 to extend the time and grant the request.
2. This is an appeal by Mr & Mrs McGarry against a decision by HMRC contained in a letter dated 13 September 2018 to refuse a claim for a refund of value added tax of £6,012.62 made under the DIY Housebuilders Refund Scheme. The decision was made under section 35(2) of the Value Added Tax Act 1994 (VAT Act 1994) as HMRC considered the claim was out of time by reference to Regulation 201 of the VAT Regulations 1995.

3. Mr & Mrs McGarry reside at 36A Ballynagarve Road, Magherafelt, BT45 6NB which is the property the subject matter of the refund claim received by HMRC on 2 February 2018. In support of their claim they submitted copies of their outline planning permission granted on 26 October 2012, full planning permission granted on 19 February 2014 and completion certificate dated 3 November 2017. They also submitted a schedule of invoices most of which were dated from 2013 and 2014 with the most recent invoice dated August 2016.

4. On the refund application form Mr & Mrs McGarry stated that they occupied the property from 1 February 2017. Having received the application dated 30 January 2018 HMRC wrote to Mr & Mrs McGarry on 12 February 2018 requesting further information. In this letter HMRC pointed out that most of the invoices were dated between 2013 and 2014 and their records confirmed Mr & Mrs McGarry had been occupying the property from April 2014. HMRC requested a list of all works (with supporting evidence) carried out on the property between January 2015 and the certified completion date of 3 November 2017.

5. Mr McGarry replied by letter dated 6 March 2018 stating that they did not occupy the property until 1 February 2017 and the reason why there was a delay in obtaining the completion certificate was due to a lack of funds. Building Control required particular works to be carried out before they would provide the completion certificate – door steps at each point of entrance to be finished, one of which had to be wheelchair accessible and provision of installation certificates from the plumber for the boiler and stove together with more lagging insulation fitted to some pipes.

6. HMRC responded by letter dated 27 March 2018 requesting a copy of the Valuation Certificate issued by the District Valuer and details of all work carried out between January 2015 and 3 November 2017. The District Valuer's letter dated 29 March 2018 was submitted to HMRC under cover of a letter dated 3 May 2018. The Valuation Certificate stated that the effective date of the valuation was 1 December 2017.

7. HMRC wrote again to Mr McGarry on 31 May 2018 again requesting details of all works carried out on the property after January 2015. The letter also stated that HMRC was informed on 22 April 2014 to amend Mr & Mrs McGarry's address to 36A Ballynagarve Road. Mr McGarry responded by letter received by HMRC on 2 June 2018 enclosing copies of two emails to building control and copies of requested certificates.

8. HMRC wrote again to Mr McGarry on 19 July 2018 requesting answers to five bullet points. Mr McGarry replied by letter dated 13 August 2018 enclosing the following letters:

7.1 Letter from the District Council dated 15 August 2013 confirming the correct postal address and stating that the address had been forwarded to all statutory authorities.

7.2 Letter from Northern Ireland Electricity dated 1 September 2014 confirming that electricity would be supplied to the property normally within 36 working days.

7.3 Copy Land Certificate showing Mr McGarry being registered as owner on 15 August 2014

9. HMRC replied by letter dated 13 September 2018 informing Mr McGarry that his claim had not met the criteria to allow a repayment under the Refund Scheme but advising him he could pursue the decision through a review or appeal. The letter drew Mr McGarry's attention to Section 2 Note 14 on the Claim form which states

“A building is normally considered to be completed when it has been finished according to its original plans. Remember that you can make only 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.”

10. The letter dated 13 September 2018 also quoted section 35(2) of the VAT Act 1994 which states:

“Where –

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.”

11. The letter continued by referring to Regulation 201 which states that the claim should be submitted no later than three months after construction of the building is complete. HMRC then gave a chronological history of Mr McGarry’s building operations according to their information:

“2013 and 2014 – invoices submitted for VAT reclaim are regular and continuous throughout this period and are for significant building materials.

April and May 2014 – Our records show your address was updated to the build address.

2015 – There are 3 invoices submitted for VAT reclaim dated 2015, the most significant being the sanitaryware invoice dated 14 January 2015 for VAT of £221.00.

2016 – There are 4 invoices submitted for VAT reclaim dated 2016, all of which are for nominal amounts of VAT except for the invoice for concrete dated 25 July 2016 for £504.00 of VAT. There are no invoices dated after July 2017.

1 February 2017 – This is the date you stated that you occupied the property on the VAT431NB claim form.

4 April 2017 – Date Building Control contacted you to request the outstanding energy certificates for the property.

4 September 2017 – Building Control contact you to request the stove certificate be amended to a different format.

1 December 2017 – Date the property became liable for rates.

2 February 2018 – Claim received.

12. The main reasons why HMRC refused the refund claim appear on page 3 of the letter dated 13 September 2018:

“You have supplied a copy of an email from Building Control confirming in April 2017 what works were required to obtain completion evidence. No works were required, except for you to supply the energy/installation related certification for the property.

When we received your claim on 2 February 2018, you had been occupying the property for at least a year and the absence of these certificates had not and did not impede or prevent your access, occupation and enjoyment of the property as a dwelling.”

13. Mr & Mrs McGarry wrote to HMRC by letter dated 8 October 2018 in which they stated:

“We did not occupy the property any earlier than we told you. We purchased a mobile home privately and placed it on the site.”

14. They also enclosed a certificate from their architect dated 8 December 2017 which stated that he, the architect, had made periodic inspections from the commencement of works throughout construction and that the work was now at the stage of “Dwelling Complete”. This certificate had been required by Mr & Mrs McGarry’s mortgage lender to enable them to obtain the final part of their mortgage.

15. HMRC's Review Officer wrote to Mr & Mrs McGarry on 9 January 2019. Included in the letter are the following paragraphs:

"Establishing completion dates which are under dispute can be problematic and I wish to acknowledge that I have fully considered all of the arguments and evidence provided, alongside the relevant legislation and previous cases in the field."

And

"Clearly the fact that the property was occupied on 1 February 2017 is an indicator (but not conclusive proof) that the property was in a habitable state at that point. I am aware however that where it is discovered that a planning condition had not yet been complied with, or something clearly set out in the plans has not been finished at the point of occupation, then the house can be considered as still under construction."

16. The Review Officer's letter upheld the original decision to refuse the claim as HMRC did not have any discretion to extend the time for submitting the claim beyond three months after completion and the evidence indicated that the property was deemed habitable and fit for occupation by at least February 2017.

17. Mr & Mrs McGarry appealed to this Tribunal by Notice of appeal dated 8 February 2018. The grounds of appeal are:

"1. When a member of the public looks to the GOV.UK website under building a new home and it clearly states

You must claim within 3 months of the building work being completed.

As per correspondence Dated 13th Sept DIY Ref 140116 it states. A building is normally considered to be completed when it has been finished according to its original plans. The normal method to confirm this is the case when the Local government officer provides a completion certificate.

In this case the local government officer provided certificate of completion in Nov 2017 and the VAT claim was made in Feb 2018.

The information on the website is misleading and leaving the public informed incorrectly.

I feel that this is causing unnecessary distress and confusion with homebuilders.

The local government officers for building control are under the understanding that a house is only complete when it is "signed off", and a completion certificate is signed."

EVIDENCE AT HEARING

18. Both Mr Buchanan for Mr & Mrs McGarry and Mr McKinley for HMRC took the Tribunal through the bundles of evidence much of which has been summarised in the Background information already recited. Mr McKinley referred to HMRC's VAT Manual VCONST02530 which outlines four factors to be considered when determining if a building is completed. These are:

- i) Date of occupation
- ii) Certificate of completion
- iii) Extent and nature of planning consent
- iv) Intentions and wishes.

However Mr Buchanan informed the Tribunal that the Manual was only available online and the taxpayer has to go looking for it – it is not easily accessed and in fact only item ii) (certificate of completion) is mentioned in the guidance notes.

LEGISLATION

19. As well as referring the Tribunal to section 35(2) of the VAT Act 1994 quoted at paragraph 10 above Mr McKinley referred the Tribunal to section 35(4) which states:

“(4) The notes to Group 5 of Schedule 8 shall apply for construing this section as they apply to construing that Group ...”

20. The relevant portion of the Notes to Group 5 of Schedule 8 is as follows:

“2 The supply in the course of the construction of –

(a) a building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose or a relevant charitable purpose;”

21. The Notes continue:

“(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.”

22. Regulation 201 of The Value Added Tax Regulations 1995 (SI 1995/2518) Part XXIII states:

Method and time for making 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 form numbered 11 in Schedule 1 to these Regulations 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 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,

(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 had been granted, and

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

CASELAW

23. Judge Jill Gort said in *David Hewett and The Commissioners for Her Majesty's Revenue & Customs* [2013] UKFTT 439 (TC) at paragraph 21:

“We accept Mr Hewett’s argument that it is open to the Tribunal when considering the provisions of Regulation 201 to take into account work done after the issuing of the Certificate of Completion. The Regulations refer to a Certificate of Completion ‘or such other documentary evidence as is satisfactory to the Commissioners’.

24. In a Tribunal decision in the case of *University of Hull v Commissioners of Customs and Excise* (Decision No 180) quoted in paragraph 14 of *Chipping Sodbury Town Trust v The Commissioners of Customs and Excise* [2000] Lexis Citation 745 the Tribunal stated:

“In our judgment a building remains in course of construction until the main structure is completed, the windows glazed and all essential services and fittings, such as plumbing and electricity have been installed therein. Thereafter the building ceases to be in course of construction for purposes of Group 8 of Schedule 4 [to the Finance Act 1972] and the phase of fitting out and furnishing is ready to begin.”

25. In *S A Whiteley v The Commissioners of Customs and Excise* [1993] Lexis Citation 1154 the Tribunal said:

“Although in our view, first occupation may well be a relevant factor in determining when the construction of a building ceases, it is not the only factor.”

26. In *Carrophil Ltd v The Commissioners of Customs and Excise* [1993] Lexis Citation 843 the Tribunal said:

“I can not accept, as an immovable principle, the proposition that the course of construction of a building stops when the architect issues the certificate of practical completion. It may be a useful working rule but it will be displaced where for example under the provisions of the original building contract some structural work is carried out or some essential services are installed, in both cases after the issue of the certificate. ... It is all a matter of degree.”

27. In *Farquharson v The Commissioners for Her Majesty’s Customs and Excise* [2019] UKFTT 0425 (TC) Judge Heidi Poon said:

“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).

43. In conclusion, the statutory interpretation of reg 201(a) is that ‘completion’ is referential to the issue of a certificate of completion. For the purposes of a VAT refund claim under the DIY Scheme, the only definition in terms of ‘completion’ is by reference to the documentation stipulated to evidence completion under reg 201(b)(i).”

DECISION

28. HMRC contend that the onus of proof lies with Mr & Mrs McGarry that their DIY claim was submitted within the statutory time limit and the standard required is the ordinary civil standard of the balance of probabilities. As a general rule HMRC consider that a building will be regarded as being in the course of construction until all the main elements required for a building to function for its intended purpose are in place. There is no one determinative factor as to whether a building is complete.

29. The Tribunal accepts that the onus of proof lies with Mr & Mrs McGarry.

30. The Tribunal follows the decision of Judge Heidi Poon in *Farquharson* that ‘completion’ in Regulation 201 is a reference to regulation 201(b)(i) and that ‘such other documentary evidence of completion’ is included to enable a claim to be submitted before a completion certificate has been issued.

31. The Tribunal notes the guidance issued by HMRC concerning such other documentary evidence as quoted by Judge Poon in paragraph 42(5) of her decision. The Valuation Certificate issued by the District Valuer is dated 29 March 2018 and states an effective date of 1 December and the architect’s certificate to enable Mr & Mrs McGarry to draw down the balance of their mortgage is dated 8 December 2017. If the building had been completed earlier it would have been in their interest to obtain the balance of their mortgage earlier as there was a shortage of funds.

32. The Tribunal decided that the Appellants had relied on paragraph 14 of HMRC’s Claim form notes for new houses (VAT431 NB Notes) which says the Appellants should send the

Building Regulation Completion Certificate with the claim form. The Appellants submitted the claim form within three months of the date upon which their local authority issued the Certificate and within three months of the Effective Date as certified by the District Valuer and within three months of the Architect's certificate of completion.

33. The Tribunal finds as a fact that the Appellants were relying on the Completion Certificate and the fact that paragraph 14 continues by saying:

“The three months will usually run from the date of the document you are using as your completion evidence.”

The appeal is allowed and the Appellants are to resubmit the original invoices to enable HMRC to consider the correctness of the other elements of the claim.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

34. 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.

**ALISTAIR J RANKIN
TRIBUNAL JUDGE**

RELEASE DATE: 30 MARCH 2020