



TC07660

VAT – DIY Builders – planning permission for house and garage - house occupied 2010 – planning permission amended 3 January 2019 to omit garage - completion certificate issued 4 January 2019 – application for refund dated 4 January 2019 rejected by HMRC as out of time – appeal allowed as building project not completed until amended planning permission issued

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/03402

BETWEEN

ANDREW FULLER

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE ALASTAIR J RANKIN
MR JOHN ROBINSON**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London, EC1R 4QU on Thursday
30 January 2020 at 10:00 AM**

The Appellant in person assisted by Ms Laura Krickova of Constable VAT Consultancy

**Ms Nickeshia Davis, litigator of HM Revenue and Customs’ Solicitor’s Office, for the
Respondents**

DECISION

INTRODUCTION

1. This is an appeal against the decision by HMRC to reject a claim for a refund of VAT under the DIY Builders and Converters Scheme (DIY Scheme) submitted by Mr Fuller under s35 Value Added Tax Act 1994 (VAT 1994).

BACKGROUND

2. Mr Fuller applied for planning permission on 1 April 2005. Permission was refused by Mole Valley District Council but on appeal an Inspector granted permission on 30 May 2006 to erect a replacement dwelling. Condition 12.8 stated: “The garage hereby permitted shall only be used for the storage of private motor vehicles and incidental domestic items.

3. HMRC had previously sent to Mrs Fuller a claim pack in connection with the Self Builder Scheme. Mr Fuller confirmed in his correspondence with HMRC that he retained the pack and that he was aware that he could only make one repayment claim and that the claim must be submitted to HMRC within three months of completion.

4. Mr Fuller started to build the house, having drawn up the plans himself. He was on a tight budget and did all of the work himself. The first invoice in his claim submitted to HMRC is dated 30 July 2005. Between then and 12 August 2016 Mr Fuller bought materials in connection with the building of the house and the associated services for the house and garage though only four invoices are dated later than 2 November 2011.

5. Mr Fuller, due to his financial circumstances, carried out all the building work himself and moved in to the house sometime in 2010. He was unable to state the exact date. When he moved in he had installed one bathroom partially installed the kitchen and all the services – electricity, water and sewage – had been connected.

6. Mr Fuller advised the Tribunal that the cost of building the house was in the region of £100,000.00 and the estimated cost of building the garage was £60,000.00. As the site was within a forest and there were trees adjacent to the property the garage floor was going to have to ‘float’ in order to avoid damaging the roots of the nearby trees. – hence the high cost.

MR FULLER’S ARGUMENTS

7. In his Grounds of appeal to this Tribunal Mr Fuller stated that he submitted a DIY claim which was received by HMRC on 11 January 2019 having received a completion certificate from his local council dated 4 January 2019.

8. Mr Fuller referred to HMRC’s guidance that ‘completion’ takes place at a given moment in time which is determined by weighing up the relevant factors of the project such as when a Certificate of Completion is issued in accordance with approved plans and specifications, the scope of the planning consent and variations to it and whether the building is habitable or fit for purpose.

9. Although the property was occupied in 2010 it was not completed in accordance with the planning consent and approved plans as the planning consent included the construction of a garage. He had not submitted a claim at the time of occupation as the garage was still to be constructed.

10. Mr Fuller referred to the First-tier decision in *B Bowley and The Commissioners for Her Majesty’s Revenue & Customs* [2015] UKFTT 683 (TC) where a certificate of completion had been issued in 1994 but the appellant had only applied for a refund under the DIY scheme in February 2014 once the garage block had been completed. HMRC had refused to claim as it was out of time but the First-tier Tribunal allowed the appeal.

11. Mr Fuller claimed he only decided not to construct the garage in December 2018 due to lack of funds. He sent an email to the local authority on 3 January 2019 applying for a completion certificate and stating "I confirm that the garage will be exempt from building regs." The Council then issued a completion certificate on 4 January 2019.

12. At the hearing Mr Fuller pointed out that the plans attached to the planning application included a garage plan and all the plans had the same planning application reference. As noted in paragraph 2 above the planning permission granted on appeal included permission to build a separate garage.

13. HMRC wrote to Mr Fuller on 18 January 2019 acknowledging receipt of his DIY Claim. They required additional documentation/information:

- When did you become aware of the Self Builders Scheme?
- As stated on your claim form, you occupied the property in 2010. What works were outstanding when you occupied the property?
- Please provide a time line of works completed since occupying the property (Time line template enclosed)
- The majority of invoices are dated prior to December. Why has there been a delay in obtaining the completion certificate?

14. Mr Fuller replied by letter dated 24 January 2019:

- I was aware of the SelfBuilders Scheme before I bought the building plot (2003). I was also aware that you can only claim once.
- Outstanding works after occupying the property were land scaping, finishing the cellar and kitchen. I hand made all unit's, cupboards, doors and built in wardrobe.
- Time line enclosed
- I have delayed getting the completion certificate because in my original planning permission there was a triple garage and at the time, I did not have the sufficient funds to do it. The cost would have been about £60,000 so I didn't want to make the claim for the house and loose the VAT on the garage and I thought I would do it at a later stage. As time has gone on, I have decided not to build it, so hence the late completion certificate and VAT return.

The Timeline referred to in Mr Fuller's letter dated 24 January 2019 had the following information:

2010	Land Scaping
"	Finishing Cellar
2011/12	" Kitchen

15. HMRC wrote to him on 4 March 2019 rejecting his claim because it was late. The letter included a timeline as follows:

30-07-2005	Date of first invoice
30-05-2006	Date Planning Permission granted
2010	Date you have entered on your claim form that you completed the property
12-08-2016	Date of last invoice
04-01-2019	Date of the completion certificate you have used as your completion evidence
04-01-2019	Date claim form signed
11-01-2019	Date claim form received

31-01-2019 Date further information received regarding the extra works completed after your Date of occupation and the reason for the late submission of your claim.

16. Mr Fuller wrote again to HMRC on 7 March 2019 as follows:

“Firstly, may I say how disappointed I was to receive back all my paperwork and your letter saying my application has been rejected.

This scheme is surely in place to help people like myself who wish to build their own home. Perhaps I did not make my position clear, so I reiterate...

- I was aware of the Self Builder Scheme before I bought the building plot (2003). I have enclosed a copy of the letter that was sent to my wife along with the “Claim Pack” which I still have in my possession.
- I was also aware you can only claim once and that you must claim within 3 months of completion.
- The house and garage were all part of the planning consent that was won on appeal. I have enclosed the garage drawing with the Council’s planning reference.
- As I did not have enough funds at the time therefore, I could not complete the whole job.
- I decided at the end of last year that I would not complete the garage and I would get the completion certificate from the Building Control. This was done and dated 3/1/19.
- So, I strongly dispute that my claim is late as it was well within the 3-month time limit!
- I have taken advise from your help team twice. Kevin Wood (11/12/18) and Christian Davis (24/1/19) and on both occasions they had not given me cause for concern that I was not complying to the guidance notes from the information provided in my claim pack.

17. HMRC’s Review Officer by letter dated 9 April 2019, having carried out a statutory review, concluded that the decision by HMRC to reject the claim should be upheld. Mr Fuller lodged his appeal to this Tribunal dated 3 May 2019.

HMRC’S ARGUMENTS

18. Initially HMRC prepared a Statement of Case which referred to a different property and different dates. As a result they had to apply for permission to amend the Statement of Case and further correspondence ensued between HMRC and Ms Krickova in which she raised concerns that HMRC had not “fully reviewed and considered the facts in [Mr Fuller’s] case.” She also complained that HMRC had rejected Mr Fuller’s claim as being out of time but were now out of time in complying with the Tribunal’s directions for submitting the Statement of Case.

19. At the hearing Ms Davis apologised for the wrong Statement of Case being submitted but did not explain the reasons for the error.

20. Ms Davis referred to s35 VAT Act 1994 and Regulation 201 of the VAT Regulations both of which we refer to later in this decision. She maintained that HMRC had to consider whether a building is habitable and fit for purpose. In her Statement of Case she states at paragraph 31:

“The Respondents submit that “a building is normally considered to be completed when it has been finished according to its original plans. Therefore a claim can be made no later than three months after the construction work is completed. The three months will usually run from the date of the document used as completion evidence.” “

The Statement of Case does not specify where this quotation is to be found.

21. Ms Davis also stated that HMRC will exceptionally permit a claim to be made more than three months after completion where there is a reasonable excuse for the delay, although the legislation does not provide for such an extension.

22. As Mr Fuller occupied the house in 2010 Ms David claimed this illustrated that the property was habitable and it was likely that the construction of the building was complete. Ms Davis noted that the majority of the invoices submitted with the claim were in respect of the period 2005 to 2010 only five invoices were issued in 2011, one in 2012, one in 2013 and the last invoice was issued in 2016.

23. Ms Davis referred the Tribunal to the Upper Tribunal decision in *The Commissioners for Her Majesty's Revenue & Customs and Asim Patel* [2014] UKUT 0361 (TCC) where at paragraph 21 Judges Colin Bishopp and Judith Powell 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.”

24. HMRC contended that no compelling evidence had been supplied to demonstrate that construction continued up to 3 months before the claim for a refund of VAT was made nor was there a reasonable excuse for the delay until January 2019.

LEGISLATION

25. Section 35 of VAT Act 1994 states:

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 may be specified by regulations or by the Commissioners in accordance with regulations.

26. Note (2) of Schedule 9 (Exemptions) Group 1 (Land) states:

(2) A building shall be taken to be completed when an architect issues a certificate of practical completion in relation to it or it is first fully occupied, whichever happens first; and a civil engineering work shall be taken to be completed when an engineer issues a certificate of completion in relation to it or it is first fully used, whichever happens first.

27. Regulation 201 of the Value Added Tax Regulations 1995 (VATR) states:

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.

CASE LAW

28. In the First-tier decision of *Mr Richard Hall and The Commissioners for Her Majesty's Revenue & Customs* [2016] UKFT 0632 (TC) Judge Geraint Jones Q.C. said at paragraph 4:

“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.”

29. As noted in paragraph 10 above, Mr Fuller referred to the First-tier decision in *Bowley* where the First-tier Tribunal allowed an appeal by Mr Bowley when he had submitted a VAT refund claim almost 20 years after the completion certificate had been issued. Mr Bowley had occupied the house in 1994 but had not built the garage and retaining walls for a further 20 years. The Tribunal found that “both the house and garage were constructed as a single continuous building project”.

30. In *Liam Dunbar and The Commissioners for Her Majesty's Revenue and Customs* [2019] UKFTT 747 (TC) Judge Robin Vos decided that the house “was completed for the purposes of regulation 201 VATR when the certificate of completion was issued” (paragraph 54). In this case Mr Dunbar had obtained planning permission in April 2015 and materials were purchased between July 2015 and January 2017. The property had been given a council tax band on 8 July 2016 and Mr Dunbar had moved in to the property on 1 March 2017 when the property did not have a permanent electricity or water supply. During 2017 an air permeability test was

undertaken which failed. The property was retested, successfully, in December 2017 as a result of which a Certificate of Completion was issued on 19 February 2018. Mr Dunbar submitted his VAT claim form on 8 May 2019.

31. Judge Vos continued:

“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, [who appeared for HMRC] 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.

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.”

32. Finally in *Stuart Farquharson and The Commissioners for Her Majesty’s Revenue & Customs* [2019] UKFTT 425 (TC) Judge Heide Poon said at paragraph 54 that

“the date of the last invoice cannot be determinative as the date of completion, since the timing of when to draw a line by triggering ‘completion’ in the meaning of reg 201 is for a house builder to decide. It is reasonable to assume that in the normal course of event, a house builder will make a claim at the earliest possible juncture for cash flow reasons. It is then for a DIY housebuilder to decide when that earliest possible juncture should be, since by precipitating ‘completion’ through obtaining the relevant documentation, a DIY house builder is effectively foregoing the opportunity of making any future claim of what may turn out to be legitimate expenses.”

DISCUSSION

33. The Tribunal notes that Regulation 201 VATR requires a claim to be submitted no later than three months after completion and that the claim must be accompanied by “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.” Ms Davis was unable to advise the Tribunal what “other documentary evidence” HMRC would accept in order to meet this requirement.

34. Ms Davis referred to the definition of completion in Schedule 9 VAT Act 1994. The Tribunal notes this definition includes the word “fully” before “occupied”. The extract from

the decision in *Richard Hall* quoted at paragraph 28 refers to a “building project” not simply a “building”. Mr Fuller has maintained throughout his claim that as the planning permission allowed him to build a dwelling house and detached garage the two buildings were part of one project which was not fully completed until either he built the garage or had the garage permission removed from the approved plans.

35. Ms Davis argued that Mr Fuller’s position was the exact opposite of the position in *Bowley* where the garage was in fact built about 19 years after the house had been completed. The Tribunal had allowed Mr Bowley’s claim as it decided that building the house and garage was all part of one project. Mr Fuller had not built the garage and therefore the project had been completed when he occupied the house.

36. Mr Fuller informed HMRC in his letter dated 7 March 2019 that he had spoken to two different people at HMRC neither of whom had suggested that his claim might be out of time. He informed the Tribunal that if he had been so advised he might have borrowed money to enable him to build the garage and then submit his claim following the decision in *Bowley*.

37. If HMRC’s argument (which we do not accept) that Mr Fuller occupied the house in 2010 is correct he could have submitted his claim then and would have been entitled to a refund of £11,309.85 (assuming occupation had taken place on or shortly after 15 December 2010, the date of the last 2010 invoice, he had made his claim within three months and was able to produce satisfactory documentary evidence of completion). He would have foregone a further £65.98 in respect of the invoices for the period 2011 to 2016. He would also have foregone any claim in respect of materials which he would have purchased for the construction of the garage. In view of the estimated cost of £60,000.00 the VAT involved would presumably have been several thousand pounds.

DECISION

38. Mr Fuller applied for and obtained on appeal planning permission to erect a replacement dwelling and garage. Although he moved into the house sometime in 2010 and put in drainage and services for the garage he treated the house and garage as a *building project* (emphasis added) in accordance with the decision in *Richard Hall*. The house cost him about £100,000.00 to build but the garage was going to cost a further estimated £60,000.00. He struggled to raise the funds for the garage which we find as a fact was part of the *building project*.

39. We found Mr Fuller to be a reliable witness at the hearing and find as a fact that it was always his intention to build the garage. If this was not his intention why would he not have submitted his claim for a VAT refund in 2010 or 2011 when he occupied the house? If he had done so, he could have received over £11,000.00 nine years ago.

40. It was only in late 2018 when Mr Fuller decided that he would not build the garage that he got in touch with his local council who required him to confirm that he would not proceed with the garage. At the hearing Mr Fuller confirmed that he understood that if he decided at some time in the future to build a garage he would have to make a fresh planning application and that he would not be able to claim a refund of the VAT involved.

41. When Mr Fuller telephoned to HMRC he was advised to submit his claim; he was not advised that his claim might be out of time. If he had received such advice he might have borrowed the necessary funds to enable him to complete the garage and claim both what he had included in his claim dated 4 January 2019 and the VAT incurred in connection with the garage – possibly a similar amount as the amount included in his claim.

42. Building Control issued a completion certificate on 4 January 2019 and on the same date Mr Fuller submitted his claim for a VAT refund. We find that following removal of the permission to build a garage, the *building project* was completed when the completion

certificate was issued and the application for a refund was submitted within the three months required by the legislation.

43. Ms Davis in her Statement of Case stated that the three months for submitting a claim will usually run from the date of the document used as completion evidence. As Mr Fuller has produced a completion certificate and submitted his claim within the three month period HMRC should have accepted the claim.

44. Following the decisions in *Bowley*, *Dunbar* and *Farquharson* the appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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.

**ALASTAIR J RANKIN
TRIBUNAL JUDGE**

Release date: 10 February 2020