TC07858

VAT DIY HOUSEBUILDERS' SCHEME – claim refused by HMRC on basis that works did not amount to construction of a building and the previous building had not ceased to exist – whether corner site and double façade retained as a condition or requirement of planning approval – whether reconstruction of an existing building - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/04014

BETWEEN

JOE SMITHERS **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN
CHARLES BAKER

The hearing took place on 10 September 2020. With the consent of the parties, the form of the hearing was a video hearing on the Tribunal video platform. A face to face hearing was not held because of COVID restrictions, and we decided that the issues and evidence could be dealt with by a video hearing.

We had an electronic bundle (comprising 116 pages in pdf format) which had been prepared by HMRC and served on the Appellant and the Tribunal. The contents of that bundle are described further in the Decision Notice. (Ms Donovan had before her a hard copy of this bundle, of 111 pages, but we were satisfied that this was the same document as that before the Tribunal, having regard to the pagination of the last page of the pdf and the fact that the cover page and index were not numbered but would have counted towards the page count in pdf format.) Both parties served skeleton arguments, and the Appellant's skeleton included (as Appendices A and B) a copy of correspondence with the planning authority and photographs of the works.

The Appellant appeared in person

Ms Olivia Donovan, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

The hearing was in public. There were four observers present, two of whom were from HMRC.

DECISION

INTRODUCTION AND SUMMARY

1. This is an appeal by Mr Smithers against the decision of HMRC to reject his application under the DIY housebuilders scheme for a refund of amounts paid in respect of VAT on goods acquired and used by him. The Notice of Appeal indicated that Mr Smithers was seeking a refund of £18,437.84. However, the skeleton arguments prepared by both HMRC and Mr Smithers referred to the appeal being in relation to a claim for a refund of £18,239.15 and at the hearing Mr Smithers confirmed that it was this lower amount that was in issue.

2. Mr Smithers had incurred this amount in respect of VAT on goods used by him for the purpose of extensive building works at 44 Bushy Park Road, Middlesex, TW11 9DG. For the reasons explained further in this Decision Notice, we have concluded that the works carried out by Mr Smithers at that address do not amount to the "construction of a building" for the purposes of s35(1)(a) of the Value Added Tax Act 1994 ("VATA 1994"), as the building originally at that address did not cease to be an existing building (as construed by note 18). The appeal is dismissed.

PRELIMINARY ISSUE

3. Mr Smithers' appeal to the Tribunal was late. Section 83G VATA 1994 requires that an appeal is brought to the Tribunal before the end of 30 days beginning with the date of the document notifying the appellant of the decision against which the appeal is brought.

4. HMRC had (first) rejected Mr Smithers' claim for a VAT refund on 30 May 2017. On 15 June 2017 Mr Smithers wrote to HMRC to request a review of that decision. It appears as if that letter was not (at least initially) received by HMRC. There is then some missing correspondence (or, at least, correspondence which was not before the Tribunal), but in any event on 1 May 2018 HMRC wrote to Mr Smithers, referring to a letter from him dated 4 April 2018 and a request which had been "previously submitted" and a telephone conversation which had taken place on 27 April 2018. That letter from HMRC dated 1 May 2018 is from an unnamed officer in the Business Tax Operations Unit National DIY Team. It states that Mr Smithers had not specifically requested that the decision be reviewed by an HMRC officer not previously involved in the matter, therefore the author of the letter had looked at the information in detail and went on to explain the reasons for the rejection of the claim. That letter then sets out the right to request a review or to appeal to the Tribunal. We are not convinced that this was an accurate statement of Mr Smithers' rights at this stage, given that Mr Smithers had previously requested a review of the decision, but in any event Mr Smithers was appealing to the Tribunal against HMRC's decision (or outcome of the review) set out in the letter dated 1 May 2018.

5. Mr Smithers gave Notice of Appeal to the Tribunal on 10 July 2018. That appeal was late, as was identified by Mr Smithers in his Notice of Appeal, and referred to by the Tribunal when the appeal was acknowledged on 31 July 2018. In their Statement of Case dated September 2018 HMRC objected to that late notice. However, HMRC served a second Statement of Case in December 2018 which made no reference to the September 2018 document and did not mention the late notice or set out HMRC's position thereon. HMRC's skeleton argument, dated 23 September 2019, was similarly silent. All three of these documents were stated to have been prepared by Ms Donovan. At the hearing, Ms Donovan confirmed that HMRC did not object to the appeal being notified late to the Tribunal.

6. The question as to whether to admit the appeal late is one for the Tribunal, albeit that HMRC's position thereon is a factor relevant to the consideration of this matter (having

regard to the principles set out by the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC)).

7. We noted that whilst the Notice of Appeal was dated 1 July 2018 and had been stamped as received by the Tribunal on 10 July 2018, in that Notice Mr Smithers had explained that his appeal was being made just one day late. Looking at the papers before us, we had a copy of a letter from Mr Smithers dated 27 May 2018 in which he stated that he wanted to appeal against HMRC's refusal of a refund, and enclosing HMRC's letter of 1 May 2018. The addressee of that letter was not stated on it (ie whether it was HMRC or the Tribunal), but one copy in the hearing bundle of HMRC's letter dated 1 May 2018 had been date-stamped by the Tribunal twice – on 1 June 2018 and 10 July 2018. The Notice of Appeal also referred to the "appeal previously submitted", attaching the letter of 27 May 2018. We inferred from this that Mr Smithers had informed the Tribunal that he was seeking to appeal by sending the letter dated 27 May 2018 to the Tribunal (albeit that he had not used the prescribed form). We considered, having regard to the very short delay in sending this letter to the Tribunal (which was sent before the 30 days expired, but received afterwards) and the fact that HMRC did not object and were prepared to proceed, that we should accept late notice of the appeal. We informed the parties of this decision during the hearing.

EVIDENCE

8. The hearing bundle comprised the Notice of Appeal, HMRC's Statement of Case (dated December 2018), correspondence between the parties, emails from Richmond planning department (including from Robert Naylor and Anita Vedi) to Mr Smithers and/or his agent (James Lloyd), outline plans of Bushy Park Road and copies of photographs taken of the building works being conducted at the site. It also contained relevant legislation as well as HMRC's claim form for DIY housebuilders and their guidance notes thereon.

9. Mr Smithers' skeleton argument included not only a chronology and outline of the matters in issue but also two appendices, A and B, together comprising 12 pages. The material in these appendices had previously been provided by HMRC in the hearing bundle, but we did note that the photographs included as part of the appendices were much better copies than those that formed part of the hearing bundle (in that they were in colour and clearer).

10. Mr Smithers gave evidence orally, and was cross-examined by Ms Donovan and answered questions from the Tribunal. We found Mr Smithers to be a credible witness, and accept his evidence as to the extent of the works which were carried out.

RELEVANT FACTS

11. We make the following findings of fact based on the evidence before us. Additional findings are contained in the Discussion

12. Mr Smithers and his partner bought a house at 44 Bushy Park Road for £500,000 in 2011. We refer to the building at that address as "the Property". The evidence included an outline plan of the road, showing the location of the Property on the road, and a photograph downloaded from Google Maps. The Property is at the end of a terrace of 5 houses, and there is then a gap between the Property and the first house in the neighbouring terrace (42 Bushy Park Road ("Number 42")).

13. Bushy Park Road itself is a curved rather than straight road and the Property is on that curve, the consequence of which is that the gap between it and Number 42 is of irregular dimensions. When asked by the Tribunal, Mr Smithers estimated that the gap is about 1.2m at the front corner of the Property, increasing to 5m at the rear of the building. We accept this as a fair estimate, which was not challenged by HMRC.

14. The gap between the Property and Number 42 provides shared access to the owners of those buildings to their own back garden. It is not, however, a public right of way, nor does this gap lead anywhere other than to the two back gardens.

15. Mr Smithers applied for and obtained planning permission from Richmond Council (the relevant local planning authority) for works including a rear dormer extension and roof lights. This planning permission was obtained on 29 September 2011. He was refused permission for a rear ground floor extension.

16. Building works began in October 2011. The works were extensive, and the bundle included some photos of those works. One of those photos, taken from the back garden, shows that there was no rear wall to the Property, nor internal fittings (not even a first floor) or a roof. Instead, we could see the front wall of the house, the flank wall and some supporting beams. Mr Smithers' evidence was that these photos showed the extent to which the pre-existing building had been demolished, and that he had retained only the front wall and the flank wall (and what had been the party wall with number 46). We accept that evidence.

17. There is then an email from Robert Naylor, an enforcement officer working for Richmond Council planning department, to Mr Smithers in which Mr Naylor states that he had been on site visits that morning and had noticed that there are "extensive works" being undertaken at the site. That email includes the following:

(1) He had discussed the development with the contractor on site, and it appears that "most of the original dwellinghouse has been demolished, with particular regard to the removal of the original roof, the original wall and the original outrigger. During my site visit I noted that only two original walls remain intact". Mr Naylor noted that this development was unauthorised and could be liable to enforcement action.

(2) He "strongly" advised Mr Smithers to cease the current works as any further works may be subject to formal enforcement action that could involve costly remedial measures.

(3) He advised that Mr Smithers would need to submit a "retrospective application for planning permission for the "substantial demolition of the dwellinghouse and the erection of a new house consisting of an outrigger and roof extension"", and suggested that such an application would only gain a favourable decision if certain suggestions were incorporated, including:

(a) Reinstate the outrigger and roof,

(b) Retention of front facing façade, and

(c) No roof extension over the outrigger.

18. That email (which we refer to as the "Naylor Notification") is undated. Works had not begun until October 2011, therefore it would have been sent after that date, and we infer it is from before 19 March 2012, as the hearing bundle included an email from Mr Naylor to Mr Smithers and Anita Vedi (another planning officer at Richmond Council) of that date which is responding to an email from Mr Smithers (a copy of which we did not have) and, from its content, appears to follow on from the points made by Mr Naylor in the undated email.

19. In the email of 19 March 2012 Mr Naylor reiterates that "as I am sure you will agree, the majority of the house has been demolished (all internal walls and floors, the main roof, the entire outrigger and the entire rear wall and been removed)". The site is "totally uninhabitable".

20. On 30 January 2013 Ms Vedi emailed Mr Lloyd confirming that it was best to proceed with an application for the retention of the re-constructed house first, and that this would be liable to a "CIL payment, affordable hosing contribution and possibly monies for a Planning Obligation Strategy".

21. A planning application (reference 13/1855/FUL) was received by Richmond Council for the "Retention of the reconstructed house with roof alterations (rear dormer) including side and rear extensions" on 29 May 2013. The planning report dated 27 February 2014 in relation to that application includes the following in the Professional Comments section:

> "It was the view from officers that sufficient demolition had taken place to warrant the application submitted and it is noted that other than the end flank wall and façade the rest of the dwelling had been removed…"

22. Earlier in that report it was noted that:

> "Save for the rear/side wrap around extension, most of the rebuild has taken place and the house is habitable."

23. On 28 February 2014 the decision notice in respect of the planning application was issued. That decision notice states that permission is granted for the "Retention of the reconstructed house with roof alterations (rear dormer) including side and rear extensions". That decision notice does not refer to the retention of either the front façade or the flank wall.

24. On 2 December 2016 Assent Building Control Ltd issued the completion certificate in respect of the works in accordance with s51 Building Act 1984.

25. On 15 February 2017 Mr Smithers made a claim for a refund of VAT under s35 VATA 1994 in relation to the works which had been carried out at 44 Bushy Park Road, Teddington, Middlesex, TW11 9DG.

26. On 30 May 2017 HMRC rejected the claim. Having referred to the VAT431NB Notes (HMRC's guidance notes), that letter explains:

> "The London borough of Richmond Upon Thames Planning Permission states that the works carried out are "Retention of the reconstructed house with roof alterations (rear dormer) including side and rear extensions" and the plans clearly show that there was already a dwelling in existence and that works have been carried out to enlarge this dwelling.
>
> It is clear from these documents that there was a pre-existing property and you have carried out extension works. This pre-existing property was not **completely** demolished; parts of it have been retained and incorporated into your "new" dwelling but not as an explicit condition of the Planning Permission."

27. On 15 June 2017 Mr Smithers wrote to HMRC to request a review of the decision. There then appears to have been further correspondence between HMRC and Mr Smithers which was not before the Tribunal (although nothing turns on this).

28. On 1 May 2018 HMRC wrote to Mr Smithers, referring to his letter of 4 April 2018, which had itself referred to his letter of 15 June 2017. HMRC confirmed that they had no record of the letter dated 15 June 2017, however his reason for the late submission was accepted. HMRC confirmed that their decision to reject the application for a refund remained the same and explains:

> "...you referred to the photographs of the building provided as evidence of the condition of the building prior to re-build. In the photographs it clearly shows that the front façade and end flank wall were retained, which you confirmed in our conversation on Friday 27th April 2018.

For the claim to be eligible as a New Build under the VAT DIY scheme, the new building should retain "no more than one façade (two on a corner site)" and that this be an explicit condition in your Planning Permission..."

RELEVANT LEGISLATION

29. Section 35 VATA 1994 provides:

> "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…
>
> (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 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…"

30. By virtue of s96(9) VATA 1994, Schedule 8 of the VATA 1994 must be interpreted in accordance with its notes. Section 35(4) provides that the notes to Group 5 (Construction of buildings etc) of Schedule 8 apply for construing s35 as they apply for construing that Group. Notes 2, 16 and 18 to Group 5 of Schedule 8 are as follows:

> "(2) A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied –
>
> (a) the dwelling consists of self-contained living accommodation;
>
> (b) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;
>
> (c) the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision; and
>
> (d) statutory planning consent has been granted in respect of that dwelling and its construction or conversion has been carried out in accordance with that consent.
>
> …
>
> (16) For the purpose of this Group, the construction of a building does not include—
>
> (a) the conversion, reconstruction or alteration of an existing building; or

(b) any enlargement of, or extension to, an existing building except to the extent the enlargement or extension creates an additional dwelling or dwellings; or

(c) subject to Note (17) below, the construction of an annexe to an existing building.

…

(18) A building only ceases to be an existing building when:

(a) demolished completely to ground level; or

(b) the part remaining above ground level consists of no more than a single facade or where a corner site, a double facade, the retention of which is a condition or requirement of statutory planning consent or similar permission."

31. A claim for a refund of VAT must be made in accordance with regulation 201 of the Value Added Tax Regulations 1995 which, provides that a "claimant shall make his claim in respect of a relevant building by 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 other specified documents.

DISCUSSION

32. It is for Mr Smithers to establish, on the balance of probabilities, that his claim for a refund of VAT satisfies the conditions of s35 VATA 1994.

33. Section 35 provides that a refund shall be made where a person carries out works comprising the construction of a building designed as a dwelling and his carrying out of the works is lawful and otherwise than in the course or furtherance of any business.

34. Ms Donovan confirmed that HMRC accept that the building was "designed as a dwelling" for the purposes of s35(1A) and that the claim was made in time. HMRC's refusal of Mr Smithers' claim was based on their position that:

(1) the works were excluded as the "conversion, reconstruction or alteration of an existing building" (referring to note 16), and

(2) the original house had not ceased to be an existing building as it had not been completely demolished – the part remaining above ground had consisted of two facades, and this had not been a condition or requirement of statutory planning consent or similar position and in any event the Property was not a "corner site".

35. Mr Smithers accepted that there had been an existing building and that this had not been demolished completely (and even if this had not been accepted we would so find based on the evidence before us). However, he argued that the retention of the double façade had been a condition or requirement of statutory planning consent, that the Property was a corner site and that the construction was not excluded by note 16 as the conversion, reconstruction or alteration of an existing building, referring in particular to the planning authority having required that the conditions for a new build were satisfied.

36. The parties therefore took issue with whether the building works amounted to the "construction of a building", as construed by notes 16 and 18.

37. Before addressing the submissions of both parties and the evidence to which we were referred, we note that the Tribunal identified a potential issue in relation to the requirement set out in s35(1)(b) VATA 1994, namely that "the carrying out of the works is lawful and otherwise than in the course or furtherance of any business". It was apparent from the papers

in the hearing bundle (in particular the correspondence between Mr Smithers and Richmond Council) that Richmond Council's position had been that the works undertaken in 2011 to 2012 were not within the planning permission which had been granted by them in September 2011 and were unauthorised. Following further exchanges, planning permission was granted in February 2014 and the claim under s35 was made in February 2017.

38. Therefore, whilst the requisite planning permission was in place by the time the claim was made, it had not been in place whilst many of the works were carried out. The requirement in s35(1)(b) is framed in the present tense – "is lawful" – thus raising a question as to whether works which had not been within the scope of planning permission at the time they were physically carried out but which were later approved by the planning authority (whether following a new application for permission or otherwise) could be within s35 VATA 1994. During the hearing we asked Ms Donovan whether HMRC sought to raise any challenge as to whether the works satisfied the requirement in s35(1)(b) – she confirmed that they did not. HMRC's position was that as the planning permission had been obtained by the time the claim under s35 had been made, the requirement that the works be lawful was satisfied.

39. We are aware that there is authority from the Upper Tribunal on the interpretation of s35(1)(b). Nevertheless, we decided not to consider this point further (or seek written submissions from the parties) in view of our conclusions on the matters that were in issue between the parties.

40. We now deal with the matters that were in issue between the parties.

Retention of double façade on corner site (note 18)

41. Note 18 states that a building only ceases to be an existing building (if not demolished completely to ground level) when "(b) the part remaining above ground level consists of no more than a single facade or where a corner site, a double facade, the retention of which is a condition or requirement of statutory planning consent or similar permission."

42. Both parties agreed that the works had involved the retention of a double façade. The parties disagreed as to whether the works involved a corner site and whether the retention of the double façade was a condition or requirement of the planning permission. The Tribunal had some doubt as to whether both the front and flanks walls were facades for this purpose – Mr Smithers stated that a façade was simply an outside wall. It seemed to us that Parliament could have said outside wall, or exterior wall, if that was their intention. Instead, they used "façade" which is defined by one dictionary as "the principal front of a building, that faces on to a street or open space" and by another as "the front of a building, especially a large or attractive building". We note in this regard that the planning office distinguished between the flank wall and the façade in his report of 27 February 2014. We do not make any finding on this point.

43. As to "corner site", Mr Smithers pointed out (in his letter of 27 May 2018) that the building is "sited on the corner of the street" and the front and flank walls clearly form the corner of the building. He noted that the term is not defined in the VATA 1994, and that a dictionary definition of a corner is "the point, area, or line that is formed by the meeting of two lines, surfaces". Ms Donovan disagreed – HMRC's position is that a corner site will face two roads (or public pathways) whereas the Property faced just one road, Bushy Park Road.

44. We concluded that the Property was not "a corner site". This phrase does not just look at whether the retained walls form a corner of a building (as suggested by Mr Smithers) but at the location of the plot as a whole. We do not consider that HMRC's approach is necessarily correct, because there is nothing in the legislation which indicates that the site must have

boundaries with two different roads or public pathways. In the present instance, Bushy Park Road is gently curved. The Property is an end-terrace house lying on the inside of the curve, and Number 42 is the first house in the next short terrace of houses on that road. The gap allows access to the back gardens, and its irregular shape simply allows the two short terraces to be orientated differently so as to follow the curve of the road.

45. This conclusion is sufficient to dismiss the appeal. We have dealt with the remaining issues as they were argued before us.

46. Mr Smithers submitted that the retention of the double façade had been a requirement or condition of the planning permission. He referred to the Naylor Notification advising that the building works should cease, noting that this was sent at a time when the pre-existing building had largely been demolished and all that remained at that time was the front and flank walls. He had then applied for planning permission on a basis that was clear that these walls would be retained.

47. Ms Donovan drew attention to the terms of the planning consent dated 28 February 2014, noting that there is no reference in that document to the retention of a single or double façade. Furthermore, she submitted that this second limb of note 18 is intended only to deal with listed buildings or those in a conservation area, and cannot apply to buildings which are not listed or in a conservation area.

48. When reviewing the evidence, the absence of any reference to the retention of either the front or flank walls in the planning consent was stark. We considered that the terms of note 18 require a much clearer reference in the grant of planning permission to an obligation to retain the double façade.

49. We were mindful of the fact that this approach does not necessarily fit well with the way in which a decision as to planning is taken – in circumstances where the owner of a building knows (either by reason of having previous applications rejected or following advice from planning consultants) that a proposal needs to ensure that certain walls are retained and submits an application which satisfies this assumed criteria, it is then likely that the planning decision which emerges will not need to specify that those walls are retained – it is implicit from the fact that the application was made on the basis that they would be so retained, and any deviation from this would be unauthorised.

50. We did not accept Mr Smithers' argument in relation to the Naylor Notification – the advice to cease the current works was given on the basis that the development being undertaken was unauthorised and there was the potential for enforcement action. Furthermore, we note that in the advice as to what might be needed to make a successful new application for planning permission, we noted that Mr Naylor referred only to the proposal involving the retention of the front façade. There is nothing in this email to suggest or imply that the retention of the front and flank wall would be a requirement or condition.

51. We also reject Ms Donovan's submission that note 18(b) can only apply to works involving listed buildings or in a conservation area. It may well be that they are a classic example of a situation which may be covered by this limb, but it is not on its face so limited and we do not read into it any such limitation.

52. Nevertheless, having regard to all of the evidence before us, we conclude that Mr Smithers has not established that the retention of the double façade was a condition or requirement of the planning permission; his appeal fails for this reason also.

Construction of a building does not include reconstruction (or conversion or alteration) of an existing building (note 16)

53. HMRC argued that, even if the works had not been excluded by note 18, the works at the Property would in any event have been prevented from satisfying the definition of the construction of a building by note 16, which states that the construction of a building does not include the conversion, reconstruction or alteration of an existing building.

54. Mr Smithers emphasised that Richmond Council had classified the works as a new build – the Naylor Notification advised that the application for planning permission would be for a new house (given the extent of the demolition which had occurred), the email from Mr Naylor of 19 March 2012 stated that the building of the new house required permission in a way that was no different from the need for permission to reconstruct a dwelling that had been destroyed by fire, the obligations referred to by Ms Vedi in her email of 30 January 2013 were requirements consistent with an application for permission for a new build, and the fee payable to Richmond Council was the fee for an application to build a new house.

55. Ms Donovan referred us to:

(1) the planning decision notice which describes the works as "Retention of the reconstructed house and roof alterations (rear dormer) including side and rear extensions", as well as the completion certificate which repeats this reference to a reconstruction; and

(2) HMRC's guidance on claims under the DIY scheme, as set out in VAT431NB Notes, which states that "A new build is a building that has been constructed from scratch. In general, unlike a conversion, it will not incorporate any part of an existing building. This means that where a building is constructed on the site of a pre-existing building it will not incorporate any part of the former building above ground level."

56. Mr Smithers had largely demolished the Property and then re-built it, retaining the front and flank walls. The question is whether this is excluded from constituting the construction of a building as a reconstruction.

57. Given our conclusions in relation to note 18, the original house at the Property had not ceased to be an "existing building" (as neither of limb (a) or (b) were satisfied in relation thereto). The works had therefore involved re-building that existing building and we considered that this fell squarely within what would typically be understood to be the re-construction of that existing building. The works are therefore outside s35(1)(a) VATA 1994 and are not eligible for a refund.

58. In reaching this conclusion, we did not find the references to the approach taken by Richmond Council to the making of planning decisions or to HMRC's guidance to be of assistance.

59. We did not find either parties' references to what a new build may or may not look like to be of any assistance – s35 and the accompanying notes (by which we refer to the notes to Group 5 of Schedule 8, not HMRC's guidance notes) do not require that the dwelling be a "new build", nor do they contain any reference to how the works are classified for planning purposes (other than in relation to the lawfulness of the works) – that is to say, the question of whether works are within s35 cannot be answered by evidence as to how the planning authority characterised them.

60. Similarly, Ms Donovan referred us to HMRC's guidance notes and the reference to a new build being "from scratch". HMRC's guidance notes are just that, and do not aid our interpretation of the legislation or the notes which the legislation provides are to be applied in construing that legislation.

HMRC's reservation of right to check invoices supplied

61. Finally, we note that in HMRC's Statement of Case and skeleton argument they sought to reserve their position in relation to the invoices supplied by Mr Smithers. HMRC stated that if we were to find that the conditions for a refund are satisfied, the invoices which Mr Smithers submitted have not been checked and "as such" HMRC reserve the right to check the invoices and make a later decision in regard to whether they are allowable.

62. Neither party made any further submissions on this matter during the hearing. Given our decision that Mr Smithers is not entitled to a refund of the VAT under s35 VATA 1994 this point is irrelevant. However, we do observe that we are not convinced that HMRC is able to reserve their position in this manner.

63. Mr Smithers' claim for a refund set out the amount claimed and supplied invoices in support of that claim. Section 83(1)(g) VATA 1994 provides that an appeal lies to the Tribunal with respect to the amount of any refunds under s35. HMRC had decided that the amount of the refund should be nil, and Mr Smithers is appealing against that decision. If we had decided that conditions of s35 had been satisfied, it is not immediately clear to us why we would not then also decide the amount of the refund. If we did not do so, and left it open to HMRC to check the invoices (which they have had since 2017) and they were to decide to allow only some of them, how would Mr Smithers be able to challenge that decision of HMRC (if he disagreed)? He has already brought his claim under s83(1)(g) once. This would be an unappealing outcome (and potentially impermissible). We express this no more strongly given that we did not hear argument on the point (and, in view of our decision above, considered it was not in the interests of justice to ask the parties to provide written submissions on the issue).

CONCLUSION

64. For the reasons given above, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

65. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

RELEASE DATE: 30 SEPTEMBER 2020