



Neutral Citation: [2024] UKFTT 892 (TC)

Case Number: TC09309

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[By remote video/telephone hearing]

Appeal reference: TC/2023/09161

VALUE ADDED TAX DIY REPAYMENT SCHEME – Planning permission granted for two developments – first permission for conversion of a barn to a dwelling - second permission for extension to existing barn conversion for two bedrooms- single claim only allowed - whether the second claim was ineligible for a refund as an extension to an existing dwelling – yes - whether decision to disallow claim for a VAT refund was correct – yes – Appeal dismissed

Heard on: 16 September 2024
Judgment date: 7 October 2024

Before

**TRIBUNAL JUDGE RUTHVEN GEMMELL WS
TRIBUNAL MEMBER DEREK ROBERSTON JP**

Between

BRIAN LAWTON

Appellant

and

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents**

Representation:

For the Appellant: Brian Lawton represented himself, (“counsel for BL”)

For the Respondents: Ope Abolude, Litigator of HM Revenue and Customs’ Solicitor’s Office, (“counsel for HMRC”)

DECISION

INTRODUCTION

1. The form of the hearing was by video, and all parties attended remotely. The remote platform used was the Teams video hearing system. The documents which were referred to comprised of an amended Hearing bundle of 270 pages.
2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.
3. Brian Lawton (“BL”) appealed against a decision of HMRC dated 28 June 2023 to refuse a VAT refund claim application for a VAT refund in the sum of £2,582.38.
4. BL, who was a credible witness, gave evidence and was cross examined.

BACKGROUND AND EVIDENCE

5. On 28 June 2010 BL submitted an application for planning permission referenced PA10/0421. This planning application related to the “conversion of a barn to a dwelling” (“the first application”). Although this planning permission included a small single-storey extension, those works were not undertaken.
6. A completion certificate was issued, in respect of part of this first application development, described as a “Conversion of barn to a dwelling”, with a completion date of 24 March 2021, in respect of the “conversion of barn to habitable unit”.
7. On 4 June 2021, BL made a VAT refund claim under the VAT Refund Scheme for DIY Housebuilders (“the VAT Scheme”) (“the first DIY Claim”) which was deemed eligible as the claim was made using planning permission PA10/0410 ‘Conversion of barn to a dwelling’ and had a completion certificate. The claim was completed and paid on 23 December 2021.
8. On 17 November 2021, BL submitted a second application for permission referenced PA21/11436 (“the second application”). This application related to an “extension to existing barn conversion” which was for a larger single-storey extension, including a second bedroom, to an existing dwelling. This planning permission superseded the planning permission granted in PA10/04210 for a small single-storey extension which had not been commenced.
9. On 31 January 2022, planning permission was granted for the second application.
10. On 10 October 2022, a completion certificate was issued in respect of the second application described as a “two bedroom extension to existing barn conversion”.
11. On 18 October 2022, BL made a second repayment claim under the VAT Scheme; (“the second DIY claim”) for a refund in the total of £2,582.38.
12. On 27 February 2023, BL provided evidence in support of the second DIY claim.
13. On 25 July 2023, BL wrote to HMRC saying that the building works were completed in two parts:

Part (i): Conversion of the existing Agricultural Barn and

Part (ii): Development of the bedroom extension.

14. On 28 June 2023, HMRC refused the second DIY claim under the VAT Scheme.
15. On 27 July 2023, BL appealed to the First- tier Tribunal (“FTT”).
16. BL gave evidence that the building project under the first application started before the Covid outbreak but was unfortunately severely disrupted during Covid and the lockdown period.
17. This brought huge uncertainty, as well as significant financial and economic impacts on the whole economy and in particular the building industry. For a self-development project, it also resulted in significant supply chain issues within the building industry as well as significant increases in materials and labour costs.
18. Building labour resource was also restricted due to the high levels of absence as a result of furlough, sickness and social distancing measures, resulting in delays, disruption and increased costs. The financial stability of firms providing labour and services also became less clear.
19. Accordingly, not only did the costs for the building project increased significantly but Covid also brought, for BL, a huge amount of uncertainty about the future social and economic impact that might result. There was also significant uncertainty as to how long the lockdown and social distancing measures would need to be in place.
20. In view of all these concerns, BL decided that, after part of the project was finished, it would be sensible to get a Building Regulations sign off and a completion certificate for the part of the project that had been completed. This would also allow the possibility of selling off the development should that become necessary as a result of the uncertainty about the future.
21. The VAT Scheme requires a claim to be made within 30 days of completion and this was provided, accepted by HMRC and subsequently paid even although the project was not fully completed in terms of the Planning permission for the first application, which BL had ‘inherited’ from the previous owner.
22. HMRC’s letter of 28 June 2023 to BL stated:

“May I draw your attention to Claim form notes for conversions Note 16 section of which states that:

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.

The legal basis for this is the VAT Act 1994 Section 35(2), 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.”

23. Prior to the second part of the first application development being completed (covered under planning decision, PA 10/04210), a second planning application, (PA 21/11436), was submitted and approved for two bedrooms to be added as an extension to an existing barn conversion. This was for an additional one bedroom to the first application.

24. BL stated that he submitted evidence to HMRC which they accepted and confirmed a telephone conversation to prove that the property was uninhabitable and had not been lived in during the phase between the two parts of the development.

25. BL made a second claim under the VAT Scheme which was refused as HMRC stated that only one claim could be considered in relation to the first application and that the claim in relation to the second application was ineligible as it was an extension to an existing dwelling which did not qualify for a VAT refund.

ISSUE BEFORE THE TRIBUNAL

26. Whether HMRC's decisions to allow and disallow the claims for VAT refunds under the VAT Scheme were correct.

BURDEN OF PROOF

27. The burden of proof was on BL to show that HMRC's decision to disallow the VAT claim was incorrect. The standard of proof is the ordinary civil standard, which is the balance of probabilities.

LEGISLATION

Single DIY claim

28. VAT Brief 8 (2022) provides as follows:

“This brief clarifies HMRC's position on making a claim under the DIY Housebuilders Scheme, following the First Tier Tribunal's decision in the case of Andrew Ellis and Jane Bromley.

Under the scheme housebuilders can submit a single claim within 3 months of completion. HMRC policy is that only a single claim is allowed under the scheme.

Where it is agreed that a claim has been repaid in error, HMRC will accept a subsequent claim with evidence that the claim has been made within 3 months of completion.”

The eligibility of VAT refund on an extension to an existing dwelling

29. Value Added Tax Act 1994 (VATA), Section 35, provides that:

(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. . . 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.

30. Schedule 8, Group 2 note 2:

(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 terms 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.

31. Schedule 8, Group 5, note 16:

(16) For the purpose of this Group, the construction of a building does not include-

- (a) A 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
- (c) Subject to Note (17) below, the construction of an annexe to an existing building.

BL'S SUBMISSIONS

32. BL says that as a consequence of (a) the significant financial, economic and related impacts of the Covid pandemic, (b) the restrictions which followed and in particular its consequences for the building industry, and (c) the limited availability and increased costs of labour and materials, he decided it would be sensible to obtain a completion certificate for the part of the project that was completed, notwithstanding that this was not the whole project for which planning permission had been received.

33. As a consequence of the requirement to submit a claim within 30 days of completion, BL submitted that the works were complete but says, notwithstanding this, that completion only occurs when a development has been finished in accordance with its original plans.

34. Completion takes place at a given moment in time and that point in time is determined by weighing up the relevant factors of the project such as when the certificate of completion is issued, the accordance to approved plans and specifications, the scope of the planning consent and variations to it and whether the building is habitable or fit for use.

35. BL says that HMRC did not follow their own definitions when only part of the first application development was submitted together with a completion certificate and, accordingly, they should not have approved the repayment. The development had not been completed in line

with the approved plans and was not habitable or fit for purpose. The project was not complete in line with the original planning PA10/04210.

36. BL says that he submitted evidence to HMRC, which they accepted and confirmed in a telephone conversation, to prove that the property was uninhabitable and had not been lived in during the phase between the first application development and the second application development.

37. Without the impact of Covid, the project would have continued to completion without any pause between the two phases and BL would have waited and made a full and single submission at the end of the project. Having already had to endure significant delays, disruption and cost increases as a result of Covid, BL requests that the requirement of only making one DIY VAT reclaim for the property is waived.

38. In addition, BL says that HMRC should have considered the planning application PA 10/04210 and rejected the initial claim on the grounds that the project was not fully complete at the point of submission. If that process had been followed, the initial claim would have been rejected and BL would now be able to make a full and complete VAT claim for all costs incurred in the development.

39. BL requests that the claim is now assessed as if the VAT claim had been rejected and that the invoices for both the first and second applications are now assessed for repayment

HMRC'S SUBMISSIONS

The Second DIY claim

40. VAT Brief 8 (2022) confirms that only a single claim is allowed under the DIY scheme unless a) it is agreed that the initial claim has been repaid in error or b) invoices and works carried out before the claim was submitted had been left out in error or c) invoices were issued late by the contractor.

41. HMRC submit that the circumstances of this case do not qualify for a second claim.

42. HMRC agree that two stages of building works were carried out; Part (i): Conversion of the existing Agricultural Barn and Part (ii): Development of the bedroom extension

43. HMRC say that a completion certificate was issued for the "conversion of (a) barn to (a) habitable unit." and that it is undisputed that the BL made a VAT refund claim with the attached completion certificate on 4 June 2021 which was granted by HMRC.

44. BL contends that the barn conversion was not lived in nor habitable at this stage and therefore, HMRC incorrectly repaid the initial DIY claim. HMRC submit that whether the property was lived in or not is not relevant to the question of whether the initial claim was repaid in error.

45. HMRC say that the claim was not paid in error as it was supported by a valid completion certificate for the conversion of a barn to a habitable unit.

46. HMRC contend that the second application for permission, PA21/11436, was granted for an extension to an existing dwelling. The completion certificate for this second application was issued in respect of a "2-bedroom extension to a barn conversion" on 10 October 2022. That completion certificate only related to the second application.

47. As there are two separate completion certificates, HMRC submit that the BL cannot attempt to have the barn conversion to a dwelling and the 2-bedroom extension considered as part of one single claim.

The eligibility of a VAT refund on an extension to an existing dwelling under the VAT Scheme

48. Section 35 Value Added Tax Act 1994 (VATA) provides that to have a valid DIY claim, it must be for the construction of a building. An applicant cannot make a claim in respect of an extension.

49. Note 16 Ground 5 Schedule 8 VATA provides:

(16) For the purpose of this Ground, the construction of a building does not include-

(d) A conversion, reconstruction, or alteration of an existing building; or

(e) Any enlargement of, or extension to, an existing building except to the extent the enlargement or extension creates an additional dwelling; or

(f) Subject to Note (17) below, the construction of an annexe to an existing building.

50. The second planning application was in respect of an “2-bedroom extension of an existing dwelling”. HMRC contend that the extension is not a separate building and thus not eligible to a claim for VAT under the DIY scheme.

51. Accordingly, part (ii) of the works is not eligible for a refund under the DIY scheme because it was an extension to an existing dwelling under section 35 VATA 1994.

52. In light of the above, HMRC contend that the decision of 28 June 2023 was properly made.

Legitimate expectation

53. HMRC maintain that whilst BL has not made an explicit argument that he had a legitimate expectation about HMRC’s view of the first or second DIY claim, the grounds set out in letter of 25 July 2023 may be interpreted as such.

54. In that letter, he refers to a telephone call with HMRC stating: “I have submitted acceptable evidence to HMRC, which they have accepted and confirmed in a telephone conversation, to prove that the property was uninhabitable and had indeed not been lived in during the phase between the two parts of the development”.

55. HMRC confirmed that they had made efforts to obtain a record of this telephone call but thus far have been unsuccessful. Accordingly, HMRC can neither confirm nor deny or make further representations on the contented telephone discussion.

56. However, HMRC submit that legitimate expectation is outside of the FTT’s jurisdiction as it is a matter of public law as the FTT does not have general supervisory jurisdiction akin to the Administrative Courts powers under judicial review as confirmed by the Upper Tribunal in *Zeman*. The UT confirmed in *Noor* [2013] UKUT 071 [87]-[93] and *Hok Limited* [2021] UKUT 383 (TCC) at [55]-[57] that the FTT do not have jurisdiction to consider public law issues in appeals brought under section 83 VATA. This position was affirmed by the Court of Appeal in *The Trustees of the BT Pension Scheme* [2015] EWCA Civ 713 at [141].

57. HMRC respectfully ask the Tribunal to dismiss this appeal and uphold HMRC’s decision of 28 June 2023 to refuse the second claim for a refund of the VAT paid on an extension to an existing barn conversion under the DIY scheme, in the amount of £2,582.38.

THE TRIBUNAL DECISION

58. The tribunal were sympathetic to BL's predicament in progressing the first application development at the time of the Covid pandemic and the lockdown with the financial and economic challenges these brought about.

59. Nevertheless, and as was stated at the tribunal hearing, the function of the tribunal is to consider all the evidence and apply the appropriate law in coming to a decision to determine the matter. It was further explained at the hearing that there is a hierarchy of decisions and accordingly a decision of the Upper Tribunal or any other higher court is binding on the FTT and, accordingly, this tribunal.

60. One such tribunal decision, *Hok Limited* [2021] UKUT 383(TCC), referred to by HMRC in relation to Legitimate Expectation, states that the FTT has no jurisdiction or ability to take into account considerations of whether the circumstances for taxpayers in relation to their obligations under the tax legislation are unfair. The tribunal is required to apply the law.

61. The tribunal considered that HMRC were entitled to insist that only one claim was made under the VAT Scheme in circumstances where there has been no repayment in error or invoices and works carried out before the claim was submitted and left out of account in error or invoices issued late by a contractor.

62. For the reasons stated by BL, in the particular circumstances in which he found himself during the pandemic period, he had decided to seek a completion certificate on the first application before all the stages specified in that application had been completed.

63. He was then required to submit a refund claim within 30 days of the issuance of that certificate and did so. In doing so, he confirmed that the first application development had been completed and the Tribunal were not persuaded that HMRC had an obligation to review a planning permission to ensure that all aspects of it had been completed, in the face of a taxpayer submitting a completion certificate confirming that a development was completed.

64. HMRC could not know if a taxpayer had decided to only complete part of a project as a matter of choice with no intention of completing the remainder of the authorised works. Instead, they allow only one claim which is likely to result in only completed works, as the taxpayer has so decided, to be claimed and refunded.

65. Accordingly, the tribunal considered that BL's first DIY claim was the only claim that could be made and was restricted to the stage of development that BL had submitted and was covered by the completion certificate, with a date of 24 March 2021, being "the conversion of a barn to a dwelling".

66. The tribunal held that HMRC were correct to allow the first DIY being the only one permitted claim which did not include the incomplete works of the first application.

67. The tribunal held that the second DIY claim related to an extension to an existing dwelling, which under the VAT Scheme was ineligible by statute for a VAT refund and that HMRC's decision to refuse this claim was correct.

68. Taking all these factors and reasons into account, the appeal is dismissed.

THE RIGHT TO APPLY FOR PERMISSION TO APPEAL

69. 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.

**WILLIAM RUTHVEN GEMMELL WS
TRIBUNAL JUDGE**

Release date: 07th OCTOBER 2024