**Appeal number: FTC/114/2013**

***VALUE ADDED TAX — Repayment claim under DIY Builders' and Converters' VAT Refund Scheme — claim refused by HMRC — appeal allowed by First-tier Tribunal — whether VATA s 35 and VAT Regulations 1995 reg 201 satisfied — whether permission pursuant to s 73A Town and Country Planning Act 1990 had retrospective effect for VAT purposes — whether FTT erred in law — claim failed to meet reg 201 requirements — appeal allowed***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** **Appellants**

**- and -**

**ASIM PATEL** **Respondent**

**TRIBUNAL: JUDGE COLIN BISHOPP**
**JUDGE JUDITH POWELL**

**Sitting in public in London on 21 May 2014**

**Mr Edward Brown, counsel, for the appellants**

**The respondent did not appear and was not represented**

## DECISION

1. This is the appeal of the Commissioners for Her Majesty's Revenue and Customs ("HMRC"), against a decision of the First-tier Tribunal (Judge John Dent and Ms Susan Stott) ("the FTT") released initially in summary form and then, on 18 June 2013, with full reasons, by which the FTT allowed the respondent's, Mr Asim Patel's, appeal against a decision of HMRC, made on 20 October 2011, to refuse his claim for a refund of the VAT he incurred on building works at a residential property in Blackburn. The amount of refund which was claimed was £8,444.22. The appeal is brought with permission given by Judge David Demack on 10 September 2013.

2. The respondent wrote to the tribunal to indicate that he would not appear at the hearing, or be represented, but he made submissions in writing which we have taken into account.

### The facts

3. The facts are set out in the full decision of the FTT. Those particularly relevant to this appeal are set out as follows.

4. On 22 May 2008, Blackburn with Darwen Borough Council ("the Council") granted planning permission to Mr Patel and his brother ("the 2008 permission") under the Town and Country Planning Act 1990. The 2008 permission was described as full planning permission for "Proposed enlargement of existing residential dwellings at 17-19 Sted Terrace Blackburn BB1 7HD" and provided that the consent related to "the submitted details marked received 11 March 2008 (plan reference; project 2258 drawing nos 01, 02 and 03) and to any subsequent amendment approved in writing by the Local Planning Authority." Building Regulations Consent was granted on 25 July 2008 for the "Re-building of two residential dwellings 17 & 19 Sted Terrace". Only the works done to number 17 are relevant to this case.

5. As the FTT explained at [8], the original intention was to extend number 17 Sted Terrace into its neighbour 19 (being the dwelling on the end of the terrace) and then build a new number 19 on adjacent land. However, the architect and the builder advised that the work could not be undertaken in that way and that both properties would need to be demolished, before replacement dwellings were constructed. Mr Patel was not told that he needed planning permission for the demolition of number 17, but Building Regulations consent for the work was sought and granted. Despite the absence of planning permission for the demolition it seems that the Council's building inspector was content with the proposal that the existing buildings should be removed and replaced by a new structure.

6. Mr Patel and his brother commenced work in March 2009. The work of constructing the new 17 Sted Terrace was completed in June 2011 and Mr Patel moved in immediately. On 5 August 2011 he submitted to HMRC a claim for a refund of the VAT he had incurred on the building works. The claim was rejected; the reason given by HMRC in correspondence with Mr Patel was that the 2008

permission did not provide for the demolition of the existing dwelling and the construction of a replacement, and that the requirements of s 35 of, and the Notes to Group 5 of Sch 8 to, the Value Added Tax Act 1994 ("VATA") were not satisfied. We come to those provisions below. Mr Patel explained that although he did not have planning permission for the demolition he had carried out the work with the knowledge and approval of the Council, but to no avail. HMRC also indicated, in the course of the correspondence, that they would not accept the retrospective planning permission which Mr Patel said he would try to obtain since their view was that the works must have been lawful at the time they were carried out, and that retrospective approval of what had been done was not enough. It seems that there was no issue about the amount claimed.

7. Mr Patel appealed to the FTT against the rejection of his claim. The hearing of the appeal began on 17 September 2012 when, as the decision records at [12], Mr Patel relied (as he had in correspondence) on the fact that the Council had raised no objection to the work as it had actually been carried out, and on its assurance that it would be willing to grant retrospective planning permission. The hearing was adjourned to enable Mr Patel to obtain retrospective permission, which he later produced. The retrospective permission was addressed to him and dated 24 September 2012. It referred to a "Full Planning Application (Retrospective) for Demolition of two dwellings and replace with two new dwellings at 17 - 19 Sted Terrace, Blackburn BB1 7HD", and permitted that work, again in accordance with the submitted details and plans. The details were identified as those received by the Council on 26 September 2012; it appears that the plans to which the permission referred were also received by the Council on that date. The date of the Council's decision was, however, recorded as 10 March 2009. We were not provided with the plans, but assume that they accurately showed the work actually carried out.

8. Neither party required a further hearing, and instead put in written submissions. The FTT met to consider its decision, which was to allow the appeal.

## The law

9. Section 35 of VATA provides (so far as relevant to this appeal) as follows:

> "(1) Where –
>
> (a) a person carries out works to which this section applies,
>
> (b) his carrying out of the works is lawful and otherwise in the course or furtherance of any business, and
>
> (c) VAT is chargeable on the supply, acquisition or importation of any goods used by him for the purposes of the works,
>
> the Commissioners shall, on a claim made in that behalf, refund to that person the amount of VAT so chargeable.
>
> (1A) The works to which this section applies are –
>
> the construction of a building designed as a dwelling or number of dwellings;

(d) the construction of a building for use solely for a relevant residential purpose or relevant charitable purpose; and

(e) a residential conversion …

(2) The Commissioners shall not be required to entertain a claim for refund under this section unless the claim—

(a) is made in such time and in such form and manner, and contains such information, and

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

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

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

10. Note (2)(d) to Group 5 of Schedule 8 is the only Note relevant in this case. It reads as follows:

"A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied— …

(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."

11. The Regulations to which s 35(2) refer are the Value Added Tax Regulations 1995 (SI 1995/2518), of which reg 201 is material in this case. It provides (so far as relevant) as follows:

"A claimant shall make his claim in respect of a relevant building by—

(a) furnishing to the Commissioners no later than 3 months after the completion of the building the relevant form for the purposes of the claim containing the full particulars required therein and

(b) at the same time furnishing to them—

(i) a certificate of completion obtained from a local authority or such other documentary evidence of completion of the building as is satisfactory to the Commissioners,

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

(iv) documentary evidence that planning permission for the building has been granted.…"

12. Section 73A of the Town and Country Planning Act 1990 makes provision for the grant of planning permission for works carried out before the date of the application, either without permission or without complying with a condition imposed by permission which has been granted. Subsection (3) provides that—

> "Planning permission for such development may be granted so as to have effect from—
>
> (a) the date on which the development was carried out; or
>
> (b) if it was carried out in accordance with planning permission granted for a limited period, the end of that period."

**The FTT's Decision**

13. As the FTT recorded it, the main force of the argument put forward for the Commissioners, then represented by Mr William Brooke, was that when the work was done it was not in line with extant planning permission. It is an essential condition, if a claim for repayment in accordance with s 35 is to succeed, that the works are lawful and carried out in accordance with such permission. The original permission allowed for an extension of number 17; in reality a new dwelling was constructed. VAT is a transaction-based tax; therefore the transactions on which the claim is based had to meet the terms of the legislation at the point in time when they occurred. Section 73A of the 1990 Act does not create a statutory fiction that can be relied upon to override the VAT legislation. Mr Brooke added that HMRC required some degree of certainty as to the bringing of any claim, and should be able to rely on the time limit for which reg 201 provides; we shall return to this point later.

14. Mr Brooke referred the FTT to two decisions in which planning permission was granted only after the works in question were undertaken, *Michael James Watson* [2010] UKFTT 526 (TC) and *Maurice Francis* [2012] UKFTT 259 (TC). In *Watson* the relevant council granted retrospective permission, but did not backdate it to a time before the works were undertaken, and the claim failed for that reason. The tribunal indicated that, had the permission been backdated, the claim would have succeeded. In *Francis* the tribunal accepted that s 73A had the effect of backdating the planning permission and, following what was said in *Watson*, allowed the appeal. Mr Brooke is recorded to have said that although HMRC did not agree with either decision they had chosen not to appeal them but, since the appeal in *Watson* was dismissed, that choice could have been exercised only in respect of *Francis*. Instead, he said, HMRC relied upon *Bond & Baxter* [2010] UKFTT 242 (TC), *Cameron Black (London) Ltd* [2012] UKFTT 257 (TC) and *Dr David Thomas Haigh* (2009) VAT Decision 20934. The FTT mentioned those cases but provided very little detail about them. They were all appeals which failed because of the lack of appropriate planning permission at the time the works were undertaken.

15. The FTT put its conclusions in this way:

> "21. We agree with the conclusion of the Tribunal in *Watson* and *Francis* (quoted above) and in [*sic*] that, 'For [the taxpayer] to have succeeded he would have needed the Council to have used its powers under s.73A at the time it issued the retrospective planning consent to backdate the consent … so that he would have had a valid planning permission at a time before the work began …'.

22. It is unfortunate that Blackburn Council have not stated in explicit terms whether they had exercised their powers under section 73A to grant a retrospective permission but they have dated the decision 10 March 2009.

23. We consider that two questions need to be answered: did Blackburn Council exercise its powers conferred by s.73A and if so from when did that exercise take effect? On the first question, the permission is granted under the Town and Country Planning Act 1990 and section 73A is the only section of that Act which refers to the planning permission having effect from the date on which the development was carried out, and is dated 10th March 2009. The conclusion we come to is that when the 2009 Permission was granted the Council did so pursuant to its powers under s 73A.

24. On the second question, we conclude that the intention of Blackburn Council was that the 2009 permission should take effect from the date they put upon it. The effect is that the 2009 permission takes effect from the 10th March 2009 – which date preceded the undertaking of the works.

25. Accordingly there was a planning permission covering the works and it was in force at the time of the works. On that basis the conditions of s 35 VATA are satisfied and thus Mr Patel is entitled to refund of the VAT incurred on the relevant works.

26 The tribunal rejected the argument put forward by HMRC on the basis of the decisions in *Bond* and *Haigh*. In neither of these had backdated permission been granted under s73A. In the finding of the tribunal, this matter is on all fours with *Watson* and *Francis* and the backdating of permission to 10th March 2009 is effective to enable the Appellant to succeed in his claim to a refund of VAT on works carried out after that date."

**HMRC's submissions**

16. Mr Edward Brown, counsel before us for HMRC, accepted that an appeal lies to the Upper Tribunal only on a point of law. The error of law on which he relied was the FTT's failure to take account of the conditions imposed by the Regulations, and particularly reg 201(b)(iv), read with reg 201(a). The requirement placed on a claimant is to furnish with his claim documentary evidence that planning permission for the building has been granted, and to do so within three months of completion of the works. It had always been common ground that the documentary evidence showing that planning permission had been granted was not available within that period; Mr Patel did not obtain the retrospective consent until 2012, and well after the three-month time limit had expired. It was nothing to the point that the permission, when granted, was retrospective; Mr Patel did not, because he could not, comply with the mandatory requirement of the Regulations that evidence of planning permission for the building actually constructed (rather than some other building) be supplied within the time limit. What he did supply, the original planning permission which related to a different proposal, plainly could not satisfy the legislative requirements.

17. The FTT did not avert to the time limit at all, but focussed only on the question whether the back-dating of the consent had the effect of deeming the works Mr Patel undertook to have been carried out lawfully. The failure to consider the time limit must amount to an error of law, and we should exercise the

power conferred on us by s 12(1) and (2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 to set aside the FTT's decision and remake it. The only decision we could properly make was that Mr Patel's claim must fail.

18. In HMRC's grounds of appeal it was accepted that a valid claim could be made if it was submitted within the requisite period and was accompanied by documentary evidence that planning permission had been granted, even if that permission was given after the work was done, provided it had retrospective effect to a date before the works began. However, Mr Brown told us, HMRC's position on this point had changed, so as to reflect what had been said in their correspondence with Mr Patel, namely that a claim would not be valid, even when submitted within the three-month time limit, if the permission relied upon was granted pursuant to s 73A and given retrospective effect to a date before the works began. We agreed to listen to what Mr Brown had to say on this point and indicated that we would consider, if it became relevant to do so, whether we could accept this change. We will return to it in our discussion below.

**Mr Patel's position**

19. In his letters to the tribunal, Mr Patel pointed out that, even if he had not at that time submitted (because he could not) the retrospective consent, he had made the claim within the three-month time limit, and had sent the original planning permission which, even if it was not sufficient to cover all that he had done, was at least planning permission for substantially the same development; and the retrospective grant of permission was sufficient evidence that the local planning authority took the view that the work was lawful. He added that he had told HMRC, and within the three-month time limit, that he was applying for the retrospective consent which he later received. Moreover, the reason given for rejecting the claim was not that it was out of time, but that the work was unlawful—yet he had remedied the failing on which the rejection was based.

**Discussion**

20. Although the FTT referred, at [19], to the requirements of reg 201(b)(iv), it does not seem to have considered the point any further, and in particular to have addressed the question whether the production, after the expiry of the three-month time limit, of retrospective planning permission covering the work actually undertaken is sufficient to satisfy those requirements. Rather, it focussed on what it perceived to be the effect of the back-dating of the permission Mr Patel obtained. It is fair to say that in adopting this approach the FTT was following in the footsteps of the tribunals in the other cases to which we were referred, *Watson, Francis, Bond & Baxter* and *Cameron Black (London) Ltd* (the point at issue in *Haigh* was rather different). The impression we form from those cases is that HMRC too have focussed in their submissions on the effect of retrospective planning permission, rather than on the time limit. Indeed, it seems from what the FTT said at [19] that Mr Brooke, in the written submissions he made after the adjournment, did not refer to reg 201(b)(iv) but simply addressed his arguments to the retrospective nature of the s 73A permission, and the consequences which flowed from it.

21. In our judgment the failure of the FTT to take the requirements of reg 201(b)(iv) into account in this way was wrong. The regulation is clear; when he makes his claim the claimant must provide documentary evidence that planning permission has been granted. This can only mean the correct permission, meaning permission relating to the works actually carried out; in that we agree with Mr Brown. As we have said, Mr Patel was not in a position to do that in 2011, since it was not until 2012 that the retrospective permission was granted. 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. HMRC's appeal must succeed on this ground.

22. We have considered whether we should also reach a conclusion on the point whether the production, before expiry of the time limit, of permission granted in accordance with s 73A and with effect from a date before the undertaking of the work is, or is not, sufficient to satisfy the statutory requirements, in particular those imposed by s 35(1)(b) to the effect that the work should be lawful, and by Note (2)(d) to Group 5 of Sch 8, which is that "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". Despite Mr Brown's request that we should, we have come to the conclusion that it is not appropriate to do so. The point does not arise in this case, and we did not have the opportunity of hearing any contrary argument on it.

**Disposition**

23. For the reasons given we allow the appeal. It follows that Mr Patel's claim for a refund of the VAT he incurred must fail. We have some sympathy with him, since he seems to be the victim of nothing more than a lack of awareness, but as we have said the requirements are strict and it is not open to us to waive or modify them even if they lead to what appears to be an unfair result.

**COLIN BISHOPP** **JUDITH POWELL**

**UPPER TRIBUNAL JUDGES**

**RELEASE DATE: 7 August 2014**