TC02045

Appeal number: TC/2010/9448

VAT – refunds to DIY builders – s 35 VAT Act 1994 - original planning permission replaced – whether replacement permission retrospective to date of works – s 73A Town & Country Planning Act 1990 - appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr MAURICE FRANCIS **Appellant**

- and -

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

TRIBUNAL: JUDGE PETER KEMPSTER
Mr MICHAEL BELL

Sitting in public at Bedford Square, London on 31 October 2011 and 9 May 2012

The Appellant appeared in person

Mr Hugh O'Leary (HMRC Appeals Unit) for the Respondents

DECISION

1. Mr Francis appeals against HMRC's refusal to refund VAT he incurred on building works at a residential property in North London ("the Property") in the amount of £15,549.75.

Relevant statutory provisions

2. Section 35 VAT Act 1994 ("VATA") provides (so far as relevant):

> **"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 the Commissioners may by regulations prescribe or, in the case of documents, as the Commissioners may determine in accordance with the regulations.
>
> …
>
> (4) The notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group but this is subject to subsection (4A) below."

3. The Notes to Group 5 of sch 8 VATA include:

> "(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."

4. Section 73A Town & Country Planning Act 1990 ("s 73A") provides:

> **"73A Planning permission for development already carried out**
>
> (1) On an application made to a local planning authority, the planning permission which may be granted includes planning permission for development carried out before the date of the application.
>
> (2) Subsection (1) applies to development carried out—
>
> (a) without planning permission;

(b) in accordance with planning permission granted for a limited period; or

(c) without complying with some condition subject to which planning permission was granted.

(3) 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."

Facts

5. The freehold of the Property was acquired by Mr Francis in December 2002.

6. On 31 January 2005 Barnet London Borough Council ("Barnet Council") granted a planning permission to Mr Francis under reference number N13151C/05 ("the 2005 Permission") which included the following terms:

"TOWN AND COUNTRY PLANNING ACT 1990

GRANT OF PLANNING PERMISSION

TAKE NOTICE that the Barnet London Borough Council, in exercise of its powers as Local Planning Authority under the above Act, hereby:

GRANTS PLANNING PERMISSION for:-

Single storey rear extension. Excavation to provide basement level. Addition of first floor to provide further habitable accommodation and non-habitable space at loft level.

At:- [the Property]

as referred to in your application and shown on the accompanying plan(s):

…

The plans accompanying this application are:- Plans Labelled 'MDF3: North east elevation to [the Property]; South west elevation rear garden; south east flank elevation; north west flank elevation; Cross section A-A; Basement; Ground Floor; First Floor ' were received along with a site plan on the 31st January 2005."

7. Mr Francis commenced works in early 2005, project managing them himself. When the roof of the existing building was removed it became apparent that the original plan was not feasible because the existing walls were not sufficiently strong. This was confirmed by the Council's building inspector who stated that it would be necessary to demolish the existing structure and rebuild it in accordance with the approved plans. Mr Francis did that during 2005 and 2006.

8. Mr Francis became aware of the VAT refund scheme for DIY builders in August 2005 and acquired a pack of paperwork from HMRC. He understood he must wait until completion of the project before making a reclaim.

9. On 26 November 2009 Mr Francis submitted to HMRC a claim for refund of the VAT he had incurred on the building works. The amount of the claim was £15,549.75 and the supporting invoices were dated between 22 February 2005 and 16 November 2006. The claim described the works as relating to a "new build". After scrutinising the claim HMRC rejected it, for reasons stated in correspondence including the fact that the 2005 Permission was not for the construction of a new dwelling as required by s 35 and the Notes to Group 5 of sch 8 VATA.

10. In February 2010 Mr Francis made a further application to Barnet Council and on 22 April 2010 Barnet Council granted a planning permission to Mr Francis under reference number B/00692/10 ("the 2010 Permission") which included the following terms:

> "TOWN AND COUNTRY PLANNING ACT 1990
>
> CONDITIONAL APPROVAL FOR RETENTION/CONTINUED USE
>
> TAKE NOTICE that the Barnet London Borough Council, in exercise of its powers as Local Planning Authority under the above Act, hereby:
>
> GRANTS PLANNING PERMISSION for: - Retention of new dwelling as built.
>
> At:- [the Property]
>
> as referred to in your application and shown on the accompanying plan(s):
>
> Subject to the following condition(s): -
>
> 1 The development hereby permitted shall be carried out in accordance with the following approved plans: North East Elevation to [the Property] North Frontage, South West Elevation Rear Garden, North West Flank Elevation, South East Flank Elevation, Cross-Section A-A, Basement floor plan, Ground Floor plan, First Floor plan, Design and Access Statement, Site Location Plan (all unnumbered) (date received 26-Feb-2010)."

11. HMRC considered the 2010 Permission but restated their rejection of the claim, issuing a formal decision letter on 3 September 2010. Following an internal review confirming that decision, Mr Francis appealed to this Tribunal.

The first hearing

12. Mr Francis submitted that Barnet Council was satisfied that the works undertaken were in accordance with the original drawings and was happy with the works. When HMRC informed him in December 2009 that the 2005 Permission was inadequate he contacted Barnet Council who advised that the best course of action was to make a new application. That application resulted in the 2010 Permission but

HMRC also refused to accept that, saying that it was not in force when the works were undertaken. Mr Francis had spoken with Ms Cheung in the planning department at Barnet Council who had assured him that the 2010 Permission was retrospective to cover the works.

13. Mr O'Leary submitted as follows:

(1) Section 35 and the Notes to Group 5 of sch 8 VATA were clear that a refund was possible only if the works constituted the construction of a new dwelling, and that expressly did not include the alteration or enlargement of an existing building. Further, it was necessary 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". That expression had been considered by the Tribunal in *Michael James Watson v HMRC* [2010] UKFTT 526.

(2) In *Watson* building works had been carried out in 2006 and a VAT refund refused because the planning permission was for "an extension". However, the building inspector's certificate described the building as a "new dwelling" and the approved works had been varied to exclude a connecting door and corridor between the existing property and the new building. As set out in ¶¶ 23 to 28 of *Watson*:

> "23. Mr Watson contacted the Mid Beds planning department who confirmed that it was a new dwelling, and advised him to put in a retrospective planning application to cover all the work for the new dwelling. This was done on 25 October 2007 and on 31 January 2008 the Council issued a Notice of Approval giving retrospective planning permission under reference 07/0182/FULL. This Notice gives the date of the valid application as 25 October 2007. Condition 5 of this Notice is different from the earlier approval, but it does restrict the occupation of the dwelling to an agricultural occupant.
>
> 24. By a covering letter dated 3 February 2008, the Appellant provided a copy of the retrospective planning permission granted by Mid Beds District Council on 31 January 2008.
>
> 25. In the course of their review the Commissioners contacted the Mid Beds District Council on 15 February 2008 to clarify what effect the subsequent planning permission has on the original planning permission. The Council responded by letter dated 6 March 2008 stating that "*Condition 5 of planning decision (ref; 05/01047/FULL) no longer applies. This decision has been superseded by the planning permission of 12 January 2008".*
>
> 26. By a letter dated 1 April 2008 the Commissioners advised the Appellant of their reconsidered view to uphold the original decision and to reject the appeal on the basis that the planning permission did not cover the earlier period when the work was carried out.
>
> 27. The Appellant filed a notice of appeal and supporting documentation at the Tribunal on 14 April 2008.

> 28. By a letter dated 25 June 2008 the Commissioners sought further clarification from the Mid Beds District Council about when the subsequent planning permission came into effect. The Council replied by a letter dated 7 July 2008 stating that the new permission took effect from 31 January 2008."

(3) In *Watson* the Tribunal concluded (at ¶ 35):

> "For Mr Watson 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 to 25 August 2005, so that he would have a valid planning permission at a time before the work began, this was not done by the Council for the reasons set out above. That they might have done it unfortunately does not avail Mr Watson in this appeal."

(4) If the present Tribunal were to follow *Watson* then there was insufficient evidence that a valid permission was in force at the time of the works, because there was no clear exercise by Barnet Council of its powers under s 73A nor any indication of when any such exercise took effect.

14. At the conclusion of the first hearing we stated the following to the parties:

(1) We agreed with the conclusion in *Watson*, that the relevant planning permission needs to be in force at the date of the works.

(2) The 2005 Permission does not assist Mr Francis because it was for the wrong works.

(3) The 2010 Permission assists Mr Francis only if it was retrospective to when the works were carried out.

(4) On the face of the document the 2010 Permission was not retrospective; however, Mr Francis had referred to telephone conversations with Ms Cheung of Barnet Council which suggested otherwise.

(5) Mr O'Leary for HMRC had fairly accepted that HMRC might reconsider their position if the 2010 Permission *was* retrospective, given the decision in *Watson*.

(6) The hearing would be adjourned part-heard to give Mr Francis the opportunity to obtain evidence from Barnet Council concerning possible retrospection.

15. On 1 November 2011 the Tribunal issued a Note of hearing stating:

> "The hearing was adjourned part-heard to be reconvened after the Appellant has had the opportunity to obtain written evidence from the London Borough of Barnet as to whether the grant of planning permission dated 22 April 2010 has retrospective effect and, if so, to what date and on what statutory basis."

The Reconvened hearing

16. The hearing reconvened on 9 May 2012 when Mr Francis explained that he had sent the Tribunal's 1 November Note to Barnet Council, and he put before the Tribunal the following three items:

(1) A letter from Ms Cheung at Barnet Council dated 1 February 2012 which stated:

> "Planning permission was granted under planning reference N1315F/05 on 7 June 2005. A retrospective planning application was then submitted, under planning reference B/00692/10 seeking planning permission for the retention of the new dwelling as built which was approved on 22 April 2010. Section 73A of the 1990 Act provides for an application to be made to a local planning authority for planning permission for development which has already been carried out."

(2) An email from Mr Francis to Ms Cheung dated 26 April 2012 which stated:

> "You may recall that I supplied you with the direction of the Tribunal dated 01/11/2011, regarding the retrospective approval of our new house. … in your letter you did not specifically give a date as to how far back is the retrospection. I think I understand that when you say retrospective, it must mean it goes back to before the build was started and supersedes the [2005 Permission]. If my understanding of the word retrospective is correct in this context, could you please confirm …"

(3) Ms Cheung's reply email dated 26 April 2012 which stated:

> "The retrospective application does not have a specified date as to when it goes back to. It grants permission for what has already been built so in essence, yes it supersedes the [2005 Permission]."

17. Mr Francis submitted that the effect of the above items taken together was that the 2010 Permission was retrospective to the date of the 2005 Permission and thus was in force when the works were carried out.

18. Mr O'Leary submitted that the correspondence still did not establish that Barnet Council had used s 73A to backdate the 2010 Permission, and so the test set out in *Watson* had not been satisfied.

Consideration and conclusions

19. As conveyed to the parties at the conclusion of the first hearing (see ¶ 14 above), we agree with the conclusion of the Tribunal in *Watson* (quoted above) 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 a valid planning permission at a time before the work began …".

20. It is unfortunate that Barnet Council have not stated in explicit terms whether they had exercised their powers under s 73A to grant a retrospective permission, nor the date from which any such grant was operative. That was the information anticipated by the Tribunal's 1 November Note. Instead the Tribunal has to draw conclusions from the Council's letter dated 2 February and the email exchange between Mr Francis and the Council's Ms Cheung.

21. We consider that two questions need to be answered: did Barnet Council exercise its powers conferred by s 73A, and, if so, from when did that exercise take effect? On the first question, the 2 February letter states that a retrospective permission was granted, and cites s 73A. The conclusion we come to is that when the 2010 Permission was granted, the Council did so pursuant to its powers under s 73A.

22. On the second question, we conclude that the intention of Barnet Council was that the 2010 Permission should stand in the shoes of the 2005 Permission. The effect is that the 2010 Permission was intended to take effect from the same date as the 2005 Permission – which date preceded the undertaking of the works. In *Watson* the council specifically refused to backdate the s 73A permission before 31 January 2008 (see ¶ 28 of the decision, quoted above), which was after the works were carried out; here we construe Ms Cheung's statements to evidence a back-dating to February 2005.

23. 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 Francis is entitled to refund of the VAT incurred on the relevant works.

Decision

24. The appeal is ALLOWED.

25. 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.

TRIBUNAL JUDGE

RELEASE DATE: 29 May 2012