[2020] UKFTT 0057 (TC)

TC07553

Appeal number: TC/2019/01443

Value Added Tax - Repayment claim under DIY Builders' and Converters' VAT Refund Scheme in respect of a property in Scotland - Building (Scotland) Act 2003 considered - claim refused by HMRC - whether VATA s 35 and VAT Regulations 1995 reg 201 satisfied - yes - Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SIMON & JOANNE COTTON **Appellants**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER MOHAMMED FAROOQ

Sitting in public at Sheffield MJC, Castle Street, Sheffield, on 5 November 2019

Mr Les Howard for the Appellants

Mr Connor Fallon, Officer of HMRC, for the Respondents

DECISION

The Appeal

1. This is an appeal by Mr Simon Cotton and Mrs Joanne Cotton ("the appellants") against HMRC's decision under s 35 of the Value Added Tax Act 1994 ("the Act"), originally made on 26 September 2018, which was upheld upon review by a letter dated 7 February 2019, to refuse their Value Added Tax ("VAT") refund claim made under the DIY Housebuilders Scheme, on the ground that the application was deemed to be out of time. The total amount of the claim under appeal is £25,683.15.

2. There are two points at issue:

- Whether the appellants intended to occupy and use the property as their residence and not for business use.
- Whether the appellants' claim was submitted within the time limits imposed by s 35(2) VATA 1994 and Regulation 201 VATR 1995.

Background

3. On 9 July 2015 a planning application was submitted by the appellants to Scottish Borders Council ("the Council") for approval of a 'change of use' of property at Coledale Workshops, East Bowmont Street, Kelso, Roxburghshire, Scotland [a former Scottish Borders Council depot] 'from workshop and alterations to form a dwelling house' ("the development works") subject to various conditions. The appellants listed their address as Romtickle House, Old Mill Lane, Sheffield.

4. On 9 March 2016 the Council granted planning permission, pursuant to s 58 Town and Country Planning (Scotland) Act 1997, ("the 1997 Act") for the development works.

5. A Building Warrant under the Building (Scotland) Act 2003 was granted on 18 November 2016. (In Scotland, Scottish Ministers are responsible for creating building regulations and preparing technical guidance to ensure buildings are safe, efficient and sustainable. The granting of permission for proposed building regulations compliant work is referred to as a 'Building Warrant'). A Construction Compliance and Notification Plan is issued with the Building warrant. This is a summary of the key stages of a building project that need to be inspected the Building Standards department of the relevant local planning authority. A property is finally certified as completed on the issue of a 'Notification of Acceptance of a Certificate of Completion,' ('A notification of acceptance').

6. Construction of the development works commenced on 19 November 2016.

7. The appellants had previously holidayed in the Scottish Borders. Mr Cotton, a builder by trade is a keen fisherman and frequently visited the area. The appellants intended to use the property as a holiday home or permanently relocate from their home in Sheffield on completion of the works.

8. The development works were nearing completion in early March 2017. Section 27B of the 1997 Act states that any person who completes a development for which planning permission has been given must, as soon as practicable after doing so, give notice of completion to the planning authority. Ordinarily as at March 2017, the property would soon have been registerable for and liable to domestic Council Tax.

9. The appellants say that at around this time the appellants' daughter, Lily, realised that she may encounter difficulties obtaining a place at the school in Scotland where she intended to study for her 'A levels' because the school disclosed that it was highly unlikely it would be providing courses in her chosen subjects. Also, at around this time Mrs Joanne Cotton's sister in law was diagnosed as having advanced cancer and that she would need urgent chemotherapy. The appellants made a decision to defer any move to Scotland and temporarily remain in Sheffield.

10. It was suggested by property agents through whom the appellants had previously found holiday accommodation that they let out the property at least on a temporary basis. The appellants agreed. The appellants saw this as a necessity rather than a preference They say that it was better to have the property occupied than left empty, perhaps to deteriorate They notified the Council of their change of plans which meant that the property would become self-catering accommodation which be treated as business use.

11. They therefore applied for 'Unoccupied business rates relief' which was granted retrospectively with effect from 17 March 2017. By this stage although the property must on a practical basis have been structurally complete, a Notification of Acceptance had not been issued by the Council's Building Standards department. Under Scottish law, until the issue of such a Notification, occupation of a property is not permitted. [It is unclear why the Council thought it necessary, at least at that stage, to rate the property and for the appellants to apply for rating relief].

12. The property was let out on at least 20 occasions from 22 July 2017 to 7 April 2018. A list of occupants between 22 July 2017 and 7 April 2018 shows that the property was more or less continually occupied. There was no multiple occupancy. On each occasion the property was let as a whole dwelling.

13. The appellants say that it remains their intention to relocate to Kelso. However, at the date of the hearing in November 2019, the property was still being advertised via the appellants' agents Crabtree & Crabtree for use as high quality self-catering accommodation, known as Coledale Stables.

14. Minor works still needed to be carried out to the dwelling but other works were also needed to adapt the property for letting as self-catered accommodation. The appellants' architect submitted a Completion Certificate to Scottish borders Building Standards on 16 January 2018. Following a visit from the Building Standards surveyor, the appellants were informed that to satisfy Building control standards it was necessary to undertake additional works to the property and obtain a revised Building Warrant. There was no mention of any need to obtain revised planning consent relating to the proposed "change of use". On 18 January 2018 they were provided with details of the

additional works which included the installation of a disabled access, alterations to the upper floor bathrooms layout, installation of vents, re-checks of both old and of newly laid drains, installed protective glazed barriers on the open staircase to be made secure, relocation of doors, attic and attic hatches to be insulated, alterations to glazing and numerous other changes. Some of the works appear to have been necessary to satisfy the initial building warrant but others may have arisen because of the change of use. An application for amendments to the Building Warrant was applied for on 23 February 2018 and granted on 22 March 2018.

15. The works were completed and a Completion Certificate lodged with the Council at the end of March 2018. A Notification of Acceptance of a Completion Certificate was issued by the Council on 10 April 2018. The notice states 'for work of construction or conversion, this acceptance *permits the occupation* of the building' [emphasis added]. In Scotland it is an offence to occupy or use a new or converted building until a 'Notice of Acceptance is obtained.

16. On 4 May 2018, the appellants submitted a VAT431C (VAT Refunds for DIY Housebuilders - Claim form for conversion) to HMRC. The claim was made in the amount of £25,683.15 and included all necessary supporting documentation. The list of 'goods and services' for which the appellants were reclaiming vat did not include anything after November 2016 save for a £1.50 air vent purchased in October 2017. Any costs and expenditure relating to the additional work carried out after the Building Standards inspection in January 2018 appears to have been omitted from the claim, although to the extent that those works may not have related to the proposed change of use and amended Building Warrant has not been explained.

17. In the refund claim form the appellants stated that they intended to live in the dwelling and that they had 'occupied' the dwelling on 1 July 2017, although at the hearing they clarified this to say that they had let out the property from that date.

18. On 21 May 2018, HMRC wrote to the appellants requesting further information to enable them to consider the claim. The information was provided by the appellants by e-mail on 13 June 2018.

19. On 26 September 2018, HMRC informed the appellants that on the basis of the information provided, it appeared that the dwelling had been completed in April 2017, and that therefore the claim had not been made within the three month time limit specified in the Regulations.

20. On 12 October 2018, the appellants asked HMRC to reconsider their decision to refuse the claim.

21. On 7 February 2019, HMRC issued the appellants with a 'Review Conclusion Letter' informing them that the original decision had been upheld.

22. On 4 March 2019, the appellants submitted an appeal to the Tribunal.

Relevant Guidance

23. Paragraph 16 of the VAT claim form for new houses (VAT431NB) states;

> "A building is normally considered to be completed when it has been finished according to its original plans. Remember that you can only make 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."

24. HMRC guidance in VCONST02530 states that:

> "There is no one factor that will always dictate whether building works are complete: as circumstances will vary from project to project. As a general rule, a building is regarded as being in the course of construction until all main elements for it to function for its intended purpose are in place."

25. Paragraph 14 of VAT431NB [VAT refunds for DIY Housebuilders Claim form - New Houses] states:

> "If you do not have a completion certificate yet we will accept one of the following documents
>
> - a habitation letter from the local authority...
> - in England and Wales, a VOA: Notice of making a New Entry into the Valuation List

26. Section 3.3.2 of VAT Notice 708 Buildings and Construction also states:

> "Completion takes place at a given moment in time. That point in time is determined by weighing up the relevant factors of the project, such as:
>
> - when a Certificate of Completion is issued that a property has been built in accordance with approved plans and specifications.
> - the scope of the planning consent and variations to it.
> - whether the building is habitable or fit for purpose."

The Evidence

27. Both parties provided bundles of documents, which included the appellants' VAT refund claim, the VAT refusal decision and the appellants' response to the decision, planning consent for the property, the Building Warrants, the Acceptance of the Completion Certificate, correspondence between the parties, relevant legislation and case law authorities. Mr and Mrs Cotton provided oral evidence.

Burden of Proof

28. The burden of proof rests with the appellants to show that their claim is a valid one. The standard of proof is the civil standard, on the balance of probabilities.

Legislation

29. 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 -

(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 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...."

The 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."

30. 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...."

31. The Building (Scotland) Act 2003 sets out requirements relating to Building regulations, a Building Warrant and the issue of a Notice of Acceptance of a Certificate of Completion in respect of a building.

"Completion certificates

Section 8 states:

8 Building warrants

(1) A warrant granted under section 9 (a "building warrant") is required for—

(a) any work for—

(i) the construction or demolition of, or

(ii) the provision of services, fittings or equipment in or in connection with,

a building of a description to which building regulations apply,

(b) any conversion of a building.

(2) Where such work is carried out, or such a conversion is made—

(a) without a building warrant, or

(b) in a case where a building warrant has been granted, otherwise than in accordance with the warrant, the persons specified in subsection (3) are guilty of an offence.

the persons specified in subsection (3) are guilty of an offence.

Section 17 states (in relevant part):

17 Completion certificates

(1) After the completion of the work or conversion in respect of which a building warrant has been granted, the relevant person must submit to the verifier a completion certificate certifying the matters specified in subsection (2).

(2) Those matters are—

(a) that the work was carried out or, as the case may be, the conversion was made in accordance with the building warrant, and

(b) that—

(iii) in the case of conversion of a building, the building as converted complies with building regulations.

Section 21 states (in relevant part):

21 Occupation or use without completion certificates

(1) This section applies to a building which is being, or has been, constructed or converted—

(a) by virtue of a building warrant,

(2) …(4)…

(5) Any person who occupies or uses a building to which this section applies (other than solely for the purpose of its construction or conversion)—

(a) knowing that no completion certificate has been accepted under section 18(1) in respect of the construction or conversion, or

(b) without any regard for whether a completion certificate has been so accepted,

is guilty of an offence …..

(6) A person guilty of an offence under subsection (5) is liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum,

(b) on conviction on indictment, to a fine.

Appellants' Case

32. The appellants' grounds of appeal are that they have complied with s 35(2) VATA and Regulation 201 VATR 1995, having submitted their VAT refund claim timeously, that is within three months of receipt of the Notice of Acceptance of the Certificate of pletion issued by the Council. The appellants assert that a property is not 'completed' until a Notification of Acceptance is issued. The Acceptance of a Certificate of Completion was issued on 10 April 2018 and their VAT Refund claim was submitted to HMRC on 4 May 2018.

33. The appellants say that until they received the Notification of Acceptance, they had no other evidence of completion of the dwelling to give to HMRC. They say that the delay in the Notification being issued was because of the additional works required pursuant to the amended Building Warrant which was outside their control, and in any event, was issued by the Building Standards department as soon as they had completed the additional works.

34. Although the property may at a practical level been habitable in early summer 2017, various items of work, in particular those identified by Building Standards, remained to be completed. Mr Cotton wished to carry out some of these himself or

supervise the works. He is a builder by trade. He could only do so when he was able to drive the 200 miles up to Kelso. More particularly however the proposed change of use to self-catering accommodation necessitated the additional works, which had to be carried out in between lettings of the property.

35. The appellants' difficulties were further compounded when they learned of Mrs Cotton's sister-in-law's illness. And trips to the property became more infrequent. Her condition deteriorated through 2017 and 2018. She passed away in March 2019.

36. They filed their DIY VAT reclaim in accordance with information available provided in HMRC's guidance, which says that only one claim can be made and that the claim should be made within three months of the date of the completion certificate. They say they could not have made their claim any sooner.

37. The appellants had previously re-claimed DIY VAT in respect of Romtickle House, which they self-built. They had been told by HMRC at the time, that it was not possible to reclaim the DIY VAT until a Certificate of Completion had been issued by the local authority. In fact the same had happened at their previous house River Mill Farm, Old Mill lane, Thurgoland, Sheffield, a barn conversion which was also a self-build.

38. The VAT Act 1994 s 35(1) requires, where a person carries out works under the DIY scheme, that such works are carried out otherwise than in the course or furtherance of a business. The appellants say that the works were in fact carried out otherwise than in the course or furtherance of a business. It was not their intention at the outset or during the carrying out of the works to March 2017 to use the property as anything other than a holiday home or as their main residence. Any subsequent proposed temporary business use had been unanticipated and only a short-term expedient, forced upon them by unforeseen circumstances.

39. Mr Howard for the appellants referred to a number of cases:

In case of *Curry (M P) v HMRC* VTD 20077, the appellant constructed a new house for himself and his wife to live in. After completion they let it for a period of one year to friends. The Commissioners denied his DIY claim on the basis that the house was to be used for a business purpose. The Tribunal said:

> "26… a 'do it yourself' builder lost his entitlement to the VAT refund if he had the intention, during the construction period, either to sell or let the house. The first actual use of the house was also to be considered strongly indicative of whether the construction was carried out 'in the course or furtherance of any business'. The business issue was to be tested over the construction period as a whole, and in accordance with the decision of this Tribunal (John Clark and Michael Silbert, FRICS) in the case of Mr. and Mrs. Williams v. HMRC, heard on 23 April 2004, particularly at the end of the construction period.

However, the Tribunal also said:

> 37. We consider that it is inappropriate to suggest that a person is carrying on the business of letting property if he decides that he must let a property for a short period because his other plans have been undermined by factors outside his control."

40. In the case of *Carrophil Ltd v HMRC* VTD 10190 a building contractor constructed an annex (a Sunday School room) for a Church building. The case concerned whether certain works were made 'in the course of construction' or not. The Certificate of Practical Completion had been issued prior to those works. The Tribunal said:

> "(1) I cannot accept, as an immoveable principle, the proposition that the course of construction of a building stops when the architect issues the certificate of practical completion. It may be a useful working rule but it will be displaced where for example under the provisions of the original building contract some structural work is carried out or some essential services are installed, in both cases after the issue of the certificate." (page 5)

41. In *Richard Hall v HMRC* [2016] UKFTT 632 the Tribunal explained the significance and limitations of the issue of a Completion Certificate:

> "(1) A Completion Certificate can be granted where the dwelling itself satisfies each of the applicable Building Regulations so as to qualify as being habitable, notwithstanding that, for example, the driveway, surrounding paths and/or boundary fences/walls have not been completed. Some may choose to reside in a new house whilst those outstanding works are done. The fact that they have not been done will not prevent a Completion Certificate being issued. Such a Certificate does not certify that the entire building works have been completed; only that the dwelling has been constructed so as to be habitable in accordance with the requirements of the Building Regulations." (para 3)

42. The Tribunal went on to state that the date of 'completion' is a matter of fact and degree.

> "It will always be a matter of fact and degree as to whether and when any particular building project has been finished and come to its actual completion. It will not necessarily be the date upon the Completion Certificate." (paragraph 4)

43. In *Stuart Farquharson v HMRC* [2019] UKFTT 425, the case concerned the construction of a dwelling. The claimant occupied the building in December 2008; the Certificate of Completion was issued in May 2017. Due to circumstances beyond the claimant's control, he had to sell the property, which was completed in July 2017. The Commissioners argued that the correct date of completion for the purposes of Regulation 201 was the date the property was occupied. The Tribunal rejected these arguments:

> "52. On a purposive construction of reg 201, we reject HMRC's interpretation that the date of completion can be arbitrarily set as the date of occupation: 'Usually a property isn't occupied until it is complete' (per ADR exit document). Not only is this interpretation non-permissible as a matter of statutory construction, but in the context of the DIY Scheme, it is not unusual that a DIY house builder starts to inhabit the building while works continue towards completion. For reasons as those related by Mr Farquharson, it is not uncommon for occupation of a new dwelling to take place before its 'completion' to plan; reasons such as to save the costs of

> running and renting an alternative home, or to take care of the property in its continual course of construction……"

HMRC's Case

44. By virtue of s 35(1)(b) of the VATA 94, the appellants, having erected a new build property, were eligible to submit a VAT new builder's claim form to HMRC.

45. Regulation 201(a) of the VAT Regulations 1994 states that the three month period in which the claimant must make their application starts at the point the building work is considered as being complete. However, it does not state that a Certificate of Completion obtained from the local authority will, in all cases, indicate the definitive date that a project has been completed.

46. Regulation 201(b) merely indicates that a Certificate of Completion obtained from a local authority is one form of evidence that can be provided to show that the building work is complete. Indeed, the claimant is not required to obtain a Certificate of Completion, and in some cases, a local authority may never issue a Certificate.

Habitation of Property

47. HMRC accept that there is no one factor in deciding when a building is 'complete'. The general rule is that a building is in the course of construction until all the main elements for its function are in place. Other factors can indicate an alternative date to the date solely given on the Certificate of Completion.

48. The property was ready for occupation in April 2017 and in fact occupied in July 2017. The property was rated for Council Tax on 17 March 2017, at which date the property was habitable and functional as a dwelling. Copy invoices show that there was a steady flow of expenditure on building materials and labour up until April 2017. Only two receipts were issued after that. All of the main construction work including heat, light and bathrooms, for example, were completed by April 2017. Any additional work after that was not fundamental for making the dwelling habitable or fit for purpose.

49. In this case the additional works carried out by the appellants after April 2017, would not have prevented the dwelling from being considered to be complete and fit for its original intended purpose. As such, the dwelling is considered complete (for its function as a dwelling) a considerable time before the Notice of Acceptance of a Completion Certificate was issued on 10 April 2018.

50. In the case of *SA Whiteley* [1993] TC11292 at paragraph 7, Judge Brice stated:

> "For practical purposes, a building is normally regarded as still under construction up to the time of first occupation by the client. Where a client does not occupy a building himself, but either leases or sells it, the building is regarded as under construction up to the time of first occupation by any lessee or purchaser."

51. The appellants have stated in their claim form that they 'occupied' the dwelling from 1 July 2017, although in fact it was used as a holiday let from that time. Whilst HMRC note that occupation of a property is not the only factor to determine its completion, various other factors as a whole demonstrate that, on the balance of probabilities, the property was complete, by being habitable and fit for purpose, well before the claim was made and thus the claim has been made outside the statutory time limits.

Evidence of the Completion date

52. At Regulation 201(b)(i) of the Regulations it states that at the same time as submitting a claim form, a claimant must also furnish:

> "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."

53. Regulation 201(a) is clear in its use of the wording "shall make his claim" that HMRC has no scope to disregard this requirement. In *Asim Patel v HMRC* (UKUT 0361) the Upper Tribunal commented that HMRC is allowed no discretion to accept something less than the prescribed documentation nor to extend the time limit and, equally, it is not within the Tribunal's jurisdiction to do so. The strict requirements of the legislation are not open to being waived or modified.

54. The Completion Certificate is not the only evidence which can be adduced as evidence of a completed building. In addition to a three month time limit, the second requirement, contained of regulation 201(b)(i) states:

> "(b) at the same time furnishing to them -
>
> > (i) Certificate of completion obtained from a local authority or such other documentary evidence of completion of the building as is satisfactory to the Commissioners."

55. The appellants could have adduced documentary evidence other than a Completion Certificate. They could have forwarded to HMRC the notice of making a new entry onto the valuation list for rating purposes, either of which would have been acceptable to HMRC.

56. *Carrophil* was concerned with construction works undertaken after issue of the Completion Certificate. In the instant case, the question concerns construction works undertaken before issue of the Completion Certificate.

57. In the case of *G M Morris v HMRC* VTD 17860, the claimant received his Certificate of Completion and occupied his house but continued to carry out additional works. He sought to submit a second claim for VAT incurred in relation to those works. The Tribunal dismissed the appeal on the three-month time limit, having focused on the point at which construction should be treated as being completed, the claimant having moved into the dwelling before the Completion Certificate was issued. Construction was regarded as complete from the date the dwelling was occupied.

58. The dwelling was completed well before the date of the Notification of Acceptance and must therefore follow that the claim was not made within the time required by Regulation 201(a).

Intention to use as a dwelling

59. The Note (2)(d) to Group 5 of Schedule 8 states:

"A building is designed as a 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."

60. The planning consent was for the conversion of a former commercial building into 'a dwelling' whereas it was listed for business rates as 'self-catering accommodation' on 17 April 2017.

61. In an e-mail to HMRC dated 13 June 2018, the appellants stated that the dwelling was converted for their own personal use with a view to moving to Kelso permanently. However, due to unforeseen circumstances, they made the decision to stay in Sheffield and let out the property as self-catered holiday accommodation.

62. The appellants have stated that it remains their future intention to use the property as their main residence. However, they continue to live in Sheffield and the dwelling remains available to book as a holiday let even to the present time.

63. The appellants clearly changed their intentions with regard to the intended use of the property from non-business to business use part-way through the project and for this reason also their vat claim must also be rejected.

Conclusion

Whether intention to occupy as a domestic dwelling

64. Although the appellants have still not taken up residence in the property, on balance, we accept that it was their original intention to use it as a holiday home and that this intention continued to the point of its practical completion in April 2017, subject to the issue of a Notification of Acceptance pursuant to s 18 Building (Scotland) Act 2003.

Whether claim lodged in time.

65. Regulation 201 of the VATR 1995 states that the claimant must make his DIY VAT claim no later than three months after the completion of the building and provide either a Certificate of Completion from a local authority or such other documentary evidence of completion of the building as is satisfactory to the Commissioners.

66. Unfortunately, the provisions of Regulation 201 VATR 1995, although clearly worded, can lead to a misunderstanding as to what is required by HMRC as evidence

that a building has been completed for the purposes of the VAT DIY regulations. It is clear that the appellants were trying to comply with their interpretation of guidance they had read in HMRC's VAT DIY literature and when they reclaimed VAT on construction of Romtickle House and River Mill Farm.

67. To determine when a building is complete, it is important to weigh all the evidence available. Under English Law, in essence, a building is deemed completed when the construction has been completed in accordance with the original plans, and as per HMRC's guidance in VCONST02530, "when all main elements for it to function for its intended purpose are in place". A Completion Certificate can sometimes be issued later than the date the property was actually deemed as habitable or fit for purpose, and therefore, whilst it can be used as evidence as to when a building was considered as complete, it is not the only factor which can be taken into consideration in determining whether the claim has been made in time.

68. Neither HMRC nor the appellants drew our attention to the fact that under Scottish Law compliance with Building Regulations is operated differently than under English Law.

69. Ordinarily 17 March 2017 was the point in time when, if the property had been in England, the appellants should have submitted their VAT reclaim. They did not do because they had not received the Notification of Acceptance but in any event, were apparently unaware of the provisions of the Building (Scotland) Act 2003 which prevented them or any others from occupying the property until the issue of a Notification of Acceptance. However, whether they were aware of that or not, the property could not in any sense be regarded as 'completed' for the purposes of regulation 201. The Building (Scotland) Act 2003 prevented that, it being an offence under s 21 of that Act to allow a new build or converted property to be occupied until the Notification is issued.

70. The property was entered on the rating register as a business property and let out in apparent contravention of s 21, but those are separate issues not readily explained and do not concern this Tribunal in deciding whether or not the property was completed for the purpose of Regulation 201.

71. As at 17 March 2017 although the property was structurally complete it could not be occupied as a Notification of Acceptance had not been issued. Additional works remained to be done although the proposed temporary change of use (so that the property could be used either as a dwelling or self-catering accommodation) must have delayed the issue of the Notification of Acceptance. Until the additional work was done the property could not be occupied. There appears to have been delays in completing outstanding minor works and also the additional works to ensure compliance with Scottish Building Regulations but that is not something which concerns us for the purpose of deciding whether the property was complete under the provisions of Regulation 201. Until Notification of Acceptance was issued the property could not be occupied. It was not habitable. Although, in actuality, the property was occupied when it was let out, that did not render the property legally habitable under Scottish Law.

72. Although it could be argued that the appellants' intention to use the property as a dwelling had changed by the time the property was completed (for Building Standard purposes under Scottish law) in April 2018, that was only because of the personal unforeseen circumstances which arose. As at April 2017 they could have submitted a VAT reclaim had they received a Notification of Acceptance, as they presumably would have done but for completion of the outstanding work without which the Notification of Acceptance could not be issued, which then became delayed because of the additional adaptation works.

73. As the Notification of Acceptance was not issued until 10 April 2018 it is difficult to see how the appellants could have properly submitted their VAT reclaim form until then.

74. The appellants have therefore complied with the three month time in accordance with Regulations 200 and 201 of the VATR 95. The appellants' VAT refund request is therefore valid and in accordance with the law.

75. For the above reasons the appeal is allowed and HMRC's decision to refuse the appellants' VAT refund claim under the Scheme in accordance with s 35 VATA is rescinded.

76. This appeal is concerned with the eligibility of the claim. HMRC say that the quantum of the claim has not been considered and in the event of the Tribunal allowing the appeal, as we have, HMRC reserve the right to consider the quantum of the claim and so save as expressly set out in this decision we make no findings of fact in that regard.

77. 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.

MICHAEL CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 30 JANUARY 2020