Tribunal ref: FTC/114/2013

COSTS — HMRC successful before Upper Tribunal — appeal from First-tier Tribunal where no costs-shifting possible — application by HMRC for costs of appeal — criteria to be borne in mind — UT rule 10 — no costs direction made

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

ASIM PATEL **Respondent**

Tribunal: Judge Colin Bishopp

Decision on written submissions alone

DECISION

1. The respondent, Mr Asim Patel, undertook building works which, in principle, were capable of falling within s 35 of the Value Added Tax Act 1994. That section provides for the repayment to a person in Mr Patel's position of the input tax incurred in the construction or conversion of certain residential property. The input tax in this case was £8,444.22. Mr Patel made a claim, as s 35 and regulations made pursuant to that section require, within the time limit of three months which the regulations impose. The present appellants, HMRC, refused to meet his claim because the planning permission he had obtained did not relate to the works undertaken. Mr Patel had intended to extend an existing dwelling, and obtained planning permission for that project, but after the work had begun it was realised that it would be necessary to demolish and replace the dwelling. The planning authority did not object to that change, but Mr Patel did not obtain a new planning permission. Instead he submitted with his claim the permission he had obtained before the change of plan. It was undisputed that there was a material difference between the works as executed and those for which the permission provided.

2. Mr Patel appealed against the refusal of his claim to the Tax Chamber of the First-tier Tribunal ("the F-tT"). After the hearing of his appeal had started the F-tT granted a postponement in order that Mr Patel could secure retrospective planning permission, in accordance with s 73A of the Town and Country Planning Act 1990, which Mr Patel duly did. On resumption of the appeal, the F-tT decided that the retrospective permission was sufficient, and allowed Mr Patel's appeal.

3. HMRC then appealed, with permission, to this tribunal. The grounds of appeal relied, among others, on the argument that the F-tT had failed to apply the requirements of s 35(2) and of reg 201 of the Value Added Tax Regulations 1995 correctly, in that it had disregarded the fact that Mr Patel had produced the retrospective permission only after the time limit for making a fully documented claim had expired. Thus even if the retrospective permission was capable of satisfying the statutory requirements, the fact that in this case it was produced to HMRC only after the time limit had expired was fatal to Mr Patel's case. HMRC accepted, in those grounds of appeal, that retrospective permission might be sufficient if produced in time.

4. When HMRC's appeal came on for hearing, before Judge Powell and myself, HMRC's position on the sufficiency of retrospective permission had changed, as we recorded at para 18 of our decision: see [2014] UKUT 0361 (TCC). Their argument now was that the works must be lawful at the time they were carried out and that retrospective permission could not cure the unlawfulness of works carried out without the correct permission. We did not, however, need to decide that point as it was clear that the F-tT had failed to consider properly the fact that Mr Patel had not complied with the time limit (because he could not) and that we must allow the appeal on that ground, as we did.

5. HMRC now seek a direction that Mr Patel be required to pay their costs of the appeal, a direction which Mr Patel resists. Section 29 of the Tribunals, Courts and Enforcement Act 2007, read with rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008, provides that in the case of an appeal from the Tax Chamber the costs are in the discretion of the tribunal. Most commonly, the

direction made is that the loser should pay the winner's costs, but there can be no assumption that such a direction will be automatic. The tribunal is required to reach its conclusion in the light of the circumstances of each case.

6. I have dealt with HMRC's application after consideration of the parties' written submissions alone, since neither has asked for a hearing and I apprehend that neither considers the additional cost of a hearing is warranted.

7. In this case, Mr Patel's appeal to the F-tT was allocated to the standard category, in accordance with rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Rule 10 of those rules is rather different from rule 10 of the Upper Tribunal rules, in that it permits the tribunal to make a direction in respect of costs, in a standard case, only in very limited circumstances: when it decides to make a "wasted costs" direction (see s 29(5) of the 2007 Act) or in a case of unreasonable conduct (see rule 10(1)(b)). Neither of those circumstances arises here, and Mr Patel was therefore unable to recover his costs of the appeal to the F-tT if he won, but was also immune from a direction in HMRC's favour if he lost. The same costs rules apply to cases before the Tax Chamber which are allocated to the default paper and basic categories, and a taxpayer whose appeal is allocated to the complex category, in which costs may ordinarily be awarded, may achieve the same result by exercising the right for which rule 10(1)(c) provides, to "opt out" of the costs-shifting regime.

8. No provision of the Upper Tribunal rules makes such immunity from a costs regime available to a litigant, whether appellant or respondent, in this tribunal. A taxpayer in Mr Patel's position, successful before the F-tT, has only limited means of protecting himself from an adverse costs direction if HMRC secure permission to appeal, that is by seeking a direction, as soon as the appeal is notified to him, that whatever the outcome of the appeal no direction for costs should be made. I infer that Mr Patel was unaware of that possibility—and I am conscious that it is not a well-known course of action, and one by no means certain of success—and there is no criticism to be made of him for his failure to make such an application.

9. In some cases, recognising that there is a wider public interest in an appeal to this tribunal and that it would be unfair for an individual taxpayer to shoulder the burden, HMRC do not seek a direction in respect of their costs; but this is not such a case. They accept that they did seek a ruling on the sufficiency of retrospective permission, but maintain that their main challenge to the F-tT's decision, on which they succeeded, was that the F-tT had failed to consider properly the requirements of the regulations, and that there was no general public interest in that point. Thus, they say, there is no reason why the tribunal should deviate from the normal practice of directing that costs should follow the event.

10. Mr Patel has submitted that he was unaware of the possibility that he could opt out of a costs regime but, as I have explained, the Upper Tribunal rules do not provide such an option. He has added that he represented himself throughout, from which I infer he means he has conducted his case with economy; indeed, he did not attend the hearing in the Upper Tribunal, but instead put in written submissions. By contrast, HMRC have been represented—before the F-tT, they were represented by a presenting officer but, more importantly for present purposes, before this tribunal they were represented by solicitor and counsel. Mr Patel has also pointed out that he will have to suffer the VAT which, but for his

inability to satisfy the statutory requirement of extant planning permission, he could reasonably have expected to recover, and is now being asked to meet HMRC's costs in addition.

11. Many of the tax appeals before this Chamber, with large sums of money at stake, have little to distinguish them from commercial disputes and in those cases there is no reason, save in unusual circumstances, why costs should not follow the event. But there are others, of which this is a paradigm case, where an unrepresented taxpayer who has succeeded in the First-tier Tribunal has been swept, with little or no opportunity of escape, into an appeal to this tribunal and with it into a costs-shifting regime. Had Mr Patel failed in the F-tT he would have incurred no costs save for his own, presumably modest, expenses. As the decision of this tribunal shows, he should have failed in the F-tT; thus HMRC have incurred the costs they now seek to recover in correcting an error, not of Mr Patel, but of the F-tT. Pausing there, it seems unfair that Mr Patel should be required to pay those costs.

12. However, errors by an inferior court or tribunal are an ordinary hazard of litigation, and the appeal system exists for the correction of those errors. It would be equally unfair if an ultimately successful litigant, as HMRC are in this case, had always to bear the cost of correcting such errors by appeal, while the respondent to such an appeal could oppose it with no risk of an adverse costs direction. Neither the 2007 Act nor the Upper Tribunal rules impose any fetter on the tribunal's power to make such a direction, and it must therefore be the case that appellants and respondents, however they find themselves before this tribunal, should be treated equally. The fact that HMRC, certainly by comparison with Mr Patel, have deeper pockets is in my view an irrelevant consideration in that context.

13. I have, however, come to the conclusion that this is one of those, perhaps exceptional, cases in which there should not be a costs direction in HMRC's favour.

14. It is not completely clear from the F-tT's decision, but it is in my view a reasonable inference that the focus of the argument before the F-tT was the absence of planning permission for the works actually carried out, rather than Mr Patel's inability, in the events which happened, to meet the time limit. That inference is consistent with the grant by the F-tT of a postponement in order that Mr Patel could obtain retrospective permission—a postponement which could have had no purpose, if the time limit argument was before the F-tT, since that limit had already expired—and it is consistent, moreover, with the absence of any reference to the time limit in the F-tT's recitation of HMRC's arguments and in its conclusions. Although HMRC's grounds of appeal to this tribunal do rely on the breach of the time limit, a significant part of them, and several of HMRC's submissions at the hearing, were directed at the question whether retrospective permission was sufficient to satisfy the requirements of s 35. HMRC, as they conceded at the hearing, have shifted their position on that question and they have an interest in its being decided—indeed, although we declined the invitation, we were urged to determine whether the various F-tT decisions on the point to which we refer in our decision were correct.

15. Those factors, in my judgment, are an indication that over the course of the appeal to the F-tT and then to this tribunal HMRC have changed the basis of their refusal to meet Mr Patel's claim, by first relying on the fact that the planning permission produced did not relate to the works as they were undertaken, then (albeit with the agreement, and possibly the encouragement, of the F-tT) allowing Mr Patel the time to secure retrospective permission, plainly in the expectation that it would assist him, only to argue once he had obtained it that retrospective permission was insufficient and, in this tribunal, that it had been produced after expiry of the time limit and for that reason too could not assist him.

16. It is in my view a further relevant factor that although Mr Patel made some written submissions, he did not attend the hearing before us to oppose the appeal with full argument. In addition, though it is a minor point which would not be enough alone, I observe that there is no indication in HMRC's grounds of appeal that they would seek a direction in respect of costs, an indication which would at least have put Mr Patel on warning, and might perhaps have prompted him to concede the appeal.

17. Against that background it would, in my judgment, be unfair to compel Mr Patel to pay, or contribute to, HMRC's costs of an appeal which, even if only in part, their changing case has made necessary and I therefore decline to make the requested direction.

Colin Bishopp
Upper Tribunal Judge

Release date 30 October 2014