TC02797

Appeal number: TC/2012/00219

VALUE ADDED TAX – DIY builders scheme – conversion of barn adjacent to a dwelling (a listed building) to enlarge the dwelling – whether the works were 'a residential conversion' within the meaning of section 35(1A)(c) VATA – whether works consisted in the conversion of a "non-residential building" or a "non-residential part of a building" into a building designed as a dwelling or a number of dwellings – held they were not – the works were therefore not a 'residential conversion' within section 35 VATA – whether the Tribunal could consider and give effect to any legitimate expectation of the appellant that he would qualify for a refund under section 35 VATA – held, following* HMRC v Abdul Noor [2012] UKUT 071 (TCC)*, that the Tribunal had no jurisdiction to consider the question of legitimate expectation – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BRYAN BURTON **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC
RICHARD THOMAS

Sitting in public at Bedford Square, London on 26 October 2012

The Appellant in person

Leslie Bingham, Officer, HM Revenue & Customs, for the Respondents

DECISION

1. The appellant, Mr Bryan Burton, appeals against a decision of the respondents ("HMRC") communicated to him by Officer Nicola Castle by a letter dated 30 August 2011, and confirmed by Officer Mrs J C Pledger, of HMRC's Appeals and Reviews Unit, in a letter dated 21 October 2011, to reject a claim for a refund of £1,654.17 VAT made by Mr Burton pursuant to section 35 VAT Act 1994 ("VATA").

2. The basis of the claim was that Mr Burton had carried out works constituting a residential conversion within section 35(1A)(c) VATA and VAT had been chargeable on the supply of goods used by him for the purposes of those works (see: section 35(1)(c) VATA).

3. The goods concerned included floor tiles, wall tiles, timber, window furniture, paint, switches, sockets, lighting, a bath, a WC, etc.

4. The works were carried out at Mudgeon Cottage, a Grade II listed property in Cornwall, which is Mr Burton's home. He acquired Mudgeon Cottage in 1998 and obtained listed building consent from Kerrier District Council on 1 July 2008 'for the conversion of existing barn to form part of residential accommodation and alterations to dwelling' (the description of the development in the consent). The works had been carried out in 2009 but the finishing off had been completed 'quite some time afterwards'. The Building Regulations Certificate of Completion had been issued by Cornwall Council on 17 June 2011. It recorded the details of the work as: 'Conversion of existing barn to residential accommodation and alterations to dwelling'.

5. Mr Burton told us (and we accept) that Mudgeon Cottage is a Georgian house with a later addition and that the barn had been a separate but adjacent building to the house, which had been joined to the house by an opening in the existing dining room wall – and permission had been obtained to make the opening. There had not been a new construction, but the incorporation into the existing house of an old building.

6. On 26 February 2009 Mr Burton had telephoned HMRC's Contact Enquiry Centre and had spoken to agent Michael Doherty. We had a record of the telephone conversation, produced by HMRC, which records Mr Doherty's note as follows:

> 'Caller advised he is having work done on listed builder [*sic*]. Contractor is not registered but is passing on VAT he is charged. How can he reclaim?
>
> Advised he cannot as not being charged VAT.
>
> Caller advised it is a conversion. He will get VAT registered [contractor] to do it.
>
> Advised alteration can be zero-rated if conditions met. Advised conversion that is not alteration can be reduced rated.
>
> [Public Notice] 708, 719 and DIY pack issued via Erith. Gave return address.'

7. Mr Burton told us (and we accept) that he had explained to Mr Doherty that it was his intention to incorporate into the main house a barn which was attached to the main house and that he was renovating the main house at the same time. Mr Doherty had advised him that there were two different VAT procedures – that to which Public Notice 708 (Buildings and Construction) applied, and that to which Public Notice 719 applied (VAT refunds for DIY builders and converters).

8. Mr Burton originally (on 6 August 2011) completed the form VAT 431, which accompanied the Public Notice 719 which Mr Doherty had sent him in 2009. He was informed by HMRC (their letter dated 12 August 2011) that that form was no longer valid and that a new claim form VAT 431C needed to be completed. A copy of the new form and relevant guidance notes was sent to Mr Burton. Mr Burton completed the new form VAT 431C on 15 August 2011. The claim was rejected by HMRC (Officer Nicola Castle of the National DIY Team) by her letter dated 30 August 2011 on the grounds that the building being converted had been used as a dwelling in the period of 10 years immediately preceding the commencement of the conversion works.

9. Mr Burton disagreed with Officer Castle's decision and, in a letter dated 8 September 2011, requested a review by a different HMRC officer. He contended that the barn was a part of the building which had never been used as a dwelling, and the 'completed totality of the Building' is 'designed as a dwelling'. On that basis he claimed that a VAT refund was due. Alternatively, he argued that the completed conversion of the barn alone met all the criteria for qualification for a VAT refund, and so qualified before the later incorporation of the barn into the adjoining dwelling. He also made the point that he originally had intended to carry out the works 'in accordance with the provisions of Notice 708, the Building being listed', but that he had followed the Public Notice 719 route on the advice of HMRC (a reference to the telephone enquiry dealt with by Mr Doherty). He added that he 'should not, of course, be penalised as a result of any incorrect advice received from HMRC'.

10. Officer Mrs Pledger of HMRC's Appeal and Reviews Unit, in her review letter dated 21 October 2011, upheld Officer Castle's decision on the ground that the building being converted had not met the condition that it had not been used as a dwelling in the 10 years immediately preceding the commencement of the conversion works. She also made the point that the barn conversion had not created an independent self-contained dwelling in its own right – it had just provided additional living accommodation to the existing cottage.

11. Officer Mrs Pledger also explained that Public Notice 708 is primarily for builders, contractors and suppliers, to assist them is determining the rate of VAT to be applied to invoices issued by them. She made the point that it had been Mr Burton's responsibility to read the Public Notices and the guidance which he was sent before making a claim and that he could have sought further clarification from either HMRC or a professional representative if he was unclear about anything.

12. Mr Burton's case before us was that he was entitled to the refund under section 35 VATA as a matter of law, and, alternatively, if he was not so entitled he should not be prejudiced in the matter because he had a legitimate expectation that he would obtain a refund under section 35 VATA, based on Mr Doherty's advice. He makes the point that if he had not received the advice which Mr Doherty gave him, he would have proceeded 'under Notice 708 – that is, he would have employed a VAT-registered contractor, who would have been entitled to zero-rate the conversion works.

13. We can deal with Mr Burton's alternative case shortly. This Tribunal has no jurisdiction to allow an appeal brought under section 83 VATA (this appeal is brought under section 83(1)(g) VATA as an appeal with respect to the amount of any refunds under section 35 VATA) by giving effect to any legitimate expectation which Mr Burton may be able to establish in relation to any refund under section 35 VATA. This proposition as to the jurisdiction of this Tribunal has recently been laid down by the Upper Tribunal in the appeal of *HMRC v Abdul Noor* [2012] UKUT 071 (TCC), released on 14 February 2013 following a hearing on 10 and 11 December 2012 (i.e. after the hearing of this appeal) – see [87] of the Upper Tribunal's decision.

14. In correspondence to the Tribunal (a letter dated 21 October 2012), Mr Burton said that *Oxfam v HMRC* [2009] EWHC 3078 – see also [2010] STC 686 – among other cases was likely to be relevant. Sales J in the *Oxfam* case did indicate that this Tribunal had the jurisdiction to consider a claim based on legitimate expectation in relation to an appeal brought under section 83 VATA, but the Upper Tribunal in *Abdul Noor*, after careful consideration and analysis, disagreed with and departed from Sales J's decision (*ibid.* [91]).

15. Although, as we have indicated, Mr Burton's alternative case based on legitimate expectation fails at the first hurdle, because of this Tribunal's lack of jurisdiction, we will say at this point that even if we had had jurisdiction to consider it we would have rejected it because – among other reasons – our reading of the advice given to Mr Burton by Mr Doherty in the telephone call on 26 February 2009 (see the extract cited at [6] above) goes nowhere near establishing that Mr Doherty gave Mr Burton unambiguous advice, reliance on which would entitle Mr Burton to a legitimate expectation that he would be entitled to a refund under section 35 VATA even if the terms of section 35 VATA providing for such a refund were not complied with in his case.

16. We turn now to the main issue in the case: is Mr Burton entitled to a refund of VAT under section 35 VATA?

17. Section 35 VATA relevantly provides 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 than in the course or furtherance of a 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) …

(b) …; and

(c) a residential conversion.

…

(1D) For the purposes of this section works constitute a residential conversion to the extent that they consist on the conversion of a non-residential building, or a non-residential part of a building, into-

(a) a building designed as a dwelling or a number of dwellings;

(b) a building intended for use solely for a relevant residential purpose; or

(c) anything which would fall within paragraph (a) or (b) above if different parts of a building were treated as separate buildings.

…

(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.

(4A) The meaning of "non-residential" given by Note (7A) of Group 5 of Schedule 8 (and not that given by Note (7) of that Group) applies for the purposes of this section but as if-

(a) references in that Note to item 3 of that Group were references to this section, and

(b) paragraph (b)(iii) of that Note were omitted.'

18. The relevant provisions of the notes to Group 5 of Schedule 8 VATA are as follows:

'(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.

(4) Use for a relevant residential purpose means use as-

(a) a home or other institution providing residential accommodation for children;

(b) a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder;

(c) a hospice;

(d) residential accommodation for students or school pupils;

(e) residential accommodation for members of any of the armed forces;

(f) a monastery, nunnery or similar establishment; or

(g) an institution which is the sole or main residence of at least 90 per cent of its residents,

except use as a hospital, prison or similar institution or an hotel, inn or similar establishment.

(7A) For the purposes of item 3, and for the purposes of these Notes so far as having effect for the purposes of item 3, a building or part of a building is "non-residential" if-

(a) it is neither designed, nor adapted, for use-

(i) as a dwelling or number of dwellings, or

(ii) for a relevant residential purpose; or

(b) it is designed, or adapted, for such use but-

(i) it was constructed more than 10 years before the commencement of the works of conversion, and

(ii) no part of it has, in the period of 10 years immediately preceding the commencement of those works, been used as a dwelling or for a relevant residential purpose, and

(iii) no part of it is being so used.

(9) The conversion, other than to a building designed for a relevant residential purpose, of a non-residential part of a building which already contains a residential part is not included within items 1(b) or 3 unless the result of that conversion is to create an additional dwelling or dwellings.'

19. Applying these provisions to the facts of Mr Burton's case, the relevant question for us is whether or not the works which were carried out at Mudgeon Cottage were 'a residential conversion' within the meaning of section 35(1A)(c).

20. The answer to that question is given, at least initially, by section 35(1D) – the definition of "residential conversion". Works constituting a "residential conversion" for these purposes are works consisting in the conversion of a "non-residential building" or a "non-residential part of a building" into, relevantly, a building designed as a dwelling or a number of dwellings. For the purpose of applying this test we can look at the entirety of Mudgeon Cottage (that is, the "building" including the barn) or at the original structure of Mudgeon Cottage (that is, without the barn), or at the barn – in the latter two cases, as separate "parts" of a building.

21. Mudgeon Cottage, whether considered as the original structure (excluding the barn) or as the structure created by the works of conversion (including the part which was formerly the barn) clearly cannot be considered to be a "non-residential building" applying the relevant definition of "non-residential" in Note (7A) of Group 5 of Schedule 8, VATA. Mudgeon Cottage is designed or adapted for use as a dwelling. This is not disputed by Mr Burton. On this basis, to count as a "non-residential building" it must have been constructed more than 10 years before the commencement of the works (which it was) and additionally no part of it can have been used as a dwelling in that period of 10 years – see Note (7A)(b)(i) and (ii) to Group 5 of Schedule 8 VATA. Mudgeon Cottage was (as to the original structure) occupied as a dwelling in that period and so the works cannot count as a residential conversion by reference to Mudgeon Cottage.

22. Therefore, we must look at the barn. The barn, considered either as a building or as a part of a building is "non-residential" within the definition in Note (7A). However the works can only count as a residential conversion on this basis if they consist in the conversion of the barn into 'a building designed as a dwelling' – see:

section 35(1D)(a) VATA. But this is not what has happened because the expression 'building designed as a dwelling' must be construed in accordance with Note (2) to Group 5 of Schedule 8 VATA – that is, as self-contained living accommodation, with no direct internal access to any other dwelling or part of a dwelling. The conversion of the barn did not form self-contained living accommodation because it lacked a kitchen, and there was direct internal access to Mudgeon Cottage (or the rest of Mudgeon Cottage) through the opening created into the dining room. Additionally, the listed building consent stated in terms that the development for which consent was given was the conversion of the barn to form "part of residential accommodation", not a 'building designed as a dwelling' within the meaning of Note (2) to Group 5 of Schedule 8 VATA.

23. It would be incorrect to construe section 35(1D) VATA as causing the conversion of the barn into *part* of a building designed as a dwelling (Mudgeon Cottage in its extended form) to amount to a residential conversion for relevant purposes. That is not what the language of the subsection provides for and it is clearly not consistent with the evident purpose of the legislation, which is to confer a VAT advantage on works which create new or additional dwellings out of non-residential building stock.

24. The result is that whether Mudgeon Cottage (in its original or extended form) is considered, or the barn is considered on its own, the works actually carried out in this case do not come within the meaning of "residential conversion" in section 35(1A) and (1D) VATA, and accordingly the works are not works to which section 35 applies (see: section 35(1) VATA) and the conditions for making a claim under the section have not been met in Mr Burton's case.

25. For these reasons, the appeal is dismissed.

26. 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.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 23 July 2013