



TC01995

Appeal number: TC/2011/00732

Value Added Tax - Claim for the refund of input VAT by the self-builder of a dwelling - whether the entitlement to refund was denied because the dwelling was constructed as two quite separate buildings, albeit that they were designed to operate as one dwelling - Appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARK CATCHPOLE

Appellant

-and-

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

**Tribunal: JUDGE HOWARD M. NOWLAN
HARVEY ADAMS**

Sitting in public at 45 Bedford Square in London on 13 February 2012

Liban Ahmed of Controlled Tax Management Limited for the Appellant

Mrs. Sylvia Knibbs of HMRC for the Respondents

DECISION

Introduction

1. This was an Appeal in which the facts will clearly be virtually unique.
2. The Appellant and his partner built a dwelling house in the very unusual format that it comprised two seemingly totally separate buildings. One building (referred to as “Unit 1”) contained two bedrooms, a bathroom, a living-room and a kitchen. The other building (“Unit 2”), linked only by timber decking, but being only one metre away from Unit 1 at the closest point, contained two bedrooms, each with a door to the exterior decking, and each with access to the shared shower-room located between the two bedrooms. Unit 2 contained no other accommodation, in other words no sitting-room or kitchen. All the services, including the supply of hot water, came from Unit 1.
3. It was said that when the architect was asked to design the house, he had been asked to build a four-bedroom house. We find it slightly implausible that an architect would have designed the rather unusual “two-box” house without any intimation from the clients that this was what they wanted. Since the “two-box” format did actually suit the Appellant and his partner because it would give the Appellant’s partner’s two children, who would sleep in Unit 2, a degree of independence, we imagine that at the very least the architect realised that this was an objective that he should bear in mind in designing the house.
4. HMRC denied the Appellant’s claim to recover VAT under section 35 VAT Act 1994. That section provides for a recovery of VAT where the claimant has borne VAT on supplies rendered to him, when acting in a non-business capacity, in undertaking works that have involved “*the construction of a building designed as a dwelling*”, and when various conditions are then satisfied as regards the question as to whether “*the building [has been] designed as a dwelling*”. The claim was rejected on the basis that there were two buildings, such that some of the conditions to which we will refer below were not satisfied.
5. We allow the appeal.

The evidence

6. Mark Catchpole gave evidence, which we have already referred to in the Introduction above, and will now amplify insofar as it is relevant.

The facts in more detail

7. Mark Catchpole is an engineer, and he and his partner wished to embark on the project of building a “self-build” house. They thus bought an existing house on a site that they found attractive, and sought and obtained planning consent for the demolition of the existing house, and the construction of a replacement house designed to their design.
8. Consistently perhaps with the terms of the Planning Application, the Planning Consent that was granted gave consent for the “*Construction of a four bedroom*

replacement dwelling". The Planning Authority were obviously being conversant with the detailed plans for the two separate buildings.

9. Condition 8 of the various conditions attached to the Planning Consent stated that

"The approved accommodation shall not be occupied as separate units of accommodation at any time.

Reason: Due to the site's location within the open countryside and its lack of an independent curtilage".

10. The new house was of somewhat unusual design, quite apart from the feature that one dwelling was split into two buildings. Mark Catchpole and his partner had chosen a site with apparently a particularly attractive view, and they wished to build a property somewhat like two nearby, and rather unusual, houses. Whilst the pictures that we were shown did not illustrate the windows, we imagine that the two flat-roofed rectangular buildings almost certainly had large windows facing the view.

11. The house was built in the Fens, and because of the unstable boggy ground, the construction required very substantial piling, very heavily reinforced foundations, very substantial RSJs beneath the floor level, and then a full and heavy steel frame to contain the walls and roof. The steel frame was then clad in heavy wood battening (approximately 3 by 4 inches in cross-section), and this cladding was then covered first in waterproof and breathable Tyvec, and then covered in steel panels. The steel panels were particularly unusual in that they were apparently favoured by an American architect. The steel was of the variety that had been used in the creation of the "Angel of the North" steel statue, its characteristic being that the exterior of the steel would rust, but the rust would not flake off.

12. While there is no relevance to this point, it will be clear from the description that each of the two adjacent buildings was rectangular, and flat-roofed, and that all that could therefore be seen from the outside was rusted steel cladding and windows, the two buildings were fairly unique, quite apart from the unusual feature of the one house being split into two.

13. One fact that has no bearing on the merits of the Appeal, but has some considerable bearing on the significance of the Appeal to the Appellant, is that it is perfectly obvious that the need to sink deep piles into the unstable ground, and the matched need for strong reinforced foundations and very substantial steel framing, must have made the project very expensive. We were only asked to reach a decision on the point of principle as regards the qualification for the VAT refund, so that nothing hinges on the quantum of the re-claim. The building costs must, however, have been unusually high for the relatively small resultant buildings.

14. There are only two other relevant points that we need to mention:

1. First, although each separate building had very substantial foundations, the foundations of the two buildings were not connected in any way. There was simply timber decking around the buildings to facilitate access between the two.
2. Secondly, mains water and electric supplies came first to Unit 1. They were then spurred off beneath the foundations to Unit 2, with heated water for the shower room of Unit 2 being supplied from the one boiler in Unit 1.

The law

15. The relevant statutory provisions are contained in section 35 VAT Act 1994, and since that section incorporates the Notes to Group 5, Schedule 8 VAT Act for the interpretation of section 35, those Notes. The relevant provisions are as follows:

“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) [irrelevant] and*
- (c) [irrelevant].*

.....
.....

(4) The Notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group”

Note 2 to Group 5 Schedule 8, VAT Act 1994 appeared to be the only directly relevant Note (though we will refer below to Notes 4 and 5), and this provided 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 terms 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.”*

The contentions on behalf of the Respondents

16. The Respondents claimed that the feature that the new construction was of two buildings was fatal to the claim for the VAT refund. They accepted, however, that there was only one “property”, and only one “dwelling”. That was expressly said not to be in dispute.

17. Ignoring at this point any significance to the feature that the Respondents then tested the issue of compliance with the four paragraphs of Note 2, by applying the tests to each separate Unit or building, and by ignoring their own concession that “*there was only one dwelling*”, and that the four paragraphs actually refer to characteristics of “the dwelling”, the Respondents then asserted that the condition in paragraph (c) of Note 2 was not satisfied as regards either unit, because neither building could be “*occupied as separate units of accommodation at any time*”, under the planning consent. Furthermore Unit 2 might arguably also fail the condition in paragraph (a) of Note 2 in that Unit 2 could hardly be said to consist of “*self contained living accommodation*”.

18. In response to the second of the Appellant’s contentions, referred to in the next paragraph, namely the contention that the Interpretation Act meant that the term “building” should be taken to refer to “a building or buildings”, either in the singular or plural, it was suggested that the VAT and Duties Tribunal had decided that this was not tenable in the case of *SA Whiteley*, Decision no: 11292 released in July 1993.

The contentions on behalf of the Appellant

19. The Appellant contended that:

- (i) the two units were in reality “one building”;
- (ii) under the Interpretation Act, the singular includes the plural “unless the contrary intention appears” and it did not so appear in this case; and
- (iii) it would be contrary to the spirit and intent of the VAT Act for the VAT reclaim to be denied simply because one dwelling, which is plainly meant to be utilised as a single “home”, happens for various reasons to be divided into two units.

20. The Appellant also contended that if the tests in the paragraphs of Note 2 were applied in relation to “the dwelling” as a whole, and not wrongly in relation to each separate Unit, the tests were then satisfied. For the dwelling as a whole plainly consisted of “self-contained living accommodation”, and more relevantly paragraph (c) was then satisfied. For although there was a planning constraint on each Unit being occupied or owned as separate accommodation, there was no such constraint as regards the dwelling having to be occupied, or to remain in ownership, with some other dwelling.

Our decision

21. The first point that we address is whether it is correct to say in this case that there was only one property and one dwelling, before we then turn to the issue of whether there were two buildings, and if so, what significance that might have.

22. The point just raised barely arises since the Appellant contended, and the Respondents conceded, that there was indeed only one property and only one dwelling. Our conclusion, however is that they were right.

23. It is obvious that there is a distinction between “a building” and “a dwelling”. That is in any event made clear by the very wording of section 35 (1A), and the opening wording of Note 2, both of which contemplate that a building might be designed as a “*dwelling or a number of dwellings*”. Semi-detached and terraced

houses, and the block of flats are of course examples of one building comprising a number of dwellings.

24. Whilst in this case we are concerned with the reverse situation, namely whether it is cogent to say that one dwelling can consist of two buildings, we consider it clear that it can do. Ignoring the fact that the parties in this Appeal have contended or conceded that that is so, it is worth noting that the Planning Authority appears to have shared the same belief. The Consent was granted for “*the construction of a four bedroom dwelling*” and Condition 8 provided that “*The accommodation shall not be occupied as separate units of accommodation at any time*”.

25. Ignoring the views of others, we agree with these conclusions ourselves. The situation would be rendered clearer still had the facts involved the construction of two buildings, one containing the day accommodation (i.e. the sitting-room, possibly a dining-room, the kitchen and toilet), with the other being the bedroom block, containing just bedrooms and shower or bathrooms. Such a building might not sound ideal (and indeed many would think the same of the dwelling constructed by the Appellant), but there will be occasions where the nature of the site might render such a plan both necessary, and indeed quite attractive. If the site were a narrow cliff-side site, where the planners might only allow the construction of single-storey buildings, it is easy to imagine that an imaginative owner might construct a dwelling on two separate levels, perhaps with the day accommodation being at the higher level to enjoy views of the sea, with the bedroom block being built a few exterior steps below it. In that situation we would have no hesitation whatsoever in saying that there was only one dwelling, and that the two buildings together would “*consist of self-contained living accommodation*”. We would certainly say, on that example, that neither separate building would “*consist of self-contained living accommodation*”.

26. In the present case, we accept that had Unit 2 not been built, Unit 1 would have ranked as “a dwelling”, and that it would have consisted of “*self-contained living accommodation*”. Notwithstanding this, however, when the whole planning of the buildings envisaged that they would be occupied as a composite whole, and when the planners took the same approach and indeed required that state of affairs to remain indefinitely, it does seem plain to us that the two Units in this case must rank as “one dwelling”.

27. Whilst this conclusion gives the Respondents something of a difficulty in that it means that their contentions wrongly considered the tests in Note 2, by reference to whether they would or would not have been satisfied, had they applied to the buildings as distinct from what they accepted to be the one dwelling, this does not resolve the appeal. In passing, however, and just dealing correctly with the tests in Note 2, and applying those tests to the single composite dwelling, it certainly appears that the tests are complied with. The dwelling contained “*self-contained accommodation*” and when the dwelling as a whole included both Units, there was no planning or other requirement that precluded the integrated use of the Units, and “*the separate use of the dwelling*”. Indeed that is precisely what the planning consent actually required. It is even worth mentioning that apparently the planners clarified that they did not envisage that it would be possible for Unit 2 in its present state to be used separately from Unit 1. Their concern was simply to preclude any extension to Unit 2 that might make it capable of separate occupation, and to indicate in advance that they would be opposed to any application to achieve that end.

28. Reverting to the conclusion that even if there were two buildings there was only one dwelling, and to the observation that this conclusion does not resolve the appeal, the question that we must now address is whether the works undertaken in this case constituted “*the construction of a building designed as a dwelling*”.

Is there just one building?

29. We cannot accept the Appellant’s first contention, namely that there was indeed only one building. We decide that in this case there were two separate buildings. We might conceivably have reached a different conclusion had the foundations been constructed as unified and reinforced foundations for the two units, but when the foundations and the buildings were separate, there cannot have been just one building. Indeed the feature of trying to contend that there was only one building could only be advanced by ignoring the word “building” and referring instead to “two units”. Once the use of the word “building” was re-introduced, it seemed impossible to refer sensibly to what were plainly two buildings as just one building.

Can the Interpretation Act operate to deem “building” to mean “building or buildings”?

30. Turning to the contention under the Interpretation Act, and the suggestion that “*a building*” should be interpreted to mean “*a building or buildings*”, we accept that this is the required interpretation under that Act, unless the contrary intention appears.

31. Before we record the modified wording that an interpretation of the word “*building*” to refer to “*a building or buildings*” would involve, it is worth observing that the later reference to “*a dwelling or a number of dwellings*” refers initially to just a single dwelling, because obviously it is the latter part of the phrase that deals with the situation where a building comprises more than one dwelling, i.e. “*a number of dwellings*”.

32. It follows that the re-cast wording of section 35(1A) and Note 2 that the Appellant asks us to accept as appropriate is that we should read both provisions to say:

“The works to which this section applies are the construction of a building or buildings designed as a [single] dwelling or a building designed as a number of dwellings”

We should then test the requirements of Note 2 by reference to the attributes of each dwelling, meaning in this case the attributes of what we have decided ranks as simply one dwelling.

33. It seems to us that there is nothing offensive in that application of the Interpretation Act. Indeed, once we have reached the conclusion that a single dwelling might consist of two buildings, and that the Note 2 tests are to be applied to the single dwelling, the contrary conclusion that the term “building” could not include the plural would mean that the Note 2 tests were rendered superfluous and inoperative. This strikes us as odd because the four requirements of Note 2 appear to be the fundamental elements of the test, as opposed to the opening words that just introduce the test. Admittedly the Respondents purported to consider those tests, but they achieved that only by wrongly applying the tests to the separate buildings, and not, as required, to the single dwelling. When we have reached the presently undisputed conclusion that one dwelling can consist of two buildings, we consider

that interpreting the word “*building*” to include the plural is consistent with the provision, rather than ruled out by some contrary intention.

34. We have considered the *SA Whiteley* decision and the claim that it decided that in the present context the singular could not include the plural. During the hearing we were not taken to the facts in the relevant case, and we were certainly not taken to the materially different wording in the then relevant section and Schedule of the VAT Act 1983. Having now considered the case, the very materially different facts, and the quite different phrasing of the section and Schedule in the 1983 Act, we conclude that that case has no bearing on the point that we must now decide.

35. Whilst we were not taken to Notes 4 and 5 to Group 5 Schedule 8 of the 1994 Act in the hearing, we have considered those two Notes and consider them to be more relevant to the Appellant’s contention under the Interpretation Act than anything in the *SA Whiteley* decision. Those paragraphs are concerned with “use [of a building] for a relevant residential purpose” which means such uses as those in childrens’ homes, care homes, and residential accommodation for students etc. There, where various buildings will commonly operate together as a unit to provide “relevant residential accommodation”, Note 5 expressly deals with the situation where a number of buildings are built at the same time, and whilst one or some individually might not be used for a relevant residential purpose, the buildings as a whole “*are intended to be used as a unit solely for relevant residential purposes*”. When this is the case, then each building, including for instance a boiler-house that might just generate the hot water to provide central heating in the residential buildings, is deemed to be used for a residential purpose.

36. Note 5 does therefore expressly deal with the situation where there are several buildings that together are used for a relevant residential purpose. There are two reasons, however, why we still consider that the fact that Note 2 does not expressly deal with the situation where two buildings might constitute one dwelling does not preclude the word “*building*” including the plural.

37. First, in the factual situation relevant in the case of children’s homes, care homes etc, the legislation contemplates areas where there will commonly be a number of buildings on the site, and where some (for instance the boiler-house) will not be individually used for residential purposes. It is obvious therefore that the legislation must deal with a situation that will be common. By contrast the situation that we are now dealing with in relation to buildings constructed as dwellings must be virtually unique.

38. More relevantly, however, if we refer to Item 1 of Group 5 in Schedule 8, and to the situation where there is a “*construction [of a] building ... intended for use solely for a relevant residential purpose*”, it is clear that it is the use of the building that must be addressed. The boiler house in isolation would plainly fail the test, and this thus has to be addressed by Note 5 which deems the building, the boiler house, to be used “*solely for a relevant residential purpose*”. Applying our interpretation of “*building*” to include the plural in relation to the use of buildings for relevant residential purposes would achieve nothing as regards the boiler house because that particular building would still not satisfy a test that has to be applied to the buildings, and it would be far from clear how to deal with a building that was not itself used for residential purposes. Note 5 must therefore go further, and attribute the purposes of the buildings as a whole to each building, so that each can then satisfy the Item 1 test of being “*intended for use solely for a relevant residential purpose*”.

39. By contrast, where Item 1 is addressing the case where “*a building is designed as a dwelling*” it would be superfluous for Note 2 to deem any of the attributes of the building or buildings to be modified, because the entire test geared to whether “*a building is designed as a dwelling*” refers solely to the characteristics of the dwelling and not the building. Note 5 was different because it had to deem what would otherwise be the excluded building to have the attributes that satisfied a test precisely geared to how the building was used. When Note 2 addresses only the circumstances of the “*dwelling*” we see the two tests as operating quite differently, and we see no reason to say that the approach of Note 5 should colour the interpretation of the word “*building*” when constructed or not to constitute “*a dwelling*”.

40. We thus conclude that the Appellant is right to apply the reference to “*a building*” in section 35 (1A) and in Note 2 in the manner that we recorded in paragraph 32 above, and we conclude that the works involved in this case did satisfy the definition in that sub-section and that Note. The Appellant’s appeal is accordingly allowed on this basis.

The intention to be derived from the legislation

41. We slightly modify the Appellant’s third contention, namely that concerning purpose and fairness, to refer not just to any policy that can be derived from the legislation, but to the somewhat wider European point to the effect that we should interpret legislation, where such an interpretation is tenable, so as not to create unfair distinctions between two substantially similar situations. A number of ECJ cases have encouraged this approach, and this approach confirms us in the view that we are right to adopt the interpretation that where two buildings comprise one dwelling and the dwelling satisfies all the tests of the crucial Note (2), it would be unfair, and discriminatory for this taxpayer to fail to recover VAT when the next-door neighbour building a two-storey house with similar accommodation would recover the VAT.

42. We are very influenced by the fact that we cannot see that our interpretation would lead to any offensive results in other contexts. If there were four buildings on the Appellant’s site, the two that comprise the “*dwelling*”, a garage and a stable block, it seems to us that our interpretation would still only apply to the two “*dwelling buildings*”. The separate garage will stand or fall in accordance with the test in Note (3) to Group 5. The stable block will simply “*fall*”.

43. Our decision appears therefore to be relevant solely to the extremely unusual situation of a single dwelling that consists of two buildings. It is not particularly relevant for us to consider whether our interpretation would apply to the unified construction of a major house, with there then being a separate building designed as staff accommodation or as a “*granny flat*”. Were the planning constraint to preclude those two units being held in different ownership, we would find it considerably more difficult to class what would appear to be two dwellings as one. The critical point in this appeal is that once we have decided, as we have done (and as indeed the Respondents have conceded), that there is only one dwelling, the situation in this case is firstly distinct from the examples just postulated, and secondly likely to be virtually unique. The feature, however, that there is just one dwelling leads us to conclude that any distinction between the claim by the present Appellant, and by some hypothetical next-door neighbour building a four-bedroom two-storey house with identical accommodation would be unacceptably discriminatory.

Our decision

44. Our decision is that both buildings comprised one dwelling, that the dwelling satisfied the requirements of Note (2), that section 35 (1A) and Note 2 can be read to refer to “a building or buildings” and accordingly that the construction of the buildings qualified for the VAT refund under section 35(1) and (1A).

Right of Appeal

45. This document contains full findings of fact and the reasons for our 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.

**HOWARD M. NOWLAN
TRIBUNAL JUDGE**

Released: 13 April 2012