TC01351

Appeal number: TC/2010/0809

VAT – DIY Builders' Refund Scheme – eligibility of barn conversion incorporating part of an existing dwelling – whether conversion satisfied provisions of S.35 VATA 1994 and Notes to Group 5 Schedule 8 of the Act – whether barn used as garage and whether additional dwelling created by the conversion – appeal allowed

FIRST-TIER TRIBUNAL

TAX

MS JULIE WADE **Appellant**

- and -

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

TRIBUNAL: MICHAEL S CONNELL (TRIBUNAL JUDGE)
MS SUSAN STOTT (MEMBER)

Sitting in public at Leeds on 8 April 2011

Ms Wade, the Appellant, appearing in person

Ms Kim Tilling , Officer of HM Revenue and Customs, for the Respondents

DECISION

1. Ms Julie Wade ("the Appellant") appeals the decision of the Commissioners for HMRC to refuse a claim for a VAT refund of £10,729.73 under the DIY Builders and Converters Refund Scheme made by the Appellant in accordance with s 35 of the Value Added Tax Act 1994 ("the Act"). The claim was made in respect of VAT incurred on the conversion of a barn forming part of a property known as Bold Hall Farm Barkisland Halifax HX4 ODE into living accommodation for her own occupation. HMRC's decision is contained in a letter dated 9 November 2009 and confirmed in a letter of reconsideration dated 10 December 2009.

2. HMRC say that the conversion of the barn does not satisfy the legislative criteria to be considered as a residential conversion in accordance with s 35 and Group 5 Schedule 8 of the Act because the conversion of the barn was not a conversion into a dwelling of either a non-residential building or a non-residential part of a building.

3. At the hearing the Appellant gave evidence and represented herself. The bundle of documents jointly provided by the parties included copy correspondence which provided a planning history of the conversion works, relevant legislation and case law authorities. Architects plans, photographs and numbered drawings were also provided by the Appellant which assisted in identifying the nature of the alteration works undertaken, including the sequential extension of the property and conversion of the barn.

The Background

4. The Appellant acquired Bold Hall Farm in 1999. The property consisted of a double fronted stone built house with a large brick built barn adjacent to its eastern gable. The two were connected by a small outbuilding described as a cowshed.

5. In 2001 the cowshed was demolished and following the grant of planning permission under reference 01/01620FUL, its site was utilised to create an extension to the house. The extension consisted of an office, utility room, shower room, fuel store and lobby leading to a door giving access to the adjoining barn. Although of only single-storey construction there was also an upper floor which provided storage space.

6. In 2006 the Appellant sought advice from a planning consultant on the possibility of obtaining planning permission for conversion of the barn into a separate dwelling to include the extension as part of the proposed conversion. Bold Hall Farm is located within the approved greenbelt and also within a Designated Special Landscape Area on the Calderdale Unitary Development Plan which was the relevant development

plan for the area at that time. Given the prevailing planning policies and the fact that the house had already been the subject of what the planning consultant described as a significant extension the Appellant was advised that the barn conversion should be approached in two stages. The first stage was an application for planning permission for the conversion of the extension to a separate dwelling. The second stage was an application for incorporation of the barn into what would then be an existing separate dwelling (assuming the conversion works took place) including any necessary changes to the external appearance of the building as a whole. It appears that the primary reason for the two-stage approach was that if the Appellant could obtain planning permission for the extension to be a separate dwelling then that permission, irrespective of whether or not it had been implemented, would form an important material consideration in the determination of a subsequent planning application for incorporation of the barn into accommodation that already existed.

7. On 30 July 2006 stage one of the Appellant's planning strategy was achieved when planning permission was granted to use the extension as a separate dwelling (to be known as 'The Mistal') under planning consent 06/00932/CON. The conversion involved changing the office, lounge and fuel store into one large lounge whilst retaining the utility and shower rooms. The upper floor storage area would provide bedroom accommodation accessed by a staircase from the lounge. The architect's plans show that the access from the main house was to be bricked up and the access to the barn retained.

8. The Appellant says that the planning consent to convert the extension into a separate dwelling was not implemented, the reason being that the ultimate intention was to convert the barn which would then be incorporated into the existing accommodation provided by the extension .She says there was never any intention to use 'The Mistal' as a separate dwelling, as evidenced by the fact that the proposed extension works did not include any independent drainage and utilities. The property therefore remained in use only as an extension to the main house.

9. On 5 September 2007 stage two of the planning process was achieved when planning permission was granted under planning consent number 07/013306/CON for the conversion of the barn to form an extension to the 'existing' dwelling for which permission had been granted in July 2006.

10. Finally on 26 August 2008 planning permission under reference 08/00106/CON was granted as an amended scheme to planning consent 07/013306/CON. Essentially this was in the same terms but included changes to the original project and in particular an improved scheme which included additional ground floor windows to the garage and different roofing materials. The Appellant implemented that permission, completing the development in July 2009.

11. The main house had been sold off by the Appellant in September 2008. Documentary evidence was provided to show that shortly prior to completion of the sale, the openings from the main house to the extension were blocked up and that the converted barn was recorded as a new entry in the rating authority's valuation list. The Appellant and her family moved into the converted barn and although there were some remaining works these carried on around them until the summer of the following year when a building regulation certificate of completion was issued on 20 July 2009.

12. Up until then the Appellant says that the barn had been used in part for the garaging of agricultural tractors, hay for horse feed and also business storage. The Appellant works as a property manager and her business required the storage of building materials, fixtures and furniture. The Appellant says that cars were not parked in the barn and that residential parking for the house had always remained external.

13. The Appellant submits that her claim relates to the barn, that is the non-residential part of the conversion and does not include works to the extension which only amounted to the dismantling of partitions and the opening of two access points into the barn. The labour was carried out by a joiner /builder who was not VAT registered and therefore a VAT refund had not been claimed in respect of that work.

14. The Appellant professes no detailed knowledge of VAT law. She says that she relied on information provided in HMRC's VAT reference Notice 708 relating to zero rating and building and construction works and Notice 719 relating to VAT refunds for 'do it yourself' builders and converters. Notice 719 is now obsolete but the VAT refund claim form and Notes are now contained in VAT 431C. The Appellant also says that she consulted the VAT helpline and submitted full plans and details of the proposed conversion works prior to work commencing in January 2008. She says that she believed the case to be straightforward and did not seek any specialist advice.

15. On 2 November 2009 the Appellant submitted a claim for a VAT refund. HMRC refused the claim on 9 November 2009 for the reasons set out in paragraph 2 above.

16. The Appellant complains that she has been misled by HMRC. She says that she made enquiries at an early stage as to whether her conversion scheme was eligible under the VAT DIY Scheme and that she was not advised that the scheme was ineligible (because it included part of an existing dwelling) until after her claim was made. The Appellant says that she contacted the VAT helpline with a detailed explanation of what she was doing and that although the VAT helpline was helpful enough, there was no indication that her barn conversion would be ineligible. The Appellant also says that she followed the VAT advice Note, VAT 431C, but there was nothing in the Note which may have indicated that her scheme was ineligible. Having

considered the Notes in VAT 431C it is observed that they make specific reference to the conversion of a non-residential building not having been used for residential purposes in the previous ten years. The notes also make reference to carrying out works to a building "that has never been lived in". and specifically say that conversion of any of those types of property are not eligible under the scheme unless the property in question has not been lived in in the previous ten years. The transcripts of the conversations which took place between the Appellant and HMRC show that the advice given by the VAT Office was of a generalized nature and not in any way incorrect. Furthermore, the notes in VAT 431C should have put the Appellant on notice that the extension into which the barn conversion was being incorporated may have rendered the conversion scheme ineligible. The Tribunal does not therefore accept the Appellant's submission that she was misled by HMRC and therefore she cannot found a claim based on breach of legitimate expectation.

The Legislation

17. The law in relation to claims under the DIY Scheme is contained in VAT Act 1994 section 35 which reads as follows :

> "(1C) Where –
>
> (a) a person ('the relevant person') carries out a residential conversion by arranging for any of the work of the conversion to be done by another (the Contractor).
>
> (b) the relevant person's carrying out of the works is lawful and otherwise than in the course or furtherance of any business,
>
> (c) the contractor is not acting as an architect, surveyor or consultant or a supervisory capacity, and
>
> (d) VAT is chargeable on services consisting in the work done by the contractor,
>
> the Commissioners shall, on a claim made in that behalf, refund to the relevant person the amount of VAT so chargeable.
>
> (1D) For the purposes of this section works constitute a residential conversion to the extent that they consist in 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.

Schedule 8, Group5, states:

NOTES

(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 … as a dwelling or number of dwellings …"

(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 …….., and

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

(8) References to a non-residential building or a non-residential part of a building do not include a reference to a garage occupied together with a dwelling.

(9) The conversion …….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.

(16) For the purpose of this Group, the construction of the building does not include-

(a) the conversion reconstruction or alteration of an existing building; or

(b) any enlargement of or extension to an existing building except to the extent the enlargement or extension creates an additional dwelling or dwellings; or

(c) …… the construction of an annex to an existing building."

The Issues to be determined

18. The Tribunal is required to determine whether the development carried out by the Appellant satisfies the legislative criteria to be considered as a residential conversion in accordance with section 35 and Group 5 Schedule 8. To do so HMRC argue that there are three main issues which must be considered. The first is whether the barn was used as a garage in occupation with a dwelling in which event the restriction in Note (8) is engaged. The second is whether the barn of itself created an additional dwelling. HMRC say that the Appellant's evidence as to whether the extension was developed into a separate dwelling in its own right is unclear. If it was, HMRC argues

that the development fails to satisfy section 35 (1D) because the legislative provisions do not allow for the conversion only to create a part of the dwelling. Thirdly, if the extension was not developed into a separate building in its own right then it must have remained as an extension to the main house and therefore does not satisfy the 10 year rule under Note (7A), in that it had been in use as part of a residential building immediately prior to the conversion.

19. HMRC further contend that the documentary evidence shows that the barn was used as a garage, whereas the Appellant asserts that the barn was neither used nor designed as a garage. In her oral evidence to the Tribunal she conceded that there would have been some domestic storage amounting to approximately 10% usage but that this did not alter the fact that the building was a barn and not a garage. She says cars had never been parked in the barn.

20. To some extent the Appellant's evidence that the barn had never been used as a garage is contradicted by the fact that the plans submitted in respect of the planning applications under references 07/013306/CON and 08/00106/CON, which show the then existing ground floor plans, describe the barn as a 'garage, store and existing barn'. Also the report to the planning committee in respect of planning application 07/013306/CON describes the proposed works as the 'conversion of existing barn with integral garage', and the plan submitted in respect of each of the planning applications contain reference to the 'existing garage door opening.' A further indication that the barn may have been used for domestic purposes was that the plans submitted in respect of the planning application under reference 01/01620/FUL show integral access from the extension to the barn.

21. The Appellant, in support of her submissions, says that the barn did not have planning permission for use as a domestic garage. She also says that references by her architects on the plans to 'garage, store, existing barn' was an anomaly and that nothing should be read into the architects use of the word garage; also that the reference to 'the conversion of an existing barn with integral garage' was to the proposed work not what it was.

22. The meaning of a 'garage occupied together with a dwelling' in the context of Note (8) would in the Tribunal's view be a structure intended and in fact used for parking of the owners car or some other domestic purpose. More often than not the building would be designed and built as such and essentially form an integral part of the accommodation and amenities provided by the dwelling as a whole. That, in the Tribunal's view is the rationale behind section 35 and Note (8).

23. HMRC referred to *Grange Builders (Quainton) Ltd 18905* as authority for the fact that a structure did not necessarily have to be built as a garage to qualify as a garage and that its use as a garage as a matter of fact and reality before conversion would be

sufficient to qualify it as a garage. HMRC also referred to *Joseph Podolsky* TC 00322 as providing assistance for determining that where at least part of the building is used as a garage and therefore does not satisfy the non-residential requirement Note (8) applies to prevent qualification of the whole of the building. That is not an interpretation of Note 8 with which this Tribunal would agree but in any event in *Podolsky* it was conceded by the Appellant that the subject building had in part been used for the parking of his car and in consequence had been used as a domestic garage. In this case the Appellant disputes that the barn was used as a garage either wholly or in part.

24. On balance, the Tribunal preferred to accept the Appellant's evidence that the barn had been used more for agricultural and commercial storage rather than as a 'garage' in the commonly accepted sense of the word, if in fact it had been used as a garage at all. Irrespective of the various references to 'a garage' or 'existing garage' in the plans and planning documentation, or the storage of a modest amount of domestic items, the barn was in the Tribunal's view what it appeared to be - a large outbuilding probably originally designed and intended for use as a barn and which remained in use as such. It was unlike the main house being of brick construction rather than stone and had all the appearances of a detached outbuilding intended and in fact used for commercial purposes. The Tribunal's conclusion is therefore that the building was a barn, and not a garage within the meaning of Note (8).

25. HMRC say that the evidence is anomalous as to whether the extension to the main house was or was not developed as a separate dwelling in its own right. The Appellant says that the planning consent was never implemented, but her postal address as recorded on the planning application to convert the barn is given as 'The Mistal' (being the proposed name of the new dwelling). Furthermore the plans attached to the planning application to convert the barn indicate that planning consent 06/00932 /CON had been implemented.

26. HMRC contend that irrespective of whether or not the planning consent was implemented the Appellant's claim under section 35 is ineligible. It is argued firstly that if the planning consent to convert the extension into a separate dwelling was not implemented, the Appellant's claim is ineligible firstly under section 35(1D) because there had not been a conversion of a non-residential part of a building into a building designed as a dwelling but only a conversion of the barn into part of a building designed as a dwelling. Furthermore it is argued that under Note (7A), because the 10 year rule is engaged. a conversion of a non-residential building must be a building that has never been used for residential purposes in the 10 years prior to the start of the works. The extension had been in use as part of a residential building, that is the main house, immediately prior to the conversion.

27. Alternatively HMRC submit that if the planning consent was implemented which is how the Appellant portrayed it in her planning application for the barn conversion, then the whole of the development fails to satisfy section 35 (1D) and Note (9), in that there must be created as a result of the conversion an additional dwelling and not an addition to or additional part of an existing dwelling. The planning permission was for the conversion of a barn as an extension to an existing dwelling and as such, the conversion of the barn did not have independent status to the existing dwelling.

28. In giving evidence, the Appellant was adamant that the work required to implement the planning consent to convert the extension into a separate dwelling had not been carried out. She maintained that although referred to as a 'separate dwelling' in her planning application to convert the barn, the extension had in reality remained in use as an extension to the main house until incorporated into the barn conversion. She referred the Tribunal to HMRC's VAT Notice 431C and its precursor Notice 719, which both contain advice on refunds for DIY house-builders converting an existing building into a dwelling. The notices say that a building is normally considered to be completed when it has been finished according to the original plans and specifications, a Building Regulation Certificate of Completion has been issued and either a habitation letter from the local authority or a Notice of Making a New Entry into the Valuation List can be produced. The Appellant says that none of this happened because the work had not been undertaken. Implementation of planning consent 06/00932/CON had never been her intention. Although the plans submitted with the Appellant's application to convert the barn indicated that the alterations to the extension had already been carried out and her address on the planning application was recorded as 'the Mistal,' this was she said, in accordance with advice received from her architect and purely for the purpose of promoting the planning application in order to achieve her ultimate goal of securing permission to convert the barn.

29. HMRC argue that if the extension was a property in its own right the development would not satisfy the requirements of a conversion under section 35 (1D) on the basis that Note (9) would be engaged. HMRC referred to the Court of Appeal decision in *Customs and Excise Commissioners v Blom-Cooper* [2003] EWCA Civ. *493* which established that where a building contains both a residential and non-residential part, an additional dwelling must be created to that already contained within the building. That case involved an individual who had purchased a former public house, which incorporated residential accommodation and converted the building into a single family dwelling. The Court found there is a necessary interaction between Notes (7A) and (9) when considering a claim made under section 35 (1D). It was determined that, taken together, the Notes had the effect that where before conversion, the building already contained a residential part, the conversion of a non-residential part would not be treated as the conversion of a non-residential part of the building for the purposes of Group 5 unless the results of that conversion was to create an additional dwelling

or dwellings. The case of *Graham Tobell* [16646] had earlier been decided on similar principles. The case involved the conversion of a former public house with residential accommodation and again fell within the restriction contained in Note (9) because no additional dwelling had been created on completion of the conversion.

30. The evidence as to whether the works required to convert the extension into a separate dwelling had been undertaken certainly appeared to be contradictory. However, the extension had never been entered as a separate property on the valuation list and no building regulation completion certificate had been issued. Furthermore, given the Appellant's clear intentions with regard to her ultimate objective of converting the barn it was inherently improbable that she would have gone to the time and expense of carrying out works to create a separate dwelling. In reality it is clear that the works had not been undertaken and planning consent number 06/00932/CON had not been implemented. Accordingly, the extension retained its original status and had not become a separate dwelling. The present case can therefore be distinguished from *Blom Cooper* and *Tobell* on the basis that, in this case, prima facie, an additional dwelling had been created.

31. The question for determination by the Tribunal is whether the conversion is caught by a limited interpretation of the words 'a building' in section 35 (1D) or a restricted interpretation of a 'non-residential' building in note (7A). HMRC submit that if the extension remained as an extension to the original dwelling the Appellant must overcome the arguments outlined in paragraph 26 above. They argue that the question before the Tribunal is 'what was it that was converted into a dwelling to qualify as a residential conversion?' There clearly was a conversion of a barn, but according to HMRC, only into *part of a building* designed as a dwelling, the remainder being the existing extension. HMRC contend that on a proper construction of the legislation a conversion of a building must create a building in its own right, not a dwelling as a composite of two or more conversions. Neither the conversion of the extension nor the conversion of the barn created a dwelling in its own right, but each created part of a dwelling.

32. The Tribunal does not agree with HMRC's interpretation of the legislation. Section 35 (1D) specifically envisages a situation where part of a building is non-residential and part is residential (or not non-residential). In those circumstances it provides for works to be within the meaning of a 'residential conversion' and qualify for relief, '….. *to the extent that'* the works consist of the conversion of the relevant part of the building into 'a building designed as a dwelling……' Indeed the concept is specifically recognised in Note (9) which provides that a conversion of a non-residential part of a building which already contains a residential part nonetheless qualifies for relief provided the result of the conversion is to create an additional dwelling or dwellings. This point was considered by the Court of Appeal in the case

of *Customs and Excise Commissioners v Jacobs [*2005] STC 1518. In that case there had been a conversion of a building which had formerly been used as a residential school. Part of a building was residential in that there was existing residential accommodation in the form of a self-contained maisonette for the headmaster, residential bedrooms and bathrooms for the pupils and staff bedsits. The Court held that 'it was not correct to limit 'additional dwelling' within Note (9) to dwellings created wholly from the non-residential part of the building. An additional dwelling if created in the building as a whole was within Note (9); an additional dwelling did not have to be created wholly from the non-residential part....'

33. Accordingly, following that analysis, the creation of a dwelling by the conversion of both the non-residential barn and the existing residential extension should not preclude relief. It would be wrong to say that the meaning of the words, 'a building' in section 35(1)(D) cannot in any circumstances mean *part of* a building. Section 35(1)(D) specifically refers to 'a conversion of a non-residential part of a building' and taking the finished dwelling or end product, as being 'the building' the barn consisted of the non-residential part of that building. This does of course mean that the claim for recovery of input tax is limited to the conversion of the barn. The part of the building which consisted of the unconverted barn was clearly non-residential and fell within note 7(A)(a). Note 7(A)(b) has no relevance firstly because whilst the extension was used as part of a dwelling it was not included in that part of the building in respect of which the claim is made and secondly because it was only part of a dwelling not a dwelling, (see paragraph 36 below)..

34. This view is endorsed by the case of *John Clark* TC 00552 where the Tribunal said that:

> '…even if only part of the building is non- residential it is not necessary that the non-residential part must itself be converted into a dwelling. It is sufficient for this purpose (but subject to note (9) …) , if the building comprised a non-residential part which was the subject of the conversion works, that after conversion the building (taken as a whole, including both the residential and non-residential parts) was a building designed as a dwelling. This was the part of the judgment of Peter Smith, J. in …*Blom Cooper*, which was not pursued on appeal to the Court of Appeal in that case: see [2003] STC 669 per Chadwick LJ at [17]. It was also confirmed in … *Jacobs;* see per Ward LJ at [34].'

The Tribunal in *Clark* concluded that the words 'to the extent that' in section 35 (1D) clearly demonstrates that relief may be partially available.

35. The Tribunal concludes that the conversion of the barn did create an additional dwelling for the purpose of Note (9) and that the conversion was within section 35 (1D). The works carried out by the Appellant, (being a conversion of a building which comprised the extension and barn), constituted a residential conversion within section 35 (1D) VATA to the extent that they consisted of the conversion of the barn but not the extension, into a building designed as a dwelling.

36. A further point made in *Clark* which is relevant to this appeal is that it is possible for there to be a residential part of the building that does not constitute a dwelling within the meaning of note (7A)(b)(ii). In *Jacobs* on the facts of that case, dormitories bathrooms and staff bedsits were classed as residential, but were not dwellings. The Appellant in this case has restricted her claim for input tax recovery to the conversion work relating to the non-residential part of the building, that is, the barn, omitting from it the VAT paid on the work carried out in converting the extension. In this regard. the facts of this case are similar to those of *Robert Duncan Blacklock* (No 20171) released 22 May 2007 where works involved the conversion of a building comprising stables, a tack room, a food preparation room, a domestic double garage and first-floor office accommodation. Mr. Blacklock had restricted his claim for input tax recovery to the conversion work on the non-residential part of the building. The decision turned on the Tribunal's interpretation of Note (9) (rather than Note 7A as in this case), but in holding that the conversion works to the existing building which contained no dwelling into a single dwelling satisfied Note (9), the Tribunal recognised that part of a dwelling is not a 'dwelling'. There is therefore no reason why the same interpretation of 'dwelling' should not be used in Note (7A.)

37. Accordingly, for the reasons set out above, the Tribunal allows the appeal subject to any requisite adjustment to exclude from the Appellant's claim any VAT relating to the conversion of the extension.

38. The Appellant has made an application for costs. The appeal was brought under the provisions of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Specifically, rule 10 provides that the Tribunal may only make an order for costs in respect of wasted costs or if a party has acted unreasonably in bringing defending or conducting the proceedings. Any application must be supported with a schedule of the costs claimed. The Tribunal does not consider HMRC to have been unreasonable in defending or conducting the proceedings. HMRC's decision is contained in a letter dated 9 November 2009 and was reviewed on 10 December 2009. The Appellant appealed that decision, and there were clearly arguable issues to be determined. There was no undue delay on the part of HMRC in either conducting the review or submitting its Statement of Case detailing the grounds on which the decision had been reached. The Tribunal concludes that these are not circumstances that can found a claim for costs under rule 10.

39. 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 S Connell

TRIBUNAL JUDGE
RELEASE DATE: 25 July 2011