



**TC02513**

**Appeal number: TC/2012/02236**

*VAT – do-it-yourself builders’ scheme – VAT Act s35, Sch 8, Group 5, Note 2 - “live-work” unit – whether conditions for zero rating satisfied – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**JOHN AND SUSAN KEAR**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE NICHOLAS ALEKSANDER  
                     ROSALIND YOUNG**

**Sitting in public at 45 Bedford Square, London on 23 November 2012**

**Michael J Flint, VAT consultant for the Appellant**

**Philip Rowe, an officer of HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction

5 1. This appeal concerns a claim by the Appellants for a refund of VAT incurred by them in connection with the conversion of commercial buildings into a dwelling. The amount involved is £12,681.34.

2. In principle, a person who is converting a non-residential building into a dwelling or a number of dwellings for non-business purposes is able to obtain a  
10 refund of VAT incurred on buying building materials used in the conversion, or, where he employs a contractor to do the work, on employing that contractor.

3. The Appellants were represented by Mr Flint and HMRC was represented by Mr Rowe. We heard evidence from Mrs Kear, one of the appellants. In addition there were produced to us a bundle of documentary evidence and a bundle of  
15 photographs.

### The law

4. Section 35(1),(1A) and (1D) of the VAT Act 1994 provides as follows:

(1) Where –

- (a) a person carries out works to which this section applies,
- 20 (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,

25 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;
- 30 (b) the construction of a building for use solely for a relevant residential purpose or relevant charitable purpose; and
- (c) a residential conversion.

(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—

- 35 (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.

5. Section 35(4) states that

5 (4) The notes to group 5 of schedule 8 shall apply for construing this section as they apply for construing that group.

6. Note 2 to group 5 of schedule 8 to the VAT Act 1994 provides as follows:

(2) A building is designed as a dwelling or a number of dwelling where in relation to each dwelling the following conditions are satisfied –

- 10 (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
- 15 (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 facts**

7. We find the background facts to be as follows.

20 8. The Appellants were the owners of a large house, formally known as “Hathaways” and now known as “Greenwood”. They conducted their business from five adjacent commercial buildings in the grounds of the house. These are timber clad barn-like buildings.

25 9. Following the sale of the business, the commercial buildings became vacant and unused. The Appellants obtained planning consent to demolish two of the five commercial buildings, and combine the remaining three into a “live-work” unit. The plans show that the space occupied by one of the buildings was to be converted into the business area and the other two buildings were to be converted into the residential area. Subsequently the planning consent was amended to allow (i) for the  
30 construction of a conservatory at the far end of the residential area, and (ii) for the retention of half of a building that was due to be demolished for use as a garage.

10. The planning application was submitted on 18 September 2009 and consent was granted on 13 November 2009. The amendments were submitted on 2 July 2010 and the amended consent was granted on 27 August 2010.

35 11. The planning consent included the following conditions:

The business floor space of the livework unit shall comprise at least 30% of the gross external floorspace of the building and shall be finished ready for occupation before the residential floorspace is

occupied and the residential use shall not precede commencement of the business use

5 The business floorspace of the livework unit shall not be used for any purpose other than for the purpose within Class B1 in the Schedule to the Town and Country Planning Use Class Order 1987, or in any provision equivalent to that class in any statutory instrument revoking and re-enacting that Order with or without modification

10 The residential floorspace of the livework unit shall not be occupied other than by a person solely or mainly employed or last employed in the business occupying the business floorspace of the unit, a widow or widower of such a person, or any resident dependents

15 Notwithstanding the details shown on the application plans, before development commences, details of the residential curtilage for the livework unit shall be submitted to and approved by the Local Planning Authority. The scheme shall be implemented and retained in accordance with the approved details.

12. Class B1 in the Schedule to the Town and Country Planning Use Class Order 1987 is as follows:

Business Use for all or any of the following purposes—

20 (a) as an office other than a use within class A2 (financial and professional services),

(b) for research and development of products or processes, or

(c) for any industrial process,

25 being a use which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.

13. The plans attached to the planning consent shows the business area as being a single large open plan space to the right of the property when entering by the front door. The residential area is to the left of the property when entering by the front door, and comprises two bedrooms (with en suite bathrooms) and a large open plan living/dining/kitchen area (with the conservatory extending beyond). However the business area of the property was never built in accordance with the plans. Instead the business area was divided into two rooms separated by a passageway, with a toilet at the end of the passageway. For reasons which will become apparent, we refer to the room furthest from the front door as Christopher's room, and the other room as Richard's room. We would note that although we were shown many photographs of both the exterior and interior of the property, none of the photographs related to the business area. Our findings in respect of the business area are therefore made on the basis of the description given by Mrs Kear during the course of her evidence.

40 14. Sussex Building Control issued a certificate of completion on 9 September 2011. However the Appellants did not move into the property until September 2012 following the sale of their house.

15. When the completed property was inspected by the district valuer for the purposes of assessing council tax and rates, the officer determined that the commercial element of the property was too small to merit separate non-domestic rating, and the whole property was assessed to council tax as being residential.

5 16. Mrs Kear told us when giving evidence that the Appellants have two (adult) sons, Richard and Christopher. Richard is an oak framer and Christopher is a chef and a musician (although the income he generates from music is not sufficient to maintain him). Richard lives with the Appellants, but Christopher does not (although he does stay with them from time to time). When Christopher stays with the  
10 Appellants, he sleeps in the spare bedroom in the residential part of the property or in his room. He uses his room as a music practice studio. Richard lives in the property and uses his room as his bedroom, from which he also manages his business. Files and other papers relating to his business are kept in his room, as is his computer which he uses in the management of his business. However his workshop is not at the  
15 property and is located elsewhere. Mrs Kear helps Richard with his business from time to time, but is not a partner or employee in the business.

17. Although Richard undertakes some management of his business from his room, we find that the room is not used solely for purposes falling within Class B1, as it is Richard's bedroom. We also find that neither of the Appellants were solely or mainly  
20 employed (or last employed) in Richard's business. Although Mrs Kear helps Richard from time to time with his business, she does so out of the love and affection she has as his mother, rather than by being employed in the business.

18. On 11 October 2011 the Appellants submitted a claim to HMRC for repayment of the VAT incurred on the conversion. HMRC replied to the application on 13  
25 October 2011. They rejected it essentially on the grounds that note (2)(c) to Group 5, Schedule 8 VAT Act 1994 was not satisfied, as there was an implied condition in the planning consent preventing the separate disposal of the business part of the property.

19. On 10 November 2011 the Appellants asked HMRC to review that decision, and the results of the review, rejecting the refund, were communicated in a letter dated 21  
30 December 2011. The review officer upheld the original decision to reject the refund on the grounds that the requirements of note (2)(c) were not satisfied as the planning consent prohibited both the separate use and the separate disposal of the residential and business elements of the property. In addition, the review officer noted that the Appellants may be in breach of their planning consent if the property was not being  
35 used as live-work unit.

### **Submissions and Conclusions**

20. Mr Flint, for the Appellants, submits that there is no condition in the planning consent preventing the separate disposal or use of the residential and business elements of the property. Mr Rowe submits that such a condition was implicit in the  
40 planning consent granted.

21. We were referred to a number of cases, in particular to *Holden v HMRC* [2012] UKFTT 357 (TC), *Cussins v HMRC* (2008) VDT 20541, *Phillips v HMRC* [2011] UKFTT 372 (TC) and *Sherwin & Green v HMCE* (1999) VDT 16396. All of those cases relate to live-work units or other arrangements with both residential and business elements. Mr Flint seeks to distinguish these cases (other than *Sherwin & Green*) on the basis that in all of those cases the business part of the development was independent of the residential part – in particular they had separate entrances and had no internal access from one to the other. It was therefore possible as a practical matter for the separate elements of the development to be severed from one another, and for the business element to be sold separately from the residential element (or vice versa). That was not the case here, where the business and residential element shared a common front door. In the *Sherwin & Green* case, the tribunal held that the planning restrictions, when properly considered, did not prohibit the separate disposal of the different elements of the development.

22. We agree that there is no express or implied condition preventing the separate disposal of the residential and business elements of the property in this case – although as a practical matter this could not be done without further building work (possibly requiring planning consent) to provide (for example) separate entrances. However we find that there was an express condition preventing the separate use of the business and residential elements of the property. The planning consent requires that the residential part of the property can only be occupied by a person mainly or last employed in the business carried on in the business part of the property (or widow/widower or resident dependent). We agree with the Tribunal in *Holden* that occupation and use of residential accommodation amount to the same thing, and it therefore follows that condition (c) of note 2 cannot be satisfied.

23. We also agree with the Tribunal in *Holden* that few (if any) live-work units can qualify for zero-rating – and we consider that HMRC’s guidance relating to live-work units in Public Notice 708 at paragraph 15.4 is misleading.

24. Mr Rowe also submitted that condition (d) of note 2 was not met, as the conversion had not been undertaken in accordance with the planning consent given. Mr Flint sought to persuade us that Class B1 of the Use Class Order was very broad – and that modern offices could be furnished informally, to include sofas and beds. So the fact that Richard’s room was used in part as his bedroom did not prevent it from being an office within Class B1.

25. We disagree.

26. We find that:

- (1) The Appellants both occupy the residential part of the property;
- (2) Neither Appellant is a person solely or mainly employed or last employed in Richard’s oak framing business, nor Christopher’s music business, nor are they a widow or widower of Richard or Christopher, nor are they dependents of Richard or Christopher; and

(3) Richard's room is used for a purpose other than for the purpose within Class B1 in the Schedule to the Town and Country Planning Use Class Order 1987, namely it used for residential purposes as his bedroom;

5 27. Although Mrs Kear helps Richard with his business, we find that the help she provides is out of the love and affection that she owes her son, and is not sufficient to amount to her sole or main employment (or last employment).

10 28. It is not clear to us whether an office within Class B1 of the Use Class Order would include a music studio, but as we heard no argument on the point, we make no finding in this regard. Irrespective of this, we are satisfied, and find, that Christopher is not resident at the property.

15 29. We therefore find that the Appellants occupy (and have always occupied) the residential part of the property in breach of the planning consent, as neither of them is a person solely or mainly employed or last employed in either Richard's oak framing business or Christopher's music business, nor are either of them a widow or widower of Richard or Christopher, nor are they dependents of Richard or Christopher.

30. We also find that the use of Richard's room by him for residential purposes is in breach of the planning consent, as the planning consent requires that the business part of the property be used solely for purposes within Class B1 of the Use Class Order.

20 31. We also find that this usage of the rooms in the business part of the property was always intended by the Appellants. Mrs Kear told us that although the property was vacant at the time the Certificate of Completion was issued by Sussex Building Control, it was always the Appellant's intention that the two rooms in the business part of the property were to be used in this way.

25 32. We therefore find that the conversion had not been carried out in accordance with the planning consent. We are supported in this finding by the fact that the district valuer decided that the business use of the property was immaterial, and therefore assessed the whole of the property to council tax.

33. We therefore dismiss the appeal.

30 34. 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)"  
35 which accompanies and forms part of this decision notice.

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**NICHOLAS ALEKSANDER  
TRIBUNAL JUDGE**

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**RELEASE DATE: 1 February 2013**