



**TC04679**

**Appeal number: TC/2014/06173**

*VAT – Zero rating – Schedule 8 Group 6 – whether designed as a dwelling – yes – separate use prohibited – whether a protected building – no -appeal dismissed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CARSON CONTRACTORS LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE CHARLES HELLIER  
                  CHARLES BAKER FCA CTA**

**Sitting in public at Vintry House, Wine Street, Bristol, BS1 2BD on 25  
September 2015**

**Mr Rob Case of Randall & Payne LLP for the Appellant**

**Mr Martin Priest, presenting officer of HM Revenue and Customs, for the  
Respondents**

## DECISION

### ***Introduction***

1. Carson Contractors Limited appeals against VAT Assessments dated 31 July 2014 in the amount of £52,145.00, plus interest. Of this amount £51,554.00 relates to supplies of construction services that the company says are zero-rated as the approved alteration of a protected building within Group 6 Sch 8 Value Added Tax Act 1994, but which HMRC says are standard rated. The balance relates to other matters that are not in dispute.

### ***Our Findings of fact***

2. We had before us several bundles of documents. Mr Rob Thompson, a director of Carson Contractors Limited, spoke briefly to clarify certain details.

3. Bridges Court is a collection of buildings within a single curtilage all of which are in the same ownership.

4. A common gated entrance from the public highway provides access to a courtyard around which are the main house, the building we will refer to as the barn (to which the construction work in dispute related), a stable block and entrances to a walled garden and to a further yard. The barn is about 20 feet away from the main house and attached to it by a wall through which there is a gate to the walled garden. The barn backs onto an outdoor swimming pool, beyond which there is a tennis court. The open air swimming pool is separated from the barn only by a waist high open trellis fence.

5. The walled garden is approximately rectangular at the eastern end but then widens out towards the western end. The main house forms the eastern boundary of the garden and extends to part of the southern boundary. The barn forms a small part of the northern boundary. The north eastern corner consists of the wall linking the barn to the main house. The barn has a first floor bedroom window overlooking the walled garden. It appears that the occupier of the main house could use the walled garden without any significant loss of privacy to the occupier of the barn.

6. We were not given a detailed description of the main house. However, from the photographs and site plan it is clear that the main house is a substantial property, significantly larger than the barn. All the buildings are in close proximity.

7. The owner runs a bed and breakfast business from the main house. Her son now stays in the barn when he visits and we understood that his main residence is elsewhere.

8. The main house and barn were constructed in the eighteenth century and are separately listed Grade II. By 2010 the ground floor of the barn was used as a garage and store. The first floor was formerly used as additional residential accommodation, possibly for the estate workers, but was by then derelict.

9. In connection with an application for planning permission and listed building consent for alterations to the barn, Verity & Beverley Architects, provided a Design & Access Statement dated 24 December 2010. It summarised the purpose of the proposed work as:

5                               The proposed alterations are to provide ancillary accommodation for  
the family at Bridges Court. The alterations will enable adequate  
living facilities for three generations of the family within the estate.  
The proposals include the modernisation and conversion of the  
10                               facilities [the barn] to provide an open plan living space on the ground  
floor and suitable sleeping accommodation on the first floor.

10. Wiltshire Council, the planning authority, indicated a willingness to grant planning permission subject to the owners entering into a covenant under section 106, Town and Country Planning Act 1990 (the Section 106 Agreement). The Section 106 Agreement dated 11 May 2011 contained the following covenants by the owner:

- 15                               1. Not to occupy the Annexe other than in conjunction with the House  
as ancillary accommodation and not to sell, lease or otherwise dispose  
of the Annexe unless such sale, lease or disposal shall include the sale,  
lease or disposal of the Land and the House and every part thereof.
- 20                               2. Not to cause or permit any separate curtilage to be formed around  
the Annexe

11. The Annexe was defined as “the residential annexe created on the Land as a result of carrying out the Development”. In turn the Development was defined as “the development of the Land in accordance with the Planning Application for Change of Use of a barn outbuilding to ancillary residential use”. The Land was the entire  
25                               collection of buildings and a large adjacent field; the House was the main residential  
dwelling on the site.

12. The Notification of Planning Decision giving permission for the works and dated 30 June 2011 was subject to conditions including:

- 30                               2. The development hereby permitted shall not be occupied at any  
time other than for purposes ancillary to the residential use of the  
dwelling known as Bridges Court, Luckington.
- 35                               REASON: The additional accommodation is sited in a position where  
the Local Planning Authority, having regard to the reasonable  
standards of residential amenity, access and planning and listed  
building policies pertaining to the area, would not permit a wholly  
separate dwelling.

13. Following receipt of listed building consent and planning permission, work started on the barn. Downstairs a large room was created (some 20 x 40 ft) with a sitting area or room at one end, a dining area in the middle and a kitchen at the other  
40                               end; there was also a boot room, a utility room, a WC, an entrance porch and entrance  
hall. On the first floor, three bedrooms, a storage room and two bathrooms were  
created. An internal staircase was installed from the large downstairs room to the top  
floor.

14. The barn and the main house are treated as a single residential property for council tax purposes. They share a common water supply. Before the alteration works they had a common electricity supply. As a result of the renovations the barn now has a separate electricity supply because the old wiring was inadequate and had to be replaced.
15. The house and the barn share a single postal address and post box.
16. Carson Contractors Limited carried out the conversion works on the barn. They zero-rated the great bulk of the work as an approved alteration to a protected building under Schedule 8 Group 6. At the time Carson Contractors Limited were unaware of the existence of the Section 106 Agreement.
17. HMRC, having become aware of the Section 106 Agreement, concluded that zero rating was not available. They issued VAT assessments on 30 July 2014. HMRC carried out a review of their decision and issued a notice of their conclusions on 15 October 2014. Randall & Payne LLP as representatives of Carson Contractors Limited submitted a Notice of Appeal to the Tribunal dated 14 November 2014.

**Legislation**

18. The legislation is found in Value Added Tax Act 1994. Section 30 provides that the supplies specified in Schedule 8 will be charged at a rate of zero. Schedule 8 is divided into a number of Groups sub-divided into Items and supplemented by Notes that have statutory effect.
19. Group 5 concerns new construction. Some of the cases cited to us relate to Group 5 which contains some provisions incorporated into the Notes of Group 6 and some other provisions similar to Group 6.
20. Group 6 related to protected buildings. This Group was amended with effect from 1 October 2012 but such amendments do not apply to work carried out in accordance with a consent applied for before 21 March 2012. HMRC agree that all the work was carried out in accordance with such a consent and so the legislation applies as it stood before amendment.
21. Item 2 of Group 6 read:
2. The supply, in the course of an approved alteration of a protected building of any services other than the services of an architect, surveyor or any person acting as consultant or in a supervisory capacity
22. This is subject to the following Notes:
- Note 1
- “Protected building” means a building which is designed to remain as or become a dwelling or number of dwellings (as defined in Note (2) below) or is intended for use solely for a relevant residential purpose or

a relevant charitable purpose after the reconstruction or alteration and which, in either case, is—

(a) a listed building within the meaning of—

(i) the Planning (Listed Buildings and Conservation Areas) Act 1990; or ...

Note 2

A building is designed to remain as or become a dwelling or 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 covenants, statutory planning consent or similar provision, and includes a garage (occupied together with a dwelling) either constructed at the same time as the building or where the building has been substantially reconstructed at the same time as that reconstruction.

An “approved alteration” includes an alteration for which listed building consent was required and given.

### ***Basis of the assessment***

23. HMRC raised the assessment on the basis that the works were not an approved alteration of a protected building. This was on the basis that the barn, after conversion, was a self-contained dwelling whose separate use or disposal was prohibited both by the Section 106 Agreement and the terms of the planning consent; as a result it did not satisfy the conditions in Note 2 and consequently was not a protected building as defined in Note 1.

### ***Cases referred to***

24. We were referred to the following cases:

*Mark Catchpole and The Commissioners for Her Majesty’s Revenue and Customs*, [2012] UKFTT 309 (TC), TC01995 (*Catchpole*).

*Mr T Fox and The Commissioners for Her Majesty’s Revenue and Customs*, [2012] UKFTT 264 (TC), TC01957 (*Fox*)

*M I M Construction (a firm) and The Commissioners for Her Majesty’s Revenue and Customs*, [2014] UKFTT 371 (TC), TC03504 (*M I M Construction*)

*The Commissioners for Her Majesty’s Revenue and Customs and Anthony Barkas*, [2014] UKUT 0558 (TCC), FTC/125/2013 (*Barkas*)

*Daniel Nabarro and The Commissioners for Her Majesty’s Revenue and Customs*, [2014] UKFTT 633 (TC), TC03757 (*Nabarro*)

*Uratemp Ventures Limited v Collins* [2001] UKHL 43 (*Uratemp*)

## ***Arguments for the Appellant***

25. Mr Case, in clear and well presented submissions, argued that the barn and the house together formed a single dwelling. The buildings forming that dwelling he argued satisfied the requirement of Note 2. In particular, because the test in paragraph (c) was to be applied to the combined dwelling, there was no prohibition on its separate use or disposal. Thus the building(s) satisfied both requirements of Note 1: together they were designed to remain or become a dwelling, and were listed. Their alteration had been approved by the council, and the works were therefore the supply in the course of an approved alteration within Item 2.

26. Mr Case accepts that the Section 106 Agreement prohibits the separate disposal of the barn and the main house, and that both the Section 106 Agreement and the planning consent require the barn and main house to be occupied in conjunction with each other. Consequently, he accepted that if the barn and house were separate dwellings, the conditions in Group 6, Note 2 would not be satisfied. However, he contended that the house and barn together formed a single dwelling. On that basis the conditions in Note 2 were satisfied.

27. Mr Case argued that *Catchpole* and *Fox* demonstrated that a single dwelling can consist of two or more buildings. It was also permissible to read the singular “building” in Item 2 as the plural. So long as those buildings together satisfied Note 2 the alteration would fall within Item 2. They would together satisfy Note 2 if they were a dwelling. He submitted that in this case, since the collection of buildings have historically formed a single dwelling, are treated as a single residential property for council tax purposes, had a common water supply, in the past had had a common electricity supply, have a single entrance, post box and residential address and looked like a single place of residence, they were one dwelling.

28. He notes that in *Nabarro* HMRC had argued that two adjacent structures could be one building and that the tribunal had regarded separate postal addresses and council tax treatment as indicative of there being two dwellings. A single postal address and single council tax were indicative of a single dwelling.

29. Furthermore Mr Case says that the Section 106 Agreement required the barn to be occupied in conjunction with the main house as ancillary accommodation. Similarly he notes that the planning consent states that the barn “shall not be occupied at any time other than for purposes ancillary to the residential use of the dwelling known as Bridges Court”. The barn he says is therefore part and parcel of the same dwelling. He relies in this context on *M I M Construction* in which the tribunal found that a pool barn which was ancillary to a dwelling formed part of that dwelling.

30. Mr Case draws our attention to the reason given in the planning consent is that “the additional accommodation is sited in a position where the Local Planning Authority, having regard to the reasonable standards of residential amenity, access and planning and listed building policies pertaining to the area, would not permit a *wholly separate dwelling*”. [our emphasis]

31. Mr Case says that there is no statutory definition of “dwelling” for this purpose and so the term has to be given its ordinary meaning. The buildings are in such close proximity to each other that they need to be used together as a single dwelling. The main house, the barn, the walled garden and swimming pool form a natural single unit of residential accommodation, supplemented by the stables and tennis court. The Oxford Dictionary says that a dwelling is a place of residence and to dwell is to live in a specified place. The owner (and her son on his visits) dwell in the entire complex.

### ***Arguments for the Respondents***

32. Mr Priest accepted that a single dwelling could consist of two or more buildings. However, that, he says was not the situation in the present case. In *Catchpole*, which concerned new construction within Group 5 there were two units designed to operate together one of which contained only bedrooms and could not have been a dwelling on its own. Here the barn had all the facilities for a dwelling. He distinguishes *Fox* for much the same reason.

33. Mr Priest says that in *M I M Construction* the pool barn, which was found to be part of a dwelling, was not a separate dwelling. In that case the pool barn was also physically part of the same building as the dwelling.

34. Mr Priest noted that *Nabarro* concerned whether, for the purposes of Sch 7A a building contained more than one dwelling. The tribunal had found it did. Two buildings connected by a wall were more likely to be two dwellings

35. Mr Priest submitted that, on the facts, the barn was a separate unit of living accommodation. It could not be considered as an extension of the main house because it was a separate building and a dwelling in its own right. The Section 106 Agreement prohibited a separate disposal of the barn and so it failed to meet the Note 2 conditions. Consequently, it was not a protected building within the meaning of Note 1.

### ***Discussion: One dwelling or two?***

36. The only issue between the parties is whether the barn and the main house are two separate dwellings or are a single dwelling consisting of the main house and an annexe. There is no dispute that if they are separate dwellings then Item 2 does not embrace the Appellant’s supply.

37. In *Catchpole*, the construction of a house of “somewhat unusual design” which was split into two buildings linked only by decking, one of which contained living accommodation and bedrooms and the other solely bedrooms was accepted by the tribunal to fall within Group 5 as the “construction of a building designed as a dwelling”. The tribunal accepted that those words could be read as including “the construction of buildingS designed as a dwelling”

38. *Fox* also concerned Group 5. That case concerned the conversion of two derelict buildings into living accommodation, rather than a fresh construction. The

tribunal found that a dwelling could consist of two buildings and the construction service fell within Group 5.

39. Note 1 to Group 6 requires the identification of a building. Note 2(c) then asks in relation to “each dwelling” comprised in that building whether or not its separate use or disposal is prohibited.

40. We do not doubt the tribunals’ reasoning in *Catchpole* and *Fox* in relation to Group 5 that a single dwelling may comprise two or more buildings. However, in the context of Group 6 Lord Walker in *HMRC v Zielinski Baker* [2004] UKHL 7 said, at [43] that he would with some hesitation accept the contrary view, although Lord Nicholls, who dissented, espoused it. For present purposes we are content to assume that the tribunal’s view in relation to Group 5 is applicable in the context of Group 6 when both the buildings are listed.

41. But even if the “building” referred to in Note 1 is identified as two buildings, the next question is what dwelling is, or dwellings are, comprised in therein, and whether or not in relation to “each” of them separate use or disposal is prohibited. Thus the question remains whether the house and the barn are properly described for those purposes as a single dwelling.

42. We consider that there is a distinction to be drawn between a person’s dwelling and a building designed as a dwelling. An ordinary house, for example, will cease to be someone’s dwelling when it becomes unoccupied or used as short term temporary accommodation. It will nevertheless remain designed as a dwelling. The test in Item 2 is not in relation to the actual use of the building but relates to the nature of its design. That in our judgement is an objective test. The way a building has been used can at best only be evidence of one way it could be used.

43. Mr Case drew our attention to [6] in *Fox*, in which the tribunal had relied on the fact that the two buildings in that case were “clearly intended to be used together” in their conclusion that they were one dwelling. He suggested that this indicated that a subjective test was relevant. We do not agree. First the tribunal did not refer to the intent of any particular person: we take the quoted phrase to refer to what, objectively, was the intent of the buildings. Second the CJEU has indicated on a number of occasions that legal certainty in the application of VAT generally precludes reliance on subjective considerations.

44. In *Daniel Nabarro* the question was whether construction work fell within Group 6 Sch 7A. The relevant test was whether or not the conversion of premises “consisting of a building” resulted, after the conversion, in a different number of dwellings in the building than before. The works concerned the demolition of a flat attached by a garage wall and a covered way to a house, and the addition of two storeys to the house. The tribunal had to decide whether before the conversion there were two dwellings in one building or one dwelling comprised of two buildings. It found that there were two dwelling in one building before the conversion and one dwelling in one building afterwards. In assessing how many dwellings there were the tribunal had regard to what was said in *Uratemp*.

45. In *Uratemp*, the Lord Chancellor said “‘Dwelling’ is not a term of art, but a familiar word in the English language, which in my judgement in this context connotes a place where one lives, regarding and treating it as home.” In our judgement a dwelling will, as a minimum, contain facilities for personal hygiene, the consumption of food and drink, the storage of personal belongings, and a place for an individual to rest and to sleep.

46. *M I M Construction* concerned whether or not the conversion of part of a listed building known as the pool barn fell within Group 6 Sch 8. The Tribunal noted that the question was not whether a separate dwelling had come into existence but whether the building which had been altered was designed as a dwelling. We respectfully agree. The tribunal appears to have considered that if the pool barn was, or became, ancillary to a dwelling it became part of the dwelling for the purposes of Group 6 so that the works would qualify. The Tribunal found that the pool barn was ancillary accommodation of a type commonly found with larger or more commodious dwellings and allowed the appeal.

47. What the tribunal said in *M I M Construction* was that because of the position and nature of the pool barn it did “not have any separate and distinct function or use”. That made it ancillary for the purpose of the test and so part of the dwelling. It is difficult to see exactly what the tribunal meant by this because the pool barn contained changing rooms which could clearly be used as such. But it seems to us clear that if a structure could be used as a separate dwelling ancillary to another dwelling the reasoning in this case does not compel a conclusion that it is to be regarded as one with that other dwelling: if the nature of the barn were such that it had a distinct function or use as a dwelling, the tribunal’s conclusion would not apply.

48. Mr Case referred us to the provisions of the Annual Tax on Enveloped Buildings in FA 2013. Section 115 FA 2003 provides that the fact that a structure that is occupied with a dwelling is itself suitable for use as a single dwelling does not prevent it from being treated as part of the dwelling. He suggests that dwelling in Group 6 should be construed similarly. We disagree: the absence of this provision in Group 6 suggests that the special meaning of FA 2003 should not be given to dwelling in that Group.

49. We now set out the factors we have considered in relation to the question of whether or not the barn was a separate dwelling, starting with the least important.

50. Historically, the property consisted of a single residential curtilage enclosing the main house, stable block, barn, walled garden, tennis court and swimming pool. Historically the entire property was a single dwelling complex. We give little weight to this because of changing social conditions. Many properties that originally housed a large family supported by domestic servants became unsuitable for modern conditions and have been divided into separate dwellings. The question to be answered is what is the nature of the new building or buildings, not their historic use.

51. We have said that post for the combined property is delivered to a single post box set in the outside wall adjacent to the entrance gate. This gives some indication

of the views of the current occupier. It would be an easy matter to add an additional post box and provides little indication of the nature of the building(s).

52. We do not regard the sharing of a water supply indicative of a single dwelling where the barn has a supply of water. It would be different if the occupier of the barn had to go to the house for water.

53. Mr Case submitted that the overall impression of the buildings as one steps into the courtyard is of one residential unit. We agree that overall impression may play some part in assessing whether something is a dwelling but the photographs of the courtyard did not convey to us the impression that the barn was part of a dwelling with the house, rather the reverse.

54. The council tax bill for 2014/2015 was a single bill for the entire property. We do not know whether the Council reviewed the basis of the council tax after the barn conversion was complete or, if they did, what criteria they used. Consequently, we give this factor little weight.

55. The planning consent and the section 106 Agreement require the barn to be occupied only as ancillary accommodation in conjunction with the house. This limits the way in which the barn may be used, but does not prevent it from being used as a dwelling for a person whose occupation of it serves the house or its use.

56. The second covenant in the Section 106 Agreement is not to form or permit a separate curtilage to be formed. We can readily think of examples of multiple dwellings within a single curtilage and do not think that this bears on the nature or design of the buildings.

57. We were not given a detailed description of the main house. However, from the photographs and site plan it is clear that the main house is a substantial property, significantly larger than the barn. It had all the facilities necessary to occupy it as a dwelling.

58. After conversion the barn had all the facilities of a dwelling. It has a separate entrance. Downstairs there is a large room with a kitchen and providing areas for living and dining. There are separate toilet and shower rooms and a conservatory. Upstairs there are several bedrooms, a bathroom with toilet and a separate WC. It has all the essential features of a dwelling.

59. We conclude that the barn and the house are separate dwellings and not a single dwelling.

60. We have said that we regard the test in Note 2 as an objective one: we are not required to determine what the actual subjective purpose of the designer was, but to consider the features of the building in order to determine whether the nature of its design was as a dwelling. However, in case we are wrong in this approach we now consider briefly the purpose of the designer.

61. We have noted the perhaps slightly evasive terms of the Design & Access Statement summarising the purpose of the proposals as including the “conversion of the facilities to provide an open plan living space on the ground floor and suitable sleeping accommodation on the first floor”. That was followed by nearly a page of  
5 detailed proposals including “... provide an open plan living arrangement ... form a new kitchen ... new wood burning stove ... form a new staircase to provide internal access to the first floor sleeping accommodation ...provide new bedrooms ...”. Reading these all together, it seems to us that architects were describing self-contained living accommodation suitable for use as a dwelling. We would therefore  
10 reach the same conclusion if a subjective test were required.

### ***Conclusion***

62. Whatever the motivation for the renovation of the barn, the result was to create a building having all the essential features that made it suitable for use as a self-contained dwelling. We find that the barn is now a building designed as a dwelling  
15 and not part of the dwelling we have referred to as the main house. The separate disposal of the barn from the main house is prohibited by the Section 106 Agreement. In consequence, the barn is not a protected building as defined in Note 1 to Group 6 of Schedule 8 Value Added Taxes Act 1994. It follows that zero-rating under Item 2 is not available.

20 63. For this reason, we dismiss the appeal.

64. 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  
25 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.

30 **CHARLES HELLIER**

**TRIBUNAL JUDGE**  
**RELEASE DATE: 30 October 2015**

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