



TC05380

Appeal number: TC/2015/07118

VAT – s 35 VATA – DIY builders –work having started many years prior to appellant’s works– appellant’s works completing earlier plan - were the works a residential conversion? - held on the facts: no.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WILLIAM STEYNOR

Appellant

- and -

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

**TRIBUNAL: JUDGE CHARLES HELLIER
DAVID BATTEN**

Sitting in public in Plymouth on 22 August 2016

Mr Steynor in person

Mrs J Ashworth for the Respondents

DECISION

5 1. Mr Steynor appeals against HMRC's refusal to meet his DIY builders' VAT reclaim in relation to the work on Three Barns in Devon.

2. We must record our thanks to Mr Steynor for his clear, informative and professional presentation.

The Evidence and the Facts.

10 3. We heard oral evidence from Mr Steynor and had before us a bundle of copy documents together with additional documents in relation to planning permissions which Mr Steynor produced at the hearing. From that evidence we find as follows.

15 4. 'Three Barns' is, as its name suggests, a property on which there have been for many years three separate buildings which were originally agricultural barns. These barns are arranged in a U with its mouth pointing roughly North. Barn 1 is on the East side, Barn 2 on the South, and Barn 3 on the West.

5. In 1994 planning permission was granted (on appeal) for the change of use of the Barns to rural workshops.

20 6. In 1997 planning permission was sought for the change of use of Barn 1 to residential use. Dartmoor National Park Authority refused permission and an appeal was made. The inspector allowed the appeal, granting permission for the change of use of Barn 1¹ from category B1 use to residential use on conditions. In his letter the inspector recorded that:

25 "The appellant's metal working and specialist smithy business is now established at the premises. Your submission is that the buildings are underused and the viability of the enterprise would be enhanced by the appellant living on the site in the largest of the three barns. Minor changes to the building are involved. The appellant accepts that the domestic curtilage should be confined to the small courtyard around which the barns are closely grouped."

30 7. In 1998, the following year, an application by Mr and Mrs Amis was made for a more substantial development. It was described in the application as the

"construction of a link in courtyard joining Barns 2 & 3 to form dwelling and extending Barn 1 to improve accommodation ancillary to dwelling. Workshop to become garage/workshop ancillary to dwelling."

35 8. The plans submitted with the application dated May 1998, show an existing state of affairs in which Barn 1 has a bathroom, kitchen and living room, Barn 2 is a "Gym" and Barn 3 is a workshop. In addition there is a more modern looking

¹ In his letter the inspector refers to "Barn 3" but it is clear from his decision and description that it is the barn that we call Barn 1 to which he is referring

structure behind Barn 2 labelled "workshop". The plans show the proposed construction of a conservatory some 16 feet wide backing onto Barn 2, partially filling in the south end of the courtyard and extending to cover entrances into Barns 1 and 3. The conservatory would thus be the central connecting room of the combined building. In the plans for the proposal Barn 2 is described as a studio with a bedroom above, and Barn 3 as an office/library. Barn 1 is shown retaining its kitchen and living room and as having a bathroom and bedroom above.

9. Section 7 of the application concerns 'Existing Uses'. It says:

"Please state existing or, if vacant, last use of the site."

10 The answer given is: "Residential & B 1"

then it asks: "If residential please state the existing nature number of dwellings."

The answer given is: "one".

10. In section 12 under the heading "Proposed uses non-residential development only" the applicants have written:

15 "The proposal involves the removal of existing B1 use to become accommodation ancillary to the dwelling."

11. Planning permission was given in September 1998 and was summarised as

"Proposed erection of glazed conservatory to link existing buildings."

12. Mr Steynor's researches suggested that Mr & Mrs Amis (who sought the 1998 planning permission) acquired the property in 1998 or 1999 and that they sold it to a Mr Hay and Mrs Crump in 2008. Mr Steynor bought the property from Mr Hay and Mrs Crump in 2013.

13. In March 2007, before Mr & Mrs Amis sold, they sought a certificate of lawful use from Dartmoor National Park Authority. In the application they said that the property had

"been occupied as a single dwelling house continuously for the last 4 years and more by the applicants for our own use only",

and in section 6 of the application, in answer to the question: "When was the use or activity begun or the operations substantially completed?" They wrote: "October 1998".

14. Mr Steynor told us, and we accept, that before he bought a property it looked as if Mr and Mrs Crump were living in it, although there was also a mobile home on the site.

15. When Mr Steynor completed his purchase in 2013 there had been some implementation of the 1998 plans. The conservatory was in place and work had been done on the barns; but the nature of the works, and the state of the structures were far from satisfactory:

- (1) the tie beams in the roofs of Barns 1 and 2 had been removed and the roofs were liable to spread;
- (2) the kitchen contained temporary units with a hob next dangerously close to which were gas bottles;
- 5 (3) in Barn 2 the new window anticipated by the 1998 plans had not been made, the floor was still bare concrete, there was uncovered plasterboard on the ceiling and the walls had not been plastered;
- (4) Barn 3's roof was corrugated tin sheet, the tiles having been removed and stored in the fields nearby; and
- 10 (5) much of what had been done did not comply with building regulations - the glass of the conservatory, the roof ties and more.
16. Mr Steynor engaged in architect to put forward proper plans for rectifying what had been done badly and completing what had not been done. Works were executed in compliance with the building regulations. They were extensive. The works took
- 15 about two years to complete.
17. Mr Steynor took up residence on completion. The living room was usable even if the chimney of the log burner left something to be desired; it was unsafe to have gas bottles in the kitchen; and the bedroom floor in Barn 1 was a little "lively".
18. A completion certificate was given by the local authority in June 2015

20 **The legislation**

19. Section 35 (1) VAT Act 1994 provides that where a person carries out works to which that section applies, and other conditions are satisfied, HMRC shall, on a claim, a refund the VAT chargeable on goods and services used for the purposes of the works.
- 25 20. So far as relevant to this appeal the remainder of section 35 provides:
- (1A) The works to which this section applies are -
- ...
- (c) a residential conversion."
- 30 (1C) [provides that where a residential conversion is carried out by arranging for the work to be done by a contractor who charges VAT HMRC shall refund the VAT 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, ...
- 35 into
- (a) a building designed as a dwelling ...

(4) The Notes to Group 5 Schedule 8 shall apply for construing this section as they apply for construing that Group but this is subject to subsection (4A) below.

5 (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.

10 21. Note (7A) of Group 5 defines a building, or part of a building as being non-residential where (after making the omission required by subsection 35(4A)):

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

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

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

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

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

20 **HMRC's publications**

22. We set out here some of the statements made in HMRC's leaflet VAT 431C "VAT refunds for DIY housebuilders - notes for conversions". We do so because the notes played some part in the arguments before us, not because we regard them as being necessarily correct statements of the law.

25 23. On page 2 the notes say that a person is eligible to claim if they "have bought a new building as a "shell" from a developer and have fitted it out to completion"

30 24. On page 6 at note 12 there is a further discussion of "fitting out or finishing" a building. Here it is said that "a shell is a building that is structurally, but not functionally, complete. It will possess all the basic structural features (such as the walls, roof, doors, windows and utilities connections) but the lack some or all of the facilities that will enable it to function as a modern dwelling. This will include work to install fixtures and fittings such as kitchen furniture and other essential features. If the only work required to be done is to decorate the building, the house is considered to be both structurally and functionally complete and VAT on the costs of decoration may not be recovered."

35 25. At note 13, answering the question: "has work been done on a completed conversion purchased from a developer ...?", it says ... "you cannot claim for extra work that is done to a converted building which has been completed before you purchased it from a builder or developer."

26. In their statement of case HMRC accept that a building may be sold before work is completed to a person who completes or finishes it, and that in those circumstances a refund under section 35 may be due when the works are complete. But they say that this relates to a situation where the building is partly completed and then is sold on before the works are finished.

Mr Steynor's argument

27. Mr Steynor says that the works he conducted were works to which section 35(1) applied because the works were a residential conversion within section 35(1D), being the conversion of a non-residential building into a building designed as a dwelling. He submits that before the relevant works started the buildings were neither designed nor adapted for use as a dwelling and thus were non-residential within Note (7A) (a); Note (7A)(b) was irrelevant - it applied only where (a) did not apply, and (a) did in fact apply.

28. Mr Steynor argued that the works of conversion started with the 1997 planning permission. Those works started at a time when none of the barns were dwellings and finished in June 2015, when a completion certificate was issued evidencing the completion of a dwelling. That was a residential conversion within section 35(1D).

29. The fact that he had lived on the site during the conduct of the works was irrelevant: not only was that a normal incident of DIY conversions, but it did not affect whether the building was, or the buildings were, a dwelling at the start of the works - and in 1997 it was not.

30. This he said was recognised, rightly, by HMRC in their published guidance and statement of case. The statute did not specify a maximum period for the works, or any other sort of time limit: if before the works started the building was not a dwelling, and when they finished it was one, that was a residential conversion.

31. Nor did a change of ownership or the person undertaking the work affect the position: if the works was started by A and finished by B, they were still works of conversion. That was acknowledged by HMRC in their publications.

32. Even if the works could be said to have started in 1998 following the planning permission then granted, it would be unlikely that the 1997 permission had fructified in a dwelling before the 1998 works started. There were only a few (winter) months between the June 1997 inspector's letter and the May 1998 application. It was unlikely that a dwelling had been created in that period.

33. Nor could it be said that the works were completed before his starting work. A building which did not comply with it with building regulations, was structurally unsound and for which a completion certificate as not been issued could not be called a dwelling. The only completion of the works was that in 2015 after his works finished.

Mrs Ashworth's arguments.

34. Mrs Ashworth argued that the description of the use of the property in the 1998 planning permission as "Residential & B1" indicated that at that time it was being used as a dwelling. That she said was supported by the 2007 application by Mr and Mrs Amis for a certificate of lawful use in which they had indicated that the "activity" -which she says must have meant their use of the property (or Barn 1) as a dwelling - began on October 1998: the planning permission was dated September 1998 so the works must have begun after Barn 1 started being used as a dwelling.

35. Thus if the works were taken as those which implemented the 1998 planning permission they consisted of the conversion of a building, Barn 1, which was a dwelling, together with Barns 2 and 3 into a larger dwelling. That did not satisfy Note 7A (a).

36. Nor could Mr Steynor's works be treated as the completion of the plan envisaged by the 1997 application since that related simply to the change of use of Barn 1. There were two sets of works, not one set conducted in two phases.

Discussion

37. We consider it likely that none of the barns were used or adapted for use as a dwelling before 1997.

38. During the hearing we discussed whether the works on the Barns could be regarded as a single set of works carried out in two phases corresponding to the 1997 and 1998 planning permission applications, rather than as two separate works. Our suggestion being that if it was one set beginning in 1997 it was likely that before the works started none of the barns designed or adapted for use as a dwelling so that the works as a whole that were works of residential conversion within Note (7A)(a).

39. On reflection we concluded that this was not the correct analysis. We shall set out our reasoning below. But had the correct approach depended upon resolving this question we would have decided that there were two sets of works and that the second set commenced with Barn 1 being a dwelling, so that section 35 would not apply. That is because:

(1) the nature and extent of the 1998 application indicated works substantially different from those of the 1997 application, for they involved all three barns in the courtyard: they were not in the nature of an amendment to or variation of the earlier planned works;

(2) the plans attached to the 1998 planning permission application show Barn 1 as having a living room, kitchen and bathroom, thus indicating that it had been adapted for use as a dwelling;

(3) the 2007 certificate of lawful use application suggests that it had been so used since October 1998;

(4) whilst the period from the grant of the 1997 permission to the date of the 1998 application was only 10 months, that would have been long enough for at least a rudimentary adaptation of Barn 1.

40. However it seems to us that the correct analysis is as follows.

5 41. In order to succeed under section 35 Mr Steynor has to show that he carried out works to which that section applies. By subsection (1A) he must therefore show that he carried out a residential conversion. By subsection (1D) he must therefore show that:

10 he carried out works which *consisted* in the conversion of a non-residential building ... into a building designed as a dwelling",

and by virtue of Note (7A) that requires either

(a) he carried out works which consisted of conversion of building neither designed nor adapted as a dwelling into a dwelling

15 or (b) he carried out works which consisted of the conversion of a building designed or adapted as a dwelling constructed more than 10 years before the commencement of the works which had not been used as a dwelling in those 10 years.

20 42. The stumbling block is the word "consists" in subsection (1D). It must be the works carried out by the claimant which consisted in the conversion. The test is not satisfied by reference to those works taken together with those undertaken by others; it is satisfied only by reference to the works undertaken by the claimant. Mr Steynor's works started after his purchase in 2013.

25 43. It seems to us that Barn 1 was, at that time, adapted for use as a dwelling. It was not a particularly well ordered or compliant dwelling, but nevertheless it was a building which had the facilities of a dwelling and in which it was possible to dwell. Thus Mr Steynor's works did not consist of the conversion within (a) of para 41 above of something which was not adapted as a dwelling into something which was.

30 44. Nor did Mr Steynor's works fall within (b) because it seems to us fairly clear that Mr Hay and Mrs Crump had occupied Barn 1 as a dwelling prior to their selling it to Mr Steynor. Again, it may not have been a comfortable, complete or wholly safe dwelling but we obtained the impression that it would have been recognised as a dwelling by a reasonable person at that time.

35 45. Mr Steynor relies to some extent on HMRC's acceptance in their statement of case that if a building is sold before the works are complete to a person who completes it or finishes it, the person finishing the conversion may claim in respect of the works undertaken.

46. We are required to give effect to the legislation and not HMRC's view of it or to their published statements. But the practice recorded in the HMRC's publications does appear to us to reflect the legislation to this extent: if a building is sold and the

5 purchaser acquires a building which is not capable of being described as a dwelling, then it will not at that time be "adapted or designed as a dwelling" with the result that the completion of the works may "consist" of converting it into a dwelling; but if prior to his purchase the works have reached such a stage that the building has the facilities and functions of a dwelling, it will be a dwelling and a further works will not consist of converting it into a dwelling. In Mr Steynor's case what he acquired was recognisably adapted as a dwelling so his works were not of conversion.

Conclusion

47. We therefore dismiss the appeal.

10 Rights of appeal.

48. 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.

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**CHARLES HELLIER
TRIBUNAL JUDGE**

RELEASE DATE: 20 SEPTEMBER 2016

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