*Value Added Tax - VAT recovery by self-builder - how to apply the conditions of Note 2 to Group 5 of Schedule 8 of the VAT Act 1994 where a single dwelling consists of two buildings - Appeal allowed*

***TC01957***

**FIRST-TIER TRIBUNAL**
**TAX**

**Reference no: TC/2011/03058**

**MR. T. FOX**

**Appellant**

**-and-**

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

**Respondents**

**Tribunal: HOWARD M. NOWLAN (Tribunal Judge)**
**JOHN COLES**

**Sitting in public at Vintry House in Bristol on 9 March 2012**

**The Appellant in person**
**Mr. H O'Leary, officer of HMRC, on behalf of the Respondents**

## DECISION

### *Introduction*

1. This hearing proceeded in a somewhat unusual way because the one and only legal point to be decided had recently been decided by the Tribunal, in a case heard in London on 13 February 2012, where the present Tribunal Judge had been the Judge in the earlier case. Although the decision in the earlier case, that of *Mark Catchpole v. HMRC*, had been released, the decision had been released so recently that neither party was aware of the outcome of the earlier case, and it was not clear whether HMRC would appeal against the decision in the earlier case. In view of the fact, however, that the point of principle to be decided was identical to that in the earlier case, and of the further fact that the other member of the present tribunal entirely agreed with the decision as well, it was obvious that this case would result in the Appeal being allowed.

2. Since it remains possible that HMRC will appeal against the decision in the case of *Mark Catchpole v. HMRC*, and since HMRC are still well within time to seek leave to appeal in that case, and implicitly HMRC might appeal in this present case as well, we must obviously summarise the facts in this case, the factual distinctions that we consider in fact to be immaterial, and we will then give a short summary of our decision. In addition we will record a further decision that, were we wrong in our primary decision that the appeal should be allowed in full, then we decide that a secondary claim for a slightly lesser refund of VAT should in any event be allowed in this case on an alternative ground. In this case that alternative ground was expressly advanced by the present Appellant.

### *The facts*

3. The Appellant owned land in Cornwall, originally known as "The Old Rocket Barn and Garage, Portscatho", consisting as the name indicated of an old barn and a separate garage. Both were seriously derelict, and the Appellant's plan was to do most of the building work himself, converting the old buildings into a dwelling.

4. It was always implicit that, because the existing two buildings were separate, the new dwelling would still consist of two buildings, the old barn becoming the main living accommodation with a bedroom, bathroom, living room and kitchen. In contrast the converted garage would consist just of a bedroom and a bathroom, but no other accommodation. So far as the Appellant was concerned, this result was entirely acceptable, because the separate bedroom and bathroom would only be used as guest accommodation. The two buildings faced each other over a small courtyard. The car parking area was outside the courtyard, immediately behind the old garage.

5. For some reason two planning applications were made and two consents granted. We were not informed why the second application was made and nothing seemed to turn on the fact that there were two applications and two consents. Both clearly related to the unified project which involved the conversion of the barn and the garage into a dwelling, and both were accompanied, in the consents, by an identical or virtually identical condition in the following terms:-

> *"The accommodation provided by the conversion and remodelling of the existing detached garage building shall only be occupied by members of the family and non-paying guests of the occupier of the main dwelling formed*

*from the conversion of the adjacent former Workshop/Rocket Barn and this guest accommodation shall not be used as a separate unit of residential accommodation or for any other purpose without the prior consent of the Local Planning Authority.*

*Reason*

*The size and siting of the building together with the fact that it has no separate curtilage would result in a separate dwelling which having regard to its location should only be used as an adjunct to the main dwelling formed from the conversion of the Workshop/Barn".*

6. It appeared to be common ground between the parties that the two separate buildings did constitute "one dwelling". Since the two buildings were clearly within one curtilage, and clearly intended to be used together, we have no hesitation in confirming the assumption that, albeit that there were two separate buildings, they did constitute only one dwelling. As we have said, however, this was the Appellant's contention, and as the Respondents advanced one of their arguments, after observing that "the Appellant's dwelling is formed of two buildings", we take that finding on our part not to be contentious.

***The legal question***

7. The only disputed legal requirement that remains to be satisfied in this case for the Appellant to recover the VAT suffered by him on goods used by him for the purposes of the conversion works is phrased slightly differently from the condition in the *Mark Catchpole* case for the simple reason that in that case, the old building was entirely demolished so that the works needed to rank as the "construction of a building designed as a dwelling". In this case, the Appellant needs to establish that the works constituted "a residential conversion". This means that the Appellant must establish that "the works …. consist in the conversion of a non-residential building, or a non-residential part of a building, into a building designed as a dwelling or a number of dwellings". This definition then incorporates another definition since Note 2 to Group 5 of Schedule 8 to the VAT Act 1994 then provides that:

*"A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied –*

*(a) the dwelling consists of self-contained living accommodation;*
*(b) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;*
*(c) the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision; and*
*(d) statutory planning consent has been granted in respect of that dwelling and its construction or conversion has been carried out in accordance with that consent."*

***The respective contentions***

8. The Appellant advanced two contentions. First he contended that the two buildings constituted one dwelling, and that when one then applied the tests in Note 2, just quoted, to the dwelling as a whole rather than to each separate building, they were satisfied. This construction admittedly involved acceptance that the word

"building" could be interpreted to mean "a building or buildings", but at least it then addressed the tests in Note 2 correctly, in other words not by reference to the characteristics of each building but by reference to the characteristics of the single dwelling. Since the dwelling did constitute "self-contained accommodation", and there was no planning constraint to the effect that the dwelling as a whole had to be used in conjunction with some other dwelling, the tests were satisfied.

9. The alternative, and lesser, contention was that if the first contention was wrong then the tests were nevertheless satisfied in relation to the conversion of the old barn building. For the conversion of that did produce "self-contained accommodation", albeit that obviously the garage that was turned simply into a spare bedroom and bathroom did not. Thus the appeal should still succeed in relation to the costs related to the barn conversion.

10. The Respondents contended that the singular could not include the plural when reference was made to "a building", and relied on the authority of the Tribunal decision in a much earlier case of *SA Whiteley*, Decision no: 11292 released in July 1993. The Respondents then proceeded to apply the Note 2 tests not by reference to what they conceded to be "one dwelling", but by reference to "each building". Accordingly the bedroom annexe failed the Note 2 tests because it was not "self-contained accommodation", and could only be used in conjunction with the barn conversion. As regards the barn conversion, although there was no planning condition that actually applied to the barn conversion element, since there was a planning ban on separate use of the garage, the separate ownership or use of the barn element would leave the bedroom annexe without a permitted use, so that pragmatically the barn could not be separately owned, or separately used either.

***Our decision***

11. We consider that the Appellant succeeds in relation to the primary contention mentioned in paragraph 8 above, and that were we wrong in that conclusion, the Appellant would nevertheless succeed in relation to the lesser, alternative, contention.

12. We will not repeat the fuller reasoning for our first decision that would simply re-state the decision in the *Mark Catchpole* case. We simply summarise that:

- it is manifest that a single dwelling can, albeit fairly unusually, consist of two or perhaps even more than two separate buildings;
- in this case the two buildings plainly did constitute one dwelling;
- since the whole thrust of the tests in Note 2 relates to the characteristics of the "dwelling", and definitely not to each building, where two buildings constitute one dwelling, it is manifestly wrong to be applying the Note 2 tests by reference to each separate building;
- there is nothing in the relevant statutory wording to undermine the normal rule of the Interpretation Act that the singular includes the plural. That rule is only displaced where "the contrary intention appears". Since the fundamental tests are to be applied to the dwelling, and it is common ground that both buildings constitute the one dwelling, it appears that the statutory intention is much better respected by following the normal rule of treating the singular as including the plural. Accordingly when the requirement is that "a non-residential building … [must be converted into] a residential building designed as a dwelling", we consider that this requirement is satisfied where one or more non-residential buildings are converted into a building or buildings "designed as a dwelling". The introductory words in the Note 2

test must obviously then be interpreted consistently. This construction avoids a result that either renders the Note 2 tests inoperative, or else (as the Respondents contended) results in them being applied wrongly to the buildings and not to the dwelling;

- the decision in the *Whiteley* case was on altogether different facts, and more relevantly, on quite different statutory wording, and is irrelevant to the present dispute; and finally
- any contrary intention, to our conclusion under the Interpretation Act, that might be said to derive from the content of Notes 4 and 5 to Group 5, Schedule 8 (which deal with a somewhat different matter) is of no relevance for the reasons given in the *Mark Catchpole* decision.

13. The case was barely argued before us in relation to the Appellant's secondary contention. We consider, however, that if our conclusion in paragraph 12 above was wrong, then we would allow the appeal in relation to the costs involved in the conversion of the barn. We accept that if the bedroom annexe could only be used in conjunction with the main barn conversion, the separate use of the barn would suffer the major disadvantage that such separate use would render the bedroom annexe unusable, save for the possibility of obtaining some variation to the planning constraints. The significant point however is that this state of affairs does not result from any conditions attaching to the planning consent. Separate use of the converted barn would be perfectly lawful, albeit possibly financially somewhat unattractive if it meant that the garage conversion would have to lie idle, or be allowed to fall down. The test in Note 2 however is not whether there was some pragmatic constraint on the separate use of the barn conversion, but whether the separate use of the barn was "**prohibited** by some covenant, statutory planning consent or similar requirement." Technically speaking the separate use of the barn conversion was not actually prohibited by anything.

14. This observation would certainly result in the allowance of the more limited secondary appeal by the Appellant, at least if it was accepted that that building became "a dwelling". If, following our decision that the two buildings in fact constituted one dwelling, it was contended that the secondary appeal should still be dismissed because the building in question was only converted into what was more realistically regarded as "part of, albeit much the major part of, one dwelling", we would have rejected this argument. If we must look (which we consider we plainly need not do) fixedly at each building, then in isolation the old barn was converted into "self-contained" accommodation that could well have been used in isolation as a dwelling, and we consider that all the tests for the Appellant's recovery of VAT in relation to the building works in relation to the conversion of the barn would have been recoverable.

15. Our decision is accordingly that the Appellant prevails in relation to the overall appeal and, were that conclusion wrong, he would prevail in relation to the secondary appeal in relation to the barn conversion.

***Right of Appeal***

16. This document contains full findings of fact and the reasons for our decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) Tax Chamber Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**HOWARD M. NOWLAN**

**TRIBUNAL JUDGE**

**Released: 3 April 2012**