# TC02180

**Appeal number: TC/2011/04608**

***VAT – DIY Housebuilders Scheme – barn conversion with adjacent office – conditions for refund – planning consent – whether use or disposal restricted by s106 agreement – appeal allowed***

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

**MR SIMON JONES** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE R J MANUELL**

**Sitting in public at 45 Bedford Square, London WC1 3DN on 24 July 2012**

**Miss Hui Ling McCarthy, Counsel, for the Appellant**

**Mrs R Pavely and Mr H O'Leary, HMRC Presenting Officers, for the Respondents**

## DECISION

1. The appellant appeals against the decision of HMRC dated 16 February 2011 to refuse his application for a VAT refund under the DIY homebuilder's scheme, submitted on 9 February 2011 following work done with planning consent to convert former agricultural buildings at Standish Moreton Farm, Standish Lane, Standish, Gloucestershire GL2 7LZ into a house and office.

2. Under the DIY Refund Scheme ("the DIY Scheme") a person may reclaim input tax incurred by him on building materials and services used in the course of converting a non residential building into a dwelling: s35 VATA 1994, subject to certain provisions. The issue between the parties was whether or not the appellant fulfilled the condition that a previously non residential building must be converted into a building designed as a "dwelling or a number of dwellings": s35(1D)(a) VATA. A building is designed as a dwelling if, *inter alia*, Note 2(c) to Group 5 of Schedule 8 VATA 1994 is satisfied, ie that "the separate use or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision".

3. The appellant maintains that both elements of this condition are satisfied, whereas HMRC maintain that neither the separate use nor the disposal of the barn are permitted under the terms of the planning consent, so that the appellant's claim is not within the DIY Scheme.

4. It should be noted immediately that office conversions are not eligible under the DIY Scheme. The appellant accepted that his original claim (which included the office) must accordingly be reduced. With permission granted earlier he has amended his Notice of Appeal to reflect that. The Tribunal was informed that the revised figures would be agreed by the parties if the appeal succeeded.

5. The Tribunal heard no evidence because the essential facts were set out in an agreed Statement of Facts, which was supported by an agreed document bundle which included plans of the buildings in question. Photographs were produced to assist the Tribunal.

6. The agreed facts were in outline as follows:-

> (a) The appellant purchased the land from Mr Bernard John Winston Goode, who had entered into a s106 Agreement dated 15 October 2008 with Stroud District Council ("the Council") prior to the grant to the appellant of planning consent for conversion of the former agricultural buildings;
>
> (b) Part 3 of the s106 Agreement provided that the owner covenanted so as to bind the land (a) not at any time to occupy or allow or permit the occupation of the office other than by an occupier of the residential premises ("the barn") and by up to three employees of the occupier of the

barn and (b) not to sell lease or otherwise dispose of the barn separately from the office and *vice versa*;

(c) Planning permission for the conversion of the existing barn and outbuildings was granted to the appellant on 20 October 2008, subject to the s106 Agreement;

(d) The conversion works were completed on 1 February 2011 and the appellant submitted his claim under the DIY Scheme on 9 February 2011;

(e) The claim was refused on 16 February 2011, as upheld on statutory review on 14 March 2011 and a further statutory review on 19 May 2011, prompting the present appeal lodged on 16 June 2011.

7. Section 35 VATA 1994 is as follows (relevant parts only):

"(1) Where-

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

(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, the Commissioners shall, in a claim in that behalf, refund to that person the amount of the VAT so chargeable.

(1A) The works to which this section applies are-

(a) the construction of a building designed as a dwelling or a number of dwellings;

(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-

(a) a building designed as a dwelling or a number of dwellings;

(4) The notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group…"

8. Note 2 to Group 5 of Schedule 8 is important and is as follows (Tribunal's emphasis):

"(2) 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 terms of any covenant, statutory planning consent or similar provision;*

(d) statutory planning consent has been granted in respect of that dwelling and its construction and use have been carried out in accordance with that consent."

9. It was agreed by both parties (and might perhaps be thought plain) that a s106 agreement falls within Note 2(c), above. It was accepted by HMRC that all other requirements for a valid claim in respect of the barn had been satisfied by the appellant.

10. Miss McCarthy for the appellant relied on her skeleton argument. Her submissions were that the s106 Agreement was enforceable against the appellant only to the extent that it created obligations restricting the development or use of the land in any specified way. Thus clause 3.1 of the s106 agreement which restricted the use of the office to the occupier of the barn or up to three of his/her employees bound the appellant. But there was no positive obligation to occupy the office, which could be left empty. The barn could be used on its own, perfectly lawfully. Hence clause 3.1 did not have the effect of failure to satisfy the separate use condition within Note 2(c). Clause 3.2 of the s106 agreement was not binding on the appellant, who was not a party to it, merely a successor in title. Clause 3.2 restricts the development or use of the land (see s106(1)(a) of the Town and Country Planning Act 1990), but neither "use" nor "development" are apt to cover disposal of land, and so could not bind the appellant. The First-tier Tribunal reached a similar conclusion in *Stevens* [2011] UKFTT 835 (Tax), which was *obiter* but persuasive. Moreover and in any event, the effect of clause 3.2 was not to prevent the separate disposal of the barn by the appellant. The office was ancillary to the barn. The purpose of the s106 Agreement was not to restrict the use and enjoyment of the barn, but rather to restrict the use of the office. It could not be right that the barn ceased to have the status of a dwelling because the separate office building existed which had to be used and disposed of at the same time as the barn.

11. Miss Pavely addressed the Tribunal on behalf of HMRC. She relied on her skeleton argument. The DIY Scheme was permissive and exceptional and to be interpreted restrictively. Every part of the conditions had to be satisfied for a claim to be valid. The use or disposal of the barn separately would have the result that the office had no permitted use as it would have no ancillary relationship to the barn. That was supported by an email from Stroud District Council where it was explained that the effect of the s106 Agreement was to "prohibit different individuals from occupying and using the residential and commercial premises". The Council also said that the ownership of the residential and commercial premises could not be split. This showed that there was a prohibition on the separate use or disposal of the barn.

The barn was not a building designed as a dwelling within the meaning of Note 2(c), and so HMRC submitted that the appeal should fail.

12. The Tribunal did not need to call on Miss McCarthy in reply. As was stated at the conclusion of the hearing, the Tribunal considered that it was a clear case and that the appeal must succeed. The Tribunal reserved its reasons which now follow.

13. There is little which the Tribunal wishes or needs to add to the submissions of Miss McCarthy, summarised at paragraph 10, above, which the Tribunal accepts and which need not be repeated here. The Tribunal finds as a matter of law that Clause 3.2 of the s106 Agreement was only capable of binding the original owner of the land. It was part of the consideration for his agreement with Council. Any development would otherwise have been stalled, and with it the intended sale to the appellant. The only permissible scope of a s106 agreement is to create a planning obligation, as the Town and Country Planning Act 1990 provides:

"**106 Planning obligations**

(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A and 106B as a 'planning obligation'), enforceable to the extent mentioned in subsection (3)

(1)(a) restricting the development or use of the land in any specified way"

The Tribunal explained the scope of s106(1)(a) in *Stevens* (above). The Council did not have power under s106 to restrict any sale by a successor in title. The only restriction could be as to development or use. The clear purpose of the restriction on the use of the office in planning terms was to tie the use of the office to the occupiers of the barn. That was enforceable by the Council against the appellant and his successors by virtue of s106(3)(b), as a person who derived title from the person who entered into the planning obligation. This prevented the office, for example, from becoming retail premises and generating traffic along a country lane and materially altering a rural locality. The staffing of the office was heavily circumscribed, for similar reasons. But the plans show, as the parties agreed, that the office was a free-standing building, entirely separate from the barn. Crucially, the s106 Agreement did not purport to require the office to be used and it is doubtful that such a condition could have been imposed. While the appellant is as he accepted only able to use the office in accordance with the planning restrictions, he is free to leave the office vacant if and as he pleases. He accepts that he has no claim for a VAT refund for the office. In practical terms it would appear unlikely that the appellant or any future owner of the barn would ever want to sell off the office separately as it would diminish the attraction of the property as a live/work entity, but he remains free to dispose of any part of his land.

14. Thus the s106 Agreement does not restrict the residential use, lease or sale of the barn by the appellant in any way. None of the authorities cited by HMRC was in point, as the appeal turned on the terms of the particular s106 Agreement covering the

land in question. The opinion of the Council cited by HMRC is not a matter to which the Tribunal can give any weight: it is simply an opinion and there is no indication that the arguments successfully advanced by Miss McCarthy were considered when the opinion was offered. The barn as converted is plainly designed as a dwelling, with the attraction of an adjacent office. Any owner or future purchaser would be free to decide whether to use the adjacent office subject to the current restrictions on its use, or to apply to the Council for a variation on those restrictions. Whether that would have any impact on the value of the barn is immaterial for present purposes. The relevant point is that the barn can be sold or otherwise disposed of as what it is, a dwelling with office premises adjacent. It seems that the fact that the Appellant originally included a VAT refund claim in respect of the conversion of the office took the whole matter off on a tangent.

15. Thus the Tribunal finds that the appellant is entitled to a refund under the DIY Scheme for the barn, in a sum to be agreed by the parties.

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.

**R J MANUEL**
**TRIBUNAL JUDGE**

**RELEASE DATE: 9 August 2012**