# TC02737

**Appeal number: TC/2012/03980**

***VALUE ADDED TAX – DIY builders scheme – conversion of one of a pair of semi-detached cottages into a dwelling – the cottages had previously been used as a care home but had become uninhabitable before the conversion – whether the cottages were a 'non-residential' building or the cottage converted was part of a 'non-residential' building within the meaning of Note (7A), Group 5, Schedule 8, VATA applied for the purposes of the scheme by section 35(4) VATA – held they were not by reason of the use of the cottages as a care home within 10 years before the conversion works – the works were therefore not a 'residential conversion' within section 35 VATA – appeal dismissed***

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

**Mr ANDREW and Mrs TRUDY BOAKES** **Appellants**

**- and -**

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

**TRIBUNAL: JUDGE JOHN WALTERS QC**
**GILL HUNTER**

**Sitting in public at Bedford Square, London on 8 November 2012**

**Andrew Boakes for both Appellants**

**Lynne Ratnett, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

1. The appellants, Mr and Mrs Boakes, appeal against the refusal by the Respondents ("HMRC") of a claim made by them on 12 October 2011 for a refund of VAT paid on building materials and services, which they said in the claim had been used by them in a do-it-yourself ("DIY") conversion of a non-residential building into a dwelling. The building in respect of which the claim was made is North Cottage in Hildenborough in Kent ("North Cottage").

2. The total amount of VAT claimed was £14,270.32.

3. Mr Boakes explained the history of North Cottage and of the claim in oral evidence to us. He was not cross-examined by Ms Ratnett.

4. From the evidence before us, which includes a bundle of documents and several drawings produced by Mr and Mrs Boakes, we find the following facts.

### The facts

5. North Cottage is one of a pair of semi-detached cottages originally built, as farm workers' cottages, in about 1850. In 1910 the cottages and the related farm were acquired by Princess Christian of Schleswig Holstein (a daughter of Queen Victoria) for the purpose of establishing an asylum or hospital for what were described as 'feeble-minded' persons.

6. By 1948 the pair of semi-detached cottages (North and South Cottages) had come into use as a residential institution connected to the Princess Christian Hospital. This fact was stated in correspondence by a Senior Planning Officer of the Tonbridge and Malling Borough Council (the relevant local authority).

7. Following the advent of the National Health Service, the Princess Christian Hospital was absorbed into an NHS complex of hospitals and continued to operate as a hospital until the end of the 1990s. At that point the hospital closed and the farm was redeveloped for residential use. However North and South Cottages were retained by the Primary Health Care Trust ("PHCT") and leased out by them to service providers who ran North and South Cottages together as a single care home.

8. North and South Cottages were physically interconnected at this stage at first-floor level and had, between them, 6 residents with learning disabilities (called 'service users'). Besides the service users there was at least one carer who slept overnight on the premises.

9. Each of the service users had the use of his own bedroom but all other parts of the building were tightly controlled and the service users did not have free access to them. Such other parts of the building included kitchens, secure offices, garden stores and carers' rooms.

10. At the end of 2008 the care home closed. North and South Cottages stood vacant for 2 years and were eventually sold by the PHCT to a charity. The charity put them on the open market and, in July 2010, Mr and Mrs Boakes purchased North Cottage.

11. At this time, North Cottage was in a very poor condition. There was extensive water-flooding and use of the property as a dwelling was prohibited. Mr and Mrs Boakes applied for relief from council tax on the basis that the building was uninhabitable and obtained a council grant for refurbishment, to bring the uninhabitable property back into the housing stock. For planning purposes, North Cottage was classed as being in residential institutional use ('C2') and Mr and Mrs Boakes were obliged to apply for planning permission for a change of use to use as a dwelling. The application included an application to separate the two properties, North and South Cottages, by the blocking up of the interconnecting first floor opening. Planning consent was granted in the summer of 2010. The works to convert North Cottage into a dwelling were begun in July 2010.

12. South Cottage has been converted into a dwelling by a third party. We were not told when those conversion works were begun or carried out.

13. By reference to a professionally prepared drawing, which showed the areas of North Cottage used by service users only (42.81 square metres or 29.16% of the total floor area), as against the areas of North Cottage used by service users and staff (55.726 square metres), by staff only (27.859 square metres) and by staff with controlled use by service users (20.39 square metres), Mr and Mrs Boakes told us that they were reducing (or had reduced) their claim from £14, 270.32 to 70.84% of that amount, i.e. £10,109.09. The thinking behind this reduction was that a claim for refund of VAT was no longer advanced in respect of that part of North Cottage which had been in residential use (the part used by service users only). Mr Boakes submitted that the rest of the floor area (70.84% of it) was in non-residential use, because it was not anyone's home.

14. Mr Boakes told us that he had made telephone calls to an HMRC help line regarding his entitlement to claim a refund of VAT on a DIY conversion and had got the impression that what he and Mrs Boakes were intending to do would qualify for a refund of VAT.

**The legislation**

15. The refund of VAT to persons constructing and converting certain buildings is provided for by section 35 VAT Act 1994 ("VATA") of which the relevant parts are set out, as follows:

> '(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, 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)...

(b)...

(c) a residential conversion.

(1B) ...

(1C) ...

(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;

(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.

(2) ...

(3) ...

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

(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..

(5) ...'

16. The relevant notes of Group 5 of Schedule 8, VATA are as follows:

'(1) ...

(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 term of any covenant, statutory planning consent or similar provision; and

(d) statutory planning consent has been granted in respect of the dwelling and its construction or conversion has been carried out in accordance with that consent.

(3) ...

(4) Use for a relevant residential purpose means use as-

(a) a home or other institution providing residential accommodation for children;

(b) a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder;

(c) a hospice;

(d) residential accommodation for students or school pupils;

(e) residential accommodation for members of any of the armed forces;

(f) a monastery, nunnery or similar establishment; or

(g) an institution which is the sole or main residence of at least 90 per cent of its residents,

except use as a hospital, prison or similar institution or an hotel, inn or similar establishment.

(5) ...

(6) ...

(7) ...

(7A) For the purposes of item 3, and for the purposes of these Notes so far as having effect for the purposes of item 3, a building or part of a building is "non-residential" if –

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

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

(ii) for a relevant residential purpose; or

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

(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, and

(iii) no part of it is being so used.

(8) ...

(9) The conversion, other than to a building designed for a relevant residential purpose, of a non-residential part of a building which already contains a residential part is not included within items 1(b) or 3 unless the result of that conversion is to create an additional dwelling or dwellings.

...'

**The submissions**

17. Mr Boakes made oral submissions and also handed up a written Skeleton Argument, which had been prepared on behalf of Mr and Mrs Boakes by Omnis VAT Consultancy Ltd. We take all the submissions so made into account in the record we give in the following paragraphs.

18. Mr Boakes submitted that we should approach the issues involved in the appeal on the basis that there were two separate parts to North Cottage. These were: a part (the bedrooms used by the service users) which was adapted for use for a relevant residential purpose (within the meaning of Note (7A) of Group 5 of Schedule 8, VATA – *viz:* 29.16% of the total floor area - and a part (the rest of North Cottage, which was used by staff only, or by staff with controlled use by service users) which was "non-residential" within the meaning of Note (7A) – *viz* 70.84% of the floor area.

19. He also addressed the issue of whether an additional dwelling was created as a result of the conversion (within the meaning of Note (9) of Group 5, Schedule 8, VATA, submitting that before the conversion there was one building comprising North and South Cottages, and after the conversion there were two separate buildings, North Cottage and South Cottage, each of which was a dwelling. He made the point that 'dwelling' must be construed in the context of Note (9) as meaning something different from a building used for a relevant residential purpose.

20. In relation to the part of North Cottage which he identified as being "non-residential" within the meaning of Note (7A), he contended that no part of that part of North Cottage had in the 10 years immediately preceding the commencement of the conversion works (that is, in the 10 years 2000 to 2010) been used as a dwelling or for a relevant residential purpose, so that that part of North Cottage was a "non-residential" part within the meaning of Note (7A). In particular, he submitted that the concepts of 'use as a dwelling' and 'use for a relevant residential purpose' were mutually exclusive, that, as a matter of fact, North Cottage was not taken into use as a dwelling merely because Mr and Mrs Boakes acquired it with the intention of using it as a dwelling after the conversion works, and that the parts of North Cottage used by staff only – the staff quarters – were not used as a dwelling, because the staff were there because of their engagement to work there, not because they lived (or dwelt) there.

21. In fact, Mr Boakes addressed his arguments to us on Note (7) which has similar wording to Note (7A) in relation to item 1(b) of Group 5, Schedule 8, VATA – but it is clear from section 35(4A) VATA (whose terms are cited above) that Note (7A), and not Note (7), is relevant for the purposes of the appeal. This point is reflected in the Skeleton Argument prepared by Omnis VAT Consultancy Ltd.

22. He referred us to the decision of the Court of Appeal in *Customs and Excise Commissioners v Jacobs* [2004] EWCA (Civ) 930, [2005] STC 1518 and to the decision of the VAT and Duties Tribunal (Chairman: David Demack) in *Robert Duncan Blacklock v Her Majesty's Revenue and Customs* [2007] UKVAT V20171 (22 May 2007). We make further reference to these cases below.

23. Ms Ratnett's submissions (made orally and in a written Skeleton Argument) were as follows.

24. First, she submitted that the entirety of North Cottage was used up to the closure of the care home in 2008 for a relevant residential purpose. Therefore, she contended, North Cottage had been used for a relevant residential purpose less than 10 years before the commencement of the works of conversion by Mr and Mrs Boakes.

25. It followed, in her submission, that North Cottage was not "non-residential", Note (7)(b)(ii) not being satisfied in relation to it. As above, we recall that Note (7A), rather than Note (7) is relevant, but Ms Ratnett's point can be made in relation to Note (7A) as it is made in relation to Note (7).

26. Secondly, Ms Ratnett submitted that no additional dwelling was created as a result of the conversion of North Cottage. Before the conversion North Cottage consisted of one dwelling and after the conversion was completed it still consisted of one dwelling. The conversion therefore did not result in any additional dwelling being created and, accordingly, by reason of Note (9), the conversion was not to be regarded as included within section 35 VATA.

27. Ms Ratnett cited the VAT and Duties Tribunal's decision in *Amicus Group Limited v Commissioners of Customs and Excise* (Decision Number 17693 (released 10 June 2002, Chairman: Dr John Avery Jones) for the proposition that in relation to Group 5 of Schedule 8, VATA 'dwelling' is to be taken to connote a place where one lives, regarding and treating it as home (cf *Uratemp Ventures Limited v Collins* [2001] 3 WLR 806).

28. She submitted that in the period when North Cottage was adapted for use for a relevant residential purpose (as a care home) it was also used as a dwelling, by reference to the fact that the service users lived there, apparently regarding and treating North Cottage as their home.

29. Ms Ratnett submitted that if the tribunal; were to find as a fact that North Cottage ceased to be a dwelling due to dilapidation (before the conversion works were undertaken) than she would accept that Mr and Mrs Boakes's claim was allowable as to the 'non-residential part' of the building. She also appeared to accept that when the interconnecting first floor opening between North Cottage and South Cottage was blocked up an additional dwelling was created.

**Discussion and Decision**

30. We look first at section 35 VATA. It is common ground, and we find as a fact, that Mr and Mrs Boakes's carrying out of the works to North Cottage was lawful and otherwise than in the course or furtherance of any business, and that VAT was chargeable on the supply, acquisition or importation of goods used by them for the purposes of the works. Therefore the conditions in section 35(1)(b) and (c) are satisfied.

31. We must decide whether the works carried out by Mr and Mrs Boakes were works to which section 35 VATA applies – see: section 35(1)(a). This depends on

whether or not they were works constituting 'a residential conversion' within section 35((1A)(c) which, in turn, depends on whether or to any extent they fell within the description in section 35(1D) VATA.

32. Section 35(1D) envisages works consisting in the conversion of a non-residential building or a non-residential part of a building. Although 'building' is not defined, in the context of this appeal we consider that the only 'building' before conversion was the pair of semi-detached cottages comprising North Cottage and South Cottage. That was a building 'designed as [2] dwellings' – compare the wording of Note (2), Group 5, Schedule 8, VATA – although we note that in relation to those dwellings condition (b) in Note (2) was not satisfied between the 1990s and the time (in 2010) when the interconnecting first floor opening between North Cottage and South Cottage was blocked up as part of the works carried out by Mr and Mrs Boakes.

33. That being so, and the works carried out by Mr and Mrs Boakes being confined to works on North Cottage, we test the application of section 35(1D) in this case by considering whether those works consisted in 'the conversion of ... a ... part of a building' (namely, North Cottage) into a part of a building (*viz:* North Cottage) which, if treated as a separate building, would be a building designed as a dwelling, *etc*. (see: section 35(1D)(c) and (a)). Clearly the works did consist in such a conversion. Therefore the next matter for us to consider is whether North Cottage was (before the conversion) a *non-residential* part of the building comprising North and South Cottages.

34. Here we turn to the definition of 'non-residential' in Note (7A). It is framed by reference to 'a building or part of a building', and, following the reasoning already given, we consider that its relevance in this appeal is in relation to North Cottage, as being part of the building comprising North and South Cottages taken together.

35. Neither party suggested that Note (7A)(a) was relevant, and it is clear that it is not relevant, as North Cottage was designed for use as a dwelling, as well as being adapted for use for a relevant residential purpose.

36. Turning to Note (7A)(b), North Cottage was 'designed, or adapted, for such use' but was constructed more than 10 years before the commencement of the works of conversion (Note (7A)(b)(i)). The next question is whether the condition in Note (7A)(b)(ii) is satisfied.

37. Note (7A)(b)(ii) requires that:

> 'no part of [North Cottage] has, in the period of 10 years immediately preceding the commencement of [the] works, been used as a dwelling or for a relevant residential purpose'

38. Use as 'a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder' is use for a relevant residential purpose (Note (4)(b)). It is clear to us that the use of

North Cottage (and South Cottage) while they were run together as a single care home until 2008 comes within that compendious description.

39. We find that all of North Cottage had, within the period of 10 years immediately preceding the commencement of the conversion works by Mr and Mrs Boakes, been used for a relevant residential purpose. On that ground, the 'part of a building' constituted by the whole of North Cottage was not 'a non-residential part of a building' for the purposes of section 35(1D) VATA and accordingly the works carried out by Mr and Mrs Boakes did not constitute a residential conversion within section 35(1A)(c). For this reason, the appeal must fail.

40. We do not consider that Note (9) of Group 5 of Schedule 8, VATA has any application to this appeal. This is because we have decided that the conversion was not a conversion 'of a non-residential part of a building'. The conversion would only be a conversion 'of a non-residential part of a building which already contains a residential part' if we were to regard the building (North Cottage and South Cottage taken together) as containing a residential part, and the conversion as having been a conversion of a non-residential part of that building. In accordance with the reasoning given above, we regard the whole of the building (North Cottage and South Cottage taken together) as not having been 'non-residential' – i.e. as having been residential.

41. We note that *Jacobs* was decided on the law as it stood before the introduction of section 35(4A) and Note (7A) to Group 5, Schedule 8, VATA – by the VAT (Conversion of Buildings) Order SI 2001/2305. In that case, the building under consideration (a residential school) was one of which part (the classrooms and associated teaching parts) were 'not residential' for relevant purposes and the other part was not 'non-residential' (i.e. it was residential). That is not the position as we have found it in this case. The whole of the building constituted by North Cottage and South Cottage taken together was not 'non-residential' (i.e. it was residential) within the 10 year period referred to by Note (7A)(b). Further, *Jacobs* was concerned with the interpretation of Note (9) to Group 5, Schedule 8, VATA, which we have found not to be engaged on the facts of this case. Likewise, the Tribunal's decision in *Robert Duncan Blacklock* concerned the interpretation of Note (9) and was not relevant to our consideration of the issues falling for decision in this appeal.

42. The fundamental flaw in the argument presented by Mr Boakes was that he considered that the parts of North Cottage which had not been used solely by the service users were parts not used for a relevant residential purpose. It is clear to us from the definition of 'use for a relevant residential purpose' in Note (4)(b) that the parts of a home or institution providing residential accommodation with personal care, which are not in the sole use of the persons in need of personal care, are still parts of the home or institution which are in use for a relevant residential purpose. Those parts are integral, as it seems to us, to the provision of personal care which gives the home or institution its character as a building in use for a relevant residential purpose.

43. Taking an overview of the problem presented by this appeal, we consider that the facts do not demonstrate that the purpose of the DIY VAT refund scheme are met. That purpose is to relieve from VAT a conversion of (put broadly) a non-residential

building into a residential building, provided that an addition to the housing stock is brought about by the conversion. In defining a non-residential building for this purpose, Parliament has, by Note (7A)(b) of Group 5, Schedule 8, VATA, fixed upon a period of 10 years prior to the conversion during which period the building concerned must not have been used as a residential building. Here, notwithstanding the state of dilapidation of North Cottage before Mr and Mrs Boakes commenced the conversion works, its history of use as a care home up to 2008 is fatal to qualification under the scheme.

44. Although the parties requested that we provide a decision in principle, it appears to us, for the reasons given, that our decision effectively disposes of the appeal altogether. Our decision that the appeal is dismissed is therefore final (so far as this Tribunal is concerned).

**Information relevant to an appeal from this decision**

45. 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.

**JOHN WALTERS QC**
**TRIBUNAL JUDGE**

**RELEASE DATE: 5 June 2013**