TC02380

Appeal number: TC/2010/1375

VAT – ***Do it yourself builders scheme – residential conversion – whether the existing building was non-residential – no – garage and extension to existing dwelling – Appeal dismissed – s 35(1) VAT Act 1994***

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANTONINA MURRAY SMITH **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL TILDESLEY OBE

Sitting in public at Employment Tribunal, 3rd Floor, Kings Court, 5a New Walk, Leicester LE1 6TE on 17 May 2012. The case was adjourned part heard for further information with an indication that the decision would be released by no later than 2 November 2012.

Appellant appeared in person

Kim Tilling appeared for HMRC

DECISION

The Appeal

1. The Appellant appealed against HMRC's decisions dated 6 November 2009, 22 October 2010 and 16 November 2010 refusing a claim for a VAT refund in the sum of £6,948.60 under the DIY Builders and Converters Refund Scheme in accordance with section 35 of the VAT Act 1994.

2. The claim related to the conversion and extension of an existing building into a dwelling. There were three issues in dispute:

(1) ***Eligibility*:** whether the existing building was a non-residential building, and more particularly a garage occupied together with a dwelling?

(2) ***Quantum*:** if the Tribunal finds that the claim was eligible, HMRC disputed part of the refund relating to three specific invoices.

(3) ***Otherwise than in the course of business:*** whether the converted property was rented prior to the claim being made and was intended to be rented during the period of the works being carried out.

3. The Tribunal decides not to deal with dispute (3) regarding otherwise in the course of business. HMRC raised this matter at a late stage in the proceedings, and stemmed from a telephone conversation between the Appellant and Ms Tilling of HMRC on 14 May 2012. The contents of that telephone conversation were hotly contested. The Tribunal considers that as this issue did not form part of the decision letters and the grounds of Appeal it would not be correct to hear it. The Tribunal, therefore, proceeds on the basis that the works were carried out otherwise than in the course of business but makes no formal determination on the issue. It is a matter for HMRC whether it wishes to raise this matter at some future date which would constitute a fresh decision giving rise to a right of Appeal to the Tribunal.

4. On 17 May 2012 the Tribunal heard evidence from the Appellant in person and the parties' submissions. The Tribunal also received in evidence a bundle of documents. The hearing was adjourned part heard to enable the Appellant to use her best endeavours to obtain a copy of the planning permission for the construction of a proposed garage[1] with attic room and the site plan drawing undertaken by the former owners of the property, Mr and Mrs H[2]. The parties were also given the right to make further submissions on the documents, if produced.

5. The Appellant was unable to obtain a copy of the planning permission for the construction of a proposed garage with attic room and the site plan drawing undertaken by Mr and Mrs H in accordance with the directions issued on 17 May 2012. The Appellant contended that she had used her best endeavours and that the

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[1] The planning application uses the word garage which I have adopted for the introductory parts of the decision so as to avoid confusion. The use of the word garage in the introductory parts has no bearing on my decision in respect of the disputed matter.

[2] I have abridged the name of the former owners of the property as they are not parties to the Appeal. Likewise I have not given the full address for the appeal property.

Tribunal should proceed to its decision without those documents. HMRC in response to the Appellant's difficulties had been in contact direct with the Planning Authority and had received a copy of the planning application and associated documents. HMRC was in the process of obtaining a copy of the planning permission subject to approval of expenditure for the £15 fee. Given these circumstances HMRC applied for a variation of the directions issued on 17 May 2012.

6. On 16 July 2012 the Tribunal varied the directions issued on 17 May 2012. The Tribunal was of the view that the documentation from the Planning Authority was relevant to the dispute and that HMRC should be given the opportunity to obtain a copy of the planning permission. The Tribunal directed that by no later than 4pm on 31 August 2012 HMRC make written submissions on the planning documentation. The Appellant was given the right of response which if exercised would be by no later than 4pm on 14 September 2012. The parties complied with the directions. The Tribunal indicated that it would publish its decision by no later than 2 November 2012[3].

The Claim and Disputed Decisions

7. On 4 November 2009 the Appellant submitted a claim for a VAT refund in the sum of £6,948.60 under the DIY Builders' Scheme in respect of a property at 25A Main Street. The Appellant stated in her application that she had converted a non-residential building, a garage, which had been empty for more than 10 years into a two storey detached house with four bedrooms, two reception rooms, two bathrooms/en-suites, a kitchen and utility room. The Appellant gave the 19 August 2009 as the certified date of completion of the converted dwelling. The Appellant in her letter accompanying the application reiterated that

> "As to evidence of the building empty for 10 years, I confirm that the building converted was empty and non-residential – it was a garage. It was never used as anything other than a garage since it was built in the 1980's. I am not sure what else I can add in this regard".

8. On 6 November 2009 HMRC refused the Appellant's claim stating that garages including detached ones were excluded from buildings that are treated as non-residential within the meaning of section 35 of the VAT Act 1994.

9. On 16 November 2009 the Appellant expressed her disapproval of HMRC's decision stating that

> "The plans that were sent to you showed the existing annexe/garage. The annexe's size and complexity far outweighed that of the garage. It is unreasonable to deem the whole building a garage when in truth the majority of it was not a garage.
>
> Further the works which were carried out were in part conversion of the annexe/garage. They were also in the main an addition of a

[3] The publication of the decision was delayed because the Tribunal Judge dislocated his shoulder after an accident

> building far exceeding the size of the annexe/garage to form a dwelling".

10. On 24 November 2009 HMRC confirmed its original decision repeating its reason that the existing building contained a domestic garage.

11. On 4 December 2009 the Appellant requested HMRC to reconsider its decision. The Appellant referred to a range of Tribunal decisions which in her view emphasised that the use to which the building was put was the criterion for determining whether a building was a garage. The Appellant pointed out that the majority of the building converted was roof space and a workshop. The Appellant also stated that cars were never stored in the building.

12. On 14 January 2010 HMRC confirmed on review its refusal of the Appellant's claim. The Review Officer stating that

> "Your claim has failed under the Law as it does not comply with both Notes (7) and (8) Group 5 Schedule 8 of the VAT Act 1994. This is because there is no definitive evidence that the building has been empty for 10 years prior to the conversion coupled with the fact that the building for conversion included a garage.
>
> I will take each of the issues in turn.
>
> I understand that the build was a conversion of large double bay garage/store which had an annexe on the first floor above. The building was situated in the garden and driveway of an existing property 25 Main Street …..
>
> The building to be converted was therefore linked to another property considered to be residential and thereby a dwelling.
>
> In order for a building to be eligible under the scheme, if a building has been used as a dwelling within ten years prior commencement of the works then supporting documentary evidence would need to be submitted to confirm the building for conversion along with the property to which it is connected has been empty for ten years. As far as I can ascertain you have provided no evidence to verify this situation……..
>
> You argue that the building was not used as a garage nor could the majority of it have been used as a garage.
>
> However, this contention is not supported by the particulars and location of the development as detailed on the full planning permission FUL/2008/0392/NH dated 6 May 2008 which states: *extension and conversion of garage/annexe to form detached dwelling.*
>
> The planning permission is a legal document and the description on the consent is crucial when determining if a claim qualifies under the DIY scheme or not. In your case this explanation of the type of build shows that it is residential. No supporting documentation has been submitted to verify your contentions that the garage is non-residential. In addition, a definition of an annexe is an auxiliary building added onto another building or serving as a supporting building to a large one. It is

> maintained therefore both the garage and annexe are residential. As this is the situation, your claim is ineligible under the DIY scheme".

13. On 26 January 2010 the Appellant appealed HMRC's decision on review to the Tribunal. On 13 May 2010 HMRC served its statement of case. On 21 May 2010 the Appellant requested HMRC to give its position on quantum so that all matters could be dealt with at the Tribunal hearing. On 9 June 2010 HMRC offered to deal with the question of quantum provided the Appellant re-sent the original invoices supporting the claim.

14. On 14 October 2010 the Appellant supplied HMRC with the invoices. On 22 October 2010 and 16 November 2010 HMRC gave its view on which parts of the Appellant's claim would be successful if the Tribunal found in the Appellant's favour on eligibility. On 5 January 2011 HMRC served an amended statement of case.

The Property

15. In or around 1870 the property was built as a school and continued as such until the late 1970s when Mr and Mrs H purchased the property and converted it into a dwelling house which became known as the The Old School House, 25 Main Street. Around February 2000 Mr and Mrs H purchased an additional piece of land which adjoined the southern boundary of the Old School House.

16. The Old School House and the additional land were registered at the Land Registry under separate title numbers.

17. On 13 September 2000 Mr H who was a Chartered Surveyor submitted a planning application for extensions to the Old School House including an attic conversion and the re-siting of a previously approved garage with room over. The garage would be erected on the additional piece of land.

18. Mr H declared in the planning application that the proposed development related to the property at The Old School House, 25 Main Street. Mr H stated in the application that the existing use of the site was an *existing domestic dwelling.*

19. Mr H informed the Planning Authority in a letter dated 13 September 2000 that

> "With regard to the Garage this application is to re-site the previously approved garage under reference 88….. and to provide an attic room over the garage for ancillary domestic use. The previously approved garage was started in 1989 when the drains went in. However, in carrying out this work there were a large number of main roots to a very large sycamore tree belonging to our neighbours but overhanging over property. …….. We now propose to re-site the garage on the other side of the garden basically on the footprint of an existing tin and brick shed, which will be demolished".

20. The Planning Authority in its Notice of the planning application described the development as an *Erection of two-storey building incorporating double garage and store with playroom above.*

21. The drawings submitted with the application showed a building with an external area of 56.27 square metres. Within the building, the double garage occupied a net internal area of 33.16 square metres. A workshop/garden shed with an approximate net internal area of 12 square metres[4] adjoined the double garage at the ground floor. At the west end of the building an internal staircase led up to a space within the pitched roof of the building with two projected windows on the southern aspect and an exit window on the eastern aspect. The drawings described the space on the first floor as *playroom/office/studio* but supplied no measurements for it. The useable area for the *playroom/office/studio* was, however, restricted by the sloping roof and the store cupboard that ran alongside the north facing wall. The drawings were entitled *Proposed Garage with Attic Room, The Old School House, 25 Main Street.*

22. On 20 November 2000 the Planning Authority granted full planning permission for the development which had to be carried out in complete accordance with the approved plans and specifications. The Authority imposed a condition on the use of the workshop/garden shed which was restricted to purposes incidental to the enjoyment of the dwelling and shall not be used for business or commercial purposes. The reason given for this condition was for *the avoidance of doubt.* Following the grant of planning permission, Mr and Mrs H erected the double garage with a room over.

23. In January 2005 the Appellant purchased the Old School House with the double garage from Mr and Mrs H. The sale particulars exhibited at page 142 of the bundle were restricted to the front page and showed photographs of the property which was identified as The Old School House.

24. Around 2007 the Appellant explored the possibility of converting the double garage with a room over to a separate dwelling. The Appellant obtained from two estate agents sale valuations of the Old School House with the double garage, and of the Old School House without the double garage, and a separate four bedroom dwelling, which constituted the conversion from the garage. The Estate Agents described the garage as a barn or annexe (see pages 138,141 and 143 of the bundle).

25. On 6 May 2008 the Appellant obtained planning permission to extend and convert the garage/annexe to form a detached dwelling.

26. The Planning Officer's report as exhibited at pages 174 to 181 of the bundle stated amongst other matters the following:

> **The Site and its Surroundings**
>
> There is an existing large double bay garage/store on the western side of the site which has an annexe at the first floor level. It is constructed of brick with a blue slate roof.
>
> The site is assessed via an un-named and un-surfaced access road from Main Street that serves 4 properties. Within the site are two drives that

[4] The square area on the plans is 2.73m x 5.41 = 14.77 square metres but an adjustment is needed for the staircase for which no measurements are given in the plans.

run parallel to each other, and join to form a parking area next to the garage.

The Proposal

The application is a revised scheme following a previous approval to extend and convert the existing garage to form a two storey dwelling.

Consultations

RCC Highways Authority

On original scheme – no objection subject to a car parking provision condition.

After the revised scheme was submitted, further discussions with the Highways Authority raised concerns about the parking provision for 25 Main Street. Written confirmation has been received by the applicant that the existing access to the property would be shared, as per the existing approved plans for FUL/2008/0392. No further written consultation has been received from Highways.

Parish Council

(On original scheme) Objection – Concerns over the impact the new build has on the access to the Old School House and reinstating the garage (car port) and large study from the previous scheme.

Following re-consultation after the revised plans were received, the Parish Council wish to continue to object to the proposal on the following grounds

The road access is poor and totally inadequate for a property of this size. The rear access, parking and garaging to number 25 have been removed so any vehicles associated with that property would in future have to park on Main Street thus adding to an already considerable traffic problem.

Planning Officer Comments

Highway Safety

The highway authority had some concerns following a refusal of permission to alter the wall and bank to gain access to no25 from Main Street. However, provided the application site can accommodate parking for no 25, the highway authority has no objection. The parking would need to be secured by condition as the applicant controls all of the land in question. At the time of finalising this report a plan has been submitted allowing parking. More detail will be reported in the addendum.

Recommendation

12. Notwithstanding the approved plan W100a, access and car parking provision shall be made and retained in perpetuity for 25 Main Street within this application site.

27. The Appellant carried out the conversion of the garage/annexe into a dwelling. The architects for the project issued a practical completion certificate on 19 August

2009. Approved inspectors on behalf of the Planning Authority issued the Final Certificate for Building Regulations in respect of the new building on 26 March 2010.

28. The converted building comprised four bedrooms with two bathrooms on the first floor with a large kitchen and utility room, lounge, study and toilet on the ground floor. The former garage had been extended to the southern aspect to create the lounge and two bedrooms upstairs. The converted building was named as The Mulberry House, with a postal address of 25A Main Street.

29. The Appellant asserted the she never used the garage/annexe for the purpose of keeping motor vehicles. According to the Appellant, she always parked her vehicle in Main Street at the front of the Old School House which was nearer and more convenient than the garage/annexe at the rear of the house. The Appellant stated that the distance between the garage/annexe and the Old School House was considerable.

30. The Appellant stated that the previous owners, Mr and Mrs H, used the room over the garage for their business. Further Mr and Mrs H told the Appellant that they could not park their vehicles in the garage because it was opposite a bridge over a stream which meant that the turning cycle was too acute to permit entry through the narrow garage doors.

31. The Appellant contended that the building never looked like a garage and that two thirds of the structure could not be used as a garage. According to the Appellant, the building was on two levels with a staircase, and had an overall area of 30 square metres. She stated that the room over constituted 15 square metres, whilst the store was six square metres and the area available for the parking of vehicles if used was 15 square metres.

Reasons

The Law

32. The dispute in this Appeal concerns the Appellant's entitlement to a refund of the VAT incurred on the building works carried out on the conversion of the building[5] to a four bedroom dwelling.

33. Section 35 of the VAT Act 1994 puts do-it-yourself house builders in a similar position to builders and property developers who are entitled to recover the VAT on their zero-rated supplies in connection with the construction of new dwellings or conversions to such dwellings. A do-it-yourself builder cannot treat the supplies received by him as zero-rated because he is the ultimate customer. Section 35 mitigates this unfairness by enabling the do-it-yourself builder to receive a refund of VAT on the supplies of any goods or services of contractors used by him for the purposes of the building works provided certain conditions are met.

34. Section 35(1) states that

[5] Referred to in the planning permission as a garage/annexe.

> Where –
>
> (a) a person carries out works to which this section applies,
>
> (b) his carrying out of the works is lawful and otherwise 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.

35. Section 35(1A) defines the meaning of *works*, which for the purposes of this Appeal includes a residential conversion (section 35(1A)(c).

36. Section 35(1C) entitles a person carrying out a residential conversion to a VAT refund on the supplies of contractors engaged in the conversion.

37. Section 35(1D) defines a *residential conversion* which is the conversion of a non-residential building or a non-residential part of a building into a building designed as a dwelling.

38. Section 35(4) states that the notes to Group 5 of Schedule 8 shall apply for construing this section subject to that the meaning of *non-residential* given by Note (7A) of Group 5 of Schedule 8 and not that by Note 7 shall be adopted for the purposes of section 35.

39. Note 7(A) provides that

> ….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.
>
> (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.

40. Note 8 states that references to a non-residential building or a non-residential part of a building do not include a reference to a garage occupied together with a dwelling.

41. Note 9 states that the conversion of a non-residential part of a building which already contains a residential part does not constitute a residential conversion unless the result of that conversion is to create an additional dwelling or dwellings.

42. The Court of Appeal in *HMRC v Jacobs* [2005] EWCA Civ 930 explained the provisions of section 35 in relation to residential conversions. Lord Justice Ward stated at paragraph 34:

> "i) The first is that the works constitute a residential conversion to the extent only that they consist in the conversion of a non-residential (part of a) building. If and to the extent that the works consist in the conversion of what is not non-residential, then those works are outside the scope of the subsection.
>
> ii) Secondly the conversion qualifies not only when converting the whole of a non-residential building but also when converting a non-residential part of the building. If part is non-residential the other part must be treated as Residential, ie, not non-residential.
>
> iii) Thirdly the conversion qualifies if it has any one of three results set out in (a), (b) or (c), namely (a), a building designed as a dwelling or a number of dwellings, or (b), a building intended for use solely for a 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.
>
> iv) Fourthly, s 35(1D)(a) needs more analysis. It covers two types of conversion. The first is the conversion of a non-residential *building.* It is easy enough to see when a non-residential *building* is converted into a *building* designed as a dwelling or number of dwellings. There is an old building and after conversion a new building and the question is simply whether the new building is designed as a dwelling or number of dwellings. The building itself remains the same: it is its use which has been changed. But paragraph (a) also applies to the extent that a non-residential *part of* the building is converted. The question then arises, "Into what is that part to be converted?" The clear answer given by the language of the subsection is that just as in the case of the conversion of the building itself, *the part* of the building likewise has to be converted into *a building* designed as a dwelling or number of dwellings. Paragraph (a) does not require *the part* of the building to be converted into *a part* of the building designed as a dwelling. The subsection does not say that. Words would have to be written in to give it that meaning. It seems to me therefore that on the proper construction of paragraph (a) it is enough if the non-residential part is converted into, that is to say changed in its character and made part of, the new building which results from the conversion and it is in the building as a whole that one must look to find whether it - the building as a whole - has been designed as a dwelling or number of dwellings".

Eligibility

43. The argument in this Appeal concerned the status of the original building, whether it met the definition of non-residential. HMRC accepted that the original building had been converted into a dwelling.

44. The Appellant relied on the VAT and Duties Tribunal's ruling in *Grange Buildings v C & E* 2005 V&DR 147, which stated that "*when deciding if a building*

was a garage, the vital factor was the purpose for which it was actually used not a particular characteristic or design". The Appellant contended that contrary to what the planning permission stated the building was never used to store cars. Further the vast majority of the building was roof space and workshop. Finally only a small proportion of the building was available for parking cars if it had been used for that purpose. The Appellant considered that HMRC had failed to consider the actual building involved, and apply the appropriate law. The Appellant concluded that the original building was not a garage and fell fairly and squarely under the definition of a non-residential building.

45. HMRC pointed out that the Appellant had given contradictory accounts of the use to which the original building had been put. According to HMRC, the Appellant first asserted that the building had only been used as a garage but when her claim was refused the Appellant then stated that the building had stored items not cars. HMRC argued that the terms of the grant of planning permission on 20 November 2000 were relevant to the determination of this Appeal. The terms confirmed that the building had been designed and constructed as a double garage. Further in the absence of objective evidence to the contrary, HMRC submitted that the original building was, therefore, used for the purpose for which it was constructed, namely as a garage.

46. HMRC's principal proposition was that the whole of the building should be regarded as a garage, and, therefore, not non-residential. If, however, that proposition failed, and only part of the building was a garage, HMRC argued that the remaining parts, the workshop/garden shed and the room over, were not non-residential because of their specific links to the dwelling known as The Old School House.

47. The Tribunal's starting point is to find the following facts in relation to the original building:

(1) The original building was designed and constructed as a double garage with a workshop/garden shed and a room over.

(2) The original building was built to be in occupation with the dwelling, known as The Old School House, 25 Main Street. This was clear from the planning application submitted on 13 September 2000 where Mr H stated that the building was to provide ancillary domestic use to 25 Main Street, and from the planning permission which imposed a condition restricting the use of the workshop/garden shed to purposes incidental to the enjoyment of the dwelling. The condition specifically stated that the workshop/shed could not be used for commercial or business purposes. The Appellant did not dispute the dwelling status of The Old School House.

(3) The space allocated within the original building for the double garage was significant with a net internal area of 33.16 square metres. The playroom and the workshop/garden shed had restricted useable areas due to the sloping roof and the stairs respectively. The measurements on the scale drawings attached to the 13 September 2000 planning permission did not support the Appellant's assertion that the internal area available for the parking of vehicles was nine square metres.

(4) There was no evidence that alterations were made to the approved design of the original building in the period prior to its conversion into a dwelling.

(5) The photograph of the original building[6] at page 144 of the bundle showed the presence of extensive gravelled areas in front of the garage doors and a clear means of access to the rear of the property. The photograph indicated that a vehicle would have no difficulty in gaining entry to the garages. The building in the photograph corresponded with the construction in the scale drawings attached to the 13 September 2000 planning application. The photograph displayed no signs of the construction works for the new dwelling.

(6) The Appellant stated that the improvements made to the access arrangements for the double garage were carried out at the start of the conversion of the building. According to the Appellant, prior to the improvements the garage doors faced a bridge over a stream which meant that vehicles could not turn into the garage and park there. The Appellant stated that this was the reason why Mr H never stored cars in the garage. The Tribunal considers it highly improbable that Mr H, a Chartered Surveyor, and the Planning Authority would respectively incur expenditure and grant planning permission on a building which could not fulfil its stated purpose of a double garage. In this respect the Highway Authority's observations on the 13 September 2000 planning application that turning facilities should be provided within the site in order to allow vehicles to enter and leave in a forward direction indicated that the Planning Authority and Mr H had given due consideration to the vehicular access arrangements for the original building. Finally the presence of an extensive gravelled area in front of the garage doors was inconsistent with the design of the new dwelling which involved the construction of a two storey extension on the place of the gravelled area.

(7) The Tribunal is satisfied on balance that the extensive gravelled area and drive as depicted in the photograph at page 144 of the bundle had been in existence for sometime prior to the construction of the new dwelling and that the access arrangements did not prevent the parking of vehicles in the double garage.

(8) The Appellant's reliance on the title plan exhibited at 123 of the bundle did not, in the Tribunal's view, substantiate her assertion that the distance from the original building to The Old School House was so lengthy that no-one would ever use the original building as a garage, particularly as it was more convenient to park in Main Street at the front of The Old School House. The title plan showed that the distance from the front of The Old School House to Main Street was about the same from the rear of The Old School House to the original building. The scale drawing at page 146 of the bundle stipulated a distance of 6.75 metres from the end of The Old School House to the original building enclosing the double garage, which would suggest a distance of not more than 20 metres from the doors of the double garage to the rear door of The Old School House.

[6] A colour photograph was supplied to the Tribunal

(9) The Planning Officer's report for the planning application for the new dwelling noted that there was a considerable traffic problem with parking on Main Street. Also it would appear that the Appellant confirmed to the Planning Authority in respect of the 6 May 2008 permission that a parking provision for the Old School House at the rear of the property would be preserved in perpetuity despite the construction of the new dwelling.

(10) The Tribunal is satisfied on balance that parking on Main Street was not a more attractive option than the garaging option at the rear of The Old School House.

(11) The official documentation including the two planning applications and the Appellant's VAT refund claim described the original building as incorporating a garage. The Appellant stated in the claim that the building was never used as anything other than a garage since it was built. The Tribunal is satisfied that the description of a garage used in the official documentation was accurate, and not undermined by the alternative descriptions of barn and annexe as given by the Estate Agents advising the Appellant about the valuations of the potential options for development of the site.

48. The Appellant had the burden of proving on the balance of probabilities that the original building did not incorporate a double garage. The Tribunal placed weight on the circumstances surrounding the planning applications and permissions for the construction and conversion of the original building as evidenced by documentation which the Tribunal considered more reliable than the Appellant's unsubstantiated assertions that the original building was never used by her and the previous owners, Mr and Mrs H, for the storage of vehicles. The Appellant adduced no witness statement from Mr and Mrs H to back up her assertions.

49. The Tribunal finds that the original building was constructed and designed as a double garage with a workshop/garden shed and a room over with good access enabling the storage of vehicles within it. The Tribunal considers the Appellant's assertions on the use of the building unconvincing and insufficient to displace the conclusion that a significant part of original building was used for the purpose for which it was designed and constructed, namely the garaging of vehicles. The Tribunal also finds that the original building was occupied together with a dwelling, The Old School House.

50. The Tribunal considers that the Appellant's submission on the law in relation to the relevance of the design of the building overlooked the particular circumstances of the decision in *Grange Builders (Quainton) Limited.* This decision involved a barn not a building that had been designed and constructed as a double garage. The Tribunal in *Grange* decided that the definition of garage should not be restricted to those buildings that were originally built as garages. The Tribunal said at paragraph 36:

> "Our approach is determined by the nature of the dictionary definitions of "garage" to which both sides urged us to have regard. They indicate that a building is or is not a garage, depending on whether it is or is not used for the purpose of the storage of one or more motor vehicles. The

> use to which the building is put is the determinative factor, not some inherent characteristic of the building or its design. In this sense a garage can be contrasted to a tower, for example. A building is a tower if it has certain physical characteristics, never mind what use it is put to. A garage, it seems, is different. Although we all may have in our mind's eye a view of what we expect a garage to look like, when one has regard to the dictionary definitions of "garage", it is clear that a building may be a garage even if it looks like a barn - or indeed a tower - provided it is used for the purpose of the storage or housing of one or more motor vehicles".

51. The Tribunal's comments at paragraph 33 should be read in conjunction with its observations at paragraphs 51 and 52:

> "We are, however, impressed by Miss Shaw's argument that her construction of "garage", with its requirement that the building concerned should have been originally constructed as a garage, would favour a straightforward and even-handed implementation of the legislation by the Commissioners. Either a building was constructed as a garage or it was not: one assumes that this is a point capable of objective verification. Miss Shaw put the point in her skeleton argument: "a change of use cannot operate retrospectively so as to transform the barn into a garage constructed as such at the same time as Mulberry House". While agreeing with Mr. Brown that his argument does not involve any retrospective transformation, we find unattractive the aspect of his submission that a building not hitherto used for the storage of motor vehicles can be converted into a garage, simply by introducing vehicles into it, rendering approved alterations to the building at any time thereafter eligible for zero-rating (on the assumption that the other statutory conditions are fulfilled).
>
> We think the answer to this point is that in the application of the legislation, it must be established whether or not the building being constructed at the same time as the "substantial reconstruction" of a protected building (Item 1 of Group 6) or being subject to an "approved alteration" (Item 2 of Group 6) is in fact and reality "a garage" (occupied as and constructed at the time indicated by Note (2)), when the respective supplies for which zero-rating is sought are made. That is, was the building at that time "a building or shed for the storage of a motor vehicle or vehicles"? This test must be applied on a realistic basis and it seems to us that (as Mr. Brown submitted) this would normally require that use had been made of the building or shed for the storage of a motor vehicle or vehicles for a significant time before the first supply in issue was made".

52. This Tribunal's reading of paragraphs 51 and 52 is that the construction and design of building as a garage is a relevant consideration, and if it can be determined on objective criteria that it was so constructed and designed, the evidence to displace the conclusion that it was a garage must be strong. Further the corollary of the Tribunal's observations at paragraph 51 is that a building which has been designed and constructed as a garage does not cease simply to be a garage because the owner chooses not to store his vehicles in it.

53. In this Appeal a significant part of the original building was designed and built as a double garage. The Appellant's evidence that the building was never used as a garage was not strong enough. The Tribunal having weighed up the evidence was satisfied that the double garage was in all probability used for the storage of vehicles. Thus the Tribunal's finding in this Appeal that a significant part of original building was used for the purpose for which it was designed and constructed, namely the garaging of vehicles, is consistent with the application on a realistic basis of the test for garage as espoused in the *Grange* decision.

54. The Tribunal has, therefore, decided that the original building was a double garage with a workshop/garden shed and room over. The Tribunal concludes from the planning documentation that the room over and the workshop/garden shed served functions independent of the double garage. The question posed by this finding is what is the status of the original building as a non-residential building as defined by Note 7A to group 5 of schedule 8 when a significant part of it was a double garage.

55. The First Tier Tribunal has answered this question in three different ways. The first decision was that of *Sally Cottam v Revenue and Customs Commissioners* (Decision no 20036). In *Sally Cottam* the building that had been converted was an outbuilding which was part two-storey and part one-storey. The outbuilding was used generally to store fruit and garden equipment and machinery. The one-storey area, which had a high pitched roof, was used as a workshop, and to repair and store cars. The VAT & Duties Tribunal found that the lower part of the one-storey area was a garage.

56. The Tribunal in *Cottam* adopted a three stage test in deciding whether there had been a residential conversion:

> "The exercise in determining whether, for purposes of section 35(1D) the "works" constitute a residential conversion breaks down into three stages. The first stage is to identify the works of conversion and determine whether the end product is a dwelling. If it is, then move on to the second stage which is to determine what building (or part of a building) is being converted. Then, at the third stage, ask whether the building so ascertained is a garage occupied with a dwelling; if it is, it will not qualify as non-residential".

57. In respect of the third stage, the Tribunal adopted a stand back approach to determine on the facts whether the original building in its entirety could be described as a garage occupied with a dwelling. The Tribunal decided that it could not be so described:

> "The concluding issue, therefore, is whether the outbuilding in its entirety is a garage occupied with a dwelling. For these purposes we recognize that the outbuilding has been referred to in several letters and application originating from Mr Cottam as a "garage"; and we accept that the one-storey part of the outbuilding can be and has been used to garage vehicles. However, much the greater area of the outbuilding is a general purpose store and has consistently been used as such. Taken in its entirety therefore the outbuilding cannot, we think, properly be

> described as a garage. Still less can it be described as a garage occupied with a building".

58. The next case is that of *Joseph Podolsky v Revenue and Customs Commissioners* [2009] UKFTT 387 (TC), which involved the conversion of a garage/workshop into a five-bedroom detached dwelling. Part of the building prior to conversion was used as a garage occupied together with a dwelling. In that case HMRC argued that *Sally Cottam* had been wrongly decided. In HMRC's view on a correct construction of statute if part of the building was a garage occupied with a dwelling then the whole building was a garage, which in turn did not meet the non-residential definition. Although the Tribunal distinguished the facts from those for *Sally Cottam,* it accepted HMRC's reasoning and dismissed the Appeal.

59. At paragraph 15 the Tribunal in *Podolsky* stated that

> "Note 8 (applied by section 35(4)) applies to prevent qualification of a subject building or part within section 35(1D) where at least part qualifies as a garage and where it has been occupied at some time within a period coincident with that applied within Note 7A(b)(ii) together with the dwelling. The Appellant accepts that part of the subject building was used as a garage and it was therefore decided that the subject building falls within Note 8 and therefore cannot qualify as a "non-residential building". The subject building was physically used as a garage. The fact that part of the subject building was used as a garage means that Note 8 is applied in respect of the whole of the subject building and which therefore excludes the conversion from falling within section 35(1D). As the conversion falls within the qualification of Note 8 (applied by section 35(4)) the Appellant is unable to satisfy the provisions of section 35(1D) and whether the subject building falls within section 35(1D)(a) and consideration of Note 9 is not relevant."

60. The final First Tier decision is that of *John Clark v HMRC* [2010] UKFTT 258 which involved the conversion of a stable block/garage into a dwelling used by Mr and Mrs Clark. The Tribunal in this case disagreed with the approaches taken by the respective Tribunals in *Cottam* and *Podolsky.*

61. On *Cottam* the Tribunal said at paragraph 28

> "With great respect to the tribunal in *Sally Cottam*, we are unable to adopt the analysis the tribunal applied in that case. We think that the tribunal addressed the wrong question in this respect. A conversion is only a residential conversion for the purpose of section 35(1A)(c) to the extent that it is a conversion of a non-residential building or a non-residential part of a building. Any part of a building that does not satisfy Note (7A) or falls within the restriction in Note (8) is not within section 35(1D). A whole building cannot be within section 35(1D) unless it is wholly non-residential. To the extent that it is not wholly non-residential, it can only be a non-residential part of a building. In *Sally Cottam*, therefore, it was in our respectful view wrong for the tribunal to have identified the whole outbuilding as having been

converted and only then to consider if it was in its entirety a garage occupied with a dwelling"

62. On *Podolsky* the Tribunal said at paragraph 31:

> With respect, we do not consider this to be a correct construction of Note (8). There is nothing in Note (8) itself that would, in our view, support the conclusion that if part of a building is used as a garage the result is that the whole building must be excluded from the description of non-residential. We have expressed our own view above that, following the approach of the Court of Appeal in *Blom-Cooper*, the Notes to Group 5 must be taken as a whole, and that a sequential approach is not appropriate. It cannot in our view be correct to take Note (7A) in isolation from Note (8) and determine first that the building as a whole is a non-residential building according to Note (7A) and only then to apply Note (8) to the building as a whole so as to conclude that the whole building is, as Mr Zwart put it to us "tainted" by the partial use as a garage".

63. The Tribunal in *Clark* opted for a construction of the Statute that where a building was part garage and part non-residential partial relief in the form of VAT refund was available for the non-residential part. At paragraph 33 the Tribunal stated

> We have the misfortune, in reaching our conclusions on the proper analysis of the application of Notes (7A) and (8) in respect of section 35(1D), to differ from the decisions of two tribunals. However, we consider that our own analysis accords not only with the natural reading of the Notes, but also with the evident purpose of section 35(1D) itself. That subsection clearly envisages a case where part of a building is non-residential and part is residential (or not non-residential). It specifically does not deny relief in those circumstances, but instead provides for works to be within the meaning of "residential conversion", and so to qualify for relief, "to the extent that" the works consist of a conversion of the relevant part of the building into, for example, a building designed as a dwelling or a number of dwellings. The use of the expression "to the extent that" itself demonstrates that relief may be only partially available, and that some allocation or apportionment may be required. This militates against the "all or nothing" approach taken, albeit in different directions, by the tribunals in *Sally Cottam* and *Podolsky*, and in our view supports the conclusion we have reached.

64. Unsurprisingly in this Appeal the Appellant preferred the decision in *Cottam*, whilst HMRC favoured the approach adopted in *Podolsky*. This Tribunal, however, adopts the reasoning of the Tribunal in *John Clark*. The Tribunal agrees with the decision in *John Clark* that the all or nothing stance taken in *Cottam* and *Podolsky* albeit in different directions was not in accordance with the statutory provisions as properly constructed.

65. The dispute on eligibility in this Appeal, however, does not end with the Tribunal's adoption of the reasoning in *John Clark*. HMRC advanced an alternative

argument in the event the Tribunal found that as a matter of fact and the law the whole of the original building was not a garage.

66. The alternative argument was that the parts comprising the room over and the workshop/garden shed did not meet the definition of non-residential. According to HMRC, the documentation with the 13 September 2000 planning application showed that the workshop/garden shed and room over were an extension of the residential provision at The Old School House, 25 Main Street. Also the original building had been built in the ten year period preceding its conversion to a four bedroom house. Thus the workshop and the room over did not meet the definitions of non-residential in note 7A(a) (neither designed or adapted for use as dwelling) and in note 7A(b) (a dwelling constructed more than 10 years ago and not occupied in the period of 10 years immediately preceding the conversion).

67. The Appellant stated that HMRC's alternative argument was wrong in law. The room over and the workshop could not be treated as residential because they were parts of a separate building constructed later than The Old School House. The Appellant cited in support of her argument the House of Lords decision in *Customs and Excise Commissioners v Zelinski Baker & Partners* [2004] STC 456 which held that that an outbuilding was not a dwelling house to qualify for zero rating in respect of supplies carried out in the alteration of a listed building. The Tribunal agrees with HMRC that the decision in *Zelinski Baker* is confined to the statutory construction of group 6 and the application of zero-rating to listed buildings and has no application to the interpretation of a residential conversion under sections 35(1A)(c) and 35(1D) of the VAT Act 1994.

68. The Tribunal makes the following findings of fact in relation to the room over and the workshop/garden shed:

(1) The original building comprising the room over, garden shed and double garage was built in or around 2001by Mr and Mrs H, the previous owners of The Old School House.

(2) The conversion of the original building into the new dwelling house commenced in 2009.

(3) The period between the construction of the original building and the commencement of the conversion works was less than 10 years.

(4) The original building was situated in the garden and driveway of an existing dwelling, The Old School House, 25 Main Street.

(5) Mr H declared in the 13 September 2000 planning application that the development which included the original building related to the property at The Old School House, 25 Main Street.

(6) The original building including the room over and the garden shed were designed to provide ancillary domestic use to 25 Main Street (The Old School House). This was reinforced by the condition to the 20 November 2000 planning permission restricting the use of the workshop/garden shed to purposes

incidental to the enjoyment of The Old School House, and prohibiting use for commercial or business purposes.

(7) The Old School House was a dwelling.

(8) The room over was described in the planning application as playroom/office/studio.

(9) In 2005 the Appellant purchased The Old School House which included the original building.

(10) The Tribunal was not persuaded by the Appellant's evidence that the room over was used as an office. Her evidence comprised an assertion that Mr and Mrs H, the previous owners, had employed the room over as an office. Further the Appellant acknowledged that she did not use it as an office but for general storage.

69. The Tribunal is satisfied from the above findings that the room over and the garden shed were an extension of the residential provision at 25 Main Street (The Old School House). They were designed to enhance the domestic facilities for the Old School House. The fact that they were incorporated in a separate building did not upset the conclusion that they were part of the dwelling house at 25 Main Street. The Appellant adduced no persuasive evidence that the room over and the garden shed had been used for non-residential purposes.

70. The Tribunal holds that the room over and the garden shed did not meet the definition of non residential for the purposes of section 35(1D) of the VAT Act 1994 as stated in Note 7A to group 5 of schedule 8. Note 7(a)(i) is not met because the Tribunal is satisfied that the room over and garden shed were designed for use as a dwelling, in that they were integral parts of the residential provision at 25 Main Street. Equally Note 7(b) is not met because the commencement of the conversion works took place within 10 years from the construction of the original building comprising the double garage, room over and the garden shed.

Decision on Eligibility

71. The Tribunal finds that the original building converted by the Appellant was not a non-residential building. A significant part of the original building was a double garage in occupation with a dwelling house, which by virtue of Note 8 to group 5 of schedule 8 falls outside the definition of non-residential. The room over and the garden shed/workshop were part of the dwelling at 25 Main Street (The Old School House). The Appellant, therefore, was not entitled to a refund on the VAT charged on the building works because they did not constitute a residential conversion within the meaning of sections 35(1A)(c) and 35(1D) of the VAT Act 1994.

Quantum

72. In view of the Tribunal's decision on eligibility, the dispute on quantum is redundant. The Tribunal, however, will determine the contested matters which concerns three transactions. HMRC had accepted the rest of the Appellant's claim subject to the question of eligibility.

Glaston Carpets Superstore

73. This dispute concerned an invoice addressed to the Appellant in the sum of £2,721 to supply flooring and dated 14 July 2009. HMRC considered that the "invoice" did not provide the requisite information to assess the accuracy of the claim. The "invoice" did not describe the quantity of the goods supplied, the unit price of the goods and whether the charge included fitting. Further the "invoice" did not specify the amount of VAT charged and the appropriate rate of VAT. The Appellant expressed her disappointment with the manner in which HMRC handled her claim. The Appellant stated that she was not told until a week before the hearing the information required by HMRC. The Appellant said that it was now too late to obtain a revised invoice from Glaston Carpets. The Appellant stated that the invoice was for 40 square metres of oak flooring and that she had supplied HMRC with the cost per metre.

Homebase

74. This comprised a customer sales order dated 13 May 2009 and addressed to the Appellant. The order gave the price for two items: Shaker Cream 500 Single Floor Unit (£57.40) and a Shaker Cream 900 Corner Floor Unit (£119.70). The order gave a grand total of £1,134.10 but did not provide a breakdown of that charge. A Master Card receipt in the sum of £1,108.10 was attached to the order. The receipt stated the VAT registration number for Homebase, and specified that it related to the customer order (£1,134.10) and a sink and tap pack (£74) with a discount of £100.

75. HMRC pointed out that the Homebase documentation did not include a VAT invoice. The order did not give a full description of the goods supplied and failed to mention the rate of VAT and the amount of VAT chargeable. The Appellant stated that there was no other documentation from Homebase, and that she was only recently informed by HMRC that it wanted the information on one invoice. The Appellant considered HMRC's demands bizarre, particularly as HMRC had allowed many receipts similar to the one provided for Homebase.

Civil Solutions UK Limited

76. The dispute concerned an invoice dated 20 October 2009 in the sum of £747.50 broken down £650 for services and £97.50 VAT. The invoice stated that the charge was for one day site investigation with digger to excavate trail holes for BRE permeability tests as per the onsite instructions of the Appellant's engineer. The charge of £650 comprised labour including travel of £350 and £300 for materials, plant and waste disposal.

77. HMRC accepted that the invoice provided the requisite detail. HMRC refused to meet the claim because the supply related to professional services and on site investigation work prior to the pump being installed. In HMRC's view, section 35(1C)(c) of the VAT Act 1994 precluded such services from the scope of the DIY Builders Scheme.

78. The Appellant expressed her bafflement with HMRC's decision. This work arose from the failure of the builder to install a soak-away to the new dwelling house which resulted in the sinks and toilets backing up. The Appellant engaged Civil Solutions to identify the problem by digging up the grounds, which enabled her to design a remedial solution by the installation of a pump. The Appellant pointed out that HMRC had accepted the other claims relating to this work. The Appellant did not understand how digging a hole could be classified as professional services.

Reasons

79. The Tribunal's jurisdiction in respect of appeals against HMRC's decisions on the Do it Yourself Builders Scheme relates to the amount of any refunds under section 35 of the VAT Act 1994.

80. Regulation 201 of the VAT Regulations 2005 sets out the procedural requirements for making a refund claim:

> A claimant shall make his claim in respect of a relevant building by—
>
> (a) furnishing to the Commissioners no later than 3 months after the completion of the building [the relevant form for the purposes of the claim] containing the full particulars required therein, and—
>
> (b) at the same time furnishing to them—
>
> (i) a certificate of completion obtained from a local authority or such other documentary evidence of completion of the building as is satisfactory to the Commissioners,
>
> (ii) an invoice showing the registration number of the person supplying the goods, whether or not such an invoice is a VAT invoice, in respect of each supply of goods on which VAT has been paid which have been incorporated into the building or its site,
>
> (iii) in respect of imported goods which have been incorporated into the building or its site, documentary evidence of their importation and of the VAT paid thereon,
>
> (iv) documentary evidence that planning permission for the building had been granted, and
>
> (v) a certificate signed by a quantity surveyor or architect that the goods shown in the claim were or, in his judgment, were likely to have been, incorporated into the building or its site.

81. The dispute regarding the supplies from Glaston Carpets and Homebase was that the Appellant had not provided the required information under regulation 201 of the 1995 Regulations, and in particular had not supplied invoices which met the necessary standard. Since the person making the claim under section 35 would not normally be a taxable person, it follows that the invoices referred to in regulation 201 (b)(ii) need not be tax invoices.

82. If a VAT invoice is submitted it must show:

(1) The supplier's VAT registration.

(2) The quantity and description of the goods and/or services.

(3) The name and address of the claimant if the value is more than £100.

(4) The price of each item.

83. The Tribunal in *Jennings v HMRC* (No 2) (2011) TC01160 held that, an invoice for the purposes of section 35 was "*a statement identifying a supply of goods or services, the amount payable for them and the time when payment is to be made*". The document in point *"adequately identified the subject matter of the supply, correctly identified the price payable, the amount that had been paid and that which remained to be paid, and it also identified the moment at which that final payment was due".*

84. HMRC guidance on *VAT Refunds on Self Build New Homes or Non-residential Conversions* emphasises that before a claim is made, the claimant must make sure that all the right paperwork is in place which means obtaining VAT invoices for everything, and they have to be correct.

85. The Tribunal is satisfied that the documentation supplied by the Appellant in support of her claim in respect of the supplies from Glaston Carpets and Homebase did not meet the requirements of regulation 201. The invoice from Glaston Carpets did not give sufficient detail about the supplies made, in particular it did not specify the type of flooring and whether the supplies included fitting of the flooring. The document from Homebase was not an invoice but a customer sales order which did not explain how the total price of £1,134.10 was arrived at. The Appellant had the obligation to lodge the required information with her claim form, and in these two instances she failed to meet the requirements of regulation 201. The Appellant criticism of the service received from HMRC is not a matter that falls within the Tribunal's jurisdiction. If the Appellant has such concerns her remedy is to invoke HMRC's complaints procedures.

86. The Tribunal, however, is not convinced that the supply of Civil Solutions UK fell within the provisions of section 35(1C)(c) of the VAT Act which excludes from the refund scheme VAT charged by contractors acting as an architect, surveyor or consultant or in a supervisory capacity. The facts showed that Civil Solutions Limited was not acting in a supervisory capacity as it was working to the instructions of the Appellant's engineer. The Tribunal considers that the essential character of the services of an architect, surveyor or consultant is the giving of professional advice. The Tribunal is satisfied from the facts that the supplies made by Civil Solutions Limited did not take the form of giving professional advice. The Tribunal considers that Civil Solutions Limited was carrying out preparatory work for the installation of the pump, and should be treated in the same manner as the installation work which HMRC had accepted as a valid claim subject to the overall question of eligibility.

87. If the Appellant had been eligible to make a claim under the DIY Builders Scheme, the Tribunal would have upheld HMRC's decision in respect of the supplies of Homebase and Glaston Carpets but allowed the claim in respect of Civil Solutions Limited.

Decision

88. The Tribunal finds that the Appellant was not entitled to a refund on the VAT charged on the building works because they did not constitute a residential conversion within the meaning of sections 35(1A)(c) and 35(1D) of the VAT Act 1994. The Tribunal, therefore, dismisses the Appeal.

89. The Tribunal notes that the Appellant has applied for her costs in connection with the Appeal. The Tribunal considers there are no grounds for making an order for costs in favour of the Appellant.

90. 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.

MICHAEL TILDESLEY OBE
TRIBUNAL JUDGE

RELEASE DATE: 22 November 2012