TC04147

Appeal number: TC/2014/00644

VAT – DIY Housebuilders' Scheme – whether part of building a garage – Yes – whether garage part of building occupied together with a dwelling – Yes – whether non residential part of building created an additional dwelling – Yes – Section 35, Schedule 8, Group 5, Notes 7A, 8, and 9 VATA 1994. Appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

VICTOR ALEXANDER DUNLOP **Appellant**

- and -

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

TRIBUNAL JUDGE RUTHVEN GEMMELL,WS
MR IAN M P CONDIE, CA

Sitting in public at George House, 126 George Street, Edinburgh on 22 October 2014

Victor Alexander Dunlop for the Appellant

Mrs Elizabeth McIntyre, Officer of HMRC, for the Respondents

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DECISION

1. This is an appeal by Victor Alexander Dunlop ("VAD") against a decision by the Commissioners for HM Revenue and Customs ("HMRC") to refuse a claim made under the VAT Refunds for DIY House Builders' Scheme on 21 October 2013 which was upheld following an internal HMRC review on 8 January 2014.

2. HMRC rejected the claim on the grounds that the building being the subject of the claim ("the subject building") fell within the ambit of Section 35, Schedule 8, Group 5, Note (8) VATA and, as such, failed to comply with Schedule 8, Group 5, Note 7A(b)(ii).

3. VAD contends that the subject building was not a garage when built; was not adapted to become a garage; did not become a garage just because it had a car stored in it; was not a garage occupied together with a dwelling and, in any event, was not a garage occupied together with a dwelling after 2005; that the whole of the subject building is not a garage occupied together with a dwelling; that Note 7 (A)(b)(ii) does not apply to the subject building; and the planning authority believed they were sanctioning a change of a non residential building to a dwelling.

Cases

S Cottam v HMRC [2007] TC20036

Joseph Podolsky v HMRC [2009] UKFTT387

John Clark v HMRC [2010] UKFTT258

Antonina Murray Smith v HMRC [2012] UKFTT713

The Law

4. A do-it-yourself house builder who is not engaged in the building business cannot, unlike his business counterpart who is making zero-rated supplies, recover input tax on supplies received for the purpose of the building works, because he is regarded as the ultimate consumer. To alleviate unfairness, section 35 VATA provides for a refund of VAT to such persons constructing certain buildings if relevant conditions are satisfied. The material parts of that section for the purposes of this appeal are set out below:

> Section 35
>
> (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*) the construction of a building designed as a dwelling or 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;

(*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.

…

(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) Sections 35(4) and (5) refer to the notes in Group 5 of Schedule 8 VATA. So far as material, and as applicable to section 35, those notes are:

(7A) For the purposes of [section 35], and for the purposes of these Notes so far as having effect for the purposes of [section 35], 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

…

(8) 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.

(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 Facts

5. The facts that were not in dispute were as follows –

6. The subject building was built in the late 1800s as a bathing house and was identified on a map dated 1895 which showed it was built on land (later called Lodge Wood) which was part of Auchenskeoch Estate. This estate was of about 10,000 acres of moorland, woodland, tenanted farms and farmland and several tenanted cottages. It was purchased as a shooting estate in 1849 and, subsequently, Auchenskeoch Lodge, the stables and ancillary buildings, the bathing house, the pond, hydro electric generator and sawmill were built on the estate.

7. Auchenskeoch Lodge was built at a T-junction with what is now the B793 road and forming the vertical part of the T shape was a lane to Whitecroft Farm ("Whitecroft Lane"). To one side of the lane were the buildings of Auchenskeoch Lodge, the stables and ancillary buildings and, on the other side of Whitecroft Lane, was the bathing house.

8. Auchenskeoch Lodge had a main gate leading onto Whitecroft Lane and also a pedestrian gate almost opposite the entrance to the subject building so that the latter could be entered by crossing Whitecroft Lane.

9. The bathing house had been built for the owners and guests of the house of Auchenskeoch Lodge but, as the fashion for bathing houses passed, the bathing house pool was filled in with boulders and concreted over to provide a floor at ground level. An inspection pit and diesel tank were included and the building was probably used for storage and maintenance of estate vehicles.

10. By May 1985, much of the estate had been sold but Auchenskeoch Lodge still remained as did Lodge Wood on the other side of Whitecroft Lane from Auchenskeoch Lodge in which the subject building was sited.

11. Photographs of the bathing house prior to 2004, when it was largely demolished by a falling tree, showed a stone rectangular building with a slated roof and one large door which could be opened by sliding both parts of the doors along the walls within the interior of the subject building. Those photographs also showed a classic or vintage Mercedes motor car parked within the subject building.

12. Photographs of the building in 2007 showed a shell of a building with no roof and much of it supported by modern brickwork to maintain the structure and no parked motor cars.

13. In November 2005, Auchenskeoch Lodge and Whitecroft Wood were sold, with the seller retaining the ownership of Lodge Wood and, consequently, the subject building.

14. In December 2007, VAD and his wife bought Lodge Wood, including the subject building in its dilapidated state with full planning permission for alteration and change of use to form a dwelling house.

15. In January 2008, VAD contacted HMRC explaining that he proposed to convert the subject building and extend it to form a dwelling house and enquired about the DIY VAT Refund Scheme. VAD had no record of the telephone conversion but suspects that he would have used the term "garage" in describing the building because "at the time I did not know its history". VAD was sent VAT 431 Forms and Notice 719.

16. The conversion of the building started in May 2009 and a completion certificate was granted in September 2013.

17. Before submitting his claim under the DIY VAT Refund Scheme, VAD sought to clarify how the VAT 431 Forms were to be completed and he was informed that these had been changed to VAT 431C Forms and that new notes had been issued specific to those converting buildings and that they could all be downloaded from the internet.

18. VAD stated that until after he submitted his claim, no question was raised by HMRC of the eligibility of a garage occupied together with a dwelling. He does not recall discussing it in his telephone conversation with HMRC nor is there, he says, a reference to it in either set of HMRC's notes.

19. The postal address given to the subject building by the previous owner when applying for planning permission was Auchenskeoch Cottage which VAD continued to use until May 2010 when it was changed to Lodge Wood Cottage to avoid confusion with Auchenskeoch Lodge and the stables where more building activity was being carried out.

20. When completing Form 431C on 24 September 2013, VAD completed Section C "Details of the Property that has been converted – What was the building before you started works?" with the response "a garage (partly demolished)".

21. The total amount of VAT claimed was £20,868.01.

22. On 27 September 2013, HMRC wrote to VAD acknowledging receipt of his claim but asking for further information including (1) plans of the detached garage and (2) evidence that the garage had not been used in conjunction with an existing dwelling for at least 10 years immediately before work started.

23. The Tribunal found that this letter was unclear and so clearly did VAD so that in response VAD provided details of the garage that he intended to build as part of the new construction which, at this stage, was a prefabricated wooden single garage.

24. In response to the second question, VAD explained the history of the building and drew attention to the fact that Auchenskeoch Lodge on the other side of Whitecroft Lane also contained a stable block which accommodated the horse and carriage used at the time of the construction of the Lodge and stated that in the early 20th century the stable block was used to garage a car and "at a later date the pool in the bathing house was filled with boulders and concreted over and used to store two or maybe three vintage cars". In 2006, Auchenskeoch Lodge and its immediate environs were sold with the vendor retaining Lodge Wood (including the subject building). The vendor had secured planning approval in 2004 to convert the subject building in Lodge Wood which, by this time, had become dilapidated and roofless and set about taking out stones from the walls to make space for windows etc. It was in this state when VAD bought it in 2007. He enclosed photographs showing the building in about 2003 and in 2008 as it was when he and his wife purchased the property. He said "the garage/bathing house has never been used prior to our conversion of it, for anything other than as a bathing house or as a garage and I am not clear what other evidence can be provided in answer to your requirement".

25. Armed with this new information, HMRC refused the claim for a refund of VAT under the DIY Scheme on 21 October 2013, stating that "it is conditional on qualifying under the Scheme that the building either must be a new build or the conversion of a new residential building. The legal basis of this is the VAT Act 1994, Schedule 8, Group 5, Note 8 which states:

> 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.
>
> This means that garages are only non residential if they are not occupied together with an existing dwelling. Whether they are integral or detached is immaterial. The conversion of a garage previously occupied as an existing dwelling into a dwelling is not a non residential conversion. It is clear from the information provided that prior to conversion the garage was used in conjunction with an existing dwelling".

26. HMRC also drew attention to the notes for VAT Refunds as follows:- "a new build is a building that has been constructed from scratch. In general, unlike a conversion, it will not incorporate any part of an existing building. This means that where a building is constructed on a site of a pre-existing building it will not incorporate any part of the formed building above ground level. There are situations where you can claim for a new building, even although it may incorporate part of a pre-existing building such as party walls and you have constructed an enlargement or extension of the existing building that creates an additional dwelling provided the additional dwelling is contained entirely within the area of the extension or the enlargement". The letter continued "as the new dwelling incorporates part of an existing dwelling (detached garage) it does not qualify as a new build. As your claim

does not meet the criteria for either a new building or a non residential conversion it has been rejected accordingly".

27. On 9 November 2013, VAD responded requesting an internal review and setting out the reasons for disagreeing with HMRC's decision. In this letter, VAD stated that the subject building was not within the curtilage of any other dwelling and that there was no dwelling within the curtilage of the subject building; that the subject building was not constructed as a garage; that the VAT Act does not define what is a garage stating that many domestic garages are not used for storing cars but everyone accepts that they are still garages. He continued "by the same token, other outbuildings do not become garages just because a motor car could be stored in them - a barn continues to be recognised by the common man as a barn even if it has a motor car stored in it. So the actual possible use of a building is not the proper basis for distinguishing a garage from other outbuildings. The only consistent distinction between a garage and other outbuildings therefore is the purpose for which it was constructed or adapted". He continued stating that the subject building was not constructed as a garage and that the subject building's use, after the pool was filled in and concreted over, was used very much as a barn would be used. The internal dimensions of 6.2 metres wide and 7.9 metres deep with a 3 metre wide and 3 metre high doorway meant "it would have been a barn in all but name. The name 'garage' may have arisen at a time with reference to the estate vehicles but that does not make it a garage in the context of Note 8 which is intended to relate to private motor cars".

28. VAD continued "for a garage to be occupied together with a dwelling, it has to be within the curtilage of the dwelling otherwise every garage with a car in could be said to be used together with the dwelling of the owner of the car regardless of ownership of the garage or the vehicle. VAD explained that on 7 October 2005, Auchenskeoch Lodge, without the subject building and its curtilage, was sold and, at that time, in addition to it no longer being a garage, the subject building was no longer occupied together with a dwelling."

29. "The 'Ten Year Rule' which relates to the restoration to use as a dwelling of a building which was previously lived in, does not apply in this case because for more than three years prior to the start of our conversion, our building was a non residential building.

30. The local planning authority recognised that our building was not a dwelling and, accordingly, approved plans for its conversion and change of use to a dwelling."

31. On 8 January 2014, the review letter upheld the decision to reject the claim for £20,868.01.

32. The review reiterated the decision that the claim was not eligible as it had to be a conversion of a non residential building and from the information provided the subject building was used in conjunction with an existing dwelling prior to conversion.

33. The review referred to VATA Section 35(1D) Schedule 8, Group 5, Notes 7A and 8.

34. The review stated that although the subject building was not originally constructed as a garage it had at some point been used as a garage and, therefore, is classed as a garage.

35. HMRC consider garages occupied with a dwelling to be part of that dwelling and, therefore, not non residential. It said "please note that the term 'garage' not only covers buildings designed to store motor vehicles but also buildings such as barns which are used to store motor vehicles".

36. HMRC said the subject building "can only qualify for the DIY Scheme if it has not been used to store motor vehicles within the last ten years prior to the start of your conversion. As you started your conversion in May 2009, your building could only qualify for DIY Scheme if it had not been used to store a motor vehicle at any time between May 1999 and May 2009. I am sorry but, as your photographs show, a motor vehicle was still stored in there in 2003, the building does not qualify for the DIY Scheme".

37. The review letter made reference to the *Joseph Podolsky* (TC003222) case.

Submissions by VAD

38. VAD says the conversion of the subject building fully complies with the intentions of VATA 1994 which is to allow a refund of VAT paid on the creation of a new dwelling or where the conversion of an existing dwelling represents its rehabilitation after it has not been lived in for ten years or more. Accordingly, as a new dwelling has been created where no dwelling existed previously and an existing dwelling has not been aggrandised, the conversion of the subject building meets the requirements and, therefore, qualifies for a full refund of VAT.

39. VAD says that HMRC have incorrectly interpreted the Notes to Group 5 of Schedule 8 of VATA as they maintain that a garage occupied together with a dwelling is part of that dwelling and as such must comply with the provision of Note 7A(b) before it can be considered a non residential building and so qualify for a refund of VAT paid.

40. VAD says that Note 8 makes reference to a garage occupied together with a dwelling. It thereby distinguishes between a garage that is occupied together with a dwelling and all other garages and whilst the latter is non residential, the former is deemed by Note 8 to be a residential building. They are still all garages and none are buildings designed or adapted for use as dwellings. Note 8, therefore, indicates clearly that not all residential buildings are dwellings.

41. Note 7A also indicates clearly that not all dwellings are residential buildings: a dwelling becomes non residential when no part of it has been used as a dwelling for ten years, but it still may remain a dwelling and it would revert to being a residential building as soon as any part of it was used as a dwelling again, regardless of whether

any conversion work had been done to it. It only ceases to be a dwelling when it becomes uninhabitable.

42. VAD says the terms "residential building" and "dwelling" are not synonymous. For a building or part of it, to change from being a dwelling to not being a dwelling or vice versa requires a physical change in (that part of) the building. A building or part of it, changes from being residential to non residential as a result of satisfying various criteria, whether or not any physical work has taken place. There is no justification for maintaining that a garage occupied together with a dwelling is part of that dwelling.

43. Note 7A states that it is only a building or part of it which was designed or adapted for use as a dwelling or a number of dwellings etc, which is subject to the "Ten Year Rule". This is because only such a building could have been used as a dwelling within the ten years prior to the commencement of the works of conversion. Just as a non residential dwelling reverts to being residential immediately it is used as a dwelling, so a residential garage becomes non residential immediately it ceases to be occupied together with a dwelling.

44. For some time immediately prior to the commencement of the works of the conversion, the subject building was not occupied together with a dwelling and Note 8 does not apply to it.

45. Consequently, the subject building is subject to Note 7A(a) only and Note 7A(b) does not apply to it. The conversion of the subject building, accordingly, qualifies for a full refund of VAT.

46. VAD states that to be a garage occupied together with a dwelling, then the garage must be situated within the grounds (the curtilage) of the dwelling or must otherwise be legally tied to the dwelling (i.e. the use or disposal of the garage separate from the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision).

47. VAD says that the subject building is situated within the boundaries of Lodge Wood, is outwith the boundaries of Auchenskeoch Lodge and is separated from the Lodge by Whitecroft Lane. Those boundaries predate the building of the Lodge and the subject building which was never within the curtilage of Auchenskeoch Lodge and was never legally tied to it. Accordingly, the subject building was never a garage occupied together with a dwelling and, consequently, was always a non residential building.

48. VAD says that the subject building is not a garage and that it is not correct for HMRC to hold that any building in which a car has been stored is a garage and the case law upholding this position is in error.

49. VAD states that garages come in all shapes and sizes, as do cars, and carried out a survey of 600 different types of motor car and established that a typical garage would be 3.6 metres wide, 6 metres long and 2.4 metres in height. Accordingly, the subject building is the wrong shape and size to be a garage and is certainly not big

enough to be a double garage because of the configuration of the doors and the size of the building would not allow this. VAD says that a building which has the dimensions substantially greater than necessary for the accommodation of one or more cars may have garaging space within it but is clearly not a garage. Some buildings are designed specifically to be multipurpose, for example, a workshop cum garage. Such a building may be described as a workshop with garaging space within it. The presence of walls, partitioning the garage space from the workshop area, are neither necessary nor desirable for either purpose and their absence does not detract from the different functions of the building.

50. Most occupiers of garages use their cars during working or leisure periods when the garages are empty of cars but this does not mean that the garage ceases to be a garage.

51. A significant distinguishing feature of a garage is that it remains a garage even when it is not being used. Other buildings, such as workshops, barns, wood stores etc. may have space within them used from time to time as garage space but which have not been adapted for use as a garage and revert to their proper use when devoid of a car.

52. VAD says the subject building was not designed or built for the storage of motor cars nor was it adapted for the purpose of storing a car or cars. Its dimensions are substantially in excess of the requirements for the storage of one car and inadequate for the storage of more than one car and submitted a pictorial diagram, based on the dimensions of an average garage in proof of this. VAD says that references to the subject building as a "garage" is a result of a careless use of the term and a desire to give the building a functional name which is both brief and sounds attractive to the user.

53. It has no significance in properly defining the use or purpose of the building. VAD says that the whole of the subject building is not a garage because the dimensions are substantially greater than needed to accommodate a single car. The width of the door makes it impractical to accommodate more than one car and so it must be compared to a typical single garage.

54. The subject building has more than twice the floor area of the largest single garage and three times the floor area of a standard size (18 feet x 10 feet) single garage.

55. The bulk of the subject building is not garage space and is a non residential part of the building. Accordingly, VAD says that Note 9 becomes relevant in so far as the conversion of the subject building creates an additional dwelling, namely a dwelling additional to the dwelling, together with which the garage space within the subject building is said to be occupied.

56. To the extent that any apportionment of a refund of VAT is appropriate, it would be equitable to assign a proportion of the costs incurred to the subject building from and including the foundations up to the ground floor ceiling height and to the

roof structure to the aggrandisement of a garage space within the subject building and to refund VAT paid on all other costs incurred in the conversion works.

57. VAD requests that the appeal is upheld and a full refund of VAT is paid. In the event that the appeal is not upheld, in its entirety, VAD requests that the appeal be upheld to provide a refund of VAT paid on the costs of the conversion work apportioned as appropriate. VAD say that compensation should be paid on any payment for the delay since the claim was submitted in September 2013.

58. VAD referred to the *Pololski* case which he says is flawed because although the building in question had been used as a garage, it was not in fact used as a garage at the time of conversion and it was not occupied together with a dwelling. The building prior to its conversion was part residential and part non residential with a small part of the building being used to park a car and to house agricultural equipment, vans and tractors. The Tribunal in that case decided that at least part of the subject building qualified as a garage occupied within a ten year period with the farmhouse. In that case, the appellant accepted that part of the subject building was used as a garage and the Tribunal held that the subject building fell within Note 8 and, furthermore, that, as it failed to qualify under Note 8, consideration of Note 9 was irrelevant.

59. In the *Antonina Murray Smith* case, VAD says that the taxpayer owned both the dwelling and the subject building and that cars were never stored in that property, having been originally built as a school. The taxpayer garaged her cars on the road, outside her property and the building never looked like a garage and two thirds of its structure could not be used as a garage.

HMRC's Submissions

60. HMRC say that VAD was carrying out a conversion of a garage that had been utilised with a domestic dwelling and, therefore, was not eligible for the DIY Scheme.

61. The property had been used as a garage with a dwelling in the ten years prior to the conversion taking place. Even although the property had been designed as a bath house, it had been used to store motor vehicles and, therefore, had the properties of a garage.

62. HMRC refer to the case of *Joseph Podolsky* which supports the view that the building is not an eligible building but also to the case of *Antonina Murray Smith* which they say supports HMRC's position.

63. HMRC referred to the picture of the derelict building, showed the roofline of the Lodge behind the building, and made reference to the pedestrian gate leading from Auchenskeoch Lodge across Whitecroft Lane to the subject building as evidence that the subject building could and was occupied together with a dwelling, being Auchenskeoch Lodge.

64. HMRC say that Note 8 makes no reference to a garage having to be within the curtilage of a building; it just has to be occupied together with a dwelling.

65. HMRC say that the subject building is no different to the stable block which is on the same side of Whitecroft Lane as Auchenskeoch Lodge and slightly further away from the Lodge than the subject building.

66. HMRC made reference to the photograph clearly showing a motor car situated within the garage and say that the photograph shows what most people would regard as a garage.

67. HMRC say that Note 8 has to be used to interpret Note 7A, so Note 7A comes first and Note 8 explains it. HMRC say that because of Note 8, the building is not non residential and, therefore, becomes residential and is caught by Note 7A(b) and the ten year period comes into effect and, by Note 8, the building is residential and, as it was adapted for such use within ten years of commencement of the works, no relief is available.

Decision

68. The burden of proof was on VAD to prove, on the balance of probabilities, that the subject building had not been used as a garage occupied together with a dwelling during the period of ten years immediately preceding the commencement of the works which were the subject of the VAT claim.

69. This was stated by HMRC as between the period May 1999 and May 2009.

70. When VAD completed the claim form, he described the previous use of the subject building as a "garage (partly demolished)" and then, on further enquiry as to its use in the previous ten years, submitted photographs which clearly showed that a motor car was stored within it.

71. VAD put forward a well argued and logical series of submissions to the Tribunal in a well presented case.

72. It was clear the subject building was neither designed nor adapted in whole or in part as a dwelling or a number of dwellings or for a relevant residential purpose and, were it not for Note 8, that would be the end of the matter.

73. The Tribunal considered VAD's submission that at the time of the conversion, the subject building was not a garage occupied (meaning present tense) together with a dwelling because, for some four years prior to that, as there was no dwelling for it to be occupied with.

74. Accordingly, VAD says that Note 8 does not apply and, consequently, the subject building is subject to Note 7A(a) only and not 7A(b) because Note 7A states that it is only a building or part of it which was designed or adapted for use as a dwelling which is subject to the ten year rule.

75. The Tribunal do not agree with this interpretation of Notes 7A and 8.

76. The Tribunal consider that any part of a building which does not satisfy Note 7A *or* (emphasis added) falls within the restriction in Note 8, is not within Section 35(1D).

77. In following this interpretation, the subject building is deemed to be residential and, therefore, although neither designed nor adapted for use as a dwelling, the test is whether, within the period of ten years immediately preceding the commencement of the works, it has been occupied together with a dwelling.

78. The Tribunal considered VAD's submission that the effect of "residential building" and "dwelling" not being synonymous means there is no justification for maintaining that a garage occupied together with a dwelling is part of that dwelling and considered whether that is justified or not. The legislation is quite clear that a non residential building or part of a non residential building does not include a garage occupied together with a dwelling.

79. The effect of this is that Note 8 deems "a garage occupied together with a dwelling" to be "residential", even if it was not designed or adapted for use as a dwelling, if within a period of ten years immediately preceding the commencement of the relevant works, there has been use as a garage.

80. The subject building had been designed as a bathing house but then, subsequently, the bathing area was partially filled in although an inspection pit was retained.

81. VAD stated in his response to HMRC that he believed the subject building had been used for storage and maintenance of estate vehicles. The photograph clearly showed a parked car within the subject building.

82. In the *Antonina Murray Smith* case, the definition of "garage" was considered with reference to a decision in *Grange Builders v Customs and Excise Commissioners* [2005 V & DR 147].

83. That decision involved a barn and not a building that had been designed and constructed as a garage and the Tribunal 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 purposes 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 may all have in our mind's eye 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 though it looks like a barn or indeed a tower – provided it is used for the purposes of storage or housing of one or more motor vehicles".

84. The Tribunal in that case, however, concluded that the construction and design of a building was a relevant consideration and, "if it could 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 is that a building that has been constructed or designed as a garage does not simply cease to be a garage because the owner chooses not to store his vehicle in it".

85. The Tribunal in this case, having weighed up the evidence, is satisfied that the subject building was on the balance of probabilities used for the storage of vehicles and certainly was so used in 2003.

86. The adaptations that took place to the bathhouse included the installation of an inspection pit, a diesel storage tank and, from the photographs, the type of doors were appropriate for garage use.

87. The Tribunal considered, therefore, that the test for the partial use of the subject building as a garage, is established but that the dimensions are in excess of the requirements for storage of one car and inadequate for the storage of more than one car.

88. The Tribunal then considered whether the subject building was "occupied together with a dwelling" and the logical point that there must be some form of connection as otherwise any garage owned some distance from a dwelling with no legal tie to a dwelling, could be included within the provision to make it meaningless in terms of what the legislation aims to provide.

89. The Tribunal considered that the use of the subject building as a garage had been, at least in 2003, by the owner of Auchenskeoch Lodge as it was in the near vicinity of Auchenskeoch Lodge as the bathhouse had been when it functioned as such and had a very appropriate if not a dedicated entrance by a gate over Whitehouse Lane to the subject building. All these factors led the Tribunal to the conclusion that the subject dwelling was occupied together with a dwelling, Auchenskeoch Lodge, in the 10 years prior to VAD's construction works.

90. The next issue the Tribunal considered was the status of the subject 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 garage. The Tribunal referred to Judge Tildesley's judgement in *Antonina Murray Smith* in the following terms which considered the relevant cases as follows:-

> "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.
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> 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 of 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 about 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."

91. In the *Smith* case, the Tribunal adopted the reasoning of the Tribunal in *John Clark* and agreed with the decision that the all or nothing stance taken in *Cottam* and *Podolsky*, albeit in different decisions, was not in accordance with the statutory provisions as properly constructed.

92. This Tribunal also follows that approach.

93. The *Smith* appeal case was, however, dismissed but that decision can be distinguished from the current circumstances as the workshop/garden shed and room over the double garage were an extension of the residential provision of a neighbouring dwelling.

94. The Tribunal agree with the judgement of Judge Berner in *John Clark* for the reasons given at paragraph 42 of his judgement and, similarly, conclude that the conversion of the non residential part of the subject building in this case did create an additional dwelling for the purpose of Note 9 and that the conversion was, accordingly, to that extent, within Section 35(1D) and was a residential conversion within the meaning of Section 35(1A)(c).

95. HMRC stated that no quantum claim had been considered because the claim had been rejected and VAD put forward a claim for any refund of VAT to be apportioned which should include the foundations up to the ground floor ceiling height and the roof structure to the aggrandisement of the garage space within the subject building.

96. The Tribunal do not, at this stage, propose to make a finding of fact as to the precise percentage of the existing building that was used as a garage. The Tribunal

can consider that question as a separate matter if there remains any dispute on it between the parties.

97. The Tribunal accept that the works carried out by VAD constituted a residential conversion within Section 35 to the extent that they consisted of the conversion of the part of the subject building, excluding the garage area.

98. The Tribunal allow the appeal subject to the adjustment to exclude from VAD's claim for VAT attributable to the conversion of the garage area.

99. The Tribunal hopes the parties will be able to agree the required adjustment.

100. We adjourn the proceedings for a period ending 30 days after the release of this decision for the parties to seek to achieve such agreement and to notify the Tribunal.

101. The parties have liberty to apply for a hearing to determine any remaining dispute on the adjustment.

102. 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.

RUTHVEN GEMMELL

TRIBUNAL JUDGE

RELEASE DATE: 24 November 2014