[2015] UKFTT 626 (TC)

TC04756

Appeal number: TC/2014/04099

VALUE ADDED TAX – conversion of a building into two semi-detached houses – the building before conversion had a residential and a non-residential part – whether VAT incurred on the works of conversion is recoverable as input tax on the basis that the works were used to make zero-rated supplies – whether item 1(b), Group 5, Schedule 8, VATA applied – whether the conversion included the conversion of a non-residential part of a building – held, no – appeal dismissed. The Tribunal's decision in* Calam Vale *followed, the Tribunal's decision in* Alexandra Countryside Investments *not followed,* C & E Commrs v Jacobs **[2005] STC 1518** *considered

FIRST-TIER TRIBUNAL
TAX CHAMBER

DM & DD MACPHERSON **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC
IAN PERRY FRICS

Sitting in public at Bristol on 27 May 2015

D M MacPherson, partner in the Appellant, for the Appellant

Sadiya Choudhury, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by the partnership of DM & DD MacPherson ("the Partnership"), which is in business as a property developer, against a decision by the Respondents ("HMRC") that the Partnership's VAT return for the period 01/14 contained an inaccuracy in that it showed VAT reclaimed on purchases and other inputs as £5,789.61 when (in HMRC's view) the VAT which the Partnership was entitled to reclaim was £1,496.26 – a difference of £4,293.35. HMRC's decision was communicated to the Partnership in a letter dated 2 May 2014. That decision was upheld on review – the review decision being communicated to the Partnership in a letter from Review Officer Ian Hartley dated 22 July 2014. The Partnership appealed to this Tribunal by a Notice of Appeal dated 29 July 2014. The disallowed amount is VAT claimed as input tax, being VAT charged to the Partnership on supplies of works carried out at a property owned by the Partnership, 63, High Street, Bradenstoke ("the Property").

2. The issue raised by the appeal is whether a grant of an interest in the Property by the Partnership would be zero-rated under item 1(b), Group 5, Schedule 8, VAT Act 1994 ("VATA"), as 'the first grant by a person converting a non-residential building or a non-residential part of a building into a building designed as a dwelling or number of dwellings …'.

3. The relevant facts were not in dispute, and we gratefully quote from an agreed Statement of Facts and Issue supplemented by oral submissions, and find facts accordingly.

4. On 11 June 2013, the Partnership purchased the Property for £171,000. The Property at the time of the purchase consisted of old village shop premises, office space and associated storage on the ground floor, as well as living accommodation on both ground and first floors. The access to the living accommodation was from within the building – that is, there was no external front door to the living accommodation.

5. On 12 May 2014, the Partnership obtained planning permission from Wiltshire Council to convert the Property into two semi-detached dwellings. According to the plans submitted in support of the application for planning permission, each of those dwellings includes areas that previously formed part of the living accommodation in the old village shop premises, as well as the commercial areas, that is, the office space and associated storage space.

6. We were told that the Partnership would commence marketing the Property for sale shortly after the time when the appeal was heard and that at the time of the hearing of the appeal the conversion work was not quite complete. The two semi-detached dwellings were each of them 4-bedroom houses.

7. Mr MacPherson submitted, on behalf of the Partnership, that the Partnership had converted a non-residential part of a building into a building designed as two dwellings.

8. Ms Choudhury, on behalf of HMRC, submitted that the Property before conversion was not a non-residential building, and also that item 1(b), Group 5, Schedule 8, VATA does not does not apply when the subject of the conversion is a building which contains one or more residential parts as well as one or more non-residential parts.

9. The relevant Notes to Group 5, Schedule 8, VATA, to which our attention was drawn were Notes (7), (9) and (10). They are in the following terms:

10. Note (7): 'For the purposes of item 1(b), and for the purposes of these Notes so far as having effect for the purposes of item 1(b), 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 grant of the major interest; and
>
> (ii) no part of it has, in the period of 10 years immediately preceding the grant, been used as a dwelling or for a relevant residential purpose.'

11. Note (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.'

12. Note (10): 'Where—

> (a) part of a building that is constructed is designed as a dwelling or number of dwellings or is intended for use solely for a relevant residential purpose or relevant charitable purpose (and part is not); or
>
> (b) part of a building that is converted is designed as a dwelling or number of dwellings or is used solely for a relevant residential purpose (and part is not)—
>
> then in the case of—
>
> (i) a grant or other supply relating only to the part so designed or

intended for that use (or its site) shall be treated as relating to a building so designed or intended for such use;

(ii) a grant or other supply relating only to the part neither so designed nor intended for such use (or its site) shall not be so treated; and

(iii) any other grant or supply relating to, or to any part of, the building (or its site), an apportionment shall be made to determine the extent to which it is to be so treated.'

13. It should be noted that the above provisions, in so far as they relate to a relevant residential purpose and/or a relevant charitable purpose, or to a building (or part of a building) no part of which has been used as a dwelling in the 10 years immediately preceding the grant, are not engaged on the facts of this appeal.

14. We were taken by the parties to three decided cases: *Calam Vale Ltd v Commissioners of Customs and Excise* (a decision, Decision No. 16869, of the VAT and Duties Tribunal, Chairman: Paul W de Voil, released on 4 October 2000); *Customs and Excise Commissioners v Jacobs* [2005] STC 1518 (a decision of the Court of Appeal); and *Alexandra Countryside Investments Limited v Commissioners for HMRC* (a decision, Decision TC02751, of this Tribunal (Judge Kempster and Mr Jolly) released on 14 June 2013.

15. *Calam Vale* concerned the conversion of a public house, which included living accommodation, into two dwellings. As in this appeal, the facts of *Calam Vale* were that in the case of each of the two dwellings created, the conversion had been of part of the original living accommodation, as well as part of the public rooms.

16. The Tribunal in *Calam Vale*, "with the greatest reluctance" (because they thought the result was 'absurd' – *ibid.* [11]) concluded that the conversion in that case did not fall to be zero-rated, because it did not come within item 1(b), not being 'the simple conversion of a non-residential part of a building but the conversion of that part plus a residential part' (*ibid.* [10].

17. The Tribunal in *Calam Vale* considered whether or not Note (9) assisted the appellant in that case, but concluded that it did not. Their reason for that conclusion was that the conversion did not come within item 1(b), and Note (9) ought not to be construed so that it extended the scope of zero-rating provided for by item 1(b).

18. In this appeal, Ms Choudhury, for HMRC, submits that the decision in *Calam Vale*, while not binding on this Tribunal, is to be preferred to that in *Alexandra Countryside Investments*.

19. *Alexandra Countryside Investments* concerned another conversion of a public house into two semi-detached houses. The public house had within it, before the conversion, a manager's flat – that is, a residential part – and parts of what had been the manager's flat were incorporated into both of the semi-detached houses.

20. HMRC urged the Tribunal in *Alexandra Countryside Investments* to take the same approach as had been taken in *Calam Vale*. However the appellant in *Alexandra Countryside Investments* relied on the Court of Appeal's decision in *Jacobs*.

21. In *Jacobs*, the Court of Appeal had considered the interpretation of Note (9) to Group 5, Schedule 8, VATA and had held, in relation to a claim for a refund of VAT under the do-it-yourself ("DIY") builder relief in section 35, VATA (not by reference to section 30, VATA (zero-rating), which is in point in this appeal, as it was in *Calam Vale* and *Alexandra Countryside Investments*), that Note (9) should be interpreted on the basis that the result of the conversion – in terms of the creation of an additional dwelling or dwellings, can be found by looking at the converted building as a whole, not just at the non-residential part of the building.

22. Section 35, VATA confers a right on a DIY builder to claim a refund of VAT on goods used and the services of certain contractors used in carrying out a 'residential conversion' (Section 35(1A), (1B)). A 'residential conversion' is defined for the purposes of section 35 in section 35(1D) VATA, as follows:

> '(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 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.'

23. By section 35(4) VATA the notes to Group 5, Schedule 8 VATA (but not Note (7)) apply for construing section 35. Thus Note (9) to Group 5, Schedule 8 VATA applies for this purpose.

24. In *Jacobs*, an original school building containing residential and non-residential parts was converted into four dwellings, a mansion and 3 staff flats.

25. Ward LJ (with whom Clarke and Laws LJJ agreed) considered section 35(1D) VATA and stated that the works of conversion constituted a residential conversion for the purposes of section 35 *to the extent only* that they consisted in the conversion of a non-residential (part of a) building. He said that if and to the extent that the works consisted in the conversion of what was not non-residential, then those works were outside the scope of section 35(1D) – that is, they were not works constituting a residential conversion – see: ***ibid.*** [34].

26. In *Alexandra Countryside Investments*, the Tribunal did 'not see any obvious distinction' between the formulations used in section 30 and section 35 (***ibid.*** [24]). That is, they did not see any obvious distinction between the requirement that a person converts a non-residential building or a non-residential part of a building into a building designed as a dwelling or number of dwellings (item 1(b), Group 5, Schedule 8, VATA) and the requirement that 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 building designed as a dwelling or number of dwellings (section 35(1D) VATA).

27. The Tribunal in *Alexandra Countryside Investments* commented that both of the above formulations require a conversion of a non-residential building or a non-residential part of a building into a building designed as a dwelling or number of dwellings (***ibid.*** [24]).

28. It was for that reason that the Tribunal in *Alexandra Countryside Investments* concluded that 'in considering the conclusions of the Court of Appeal in *Jacobs* on the meaning of Note (9), the position under both section 30 and section 35 is, for the purposes of the current appeal, identical'.

29. Although HMRC did not appeal the Tribunal's decision in *Alexandra Countryside Investments*, Ms Choudhury submits that the decision in *Calam Vale* is to be preferred to it and indeed that *Alexandra Countryside Investments* was wrongly decided.

30. We accept Ms Choudhury's submissions and respectfully disagree with the Tribunal in *Alexandra Countryside Investments* when they saw no distinction between the parameters of a conversion which would qualify for a refund under section 35 VATA and the parameters of a conversion which would give rise to a recovery of input tax under section 30 VATA. Section 30 VATA is the zero-rating provision which introduces Schedule 8 – see: section 30(2) – and thus item 1(b) of Group 5, Schedule 8 VATA.

31. When construing item 1(b), to see whether, in any particular case, a person is converting (or has converted) 'a non-residential building or a non-residential part of a building into a building designed as a dwelling or number of dwellings', one has, in our judgment, to examine the conversion actually carried out. In this case it is clear that the Property (taken as a whole) was not a non-residential building within the

definition in the applicable Note (7). This is because it was designed for use as a dwelling by virtue of the living accommodation contained within it. Although we accept that if one divided up the Property one would find that it contained both a residential part and a non-residential part, nevertheless it would not be correct to describe the conversion works in this case as the conversion of the non-residential part of the building – they were works of conversion of the entire Property. For this reason we hold that the Partnership has not converted a non-residential building or non-residential part of a building and we are therefore in agreement with the conclusion of the Tribunal in *Calam Vale* that the conversion does not fall to be zero-rated, because it does not come within item 1(b), not being 'the simple conversion of a non-residential part of a building but the conversion of that part plus a residential part' (*ibid.* [10]).

32. The position is not the same under section 35. There the words 'to the extent that' in the definition of residential conversion in section 35(1D) – '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 building designed as a dwelling or number of dwellings' – introduce the concept of works qualifying as a residential conversion even if what is converted includes a residential part of a building (as was the position in *Jacobs*). In such a case an apportionment of the total VAT incurred to find the amount which can be claimed under section 35 is provided for by Note (10) to Group 5, Schedule 8 (as applied by section 35(4) VATA). The amount which can be claimed will be the amount of VAT attributable to the works carried out in converting the non-residential part of the original building (see: Note (10)(b) and (iii)).

33. This is enough to dispose of this appeal, which must be dismissed. Note (9), the interpretation of which was at the centre of the *Jacobs* appeal (see: *ibid.* [27]) is not engaged. That is, it is irrelevant on the facts of the present appeal that 2 dwellings were created in a building in which there had only been one dwelling before the works of conversion, because the threshold condition for zero-rating in item 1(b), Group 5, Schedule 8 VATA is not satisfied. For the same reason Note (10), dealing with apportionment is not engaged on the facts of this appeal.

34. Ms Choudhury in her Skeleton Argument raised the possibility that the Partnership might argue that the supply of the Property be taxed at two different rates following *European Commission v France* [2012] STC 573 (the 'French Undertakers' case). Mr MacPherson, for the Partnership, in our view correctly, declined to take any such point on the basis that there was no concrete and specific aspect of the supply of the Property that would attract zero-rating.

35. For the reasons given above, the appeal is dismissed.

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

"Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN WALTERS QC

TRIBUNAL JUDGE
RELEASE DATE: 30 NOVEMBER 2015