[2017] UKFTT 130 (TC)

TC05624

Appeal number: TC/2015/7264

VAT – construction of a pirate island – zero rating – Note 2 to Group 5 Schedule 9 Value Added Tax Act 1994 – building designed as a dwelling – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE MASTER WISHMAKERS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE AMANDA BROWN
BEVERLEY TANNER

Sitting in public at Centre City Tower, 5 – 7 Hill Street, Birmingham, B5 4UU on 10 January 2017.

Mr Sege Rosella former director of the Appellant.

Ms Ester Hickey, presenting officer of HM Revenue and Customs, for the Respondents

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DECISION

1. This is an appeal by The Master Wishmakers Limited ("the Appellant") against assessments raised by HM Revenue & Customs ("HMRC") on 29 April 2015 in the sum of £75,547 for VAT accounting periods 08/12 to 08/13 inclusive ("the Assessments").

2. The Assessment sought to recover output tax said to have been under declared on supplies made to Mr Challis in connection with a development known as Challis Island (see paragraphs 9 - 17 below).

3. For the reasons stated below the Tribunal finds that the supplies were properly standard rated and the VAT shown on the invoices should have been declared as output tax by the Appellant.

Background

4. On 18 February 2015 the Appellant was the subject of a VAT assurance visit during which the officer identified that 15 VAT invoices had been raised by the Appellant in respect supplies relating to the construction of Challis Island on which VAT had been shown on the invoice but in respect of which there had been no corresponding declaration on the VAT return.

5. The officer established that at the time the works were undertaken the Appellant had been uncertain as to the liability of the supplies made. Enquiries had been made of HMRC who, it was said, had advised that given the unusual nature of the development, liability was complex. Mr Rosella told the Tribunal that HMRC's helpline advised that the supplies be standard rated for the time being and liability considered at a later point. It appears that the Appellant treated all supplies made regarding the construction of Challis Island as standard rated. The total value of the project was in excess of £1m and VAT had been declared on all but the 15 invoices identified. These invoices, for some reason not now explicable by the Appellant, whilst showing VAT had been processed as if the total invoice amount was net of VAT and by implication eligible to be zero rated.

6. On 29 April 2015 HMRC issued the Assessments to recover the VAT under declared. The Assessments were the subject of a statutory review which upheld them. The Appellant appealed on 18 December 2015.

7. The issue before the Tribunal concerns whether some or all of the works undertaken in connection with the construction of Challis Island were eligible to be zero rated under Item 2 to Group 5 Schedule 8 Value Added Taxes Act 1994 ("the Zero Rating Provision").

8. A number of matters were raised in correspondence between the parties which are not matters over which this Tribunal has jurisdiction:

(1) HMRC contend that as an alternative to the Assessment they have the power to recover the VAT shown in the invoices pursuant to paragraph 5 Schedule 11 Value Added Taxes Act 1994 as a debt to the Crown. As a matter of law that is correct; however, the Assessments are not the means by reference to which debt due to the Crown is collected and cannot be a justification for the Assessments. This Tribunal cannot consider recovery by way of debt due to the Crown and does not consider any defence of the Assessment on these grounds as within its jurisdiction.

(2) The Appellant contends that he was misled by the HMRC when he contacted the enquiry line. Whilst Mr Rosella was keen to tell the Tribunal of the circumstances of the calls (of which HMRC had no record) the Tribunal was clear during the hearing that misdirection was not an issue within its jurisdiction. The Appellant was referred to the Adjudicator should it wish to pursue such an allegation.

Challis Island

9. The Challis Island development is an unusual one and certainly one which had not been contemplated by the relevant VAT legislation.

10. Lakeside View is a recreational site owned by Mrs Dickerson. It consists of an enclosed area of land lying between a large industrial estate and a landfill site. It comprised an open body of water and an open field. The only buildings on the site prior to the development of Challis Island were a private lakeside boat house and a stable block that had been converted into offices. There is no residential use of the site or any land in its vicinity.

11. The development which is the subject of the appeal consisted of various engineering operations relating to the dredging of the lake (which had been originally formed as a consequence of gravel extraction) and the use of the silt extracted to construct an island on which five "themed recreational structures" were constructed.

12. The island itself was situated at the opposite end of the lake to the boat house. It is kidney shaped and 4m above the lake bed and 2m above water level with graded sides and relatively flat top. There is a channel dug in the surface of the island through which a stream flows and runs over a manmade waterfall constructed in the inner curve of the kidney and, the Tribunal was told, acted to buttress the island construction.

13. The 5 structures built on the island were designed to depict an abandoned 18th century colonial island with a number of surviving, but run down, Georgian-style buildings. Together they provide an "atmospheric and theatrical theme". All buildings are built using robust and good quality materials, including oak. They stand on simple consolidated hardcore foundations.

14. The buildings comprise:

(1) The Black Doubloon – a 1.5 story unit with ground and mezzanine floors comprising of a head (toilet and wash basin), snug, bar, cellar and quarter deck.

(2) Coffer Cabin – a single story unit built in the style of a former military commander's office and comprising: a "head" including shower, wash basin and toilet; a "galley" including a dishwashing sink, built in fridge and combination oven/microwave; a "bunk" where there is a bed; and a "ward room" where there is grand comfortable chair and a large colonial desk and chair are situated. The ward room leads on to a veranda.

(3) Lubbers Locker – single storey unit built in the style of a small store or lock up

(4) Dead Man's Deck – a free standing open structure built in the style of the ruins of a military hospital and mortuary

(5) Gibbet Gate – a free standing open structure built in the style of an abandoned battlemented entrance of the former garrison

15. In addition to the five buildings there are a number of other structures including lamp posts, skeleton cage and waterfall.

16. The Tribunal was shown a number of photographs and a video of Challis Island. Whilst somewhat unusual it was clear that the construction and artistry of the development was exceptional.

17. The Tribunal were told that Mr Challis did intend and currently does use the Island for occasional residential purposes.

Planning permission

18. When Mr Challis first approached the Appellant with the concept for Challis Island he did not consider that planning permission was required for it. Mr Rosella said that Mr Challis had instructed the Appellant to commence design in 2012. Works to the lake commenced on 7 January 2013.

19. The first planning application for the development was submitted in September 2013 and was later withdrawn. The second application was made on 11 November 2013. By the time the second application was submitted the works were complete.

20. Retrospective planning permission was granted by South Cambs District Council on 24 February 2014.

21. The planning statement supporting the planning application stated:

(1) "The recreational structures that have now been placed on the island… To provide this atmospheric and theatrical theme the buildings are of bespoke design, all specifically designed and built for this purpose and effect… The units have been designed and built solely for private recreational purposes and are not intended to be used for full-time habitation" (para 3.4)

(2) " … this site has been used by the family for leisure and recreational purposes for a considerable period of time and this is very much a private family facility … that is not intended to be open to the public. The current development will remain for the family's personal enjoyment"

5 (3) "… The proposals are directly related to outside recreational uses, that clearly relate to the family's historical use of the site for recreational purposes" (para 5.1)

(4) "whilst the erection of themed recreational buildings may be a relatively novel form of development, the proposals have much in common with proposals 10 for the erection of stables, which are effectively buildings of timber construction, effected for private recreational use" (para 5.2)

22. The planning permission when granted was retrospective to the date of construction.

23. The grant was subject to a number of conditions. Pertinent to the present appeal 15 was condition 2: "The use, hereby permitted, shall be for the private recreational use only by the owner of Lakeside View (Reason – To protect the amenities of adjoining property and that the public use of the site would require a different planning assessment". The information also provided "This planning consent does not give consent for the habitation or renting out of the no 5 recreational buildings on the 20 island. This requires a separate planning permission.

The Law

24. Section 30 Value Added Taxes Act 1994 and the Zero Rating Provision provide for the zero rating of:

The supply in the course of construction of (a) a building designed as a dwelling 25 … of any services related to the construction other than the than the services of an architect, surveyor or person acting in a consultant or in a supervisory capacity.

25. The notes to Group 5 Schedule 8 provide the definition of the phrase "designed as a dwelling". Note 2 provides:

30 A building is designed as a dwelling … where … the following conditions are satisfied:

(a) the dwelling consists of self-contained living accommodation

(b) there is no provision for direct internal access from the dwelling to any other dwelling or part thereof

35 (c) the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision, and

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

26. Note 11 provides:

5 Where a service falling within Item 2 … is supplied in part in relation to the construction of a building and in part for other purposes, an apportionment may be made to determine the extent to which the supply is to be treated as falling within item 2.

27. Section 73A Town and Country Planning Act 1990 provides:

10 Planning permission for such development may be granted so as to have effect from (a) the date on which the development was carried out; or (b) ….

The arguments

28. HMRC's challenge to the liability of the supply principally focused on conditions (c) and (d) of note 2. . HMRC contended that even were each building to be considered separately none met the conditions in Note 2 of the Zero Rating 15 Provision. However, they also contended that even in the event that any building did so qualify there was no entitlement to zero rate the works associated with its construction because it was part of a single development which should properly be standard rated.

29. HMRC contended that should any of the buildings qualify for zero rating 20 requiring an apportionment of the consideration payable for whole development as between the standard and zero rated elements note 11 would have provided the mechanism for doing so. However, in HMRC's submission note 11 required such an apportionment to be undertaken at the time the invoices were issued and not subsequently? Although the argument was not clearly put the Tribunal understood the 25 HMRC representative to be contending that in the event that the Tribunal determined that some of the works undertaken were eligible to be zero rated the Assessments should, nevertheless be upheld on the grounds that the Appellant had not apportioned the invoices at the time of issue. It was further contended that any apportionment of the invoices would need to be undertaken by reference to the submission of a claim to 30 overpaid VAT pursuant to section 80 Value Added Taxes Act 1994 provided such claim was submitted within the time limits prescribed and otherwise in accordance with the requirements for such claims.

30. HMRC also set out their views on each of the buildings and structures separately and contended that the only building or structure that met any of the 35 conditions prescribed in Note 2 was Coffers Cabin and that therefore all other buildings or structures were ineligible to be zero rated. They accepted that the conditions set out in note 2(a) and (b) were met in relation to Coffers Cabin; ie. that it consisted of self-contained living accommodation with no provision for direct access to any other dwelling. Their objection to zero rating Coffers Cabin was that it failed 40 to meet conditions 2(c) and (d).

31. As regards condition (c) HMRC contended that both the separate use and separate disposal of Challis Island was prohibited by the terms of the planning consent which required that the development be used only by the owners of Lakeside View.

5 32. The Tribunal was referred to a number of decisions of the First and Upper Tier Tribunal. The majority of these cases concern tied accommodation.

33. By reference to the judgements in *Roy Shields [2014] UKUT 453* and *Richard Burton [2016] UKUT 20* HMRC invited the Tribunal to look exactly at the terms of the planning consent and what their effect is. It was contended that there was no 10 residency occupancy at all. It was further contended that as any use of the development was restricted to the owners of Lakeside View both separate use and disposal were prohibited.

34. The case of *Lunn [2009] UKUT 244* was considered analogous to the present case on the basis that the Upper Tribunal had determined that use of the building 15 constructed in that case was limited to use ancillary to the main dwelling.

35. As regards condition (d) HMRC referenced two First Tier Tribunal cases. By reference to these cases (discussed below) HMRC contended that as there was no planning permission in place at the time the supplies were made (ie in the period 2012 – 13) the terms of condition (d) had not been met.

20 36. The Appellant essentially contended that the note 2 conditions were met in respect of Coffers Cabin (they accepted that all other structures did not meet the note 2(a) conditions and did not seek zero rating in respect of the works attributable to them) in the same way as they would be met for a holiday home which HMRC accept as eligible to be zero rated under the terms of Notice 708 paragraph 5.4.

25 37. The Appellant's position on the retrospective planning permission was that pursuant to s73A Town and Country Planning Act 1990, the development had been granted planning consent with effect from the date of construction and hence that the terms of Note 2 were met.

Note 2(d)

30 38. Note 2(d) requires that a building will not be designed as a dwelling if the construction is not carried out in accordance with the terms of the planning consent.

39. The Tribunal was referred by HMRC to two authorities in this regard: *Northside Management Limited [2012] UKFTT 647* and *Cavendish Green [2016] UKFTT 620.* The Appellant referred to *Patel v HMRC [2014] UKUT 361.*

35 40. *Northside* concerned the application of note 2 to the grant of leases by a person constructing buildings in respect of which there was a restriction on full time occupation of the buildings. The supply in question was not therefore an Item 2 supply rather an Item 1 supply. The importance of that distinction arises as a consequence of note 13 to Group 5 which provides that the grant of an interest in a

building designed as a dwelling is not within Item 1 if the recipient of the supply of the interest in land is not entitled to reside in the building throughout the year (either as a result of the grant or a planning consent or both).

41. Northside had developed properties which were subject to a planning consent which restricted occupation to 10 months of the year. Consistent with the planning consent the leases granted in the buildings were similarly restricted. Subsequent to the grant of the leases the planning consents were amended to remove the occupancy restriction.

42. Northside argued that as a consequence of the removal of the occupancy restriction the grant of the leases should be eligible to be zero rated retrospectively. HMRC resisted such an argument contending that compliance with note 2(d) was required at the time of supply (in this case the grant of the lease) and that the terms of note 13 required the focus to be at the time of the grant.

43. The Tribunal reviewed the correspondence with the planning authority and the revised terms of planning restriction and concluded that it was not clear that the planning restriction had been removed retrospectively back to the date of the grant of the permission. The Tribunal also noted that as at the date of the grant of the leases the terms of the grant included a similar restriction on occupation.

44. The Tribunal considered that as a consequence of the very structure of the VAT system which determined the liability of tax at the time at which a supply was made and the language of notes 2(d) and 13 fulfilment of the conditions had not been met as at the date of supply there was both a planning restriction and a term of the lease preventing occupation throughout the year.

45. *Cavendish Green* again concerned an Item 1 supply. At the time of the grant of the interest the only structure constructed was a garden wall which, although at the time of the grant had not actually exceeded the height restriction in the planning consent was intended to be built so as to exceed it. Two issues arose: whether the supplier could be considered to be a person constructing a dwelling when only the garden wall had been built, and whether the terms of note 2(d) were met.

46. The taxpayer contended, inter alia, that the terms of note 2(d) when viewed in the context of Item 1 required only that the terms of the planning consents be complied with when construction was complete in order to answer whether the building had been constructed in accordance with the planning consent. It was argued because, subsequent to the grant, but before the development was complete a revised, but prospective planning consent had been granted in respect of the wall, the terms of note 2(d) were met. HMRC contended that at the time the taxpayer made the grant of the incomplete development the wall was in breach of the planning consent and accordingly the terms of note 2(d) were not met.

47. The Tribunal noted that the revised planning consent was prospective only and therefore at the time of the grant in the incomplete development it was in breach of the terms of the planning consent. The Tribunal determined that in order to be

designed as a dwelling the building must satisfy all of the conditions, including note 2(d) at the time of supply and not by reference to the time of completion of the building.

48. The final case referenced was that of *Patel*. The case had been referred to by the Appellant's representative in correspondence. Mr Rosella did not refer to it at the hearing.

49. *Patel* was the only Upper Tribunal case to which this Tribunal was referred in the context of note 2(d). It concerned the DIY builders' scheme which seeks to ensure the same tax treatment of DIY builders constructing dwellings as would be obtained on the purchase of a newly built dwelling or engaging a builder to build one. The provisions of note 2 apply to the DIY builders scheme in order to determine whether a building is designed as a dwelling. DIY builders are required to submit their claims to VAT to HMRC within 3 months of completion and, pursuant to the terms of the relevant legislation, are required to show that planning permission for the works carried out has been granted.

50. In Patel the taxpayer did not, within 3 months of the date of completion of the building have planning permission for the development. The Upper Tribunal concluded that the claim should be. The Tribunal explicitly reserved the position as to whether a retrospective planning consent granted as effective from the date on which the development was carried out pursuant to the provisions of section 73A Town and Country Planning Act if obtained within the 3 month period for submission of a claim would have resulting in a different outcome.

51. This Tribunal was concerned that none of the cases referred to addressed precisely the situation in the present appeal.

52. The evidence in the present case is clear, the planning permission granted was retrospective to the date on which the development was carried out. In the Tribunal's view the effect of s73A is such that the development is deemed always to have been subject to the consent granted. That was a situation which had not apparently been considered by the Tribunal before. In each of the cases above the planning permission had not been retrospective. The Tribunals had considered the language of note 2(d) which is clearly drafted in the past tense ("planning permission had been granted") and the structure of the tax by reference to which VAT becomes chargeable at the time of supply.

53. What was unclear to this Tribunal was whether the consequence of a retrospective planning approval should, if it occurred within 4 years of the time of supply of the construction services, permit the liability of the supply to be altered either by reference to the original period of supply (by reference to a section 80 error correction claim) or whether, at any time it could be amended in the period in which the planning permission was granted (pursuant to regulation 38)

54. Whilst considering this issue the Tribunal identified the recent First Tier judgment in *Nigel Williams [2017] UKFTT 846*. The case of Nigel Williams

concerned Item 2 and the construction of a new dwelling. Works began on an extension to an existing building, however, once they were commenced it became necessary to demolish the existing building and construct a new building. These works began and the taxpayer made an application for retrospective planning permission pursuant to section 73A Town and Country Planning Act 1990 effective from the date of development. This application was granted during construction. HMRC determined that zero rating was applicable for the construction services supplied after the revised planning consent was granted but resisted any claim from the builder to zero rate supplies before that date. Had zero rating applied it is stated in the judgment that the taxpayer would have been entitled to reclaim the overpaid VAT from the builder and therefore, by inference, that the builder would have been able to claim that over paid VAT back from HMRC (there is no indication whether that would have been by error correction under s80 or by change in consideration under regulation 38).

55. The Tribunal in Nigel Williams considers:

> "83. The Tribunal is of the view that the use of the past tense in "*has been granted*" and "*has been carried out*" is not determinative of the interpretation. The language does not explicitly state the point in time at which the consent must have been granted or the construction have been carried out. It is at the time of the supply of the services, the completion of the construction, the time at which a VAT return is due or may be adjusted, or some other time?
>
> …
>
> 89. The statutory language in Note 5, item 2(d) [sic] of Schedule 8 to VATA speaks of planning consent being 'granted' not 'being in effect'. The Tribunal asks itself the simple question, when the planning permission was granted? The answer must be that it was granted on 10 August 2015 and had not been granted on the earlier date, being the commencement of the works in March 2015.
>
> 90. The Tribunal agrees with HMRC's submissions that it is important to distinguish between legislation concerning VAT and that concerning Planning. The Tribunal should be cautious to read across planning legislation to tax legislation. Having said that, the planning legislation does not necessarily assist the appellant. Section 73A(3) of TCPA provides for retrospective planning permission to 'be granted so as to have effect from' an earlier date than the application. It does not speak of the planning permission being 'granted' from an earlier date.
>
> 91. The appellant was granted planning permission to have retrospective effect from the commencement of the works but he was not granted planning permission on or before March 2015. He was granted planning permission on 10 August 2015.

> 92. When the work was carried out between March and 9 August 2015 and the supplies were made in the course of construction, no planning permission had been granted or was in effect,
>
> …
>
> 94. The Tribunal agrees with the submissions of HMRC that the relevant time to examine for the purposes of VAT liability is the time at which the supplies were made. The time of supply is dictated by EC Directive 2006/112 Article 63 "*The chargeable event shall occur when the goods or services are supplied*".
>
> 95. This interpretation is entirely consistent with the statutory language of zero rating for 'supply of services in the course of construction of a building designed as a dwelling where planning permission has been granted and the construction carried out in accordance with that permission'. The Tribunal considers that the ordinary and natural meaning of the statutory wording is that the planning permission has been granted at or before the supply of services."

56. Mr Williams appeal was thereby dismissed. That decision is persuasive but not binding on this Tribunal.

57. Before deciding to follow it this Tribunal considered the position regarding the issue of zero rating for relevant residential developments which requires that before a development intended for relevant residential use may be zero rated the user must issue to the supplier a certificate of use. The statutory language for the issue of such a certificate is that it must be issued before any supply is made (under item 1 or item 2 to Group 5). Notice 708 paragraph 17.6 does permit a builder to retrospectively zero rate where a certificate is produced after the time of supply however, such amendment to the liability is expressly stated to be an extra statutory concession. This position reinforces the conclusion reached in the *Nigel Williams* judgment and on that basis this Tribunal respectfully agrees with the reasoning and conclusion and thereby follows it.

58. In the present matter all works on Challis Island were complete by the time that the planning permission was granted on 24 February 2014. It is clear that therefore that the terms of note 2(d) were not met in respect of any of the works and in particular the works which were the subject of the assessments.

Note 2(c)

59. It is not necessary for the Tribunal to determine whether the conditions of note 2(c) are met as all conditions (a) – (d) are required to be met for zero rating to apply. However, for the sake of completeness the Tribunal sets out its conclusions on this issue.

60. It is clear that there have been decisions of the First Tier Tribunal which have gone for the taxpayer and those that have gone against in apparently similar situations concerning tied accommodation. The Tribunal has restricted itself to the application

of the two Upper Tribunal decisions on this issue: that of *Roy Shields [2014] UKUT 453* and *Richard Burton [2016] UKUT 20.*

61. Mr *Shields* had made a claim to recover tax paid under the DIY builders' scheme. The circumstances in which a claim can be made are subject to the provisions of note 2 of the Zero Rating Provision.

62. The dwelling under consideration in Shields was constructed as an equestrian facility manager's residence. One of the planning restrictions was that "the occupation of the dwelling shall be limited to a person solely employed by the equestrian business". The restriction was subsequently removed.

63. The Upper Tribunal reviewed a number of previous First-tier Tax Tribunal judgments concerning a variety of occupancy conditions. It went on to outline the approach to be taken:

> (1) Analyse the terms of the planning condition carefully to determine whether it prohibits the separate use and/or separate disposal of the dwelling (para 41).
>
> (2) "Separate use or disposal" refers to use or disposal that is separate from the use or disposal of some other land (including any building or other structure on it) (para 42).
>
> (3) A term prohibiting use for a particular activity or disposal generally would not fall to satisfy note 2(c) unless the effect of the term in that particular case was to prohibit use or disposal separately from use or disposal of other land (para 42).
>
> (4) The effect of the term should be determined by construing the words of the planning permission, including any conditions and reasons and by reference to the approved plans and where necessary the planning context, and applying those words to the facts of the particular case (para 43).

64. Following that approach the Upper Tribunal determined that the condition in that case requiring that the dwelling be occupied by a person who worked at a specified location prohibits the use of the dwelling separately from the specified location with the consequence that it did not comply with the condition in note 2(c).

65. The case of *Burton* concerned the provisions of note 2(c) in the context of a claim by Mr Burton again under the DIY builders' scheme. Mr Burton was the owner of a site and lake which he had developed and operated as a fishery. He constructed a dwelling on the site pursuant to a planning permission which restricted occupation of the dwelling such that only "a person solely or mainly employed or last employed by [the fishery] or a widow or widower of such a person, or any resident dependants" could occupy.

66. The Judge considered that in construing the planning permission the whole consent needed to be considered in a way which was "benevolent, applies common sense and, where appropriate, takes account of the underlying planning purpose for the condition as evidenced by the reasons expressed."

67. Adopting the approach advocated in *Shield* the Upper Tribunal considered that they appropriate interpretation of Note 2(c) as being "separate from". In the circumstances of the case before it the Upper Tribunal therefore considered that the relevant planning condition was to ensure, by means of the occupancy restriction, that the accommodation was retained for the purposes of the fishery business. As a consequence of the planning restriction each occupant of the dwelling was required to have a specific link to the fishery. The Upper Tribunal concluded:

> "It is that required link to specific land or premises which is crucial, and which puts cases such as the represent in a different category from those which have no such link or to which the link is too general or too tenuous. … No doubt there will be cases which are borderline and therefore difficult to call, but I do not regard the present case as one of those. Here the link between the occupancy of the building and the [fishery] is sufficiently close, specific clear and unequivocal"

68. It is clear from the judgment in *Shields* that a general use restriction is not necessarily a prohibition on separate use. It is further clear from the judgment in *Burton* that there will be cases where the required use of the building in the context of associated land is not sufficiently restricted to amount to a prohibition on separate use

69. Applying the approach advocated in these two binding judgments has not been an easy one.

70. Lakeside view was, prior to the grant of the relevant planning permission, essentially a field, a lake and some offices situated in a non-residential area. It was used recreationally by the Dickerson family but it was not site for which there appeared to be any particular and specified planning use, certainly not one similar to the equestrian centre and fishery in *Shields* and *Burton*.

71. HMRC relied on planning condition 2 and a restriction of "private recreational use only by the owner of Lakeside View". The reason given is the protection of the amenities of the adjoining property – an industrial estate and a landfill site – and because public use required a different planning assessment. It appears to the Tribunal that fundamentally the planning consent prevented public use of the Challis Island development. The planning condition did not restrict the use of the development to the business carried on in the offices on the site but merely to the owner of the site.

72. Through the lens affirmed in both *Shields* and *Burton* that the separate use/disposal test is "separate from" the Tribunal struggled with whether the restriction could be truly construed a prohibition of separate use because the question would then be separate from what? The site consisted of a field, a lake and an office. Of course the Island could not be used by anyone without ownership of or access to the field and lake because without such access there could have been no use at all. It felt to the Tribunal that restriction only to the owner in such circumstances could easily be construed as no more than the prohibition of public use. Whether that represents a general use restriction or a specific prohibition on separate use was, in the Tribunal's

view, difficult to determine. Had the Tribunal been forced to do so it is likely that planning condition 2 would have been seen as a general use restriction and not a prohibition on separate use or disposal?

73. Connected to the consideration of note 2(c) was, perhaps, an even more difficult conceptual issue. The Zero Rating Provision and note 2 concern buildings. A building "designed as a dwelling" can be zero rated. Note 2 defines when a building is "designed as a dwelling" but nowhere does that definition appear to require there be a right to habitation. As set out in paragraph 25 note 2 has 4 specific requirements. 2(a) requires that the building, (though it is described as a dwelling), consist of self-contained living accommodation. HMRC, and the Tribunal, agree that Coffers Cabin does consist of self-contained living accommodation.

74. By virtue of the planning consent "informatives" the applicants were informed that "habitation or renting out" required separate planning consents. It appears (see *Slough Borough Council v Secretary of State for the Environment and Oury [1995] JPL 1128*) that, in general, planning informatives are not mandatory and form non-binding best practice or additional information. They may be relied upon only where there is ambiguity in the terms of the planning consent and may only be used in the same way as any other extrinsic material may be used. The informative is a clear steer that, despite the fact that Coffers Cabin does consist of self-contained living accommodation, it does not meet the ordinary definition of a dwelling as "a place where one lives, regarding and treating as home" (the ordinary definition of dwelling and used for the purposes of the Housing Act 1988 – see *Uratemp Ventures Ltd v Collins [2002] 1 All ER 46*).

75. What is not clear is whether a "building" can ever meet the requirements of note 2 if it cannot be used for habitation and thereby meet the ordinary meeting of dwelling. HMRC's own internal guidance (VCONST14010) sets out the *Uratemp* definition and then states "For VAT purposes, however, the term 'dwelling' is used in a variety of contexts and is often used in combination with other words to identify the specific type of dwelling. The wording depends on the context". It then goes on to confirm that 'designed as a dwelling' requires contextualisation when determining the status of a building after construction.

76. Had the Tribunal had to decide the point it is likely to have considered that the test for determining whether Coffers Cabin had been 'designed as a dwelling' should be by reference only to the conditions in note 2 which purports to define the term exclusively. The fact that note 2 refers to the building under consideration (vis a vis the 'designed as a dwelling' test) as a *dwelling* does not, necessarily, incorporate the ordinary definition of dwelling into the note 2 conditions. It is therefore conceivable that a building might meet all the tests set out in note 2 any yet not permit habitation. Thankfully this Tribunal has not had to determine that issue as Coffers Cabin does not meet the terms of note 2(d).

HMRC's alternative position

77. As set in in paragraph 28 and 29 above, HMRC contended that even were the Tribunal to find that Coffers Cabin was a building designed as a dwelling the Appellant was not entitled to zero rating on the basis that it was part of a single supply of construction services which were standard rated and/or that, by virtue of note 11, the Appellant had a once and for opportunity to apportion the consideration received as between the standard and zero rated supplies and had failed to exercise it when they issued the invoices.

78. These arguments were not apparently argued with any gusto before the Tribunal. This was stated to be because HMRC were so confident of success on the application of conditions 2(c) and/or (d) that they were unnecessary.

79. As they were raised the Tribunal deals with them very briefly.

80. On the question of single v multiple supply provisionally it would have been the Tribunal's view that the works needed to be considered on a building by building basis as the Zero Rating Provision applies to the services of construction relating to "a building". The Island was not "a building" but rather a series of buildings/structures. Had Coffers Cabin met the note 2 conditions the Tribunal would have considered that it was a building designed as a dwelling and that all works associated with its construction (as distinct from those pertaining to the other buildings and structures) and its share of the general construction work would have been zero rated.

81. As regards the interpretation of note 11: no basis for an argument that it represents a once and for all entitlement to apportion as at the date of invoice was proffered by HMRC. Had it been relevant, the Tribunal would have determined that there is no basis for such an assertion.

82. Finally by reference to the submission that any claim to zero rate would have had to be made by the Appellant by way of a section 80 claim it is the Tribunal's view that its obligation and jurisdiction in the context of an appeal against an assessment is to determine the correct amount of tax due. Had the Zero Rating Provision applied in respect of the invoices which were the subject of the Assessments it would have been the role of the Tribunal ultimately to determine the relevant apportionment of consideration as between the zero and standard rated elements. HMRC were however, correct that to the extent that the Appellant claimed that other invoices which had been issued were also required to be apportioned as between standard and zero rated supplies would have needed to have been the subject of a s80 claim to overpaid VAT.

Conclusion

83. For the reasons set out above the Tribunal concludes that the Appellant's appeal must be dismissed on the basis that at the time the development was no statutory planning consent had been granted and thereby the condition prescribed in note 2(d) was not met and Coffers Cabin was not therefore a building designed as a dwelling in respect of which the Appellant was entitled to zero rate its construction services.

84. 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.

AMANDA BROWN
TRIBUNAL JUDGE

RELEASE DATE: 1 FEBRUARY 2017