[2017] UKUT 404 (TCC)

Appeal number: UT/2016/0221

VAT – refund for DIY housebuilders – planning conditions at time of application – subsequent removal of conditions – otherwise than in the course or furtherance of any business – separate use not prohibited by statutory planning consent – appeal allowed – decision of First-tier Tribunal set aside and case remitted

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

RICHARD AKESTER

Appellant

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Greg Sinfield
Judge Sarah Falk

Sitting in public at the Royal Courts of Justice, London on 12 July 2017

The Appellant in person

Joshua Shields, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Mr Akester applied for planning permission to construct "a log cabin to form holiday and short term business letting accommodation" in the garden of his then home. He was subsequently granted permission to build the log cabin subject to conditions including that it should be occupied for tourism purposes only and not on a permanent basis or as a person's sole, or main place of residence. Before construction of the building, now called Rose Cottage, started, Mr Akester sold his home. After the building had been completed, Mr Akester and his family ultimately occupied it as their principal residence.

2. Mr Akester made a claim for a refund of VAT of £31,833.11 incurred by him on the construction of Rose Cottage under the provisions of section 35 of the VAT Act 1994 ('VATA94'), commonly known as the DIY Builders' Scheme. A person is only entitled to a refund of VAT under the Scheme if certain conditions are met. The conditions include that the construction works were lawful and not carried out in the course or furtherance of any business. The Respondents ('HMRC') considered that Mr Akester did not meet those conditions because the construction for use as a permanent residence was contrary to the planning permission and thus unlawful. In addition, if Rose Cottage had been used as required by the planning permission then that would be a business use, namely letting, so the building was constructed in the course or furtherance of a business. Accordingly, HMRC refused Mr Akester's claim.

3. Mr Akester appealed to the First-tier Tribunal ('FTT'). In an amended decision released on 16 August 2016, [2016] UKFTT 0374 (TC), ('the Decision'), the FTT (Judge Rankin and Tribunal Member Robertson) held that Mr Akester had satisfied the conditions relied on by HMRC but had not met two other conditions found in the notes to Group 5 of Schedule 8 to VATA94. The first, in Note 2(c), is that the separate use or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision. The FTT held that the conditions to the planning permission prohibiting the use of Rose Cottage as a principal residence came within Note 2(c). The second, in Note 2(d), is that the dwelling had been constructed in accordance with the planning consent. The FTT held that, during construction, Mr Akester decided he wanted to live permanently in Rose Cottage, which he subsequently did, and such use was in breach of the planning permission. Accordingly, the FTT dismissed Mr Akester's appeal.

4. Mr Akester appealed to this Tribunal, with the permission of the FTT, against the Decision. A short hearing took place on 12 July 2017. Mr Akester appeared in person, having previously provided several documents running to many pages that contained a mix of submissions and evidence, not all of which were relevant to the issues in the appeal. Mr Joshua Shields appeared for HMRC. We are grateful to Mr Shields who, conscious of the fact that Mr Akester is not a lawyer, was careful to ensure that his submissions were understood and often assisted Mr Akester to make a point that supported his case.

5. For the reasons given below, we have concluded that the Decision contains errors of law and must be set aside. Notwithstanding Mr Shield's determined submissions, we do not consider that we are able to remake the decision on the basis of the facts as found

by the FTT or make findings of fact necessary, in our view, to decide the appeal. Accordingly, we have decided to remit the case to a differently constituted FTT.

6. In this decision we attempt to set out the applicable law and the issues to which it must be applied in ways that we hope will make them clear to Mr Akester. We address this decision to Mr Akester in particular because it appeared to us at the hearing that he had not fully understood the legislation governing the DIY Builders' Scheme or the reasons given by HMRC for rejecting his claim.

Legislative framework

7. The relevant legislation is found in the VATA94 and can be set out quite shortly. Section 35(1) states:

> "Refund of VAT to persons constructing certain buildings
>
> (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."

8. Section 35(1A) provides that the works referred to in section 35(1) include the construction of a building designed as a dwelling. The meaning of 'business' in section 35(1)(b) is defined by section 94 as including any trade, profession or vocation.

9. By virtue of section 96(9), Schedule 8 of the VATA94 must be interpreted in accordance with its notes. Section 35(4) provides that the notes to Group 5 (Construction of buildings etc) of Schedule 8 apply for construing section 35 as they apply for construing that Group. Note (2) to Group 5 of Schedule 8 is as follows:

> "(2) A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied –
>
> (a) the dwelling consists of self-contained living accommodation;
>
> (b) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling;
>
> (c) the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision; and
>
> (d) statutory planning consent has been granted in respect of that dwelling and its construction or conversion has been carried out in accordance with that consent."

Factual background

10. There is no dispute about the events that led to the appeal. The material facts taken from at [2] to [7] of the Decision and the documents before us are as follows.

11. In 2011, Mr Akester, a private individual not registered for VAT, applied for permission for the 'Erection of a log cabin to form holiday and short term business letting accommodation' on land forming part of the garden of his then home, Jalna, Goodmanham in the East Riding of Yorkshire ('Jalna'). He relied on a 'Design, Access, Planning & Heritage Statement' dated May 2011 prepared by architects Frank Hill & Son in support of that application.

12. The FTT recorded Mr Akester's evidence that he had never intended to carry out any business at the property in respect of which he had applied for planning permission, and found at [34] that he had never in fact carried on business there. There was no evidence that any such subjective intention was ever communicated to the planning authorities prior to 2015.

13. Planning permission was granted on 23 December 2011 for the construction of a log cabin in accordance with Mr Akester's application, subject to the following conditions:

> "2. Notwithstanding the description of the proposed development the log cabin on the site shall be occupied for tourism purposes only and shall not be occupied on a permanent basis.
>
> 3. The log cabin on the site shall not be occupied as a person's sole, or main place of residence.
>
> 4. The site owners/operators shall maintain an up-to-date register of the names of all owners/occupiers of the log cabin on the site, and of their main home address, and shall make this information available at all reasonable times to the local authority."

14. Further planning approvals allowed Rose Cottage to be built instead of a log cabin. Jalna was sold on 2 January 2014. The land adjoining Jalna (the garden) was not sold. Work on the construction of Rose Cottage commenced in spring 2014.

15. In February 2015, Mr Akester applied to remove the conditions imposed in the planning permission, such that Rose Cottage could be occupied as a permanent dwelling.

16. A completion certificate was granted in respect of the construction of Rose Cottage on 16 March 2015, and Mr Akester began to occupy the property on 25 March.

17. By a claim dated 7 April 2015 and submitted on 14 April, Mr Akester sought a refund of VAT pursuant to section 35 VATA94 in connection with the construction.

18. By letter dated 15 April, HMRC wrote to Mr Akester informing him that the conditions had not been met as 'to obtain a refund you must provide evidence that the works are lawful and you must provide a copy of the Planning Permission'. HMRC continued by advising Mr Akester that his planning permission related to the 'Erection

of a log cabin to form holiday and short term business letting accommodation' and that the terms of the document and its conditions would not allow the dwelling to be used as a permanent residence.

19. Mr Akester sent an email to HMRC dated 17 April attaching a copy of a letter from East Riding of Yorkshire Council acknowledging receipt of his application for the removal of conditions 2, 3 and 4.

20. By a further letter dated 20 April, HMRC advised Mr Akester that despite the further information he remained ineligible to apply for a VAT refund. HMRC acknowledged that Mr Akester had applied for removal of the three conditions but stated that the planning consultation available online suggested that it was highly unlikely that the conditions would be removed.

21. By letter dated 23 April, Mr Akester asked HMRC to carry out a review by an officer not previously involved or consulted.

22. In a letter dated 11 June 2015, Mrs S Hanrahan, a Review Officer of HMRC advised Mr Akester that she upheld the original decision by HMRC to refuse his claim on the grounds that:

> "Condition 2 states the log cabin should be occupied for tourism purposes only. This would be for business purposes and mean that the requirement at section 35(1)(b) is not met.
>
> …
>
> The decision to refuse the claim is upheld because the planning permission specifies the log cabin shall be occupied for tourism purposes only and therefore the condition at section 35(1)(b) has not been met."

23. The conditions preventing the use of Rose Cottage as a permanent dwelling were removed by a decision dated 8 October 2015. Although Mr Akester appears to have argued that this was done on a retrospective basis, the Decision records at [35] that Mr Akester accepted that the removal of the planning conditions was not retrospective. Mr and Mrs Akester moved permanently into Rose Cottage on 9 October.

24. By Notice of Appeal dated 27 October 2015, Mr Akester appealed to the FTT.

The Decision

25. The only issue in the appeal to the FTT was whether Mr Akester was entitled to claim a refund of VAT under the DIY Builders' Scheme. Having made its findings of fact and set out the parties' submissions, the FTT stated its views on whether Mr Akester had met the conditions for a refund at [25] to [36] of the Decision.

26. At [25], the FTT found that the condition in section 35(1)(b) VATA94 that the works must be "lawful and otherwise than in the course or furtherance of any business" had been met. The FTT gave its reasons for that conclusion in a single sentence:

> "No evidence was produced to the Tribunal that any business has been carried out at Rose Cottage."

27. The FTT referred to the business condition again at [34] where it said:

> "Mr Hill [for Mr Akester] has persuaded the Tribunal that no business was ever carried out by Mr Akester at Rose Cottage and therefore HMRC was wrong to refuse his claim on the grounds that he intended to use Rose Cottage for business purposes in April 2015."

28. The FTT also decided, so far as is relevant to this appeal, at [29] to [33] as follows:

> "29. Fifthly the notes to Group 5 of Schedule 8 are to be applied for construing the above requirements. Of particular relevance to Mr Akester's application for a refund is Note (2) subsections (c) and (d). Subsection (c) states that the 'separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision'. While Mr Hill argued on behalf of Mr Akester that the removal of the planning conditions in October 2015 gave Mr Akester retrospective permission to use Rose Cottage as his principle [sic] residence the Tribunal is unable to accept this argument as the decision made by HMRC which Mr Akester is appealing was made in April 2015.
>
> 30. Subsection (d) requires statutory planning consent to have been granted and for the building to have been constructed in accordance with that consent. While the Tribunal accepts that Rose Cottage was constructed in accordance with the planning permission at the time of the decision by HMRC it was not being used by Mr Akester in accordance with that consent. Mr Akester has supplied two different dates as to when he occupied Rose Cottage: the former, 25 March 2015 would have been in breach of the then planning conditions while the latter, 8 October 2015 was after the removal of the conditions. The former date is contained in Mr Akester's application and is referred to in HMRC's skeleton argument dated 8 January 2016 at paragraph 4. In a letter to HMRC dated 23 April 2015 Mr Akester said:
>
> > "yes we stated we moved in on date in application, this resulted in us being liable for council tax and enabled all the family to enjoy occupancy as per the planning permission present."
>
> 31. In his grounds of appeal Mr Akester stated:
>
> > "During the early stages of constructing Rose Cottage we decided we wanted to live permanently at Rose Cottage instead of being the family holiday home."
>
> 32. In his written submission to the Tribunal dated 18 June 2016 Mr Akester accepts that occupying Rose Cottage as a main place of residence prior to the removal of the conditions would have constituted a breach of the then planning conditions. At the

> hearing Mr Akester confirmed that he had not kept a register of the names of all owners/occupiers of the Rose Cottage as required by condition 4.
>
> 33. The Tribunal finds that 'enabling all the family to enjoy occupancy' between 25 March 2015 and 8 October 2015 would amount to more than occupying Rose Cottage for tourism purposes and therefore be in breach of condition 2 of the planning permission."

29. For those reasons, the FTT concluded that Mr Akester had not met the requirements of Note 2(c) and (d) and dismissed his appeal.

30. In [34] and [35], the FTT followed the decision of Judge Bishopp in *HMRC v Asim Patel* [2014] UKUT 0361 (TCC), [2015] STC 643 which also concerned a claim under the DIY Builders' Scheme. In *Patel*, the UT held that retrospective planning permission did not satisfy the conditions in section 35(1)(b) that the works must be lawful and in Note 2(d) that they have been carried out in accordance with the planning consent because Mr Patel had not obtained the retrospective planning consent until after the time limit for making the claim had expired. Judge Bishopp stated at [21], cited by the FTT at [14]:

> "The regulation is clear; when he makes his claim the claimant must provide documentary evidence that planning permission has been granted. This can only mean the correct permission, meaning permission relating to the works actually carried out; in that we agree with [counsel for HMRC]. As we have said, Mr Patel was not in a position to do that in 2011, since it was not until 2012 that the retrospective permission was granted. The requirements of the regulation are framed in mandatory terms; HMRC are allowed no discretion to accept something less than the prescribed documentation, nor to extend the time limit, and it is equally not open to the FTT or to us to do so."

31. That decision was, of course, binding on the FTT. The FTT distinguished the decision of the FTT in *Francis v HMRC* [2012] UKFTT 359, which was not binding, on the ground that, in that case, the retrospective planning permission was granted before HMRC made their final determination. In any event, the FTT recorded that Mr Akester had accepted that removal of the planning conditions was not retrospective. The FTT then dismissed Mr Akester's appeal because at the date of his claim the requirements of Notes 2(c) and (d) of Group 5 of Schedule 8 VATA94 had not been met.

Discussion

32. The DIY Builders' Scheme permits recovery of VAT incurred on building materials by persons carrying out certain works provided that the carrying out of the works is lawful and not in the course or furtherance of a business. The relevant works for Mr Akester's appeal are the construction of a building designed as a dwelling, ie Rose Cottage.

33. To be entitled to a refund of VAT incurred on building materials used in constructing Rose Cottage, Mr Akester must satisfy the following conditions at the time that the works are carried out and when the claim is made:

(1) Rose Cottage must be a building designed as a dwelling;

(2) the construction of Rose Cottage must have been lawful; and

(3) the construction must not have been in the course or furtherance of a business.

34. The phrase "building designed as a dwelling" has a special meaning for VAT purposes. There is no dispute that Rose Cottage is a dwelling but it does not necessarily follow that it was designed as a dwelling within the meaning given to that expression in the legislation. A building will only be a building designed as a dwelling if it meets the four conditions set out in Note (2) to Group 5 of Schedule 8. There has never been any dispute that Rose Cottage satisfied the first two conditions in Note (2)(a) and (b). The FTT concluded that Rose Cottage did not satisfy Note (2)(c) and (d) and, therefore, was not a "building designed as a dwelling" for the purposes of section 35(1A) VATA94 and accordingly no refund was available. For the reasons set out below, we consider that the FTT did not interpret the conditions in Note (2)(c) and (d) correctly or make relevant findings of fact and, accordingly, its conclusions on those conditions cannot stand.

35. The condition in Note 2(c) is that the separate use or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision. The FTT appears to have interpreted the planning conditions as a prohibition on the separate use or disposal of Rose Cottage. We disagree. We do not consider that the conditions contain any such prohibition. We interpret Note 2(c) in the same way as the Upper Tribunal (which included one of the panel in this appeal) in *HMRC v Shields* [2014] UKUT 0453 TCC, [2015] STC 643 at [42]:

> "In considering whether Note (2)(c) is satisfied, it is necessary to ascertain whether a term of any statutory planning consent (or covenant or similar provision) prohibits the separate use or separate disposal of the dwelling. By using the word 'term', it is clear that Note (2)(c) is not merely concerned with the conditions that may be imposed by the planning authority. Note (2)(c) also requires consideration of any part of the covenant, statutory planning consent or similar provision that prohibits separate use or disposal. The phrase '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). A term prohibiting use for a particular activity or disposal generally would not fail 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."

36. The FTT appears to have regarded the two conditions in the planning consent that prohibited occupation of Rose Cottage as a person's sole or main place of residence or, even if not a sole or main place of residence, on a permanent basis as prohibiting the separate use or disposal of Rose Cottage. In our opinion, the conditions cannot be interpreted in that way. It seems clear that the restrictions on use imposed by the planning consent did not restrict Mr Akester's ability to dispose of Rose Cottage. By the time of its construction, Rose Cottage was already separate from his former home, Jalna, which had been sold. In [29], the FTT rejected the argument put forward on behalf of Mr Akester that the removal of the planning conditions in October 2015 gave

Mr Akester retrospective permission to use Rose Cottage as his principal residence. We do not see the relevance of that argument to the condition in Note (2)(c) on the facts as found. There is no finding to link the prohibition on the occupation of Rose Cottage on a permanent basis or as a sole or main place of residence, with Mr Akester's use of Jalna, in the grounds of which Rose Cottage was built. Without such a link (or, conceivably, a link to some other property), we do not consider that the two conditions in the planning consent prohibit the separate use or disposal of Rose Cottage. We conclude that either the FTT's interpretation of Note (2)(c) is faulty in that it gives no weight to the word "separate" or there is some finding of fact establishing the necessary link that is missing from the Decision.

37. The fourth condition, in Note (2)(d), is that the construction of the dwelling has been carried out in accordance with the statutory planning consent. Section 35(1)(b) VATA94 provides, among other things, that the carrying out of the works must be lawful. The two requirements clearly overlap each other. Building works that are not carried out in accordance with the planning consent are not carried out lawfully. The two conditions are not, however, identical. Note (2)(d) focuses solely on whether the construction has been carried out in accordance with the statutory planning consent. The requirement in section 35(1)(b) is wider and looks beyond compliance with the planning consent to take account of other obligations in addition. In this case, it does not appear to have been suggested by HMRC that the construction of Rose Cottage was unlawful in any way other than in failing to comply with the conditions contained in the planning consent (on the basis that the building was constructed for use as a permanent residence, which the conditions did not permit). It follows that we can consider Note (2)(d) and section 35(1)(b) together by focussing on Note (2)(d) as the FTT did in the Decision.

38. In relation to Note 2(d), the FTT held, at [30], that Rose Cottage was constructed in accordance with the planning permission at the time of the decision by HMRC, ie in April 2015, but found that it was not being used by Mr Akester in accordance with the planning consent. The FTT reached this view because it found, at [33], "that 'enabling all the family to enjoy occupancy' between 25 March 2015 and 8 October 2015 would amount to more than occupying Rose Cottage for tourism purposes and therefore be in breach of condition 2 of the planning permission." This seems to reflect a submission by Mr Akester to us (but not recorded by the FTT) that the description of the development in the planning consent as "holiday and short term business letting accommodation" and the condition that it should be occupied for tourism purposes only did not necessarily mean that Rose Cottage had to be let. He argued that "letting" applied to "business" but not necessarily to "holiday" and that "tourism purposes" included use by him and his family as holiday accommodation. It is not clear to us that this submission was made to the FTT and there are no findings in relation to it in the Decision. Although the construction of the terms of the planning consent is a matter of law, we feel that any interpretation would be informed by a proper understanding of the surrounding circumstances which would require further findings of fact that we are not in a position to make.

39. In [40] of *HMRC v Shields*, the Upper Tribunal made the point that whether a person meets the conditions entitling them to a refund of VAT must be considered in the light of the facts when the construction has been carried out and the claim is made. We would clarify this to say that, in the context of Note (2)(d), the key focus is on the time when the works are carried out, the question being whether those works were carried

out in accordance with the consent. That means that an amendment to a planning permission, such as the removal of conditions, after the works have been carried out comes too late to affect the liability of supplies that have already been made, at least if that amendment is not retrospective. (In *Patel*, the Upper Tribunal left open at [22] whether the position would be different if retrospective permission was granted before the expiry of a time limit for making a claim, but that is not relevant here.)

40. Where a planning consent includes conditions relating to the future use of the property then the question whether the works were carried out in accordance with the consent can only be determined, insofar as those conditions are concerned, by reference to the intended use during the period of the works. The same approach must apply to determining whether the carrying out the works is lawful within section 35(1)(b). It follows that a breach of a planning permission condition as to use that occurs after the construction has been completed will not prevent a person making a claim under the DIY Builders' Scheme provided that, at the time of the construction works, there was no intention to breach the condition. We do not mean to say that the use of a property after completion of construction is completely irrelevant. Such use may be evidence of the intended use during construction. The focus of Note (2)(d), however, is the construction of the building not its subsequent use. In this case, the construction of Rose Cottage was completed on 16 March 2015.

41. In [31], the FTT sets out the statement in Mr Akester's ground of appeal that he formed an intention to occupy Rose Cottage as a permanent home during the early stages of construction. That is, of course, what ultimately happened. Unfortunately, the FTT makes no finding of fact as to what Mr Akester's intentions were, whether there was a change of intention and if so when that occurred. It seems to us that the FTT must consider whether Mr Akester had decided during the period of construction that he would occupy Rose Cottage as a permanent residence and not let it or use it for other purposes, and then determine in the light of those findings whether the construction was carried out in accordance with the statutory planning consent. It seems to us that we are not able to make the necessary findings of fact to determine whether the condition in Note (2)(d) was satisfied.

42. Section 35(1)(b) also provides that a person will not be entitled to a refund of VAT where the construction is in the course or furtherance of a business. The planning application for what became Rose Cottage was to build "holiday and short term business letting accommodation". The FTT states that Mr Akester had applied for planning permission on the basis that he would use Rose Cottage for holiday letting or short term business letting because he had been advised that it was the only way that he would obtain permission. Mr Akester told the FTT that he never intended to carry out any business at Rose Cottage nor did he do so. The FTT held, at [25], that:

> "No evidence was produced to the Tribunal that any business has been carried out at Rose Cottage …"

This reflected an argument put forward on behalf of Mr Akester in the FTT that there was no evidence that Mr Akester ever started a business at Rose Cottage and even if he had so intended at the outset, he very soon changed his mind. We consider that this submission and the FTT's brief discussion of it, set out in full above, show a misunderstanding of the concept of business for VAT purposes and the condition in section 35(1)(b).

43. The term 'business' has a wide meaning for these purposes. Section 94 defines it as including any trade, profession or vocation. It is also settled law that it should be interpreted as having the same meaning for VAT purposes as "economic activity" in Article 9 of the Principal VAT Directive (see Lawrence Collins J in *Riverside Housing Association v HMRC* [2006] STC 2072 at [68]). Article 9 defines economic activity as including, in particular, the exploitation of intangible property for the purposes of obtaining income therefrom on a continuing basis, whatever the purpose or results of that activity. Economic activity is not limited to making of supplies, eg letting a property for rent, but has been held to include preparatory activities before any supplies are made even where, in the event, the economic activity originally envisaged does not take place and no supplies are actually made (see Case 268/83 *Rompelman v Minister van Financiën* [1985] ECR 655 and Case C-110/94 *Intercommunale voor Zeewaterontzilting (in liquidation) v Belgian State* [1996] STC 569).

44. The Court of Appeal summarised the relevant case law of the Court of Justice of the European Union ('CJEU') on economic activity in *Longridge on the Thames v HMRC* [2016] EWCA Civ 930, [2016] STC 2362. The summary by Arden LJ, with whom Tomlinson LJ and Morgan J agreed, may be reduced to the following propositions:

> (1) The concept of economic activity is objective in nature.
>
> (2) Exploitation of property and the provision of goods and services for the purpose of obtaining income therefrom on a continuing basis is an economic activity.
>
> (3) For there to be economic activity, certain characteristics must be present. There must be relevant activity.
>
> (4) Passive ownership of an asset, even if income producing such as shares, is not enough.
>
> (5) Economic activity entails a permanent activity in return for remuneration received by the person carrying out the activity of exploiting the property or providing the goods or services.
>
> (6) As a general rule, an activity which is permanent and is carried out in return for remuneration which is received by the person carrying out the activity is an economic activity. Morgan J called this a rebuttable presumption or a general rule subject to possible exceptions.
>
> (7) There must be a direct link between the supply and the consideration received by the supplier.
>
> (8) Economic activity does not require an intention to make a profit and a person may be carrying on economic activity even if the activity is (and is intended to be) loss making.

45. Arden LJ also reviewed the domestic case law authorities of *Customs and Excise v Morrison's Academy Boarding Houses Association* [1978] STC 1, *Customs and Excise v Lord Fisher* [1981] STC 238, *Customs & Excise v Yarburgh Children's Trust* [2002] STC 207 and *Customs & Excise v St Paul's Community Project Limited* [2005] STC 95. Arden LJ commented that the domestic authorities have developed in a way which means that they now diverge in some respects from the CJEU case law.

46. It follows from those cases that the construction of a building with the intention of letting it can be an economic activity and thus construction in the course or furtherance of a business for the purposes of section 35(1)(b). The position was clearly and succinctly explained by the FTT in *Bourne v HMRC* [2010] UKFTT 294 (TC). In that case, the appellant constructed two flats: one to live in and one to rent or sell. When he claimed a refund of VAT under the DIY Builders' Scheme, HMRC refused the claim in relation to the flat built for sale or rent on the ground that it was constructed in the course or furtherance of a business. The FTT dealt with this at [16] and [17]:

> "16. We understood HMRC to accept that the Appellant is not a commercial house-builder. His assertion that this was only the second property that he had constructed for himself over the last 20 years was not challenged. It might therefore seem odd that the Appellant could be regarded as constructing Flat 2A in the course or furtherance of a 'business'. However, the word 'business', as used in the Value Added Tax Act 1994, must be construed to conform to the meaning of the expression 'economic activity' used in the Council Directive (2006/112/EC): see *Riverside Housing Association v HMRC* [2006] STC 2072 at paragraph 68. The Directive in Article 9.1 states that VAT is concerned with any person who 'independently carries out … any economic activity … whatever the purpose or results of that activity'. The ECJ has stressed that the concept of economic activity must be given a wide scope, and is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results (see *EC Commission v Netherlands* (Case 235/85) [1987] ECR 1471 at 1487). In addition, Article 9 of the Directive makes it clear that the letting of an asset for the purposes of obtaining income therefrom on a continuing basis is regarded as an economic activity.
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> 17. It is clear from the decisions cited above that where a newly built property is either let or sold on completion, this may mean that the property was constructed in the course or furtherance of a business but that this conclusion is not automatic. It is necessary to look at all the circumstances in deciding whether the sale or letting formed part of a business. For example, in [*Sassi v HMRC* [2009] UKFTT 280 (TC)] the letting also included designing and creating a sustainable building for use not only as a dwelling but for ongoing research and academic activities and the Tribunal concluded that the letting in those circumstances meant that the building had not been constructed in the course or furtherance of a business. Similarly, in [*Curry v HMRC* (2007)VAT Decision 20077] the special circumstances of that case, where the letting was a short term expedient, meant that the letting was not a business. Moreover, where the sale or letting is an isolated transaction careful attention must be paid to the context in which the transaction occurs to determine its objective characteristics (see *Sassi* at paragraph 35 and *Riverside Housing Association* at paragraph 80)."

47. It seems to us that the FTT in this case misunderstood the condition in section 35(1)(b) VATA94 that the works must be carried out otherwise than in the course or furtherance of any business. It is clear from [25] and [34] that the FTT only considered whether any business had been carried out *at* Rose Cottage and, having concluded that it had not because Mr Akester never let the property, found that the condition in section 35(1)(b) was satisfied. The condition that must be satisfied is not whether Rose Cottage was used to carry on a business but whether the works of construction were in the course or furtherance of any business. The FTT does not appear to have considered whether, at the time that the construction was being carried out, Mr Akester was doing so with a view to using it for letting purposes, or for some other purpose. If so, the FTT must determine whether such an activity would be a business for VAT purposes, ie an economic activity, and whether the construction was in the course or furtherance of it. The FTT recorded, in [21], that Mr Akester had said in evidence that, at the time that the original planning application was submitted, his agent had advised him that he would only obtain planning permission to use Rose Cottage as a holiday letting or short term letting. There was, however, no finding of fact as to whether, at the time the Rose Cottage was being constructed and the VAT was being incurred, Mr Akester was carrying on a business, ie an economic activity. Before us, Mr Akester said that he had not said what the FTT recorded him as saying in [21], although that was not mentioned in his grounds of appeal. We make no finding as to that but it reinforces our view that the case must be remitted for a re-hearing to determine this and the other issues in the appeal.

Disposition

48. For the reasons given above, Mr Akester's appeal against the Decision is allowed. The Decision is set aside and we remit the case to a differently constituted First-tier Tribunal.

Greg Sinfield
Upper Tribunal Judge

Sarah Falk
Upper Tribunal Judge

Release date: 16 October 2017