[2018] UKFTT 542 (TC)

TC06711

Appeal number: TC/2015/06528

VAT – dwelling construction – business intention in obtaining planning permission not displaced by time of claim – whether entitled to refund under DIY Housebuilder scheme — no

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICHARD AKESTER **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO
ELIZABETH POLLARD

Sitting in public at Leeds on 29 March 2018

The Appellant appeared in person

Mr G Hilton, presenting officer for the Respondents

DECISION

Introduction

1. This is an appeal against a decision of the Respondents (HMRC) to refuse a refund of VAT incurred on the construction of a building as a DIY housebuilder. The amount of VAT under appeal is £31,833.11.

2. The appeal was remitted back to this Tribunal by the Upper Tribunal in a decision dated 12 July 2017, following an appeal by the appellant against a decision by the First-tier Tribunal dated 16 August 2016. The Upper Tribunal set aside the First-tier Tribunal decision and so we have approached the appeal afresh.

Background

3. In September 2011, whilst the appellant was living at Jalna, Church Side, Goodmanham YO43 3JD ("Jalna"), he applied to the East Riding of Yorkshire Council ("the Council") for planning permission for a two bedroom log cabin to form holiday and short term business letting accommodation, to be built in the rear garden at Jalna.

4. In December 2011, the Council gave planning permission for the development, to be built within three years of the date of the permission being granted The permission granted restricted, as relevant, the use of the proposed building to "tourism purposes only" and required that the building "shall not be occupied on a permanent basis". The permission also required that the building not be a person's sole or main residence and that the site owners/operators shall maintain an up-to-date register of the names of all owner/occupiers of the property and of their main home address and shall make the information available to the Local Authority. The application for the building to be used for short term business letting was not granted.

5. In July 2013, the appellant wrote to the Council to ask how long a person could stay in the property without a break. The Head of Planning and Development Management replied to confirm that any occupants of the developed property would be required to have a main residence elsewhere. It was indicated that a stay of "more than a few months" would breach the planning conditions.

6. Following a long-running dispute with a neighbour, in December 2013 the appellant and his wife moved into another property in Goodmanham. In January 2014 they sold the existing house at Jalna and part of the land around the house. The purchasers did not want to purchase the part of the property over which the planning permission had been granted and so this part of the land was retained by the appellant.

7. In March 2014 the Council approved an amendment to the proposed development, to increase the size of the proposed property and change the external appearance. Further proposed changes to the external appearance were approved in May 2014.

8. In May 2014, the location of the development was assigned a post code by the Post Office, although the request for a postal code was initially refused on the grounds that the proposed property was to be used for holiday and leisure use only.

9. Construction work began on the property in late May 2014. The appellant purchased all materials used in construction, and self-employed constructors were engaged to undertake the construction.

10. On 7 October 2014, after the appellant made enquiries of the Council as to a proposed single storey extension to the property, the reply from the Council reminded the appellant that the planning permission restricted use of the property to tourism purposes and prevented it from being used as a person's sole or main residence.

11. On 2 March 2015 the Council received an application from the appellant for permission to remove the conditions that:

(1) the property be used for tourism purposes only;

(2) the property not be occupied as a person's sole or main place of residence;

(3) the owner/occupiers maintain an up to date register of the names of all owner/occupiers of the property.

12. Following the issue of the completion certificate by the building surveyor in 16 March 2015, an application for a VAT refund was submitted to HMRC on 14 April 2015 under the DIY housebuilders scheme. This included a declaration that the property had been occupied since 25 March 2015.

13. The Council issued a council tax bill in respect of the completed property on 20 May 2015, including an empty property discount of 100% for the period 2 April 2015 to 1 June 2015 and a long-term empty property discount of 0% from 2 June 2015 to 31 March 2016 on the basis that the property was empty and unfurnished (Council letter dated 8 April 2015),

14. In June 2015, HMRC refused the VAT refund application on the basis that the property was to be occupied for tourism purposes only and so the condition in s35(1)(b) VATA 1994, that the property be constructed otherwise than in the course or furtherance of a business, was not met.

15. In July 2015 the Council approved an application for permission to construct a single storey extension to the front and side of the property.

16. In October 2015 the Council approved the removal of the conditions referred to in paragraph 5 above. The permission was not retrospective.

Appellant's submissions and evidence

17. The appellant submitted a skeleton argument, substantial amounts of correspondence and other documentation, and gave oral evidence at the hearing.

Whether constructed in the course of a business

18. The appellant submitted that the property was not constructed in the course of a business. He submitted that no business existed at the time the work was carried out and no business ever existed in relation to the property and so the property cannot have been constructed "in the course or furtherance of a business".

19. The appellant submitted that this was supported by the fact that an enquiry by HMRC into his wife's self-assessment tax affairs for the 2015-16 tax year was withdrawn.

20. The appellant also submitted that the case of *Curry* (Decision 2077) supported this, as that decision concluded that as no business was ever commenced then the intentions of the builder would not prevent the VAT refund from being claimed.

21. He also submitted that as his wife had won the lottery, they had no need to rent out the property for money.

22. The appellant submitted that the position was the same as that in *Swain* [2013] UKFTT 316 which held that a barn conversion was not undertaken in the course of furtherance of a business, on the basis that no business existed at the time and the possibility of a business existing in the future was too vague for it to be properly said that the work could have been carried out "in furtherance of the business".

23. The appellant further submitted that the planning permission granted did not cover business use, as the application to allow short term business letting had been rejected and the planning permission only allowed "tourism". The appellant submitted that the definition of tourism was "the practice of travelling for pleasure" and so business use was not approved. The appellant further submitted that the Parish Council recommendation received by the Council on 20 September 2011 was for planning permission to be restricted to holiday accommodation for family use only.

24. The appellant submitted the case of *Burton* [2016] UKUT 0020 (TC) shows that planning permission does not allow for implied conditions and that any planning conditions are required to be express clear conditions and in the document containing permissions. Accordingly, the appellant submitted that a business purpose cannot be read into the conditions restricting the property to tourism use.

25. The appellant further submitted that, if "tourism" were to be considered to be a business activity, the planning permission should only be construed as allowing personal use because the planning committee decision referred to "holiday accommodation" and not to "tourism"; the appellant submitted that "tourism" was wording that had been added in by the planning officers and that the planning officers could not override the decision of the committee.

26. The appellant submitted that in another case, *Jennings* [2010] UKFTT 49 (TC), HMRC had not argued that business use of the holiday accommodation prevented a VAT refund from being applied.

27. On being asked what his intentions were with regard to the property when applying for planning permission, the appellant replied that he intended both to use the property for himself and his family and that he intended to get "a couple of bob" from renting it out. He also stated that if he wanted to rent the property out, he would do so.

28. When asked what his intention was at the start of construction, the appellant stated that he had started the footings to prevent the planning permission from expiring unused. He also stated that he "wasn't thinking anything" as he had just moved away from the neighbour with whom he had had a dispute.

29. The appellant stated that he had applied for changes in the planning permission as to materials and other physical aspects of the property during 2014 because he had in mind the possibility of living there permanently. He stated that the change of use application was not submitted until February 2015 because the property is in a conversation area which is very sensitive and he did not want to put in an application until he had full agreement.

Change of intention as to use of the property

30. The appellant submitted that HMRC's guidance (VCONST2450) states that "a person who changes his intention part way through a project so that he intends to use the property for non-business purposes is entitled to use the refund scheme. VAT incurred on eligible goods and services purchased after the intention is changed can be recovered through the scheme".

31. The appellant submitted in his skeleton argument that he and his wife began to consider the development as a possible permanent residence for retirement in approximately June 2014, if the Council would agree to the removal of the conditions relating to holiday occupancy.

32. In the hearing, when asked specifically when it was that he and his wife had decided to use the property as a main residence, the appellant was unable to provide a date or an approximate timeframe for such a decision.

33. The appellant explained that the date of occupation, 25 March 2015, given on the application for the VAT refund was not the date on which he and his wife permanently occupied the property. This was the date on which they began to use the property in accordance with the terms of the planning permission: that is, as temporary accommodation. They did not occupy the property permanently until 8 October 2015, after the planning permission restrictions were removed on 6 October 2015.

HMRC submissions and evidence

34. HMRC submitted that the appellant is not entitled to a VAT refund as the property was constructed in the course or furtherance of a business, being that of a tourism business.

35. HMRC submitted that the appellant's submission that he had no business purpose in the construction is contradicted by the appellant's original application for planning permission which makes a number of clear references to such a business purpose including, for example, a statement that the development was intended to provide temporary accommodation for holiday makers which would benefit local services. This is inconsistent with use by the appellant and his family, as that would have no additional benefit to the locality as the property was to be constructed in the grounds of their residence at the time of the application.

36. HMRC submitted that even if the planning permission were to be construed as allowing the appellant to use the property within the constraints of the planning permission, it did not mean that there was no business purpose to the construction as the application for permission was clear that a business purpose was intended. They submitted that the case of *Burton* quoted by the appellant made it clear (at paragraph 60) that the planning permission should not be construed narrowly. The commonsense reading of the planning permission, stated by *Burton* to be the correct approach, was that the planning permission was for business use. Further, correspondence between the Council and the appellant, such as an email response from the Council Development Management Team Leader on 10 February 2015 makes it clear that the "need for tourist accommodation" was "one of the key considerations in [the committee's mind] when they approved the application".

37. HMRC submitted that there was no requirement that a business in fact be carried on in relation to the property, notwithstanding the decision in *Curry*, which they submitted was not binding on this tribunal. Instead, the test is whether the carrying out of the works is, in this case, in the furtherance of a business which depending on the intention during construction, as stated in the case of *Flynn* (Decision 16930).

38. HMRC submitted that the appellant's intention at the time of construction should be inferred from his formally stated intention in the planning application and the legal documents in place at the time. That formally stated intention was clearly for business purposes and does not include any reference to personal use and the planning permission in place at the material time reflected this.

39. HMRC submitted that the application to remove the tourism condition did not establish a change of intention with regard to business use as the removal required Council approval. At the time of the refund claim, the restrictive condition was still valid and the application to the Council to remove the condition could indicate no more than an aspiration to use the property as a main residence in future. If the application had not been granted, the appellant would have continued to be restricted to a business purpose in the use of the property. The Council condition was removed only after completion of the construction and after the deadline for making the claim. The case of *Patel* [2014] UKUT 0361 established that where correct permission has not been obtained, even if retrospective planning permission is granted that retrospective planning cannot make the refund claim retrospectively valid.

40. HMRC submitted that, if the VAT refund were to be permitted, it would mean that a person could submit an application to remove business-related conditions in planning permission, obtain a refund, and then withdraw their application. HMRC submitted that this was not in the spirit of what was intended by s35(1)(b).

41. HMRC submitted that s35(1)(b) requires that the carrying out of the works is lawful, meaning that they are carried out in accordance with planning permission. The planning permission is clear that the building should be occupied for tourism purposes only. They accepted that the appellant could have used the property himself, but only if he had another main residence as required by the planning permission, and that the main purpose of the planning permission was clearly stated to be for tourism.

Relevant law

42. Section 35 of the Value Added Tax Act (VATA) 1994 states, as relevant:

43. **35 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.

(1A) The works to which this section applies are—

(*a*) the construction of a building designed as a dwelling or number of dwellings;

(*b*) the construction of a building for use solely for a relevant residential purpose or relevant charitable purpose; and

(*c*) a residential conversion.

…

(2) The Commissioners shall not be required to entertain a claim for a refund of VAT under this section unless the claim—

(*a*) is made within such time and in such form and manner, and

(*b*) contains such information, and

(*c*) is accompanied by such documents, whether by way of evidence or otherwise,

as may be specified by regulations or by the Commissioners in accordance with regulations.

…

(4) The notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group but this is subject to subsection (4A) below.

(4A) The meaning of "non-residential" given by Note (7A) of Group 5 of Schedule 8 (and not that given by Note (7) of that Group) applies for the purposes of this section but as if—

(*a*) references in that Note to item 3 of that Group were references to this section, and

(*b*) paragraph (*b*)(iii) of that Note were omitted.

…

44. The notes to Group 5 of Schedule 8 provide, as relevant:

45. NOTES

…

(2) A building is designed as a dwelling or a number of dwellings where in relation to each dwelling the following conditions are satisfied—

…

(*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.

…

Discussion

46. We note that the burden of proof in this matter is on the appellant to demonstrate, on the balance of probabilities, that he meets the statutory criteria for a VAT refund.

47. It is not disputed that the property constructed was designed as a dwelling and it was agreed that the application was made in time and in the form required. We have not been addressed on the question of whether the expenditure for which a VAT refund was sought was incurred in relation to relevant goods and so we have not considered that matter.

48. The question for this Tribunal is therefore whether the carrying out of works in relation to which the appellant seeks a VAT refund was lawful and otherwise than in the course or furtherance of any business.

49. A number of cases other than those referred to in this decision were included in the bundle to the Tribunal but it was not disputed that the majority of these were not helpful in this case as the majority were concerned with whether a property could be separately used from another property; there was no such question in this case. We were also referred to the case of *Flynn* (VAT Decision 16390) but, as that case involved a business which actually commenced, we do not consider that it has

particular relevance to this matter other than to confirm, as set out below, that it is the intention of the claimant in carrying out the works that is important when considering whether a claim for a VAT refund can be made.

Meaning of business

50. The appellant asked what was meant by "business" in relation to the requirement that the construction be "otherwise that in the course or furtherance of a business".

51. We note that "business" for VAT purposes has been established in statute and case law to be widely interpreted as any "economic activity" (s94 VATA 1994 and Article 9, VAT Directive 2006/112) which includes any supplies made for a consideration which are not a single isolated transaction. European case law, which governs UK interpretation of VAT law has determined that the scale of activity does not preclude an activity from being a business.

52. We note that it is well established that the letting of property in order to receive income is a business activity for VAT purposes.

Whether a business purpose is within the scope of the planning permission

53. The appellant submitted that there was no business purpose to the construction and, further, that a business purpose was not within the scope of the planning permission.

54. The appellant submitted that this is shown by the Parish Councillors recommendation to the planning committee, which included a recommendation that the holiday accommodation should be for family use only.

55. We do not consider that the Parish Council decision has any bearing on this matter because the Council sub-committee report of 20 December 2011 makes it clear that Parish Council is providing a consultation reply only and the recommendation to restrict use to family only was clearly not included in the planning permission nor the committee decision as recorded in minutes provided to us.

56. The appellant submitted that the tourism condition in the planning permission granted in 2011 did not indicate a business and could not be so interpreted because "tourism" meant the act of "travelling for pleasure" and had nothing to do with "business".

57. The appellant argued that any reading of that planning permission to construe it as permitting business use was not possible, on the basis that case law has determined that planning permission does not allow for implied conditions and that any planning conditions are required to be express clear conditions and set out in the document containing permissions.

58. We do not agree with the appellant's submissions that the planning permission restriction to "tourism" precludes a business purpose. We consider that the appellant's submission that "tourism" means "travelling for pleasure" approaches the definition of "tourism" only from the perspective of the tourist and not from the perspective of persons providing facilities for tourism, such as those providing accommodation facilities.

59. The "East Riding of Yorkshire Council Planning for Tourist Accommodation" guidance note produced to the Tribunal by the appellant makes it clear that tourism, for those providing such facilities, is a business activity, noting that it is "an important part of the East Riding economy" (section 1.1.1 of the guidance note) and refers inter alia to "tourism businesses" in the context of accommodation (section 1.3.2 of the guidance note). The Council's "policy approach to tourism accommodation is to support the development of the tourism industry" (section 1.4.1). The appellant also provided a copy the Council's notes on 'model' planning conditions for "holiday accommodation" which state that they were developed by a working group which included the British Holiday and Homes Parks Association Ltd, caravan manufacturers, park operators and agents. These are clearly representatives of businesses. The 'model' planning conditions were set out in a report agreed with these business representatives were the same conditions included in the appellant's planning permission in October 2011.

60. We note also that, in an email dated 16 March 2016 addressed to HMRC and sent at 14:15, the appellant quoted the Oxford Concise English dictionary as defining "tourism" as "the commercial organization and operation of holidays and Visits to places of interest".

61. We find, therefore, that planning condition 2, that the property be occupied for tourism purposes only, in the original planning permission is an express clear planning condition permitting business use of the proposed development.

Whether the planning condition should be more narrowly construed

62. The appellant also argued that the planning committee had decided that the permission should be restricted to "holiday accommodation only" and that the use of the word "tourism" in the notice of decision was an insertion by the planning officers. This was supported by the Council sub-committee minutes of 20 December 2011 which showed that at "Agenda 6290", the appellant's planning application "was approved with a condition restricting the use to form holiday accommodation only".

63. The appellant submitted that a planning officer cannot amend a decision of the committee and therefore that even if "tourism" has a business connotation, the phase "tourism purposes" in the planning permission conditions should be taken to refer to "holiday accommodation" used for the purposes of family vacations and not to any business activity as such.

64. However, even if the word "tourism" were replaced with the term "holiday accommodation" in the planning permission, we consider that this would make no

difference to this case. The term "holiday accommodation" is used in many places in Council documentation provided by the appellant to refer to business activities (see, for example, the Council's notes on "Holiday accommodation 'model' planning conditions" agreed with business representatives and referred to above).

65. Further, we note that the case of *Burton* referred to by the appellant makes it clear (at para 60) that

> In construing a planning permission, the whole consent falls to be considered, and a strict or narrow approach is to be avoided, in favour of one which is benevolent, applies commonsense and, where appropriate, takes account of the underlying planning purpose for the condition as evidence by the reasons expressed.

66. Accordingly, we do not agree that the planning permission should be narrowly construed as meaning private occupation by the appellant and his family only. The reasons given for the planning permission make it clear that the underlying planning purpose was for business use, as the permission includes references to the economic benefits provided.

67. We therefore find that the use of the term "holiday accommodation" would not have prevented a business use of the proposed development.

68. Reviewing the correspondence, we note that in correspondence the appellant made reference to the refusal of the "short term business letting" purpose applied for in the planning application as meaning that the proposed development could not be used for business purposes. We consider that the refusal of permission to use the development for "short term business letting" does not mean that the property could not be used for business purposes as we have found that the planning permission permits business use, whether that business is described as "tourism" or "holiday accommodation".

69. Accordingly, we find that there is nothing in the planning permission that means that the appellant was prohibited from undertaking a business in relation to the proposed property. Indeed, we find that the Council's references to "holiday accommodation" and "tourism purposes" and their further explanation of the reasons for granting approval anticipated that a business would be conducted as a result of the construction.

70. We have considered HMRC's submissions that the tourism conditions mean that the appellant must have had a business purpose in the carrying out of the works but we note that the tourism conditions do not compel the appellant to let the property to third parties and do not, as discussed below, prohibit personal use within the constraints of the conditions. We therefore find that the tourism conditions in this case do not impose a business purpose on the appellant although, as we have found, the conditions do not prevent the appellant from having a business purpose.

71. Accordingly, we find that we do not need to consider HMRC's submission that it would not be within the spirit of s35(1)(b) to allow a VAT refund where an

application for change of planning permission has been made but not obtained, as there would in this case be no absolute requirement to change the planning conditions for construction of the property to have been capable of being otherwise than in the course of a business.

Whether use by the appellant within the terms of the planning permission prevented any business use

72. We note the appellant's submissions that the Council confirmed to the appellant that he was not precluded from using the property as holiday accommodation himself, provided that he did not reside in the property permanently, but we consider that it is clear that the Council is not stating that the planning permission should be interpreted as meaning that "holiday accommodation" or "tourism purposes" should not be regarded as business activities. We also consider that the Council's agreement that the appellant is not prevented from using the property as holiday accommodation does not mean that the property cannot have been constructed in the course or furtherance of a business.

73. In addition, we find that the term "otherwise than in the course or furtherance of business" cannot be construed as meaning "solely in the course or furtherance of a business". Indeed, we find that it has the opposite meaning: that is, for a refund to be available under s35, the construction must not have any connection with an existing or planned business.

74. Accordingly, we find that any personal use by the appellant of the property within the terms of the planning permission does not mean that it could not be used for business purposes.

Whether the carrying out of the works was lawful

75. The notes to Group 5 of Schedule 8 apply for construing the provisions of s35 VATA 1994. In particular, with regard to the question of whether the carrying out of the works is lawful, we need to consider note(2)(d) which requires that any construction is carried out in accordance with planning consent.

76. The planning consent in this case was for a property with particular physical characteristics which would be occupied for tourism purposes only and was not to be occupied on a permanent basis.

77. HMRC submitted that the case of *Patel* required that a VAT refund claimant must have "correct permission, meaning permission relating to the works actually carried out", and argued that the appellant did not have permission for the works actually carried out, being the construction of a permanent residence, until 6 October 2015.

78. We find that the tourism condition is an occupancy condition and not a physical construction condition.

79. An intention during construction to occupy the property in accordance with the occupancy conditions would not breach the planning consent provided that the physical characteristics of the property constructed were in accordance with the planning consent. We find that it would be the occupancy of the property for such contrary purpose that would be in breach of the planning consent.

80. Therefore, we consider that occupancy restrictions in a planning consent alone would not prevent a VAT refund where the claimant could establish that the works were not carried out in the course or furtherance of a business and that the occupancy conditions had been complied with.

81. We have found that the occupancy conditions in this case did not restrict personal use by the appellant and his family provided that such personal use was within the constraints of the occupancy conditions. We have found that the occupancy conditions do not compel the appellant to carry on a business in relation to the property. It has not been argued that the construction works did not meet the physical characteristics required by the planning consent.

82. Accordingly, we do not agree that the occupancy conditions to the planning permission in this case would automatically prevent a VAT refund as the occupancy conditions could be satisfied if the claimant could show that the works were not carried out in the course or furtherance of any business.

Meaning of "in the course or furtherance of any business"

83. The appellant submitted that, even if the planning permission did allow for a business to be conducted with the developed property, no business was ever carried on in relation to the developed property and he never intended to carry on a business in relation to that property and so the property cannot have been constructed "in the course or furtherance of a business". He quoted the case of *Curry* in support of this.

84. We note that the case of *Curry*, being the equivalent of a First-tier tribunal hearing, is not binding on us. Considering the legislation, we do not agree that it is necessary that a business have commenced in order for a property to be constructed "in the course or furtherance of a business". All that is required is that the property construction relates to a business which is either carried on (so that the construction is "in the course of" that business) or is intended to be carried on (such that the construction is "in the furtherance of" that business).

85. That is, construction will be in the "furtherance" of any business where such construction is intended to advance a person's ability to be able to carry on a business. It may be that the business is not eventually commenced but that does not preclude the possibility that construction activities were undertaken "in the furtherance" of a planned business.

Whether the works were in the furtherance of any business

86. We agree that it is possible that intentions as to business use may change in the course of construction so that, where the claimant can establish a date from which there is no longer any intention as to business use, a claim for a VAT refund can be made for expenditure from that date.

87. We therefore need to consider whether the appellant had an intention as to business use at any time and, if so, whether that intention changed and, if so, when it changed.

Whether there was any intention as to business

88. The appellant's planning application made in 2011 states that the "development creates a new opportunity of high standard temporary accommodation either for holiday makers visiting or business people working within the area" (page 5 of the application). The application also states that the appellant "has discussed the potential development with nearby businesses who have expressed positive support" (page 6) and that "the accommodation … will help support the local services, economy, community and social infrastructure" (page 8). Further, the application states that the "development proposes to allow the applicants to provide a business which will bring economic, social and environment benefits" (page 10). The application also notes that the appellant "would if required collect and drop off users of the holiday accommodation to and from the adjacent town" (page 18). The application confirms in several places that the proposed development would "NOT" (sic) form an occupier's main place of residence (pages 14, 16, 18).

89. During the hearing, the appellant submitted that the application was drafted in order to comply with particular requirements for applications in open countryside and that he had never had an intention or need to rent out the property for profit. He submitted that the last paragraph of the application, which refers to an expectation of restriction to "holiday" use to mean that it would be used by members of his family for holiday purposes.

90. However, we find that the statements made in the planning application clearly show that one purpose of the proposed development was for the appellant to provide a property to be let to third parties. The proposed activity is not described in generic terms: it refers to the appellant having undertaken specific steps such as discussing the application with other businesses in the area and receiving their support and making provision for property users without their own means of transport. Any personal use by the appellant would not benefit other businesses in the area, as the appellant already lived in the village, and the appellant would clearly not need to make provisions as to transport to enable himself to travel to the accommodation.

91. The appellant submitted, in the hearing, that he cannot have had a business purpose as there would have been no need to earn income from the property as his wife had "won the lottery". No further information as to the amount or date was stated. In contrast, in his grounds of appeal the appellant states that he and his wife are "on state pension" and "unable to employ professional people due to lack of funds".

He also states in his grounds of appeal that he has had to take out an equity release arrangement to finish the works because the VAT refund has been refused.

92. Further, the appellant also stated in the hearing that, when submitting the planning permission, he had had in mind both personal use and also that there would be "a couple of bob for renting" the property.

93. Considering these statements and the evidence before us, we consider that the appellant has not established that he had no financial reasons not to let out the property and that, on the contrary, he expected to receive income from renting the property.

94. A letting activity may not amount to a business if it is isolated or not seriously undertaken. However, from the specific details in the planning application we find that the appellant had more than a vague plan for the letting activity as, for example, he had undertaken discussion with other businesses in the area for support and had taken steps to ensure that the property would be accessible to tourists.

95. We therefore find that the appellant had a relevant business intention when submitting the planning application and that business intention related to the letting of the property to both holidaymakers and short term business visitors.

96. We have considered the appellant's submissions in relation to the case of *Swain* and consider that the facts in *Swain* were materially different: the appellant in that case intended from the outset to occupy the property as her permanent home. The decision notes that she may have been "burying her head in the sand" as to the planning conditions but that her motive throughout was to provide herself with a home and not to carry on a business.

97. In contrast, in this case, the appellant's planning application and own evidence shows that he intended to carry on a business of property letting and that this was not a vague possibility in the future but, instead, there was a "reasonably clear plan to start a business" (to take the phrase used in *Swain*) that the appellant had in mind and he had taken active steps to pursue that as part of his planning application.

98. The appellant also submitted that, in the case of *Jennings* which he considered to be similar, HMRC did not challenge the business purpose of the construction. HMRC submitted that the case of *Jennings* was based on different facts and related to a different area of law.

99. We considered that the appellant's submission with regard to *Jennings* is that HMRC should have taken the same approach to his case as that which he considers they took in the case of *Jennings*. We find that this is a submission that he has a legitimate expectation that HMRC would act in a particular manner: it is well established in case law that this Tribunal has no jurisdiction to hear claims in respect of legitimate expectation.

100. In case we were wrong as to the intention of the appellant's submission, we reviewed the information provided by the appellant in relation to the *Jennings*

decision, being the decision itself and planning material provided by the appellant and note that there is no reference in that information to any proposed or actual business in relation to Mr and Mrs Jennings. That case relates only to the question of whether the property was subject to particular restrictions that are not material to this matter. On the basis of the information provided, therefore, we consider that the case of *Jennings* cannot provide any support for an argument that the appellant should not be regarded as having had a business purpose when submitting the planning application.

Whether there was any intention as to business at the start of construction

101. In his grounds of appeal, the appellant stated that the Council's refusal to allow short term business letting of the property meant that business use of the property was not permitted. As set out above, we do not agree that the planning permission as granted excluded business use. The appellant did not abandon the planning consent nor did he apply to have it changed prior to the start of construction, for example to remove the requirement to maintain a register of occupation. The appellant had the opportunity to apply make such changes, as applications were made to alter the physical appearance of the property.

102. In his grounds of appeal the appellant also stated that, at the start of construction, he intended that the property would be a family holiday home and not a main residence. As already discussed, we find that use of the property by the family for holidays does not prevent a business purpose from also existing in relation to the property.

103. The appellant's evidence in the hearing was that at the start of construction he "wasn't thinking anything" and that he started the footings because the planning permission would otherwise expire.

104. Considering the evidence, we consider that the appellant has not satisfied us that his intentions with regard to the dual purpose of the property both for family and business use had changed between obtaining planning permission and the start of construction.

105. We therefore find that, at the start of the construction, the carrying on of the works included a relevant business purpose and so was not "otherwise than in the furtherance of any business".

Whether there was any intention as to business at the time of the claim

106. The appellant stated that he and his wife had decided to move into the developed property when they made an application for alteration of the external appearance of the property in May 2014. However, the application to remove the tourism conditions was not made until late February 2015, being received by the Council on 2 March 2015.

107. Although it is clear that the appellant had an aspiration to reside in the property when making the application for the removal of the occupancy conditions, he could

not use it a main residence unless and until that application was approved by the Council.

108. At the time of the claim for a VAT refund, therefore, the appellant cannot have been certain that he would not be required to continue to maintain another residence as his main residence in order to comply with the planning conditions whilst using the property as a family holiday home.

109. As noted above, the appellant has stated in his grounds of appeal that he has limited means and has not provided any evidence that he could maintain both the property and a separate main residence at the date of the VAT refund claim without undertaking some business use in relation to the property if he was unable to have the planning conditions removed.

110. Accordingly, the appellant has not satisfied us on the balance of probabilities that he had abandoned any business purpose in relation to the property whilst he was required by the planning permission to have a main residence elsewhere in order to use the property.

111. As the planning permission was not amended by the Council until after the completion of the works, we therefore find that the appellant's carrying out of the works included a business purpose throughout the course of those works such that the provisions of s35(1)(b) VATA 1994 are not satisfied.

Findings of fact

112. We find that:

(1) planning permission for the development was granted in December 2011. Planning permission was granted for tourism purposes only. It was a condition of the permission that the site owners/operators should maintain an up-to-date register of the names of all owners/occupiers of the building and of their main home addresses. The permission was granted as it was considered that it would meet a need for holiday accommodation in the local area and would benefit other local businesses accordingly;

(2) the appellant's purpose in applying for planning permission was to enable him to construct a property to be let out to tourists and to short term business visitors;

(3) when planning permission was refused for short term business visitor letting, the appellant continued to intend to undertake a business of providing holiday accommodation to tourists;

(4) the planning permission did not prevent the appellant and his family from using the property as holiday accommodation for themselves, provided that the terms of the planning permission were adhered to with respect to their occupancy of the property;

(5) the appellant's ability to use the property as personal holiday accommodation did not prevent it being used for a business purpose, being the letting of the property as holiday accommodation to third parties;

(6) the appellant was not permitted to occupy the property as his only or main residence prior to the Council's approval of the removal of planning restrictions as to occupancy being granted in October 2015;

(7) the appellant had a business purpose at the start of construction and that business purpose did not cease until the Council approved the removal of the planning restrictions.

Decision

113. The burden of proof in this matter is on the appellant to demonstrate, on the balance of probabilities, that the construction for which he seeks a VAT refund was, in this case, otherwise than in the course or furtherance of any business. For construction to be otherwise than in the course or furtherance of any business, there must be no intention to carry on a relevant business during the course of carrying out the works.

114. Having considered the evidence put to us, and in particular balancing contradictory information from the appellant in the hearing, in his grounds of appeal, and other documents, we find that the appellant intended to carry on a relevant business in relation to the property when obtaining planning permission and we are not satisfied that the appellant has established on the balance of probabilities that this intention had ceased prior to the start of construction nor are we satisfied that the appellant has established on the balance of probabilities that such intention had ceased at the date at which the VAT refund was requested.

115. Accordingly, the appeal is dismissed and HMRC's refusal to allow the VAT refund is upheld.

116. 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.

ANNE FAIRPO
TRIBUNAL JUDGE

RELEASE DATE: 11 SEPTEMBER 2018