Neutral Citation: [2023] UKFTT 00727 (TC)

Case Number: TC08916

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/02580

VALUE ADDED TAX – DIY House Builders Scheme – section 35 VATA – input VAT repayment claim – whether the works being carried out in 'furtherance of any business' – subsection 35(1)(b) VATA – proposed property with planning consent granted to be a holiday let – whether distinction drawn for 'building designed as a dwelling' for VAT purposes – appeal dismissed

Heard on: 30 March 2023
Judgment date: 22 August 2023

Before

TRIBUNAL JUDGE HEIDI POON
MOHAMMED FAROOQ

Between

PHILIP SPANI

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Nathaniel Monk of TM Sterling Limited

For the Respondents: Milan Chudasama, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. Mr Spani ('the appellant') appeals against a decision by the respondents ('HMRC') which refused a claim for a repayment of input VAT on costs incurred as being eligible under the Refunds for DIY Housebuilders Scheme (the '**Scheme**').

2. HMRC's decision to reject the appellant's input VAT claim was on the basis that the property in question would be available to be used in 'furtherance of any business' and therefore contravenes section 35 of the Value Added Tax Act 1994.

3. The issue for determination in this appeal is whether HMRC's decision to refuse the appellant's repayment claim is correct in law.

4. The quantum of the VAT repayment claim is £13,048.28 and has not been subjected to an appealable decision to date, and is not a matter in front of this Tribunal.

EVIDENCE

5. Mr Spani gave evidence in relation to the VAT repayment claim. We have no issue with Mr Spani's credibility, and accept his evidence as to matters of fact. Any aspects of Mr Spani's evidence which represented his interpretation of the legislation, we have considered them, where relevant, as additional submissions for the appellant.

LEGISLATIVE FRAMEWORK

6. The primary legislation providing for a claim of VAT refund is under s 35 of the Value Added Tax Act 1994 ('VATA'):

> '**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 changeable.
>
> (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.'

7. The meaning under sub-section 35(1A)(a) of '*a building designed as a dwelling or a number of dwellings*' is by reference to the definition under Item 2, Group 5, Sch 8 of VATA:

> '(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) a 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 terms 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.'

8. By virtue of reg 201 of the Value Added Tax Regulations 1995 ('the 1995 Regulations'), the method and the time-limit for making a claim under the Scheme are specified as follows:

> '**201 Method and time for making claim**
>
> A claimant shall make his claim in respect of a relevant building by –
>
> (a) furnishing to the Commissioners no later than 3 months after the completion of the building the relevant form for the purposes of the claim containing the full particulars required therein, and
>
> (b) at the same time furnishing to them –
>
> (i) a certificate of completion obtained from a local authority or such other documentary evidence of completion of the building as is satisfactory to the Commissioners,
>
> (ii) an invoice showing the registration number of the person supplying the goods, whether rot not such an invoice is a VAT invoice, in respect of each supply of goods on which VAT has been paid which have been incorporated into the building or its site,
>
> (iii) in respect of imported goods which have been incorporated into the building or its site, documentary evidence of their importation and of the VAT paid thereon,
>
> (iv) documentary evidence that planning permission for the building has been granted, and
>
> (v) a certificate signed by a quantity surveyor or architect that the goods shown in the claim were or, in his judgment, were likely to have been, incorporated into the building or its site.'

9. Regulation 201A of the 1995 Regulations stipulates the relevant form for a claim to be:

> '(a) form VAT 431 NB where the claim relates to works described in section 35(1A)(a) or (b) of the Act; and
>
> (b) form VAT 431 C where the claim relates to works described in section 35(1A)(c) of the Act.'

THE FACTS

Claim and verification correspondence

10. The background leading to the verification correspondence between the appellant and HMRC in relation to the VAT repayment claim is as follows:

> (1) On 5 January 2021, HMRC received the appellant's claim for VAT repayment under the DIY Housebuilders Scheme for a new house, being a cottage in Seaford (the 'property' or the '**Cottage**').

(2) By letter dated 3 March 2021, the team within HMRC designated to deal with claims under the Scheme (the '**DIY Team**') requested further information to be provided by the appellant to verify the claim for the new property.

(3) By letter dated 10 March 2021, the appellant replied with the requested information, including the full Planning Permission documentation and Home and Contents insurance documents. Mr Spani explained that the Council would not have granted planning permission for the house had it not been as a holiday let, and stated:

> 'The property was granted permission to be built as a Holiday Let. According to the Local Valuation Office Agency, the property must be available for letting on a commercial basis for not less than 140 days, which it is. Thus, I can live in the property within the Holiday Let guidelines, although Covid-19 has scuppered my lettings plans this year.'

11. On review of the information, which indicated that the property would be advertised for rental as a self-catering holiday unit, HMRC wrote again to the appellant on 30 June 2021 for further information regarding the use of the Cottage. On 14 July 2021, Mr Spani wrote in response to HMRC's letter of 30 June, and stated:

(1) The property 'is advertised with Air BnB', but 'there is no printed contract', and provided an url link for the property as listed on the Airbnb website. He also said:

> 'My intentions were to advertise the property with Air BnB, and to let it in compliance with FHL regulations.'

(2) To the question on the appellant's living arrangements when the property is being used by others as a holiday let, his reply was:

> 'When the property is let, I have several options. I have use of a property in Italy and my principle [sic] intention is to reside there for a significant part of the year, with the UK property let … as my UK home for the unlet periods. I have arrangements for the property to be managed when I am absent. I also have options for staying with friends and family during let periods should this be necessary.'

(3) Mr Spani continued by relating that:

> 'Along with many owners of furnished holiday lets, my plans to date have been frustrated by COVID. This has stopped me from getting [the Cottage] established in the letting market, and business plans have been put on hold. However, I am sure AirBnB will yield some enquiries and provided that the Covid measures permit, the property will be ready.'

Documents provided to DIY Team

Grant of Planning Permission

12. From the drawings and the floorplans, the proposed building for the planning permission application is a two-storey building with areas on the ground floor, and two bedrooms above.

13. The planning permission was granted pursuant to Town and Country Planning Act 1990 and secondary legislation of the Town and Country Planning (Development Management Procedure) (England) Order 2010. The grant was jointly issued by Lewes District Council and South Downs National Park Authority on 13 February 2015, and the relevant details include:

(1) *Proposal* – Demolition of existing outbuilding and erection of a detached holiday-let with parking and landscaping

(2) *Site Address* – Outbuilding Near … Cottage, … East Sussex …

(3) *Date of application* – 3rd December 2014

14. The permission was granted subject to eight stipulated conditions, of which the first three are as follows:

(1) Condition (1) stipulated that the development be carried out according to the plans approved in relation to location, block, existing elevations, floor plans, aerial view, roof plan and parking, and isometric view.

(2) Condition (2): 'The building hereby approved shall only be used for holiday accommodation and for no other purpose (including any purpose in Class C3 of the Schedule to the Town and Country Planning (Use Classes) Order 1987, or in any provision equivalent to that class in any statutory instrument revoking and re-enacting that Order'. The Reason given in conjunction with condition (2) is as follows:

> 'The building is specifically proposed as a holiday let in the application and the site is in a location where new residential accommodation would not normally be permitted, having regard to the national park landscape protection policies in the Lewes District Local Plan and National Planning Framework.'

(3) Condition (3): 'The building hereby approved shall not be occupied until the existing access onto the […] has been closed up and the proposed access has been implemented and brought into use, all in accordance with the 'Sketch of Proposed Access and Visibility Splay' contained in the '*Technical Report – Holiday Let at [Cottage] A--Road*' by Reeves Transport Planning Ltd dated June 2014.'

Certificate of completion

15. The certificate of completion was issued by Building Control of Lewes District Council and addressed to Mr Spani at a different cottage in the same area as the site for the new build. The details on the certificate relevant to this appeal are as follows:

(1) *Details of Work* – Detached holiday let with parking

(2) *Location of building* – [on site of the name of the former] Cottage […], Seaford

(3) *Completion Date* – 7th December 2020

Home and contents insurance

16. The policy schedule was issued by Intelligent Insurance with the relevant details being:

(1) *Requested period of insurance* – 17 July 2020 to 16 July 2021

(2) *Liability cover (Policy Section 3)* – Tenant's liability with maximum claims limits at £15,000.

Refusal decision and review request

17. On 23 August 2021, HMRC's National DIY Unit wrote to refuse Mr Spani's DIY Housebuilders claim on the basis that the property was 'let out or used for any other business purpose' and was not eligible for repayment under the Scheme. The decision also stated that 'the eligibility of the individual invoices has not been determined'.

18. Mr Spani requested a review of the National DIY Unit's decision via his accountant by letter dated 14 September, which was responded to by HMRC on 29 October 2021 that a statutory review would be carried out.

19. The Review Conclusion letter dated 8 December 2021 upheld the refusal decision on the basis that the property has been constructed to be a holiday let, and as such does not meet the criteria of 'designed as a dwelling' for VAT purposes to be eligible for a repayment refund under the Scheme. The review conclusion letter specifically referred to the quantum of Mr Spani's DIY Housebuilders claim as not forming part of the review, and that HMRC have not made any decision in relation to the quantum of the claim.

APPELLANT'S APPEAL

20. On 3 February 2022, Mr Spani's accountant lodged an appeal with the Tribunal against the review conclusion decision. The late appeal was admitted on application by Mr Spani, to which HMRC did not object.

21. Mr Spani was directed to provide further and better particulars following the admission of his late appeal. Mr Monk of TM Sterling Ltd was then appointed to be his representative. The grounds of appeal stated in the further and better particulars (lodged by TM Sterling for Mr Spani in June 2022) are summarised as follows:

(1) The property was made available for the purpose of letting solely due to the fact that it falls within the South Downs National Park. In order to obtain planning consent, the property was required to be made available for letting, despite the property being the appellant's primary residence.

(2) This requirement to let the property was not of concern to the appellant as, until recently, it was usual for the appellant to spend part of each year overseas.

(3) It is contended that the arrangement 'falls far short of the HMRC's position that it was the appellant's intention to use the property for a wholly commercial purpose'.

(4) There is no specific definition in VAT law as to the nature of 'business', and the appellant contends that 'the key tenets' include:

(a) Is the activity a serious undertaking, earnestly pursued?

(b) Is it pursued with regular continuity?

(c) Does it have a measure of substance?

(d) Is it conducted on business principles?

(5) Apart from a simple listing on the website AirBnB, which was undertaken to satisfy the requirements of the planning permission, there has been no attempt by the appellant that should satisfy the key tenets listed above.

(6) Since its construction, the property has only been lived in by the appellant and his partner. During a recent short period of international travel, the property was not let.

(7) The fact that 'any income generated from the letting of the property would be chargeable to income tax falls short of qualifying the arrangement as a "business" within the context of VAT'.

(8) If the appellant had wished to pursue the letting of the property as a legitimate business venture, he could have opted to register for VAT, but 'this was not undertaken because the property was never intended to be a commercial endeavour'.

(9) The property is 'simply the appellant's home in the UK'.

(10) The appellant is 'of the belief that the construction of the property satisfied the requirements of a VAT reclaim' under the Scheme, in that the property 'represents his private residence', and therefore 'the reclaim should be allowed on this basis'.

22. Mr Monk's submissions at the hearing did not depart from the further and better particulars. The main grounds of appeal can be summarised as:

(a) There has been no business activity being pursued, and the property was not let at any point 'during the period'; and

(b) Mr Spani has been 'prejudiced' by the 'caveat' to the planning permission being granted. It is submitted that had an identical property been built outside the South Downs National Park, there would have been no issue with Mr Spani's claim.

HMRC'S CASE

23. Mr Chudasama submits that HMRC's refusal decision is based on the applicable legislation, in that:

(1) For a valid DIY Housebuilders claim to be refunded, the appellant must have constructed a dwelling within the meaning of Items 2, Group 5 of Sch 8 to VATA.

(2) From reading of the planning permission documentation, the appellant has been granted permission to build a detached 'holiday let' because the construction of a residential home would not be permitted.

(3) A holiday let is classed a business for VAT purposes and is not a type of build which is eligible for a refund under the DIY Housebuilders Scheme, as it is not considered to be a 'dwelling' for VAT purposes.

(4) The appellant argues that as a part of the conditions to get planning consent to build the house, he had to demonstrate that the property was required to be made for letting – despite being his primary residence.

(5) HMRC submit that the fact that the property is available to be let out via Airbnb means that it is capable of earning the appellant a business income.

(6) From correspondence, it is clear that the property is vacant for some time every year and as part of the planning permission, the appellant must make the property available for let. There is therefore a risk that the property can be used to earn a business income, even if done so irregularly.

(7) The appellant's intentions are clear as per his letter of 14 July 2021 that the property was built with the intention of it being a business venture, and those are the grounds on which the planning permission was granted.

DISCUSSION

Burden of proof

24. The issue for determination in this appeal is whether Mr Spani's claim under the DIY Housebuilders Scheme has met the eligibility criteria. The burden of proof is on Mr Spani as the claimant that he has met the eligibility criteria for the DIY Housebuilders Scheme for his repayment claim to be entertained.

Eligibility criteria

25. Section 35 VATA is the primary legislation for the DIY Housebuilders Scheme, and the eligibility criteria are by reference to the 'person' and 'the works', whereby:

(1) The eligible person is defined as 'a person carries out works to which this section applies', and crucially, section 35(1)(b) VATA sets out an additional condition that:

> *'[the person's] carrying out of the works is lawful and **otherwise than** in the course or furtherance of any business, …*'

(2) The eligibility of the works is defined by section 35(1A) VATA, whereby:

> '*The works to which this section applies are –*
> *(a) the construction of a building designed as a dwelling …*'

(3) Item 2, Group 5, Sch 8 of VATA provides for the definition of a dwelling for VAT purposes if the conditions under Item 2(a) to (d) are satisfied (see §7 above).

26. There are two aspects to the primary legislation under s 35 VATA as concerns eligibility for the DIY Housebuilders Scheme; namely: (a) eligibility of the person carrying out the works, and (b) eligibility of the works as relating to the building.

27. In the present case, the facts that we are required to find in order to determine the eligibility as concerns the person and the works have to take into account the conditions placed on the use of the proposed building as stipulated by the grant of the planning permission. The planning permission for the Cottage was granted with conditions attached, of which Condition (2) is material to our consideration, and it stipulates that:

> 'The building hereby approved shall only be used for holiday accommodation and for no other purpose (including any purpose in Class C3 of the Schedule to the Town and Country Planning (Use Classes) Order 1987, …'

28. The respondents were directed at the end of the hearing to provide the relevant version(s) of Town and Country Planning (Use Classes) Order 1987 (SI 1987/764) (the '**1987 Order**'). In relation to the definition of 'Class C3' in the 1987 Order, the version with all changes known to be in force on or before 4 October 2022 reads as follows:

> '**Class C3 Dwellinghouses**
>
> Use as a dwellinghouse (whether or not as a sole or main residence) by –
>
> (a) a single person or by people to be regarded as forming a single household;
>
> (b) not more than six residents living together as a single household where care is provided for residents; or
>
> (c) not more than six residents living together as a single household where no care is provided to residents […]
>
> **Interpretation of Class C3**
>
> For the purposes of Class 3(a) "single household" is to be construed in accordance with section 258 of the Housing Act 2004.'

29. The planning permission was granted on 13 February 2015, and the date of the completion certificate was 7 December 2020. There are two earlier versions of Class 3 from the 1987 Order which were updated at 25 February 2016, and 1 September 2020. We conclude that there has been no material change to Class C3 definition of the 4 October 2022 version set out at §28 from the earlier versions which were closer in time to the dates of the planning permission and completion certificate.

30. For the claim to be eligible for the DIY Housebuilders Scheme, both criteria as concerns (a) the eligibility of the person carrying out the works, and (b) eligibility of the works as relating to the building have to be met. We make findings of fact in relation to each criterion in turn.

Eligibility of the person carrying out the works

31. The evidence from Mr Spani is that the property has not been used for any business activities due to Covid, and the ill health of his partner has meant that they could not travel abroad, and the property has been their main residence.

32. On one interpretation, the appellant's submissions amount to inviting the Tribunal to find that (a) the property has been built to be his main residence all along; (b) that the reference of the property to be built as a holiday let (in the planning application) was merely a ploy to get round the planning restriction applicable to South Downs Country Park, which is to prohibit the construction of buildings for residential accommodation; and (c) that the advertising of the property under Airbnb was yet another ploy to give the appearance that the appellant intended to make the property a holiday let. The Tribunal declines to make any such findings of fact.

33. In any event, even if we accept Mr Spani's evidence that he and his partner have been forming a single household, and living in the property as their main residence, and due to the unforeseen circumstances brought by Covid, there have been no business activities by letting the property, we remain bound by Condition 2 of the planning consent to conclude that the

relevant works that had been carried out by Mr Spani was in '*furtherance of [a] business*' in terms of s 35(1)(b) VATA. We make the following findings of fact in relation to our conclusion.

(1) The planning consent was categorical that the building approved to be constructed '*shall only be used for holiday accommodation*', and '*for no other purpose*'.

(2) The planning consent particularised the prohibition of use of the approved building to include Class C3 purpose, which is the use as a '*dwellinghouse*' by '*a single person or by people to be regarded as forming a single household*'.

(3) The planning consent gave clear reason for the prohibited use of the property as a dwellinghouse, as being in line with the protection policies of national park landscape in which the property is situated.

(4) The building is specifically proposed as a holiday let in the application, because the site is in a location where new residential accommodation would not normally be permitted. The precondition for the grant of consent was reiterated in Mr Spani's letter of 10 March 2021: 'The property was granted permission to be built as a Holiday Let'.

(5) Mr Spani's first response to HMRC by letter of 10 March 2021 stated in no uncertain terms his intention to carry on with a Furnished Holiday Letting ('FHL') business, citing the Local Valuation Office Agency, and that 'the property *must* be available for letting on a commercial basis for not less than 140 days' (italics added).

(6) Mr Spani's letter of 14 July 2021 made it clear 'his intentions were to advertise the property with Airbnb' and to let the property 'in compliance with the FHL regulations', and provided an url for the listing on Airbnb website as evidence of his intentions.

(7) The Home and Contents insurance cover specified Tenant's liability being part of the cover and that a claim under Tenant's liability is restricted to £15,000.

34. We accept that Mr Spani' letting plans in 2021 were 'scuppered' by Covid, and his partner's ill health has put the letting plans on hold. However, none of these events subsequent to the grant of the planning permission and completion certificate detract from the fact that the property was built to be a holiday let (as stipulated by the planning consent) and was therefore constructed in furtherance of a FHL business.

35. As to Mr Spani's plan to 'live in the property within the Holiday Let guidelines', it is not for this Tribunal to decide whether the appellant's plan to inhabit the property in this manner represents a contravention of the precondition for the grant of planning consent. For the purposes of this appeal, it is plain that the appellant's plan to live in the property within the FHL regulations does not (and cannot) alter the property into a 'dwellinghouse' for Class C3 purposes when there is the express prohibition placed on the property to be a dwellinghouse.

36. We conclude that the appellant's claim falls at the first hurdle, and the eligibility criterion by the express provision under s 35(1)(b) VATA as concerns the person carrying out the works is not met, based on our conclusion that the property was built in furtherance of a business.

Eligibility of the works

37. It is sufficient to determine the appeal based on our conclusion as regards the eligibility criterion by reference to s 35(1)(b). Whilst it is not necessary for the Tribunal to consider whether the works carried out meet the eligibility criterion under s 35(1A) VATA, we address this aspect briefly for the sake of completeness.

38. The relevant test for '*a building designed as a dwelling*' in the VAT context is by reference to Item 2, Group 5, Sch 8 to VATA. For a building to meet the criterion '*designed as*

a dwelling', all four conditions under Item 2 have to be satisfied. In relation to each of the four conditions, we make relevant findings of fact as follows:

> (a) *a dwelling consists of self-contained living accommodation* – the property in question satisfies this condition as per the drawings and plans submitted for the planning permission application and the fact that the appellant and his partner has been using the property as a 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* – this condition would appear to be satisfied on the fact, on the basis that there does not seem to be any evidence to the contrary.
>
> (c) *the separate use, or disposal of the dwelling is not prohibited by the terms of any covenant, statutory planning consent or similar provision* – this condition is not one we can make any relevant finding of fact based on what has been provided.
>
> (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* – this condition interacts with the planning consent which was granted with its eight conditions and raises the question as to whether the meaning of a 'dwelling' for VAT purposes is to be construed by reference to the prohibition condition of Class 3C purposes in the planning consent granted.

39. When considering the relevant test within the VAT context, the First-tier Tribunal ('**FTT**') in *Carson Contractors v HMRC* [2015] UKFTT 530 (TC) ('*Carson*') specifically distinguished it from similar tests for dwellings in other contexts at [42]:

> 'We consider that there is a distinction to be drawn between a person's dwelling and a building designed as a dwelling. An ordinary house, for example, will cease to be someone's dwelling when it becomes unoccupied or used as short term temporary accommodation. It will nevertheless be designed as a dwelling. The test in Item 2 [Group 5 Schedule 8 to VATA 1994] is not in relation to the actual use of the building but relates to the nature of its design. That in our judgement is an objective test. The way a building has been used can at best only be evidence of one way it could be used.'

40. In *Carson,* the FTT found that a planning permission restriction of a building to purposes ancillary to another large house did not prevent the building from being 'self-contained living accommodation'. We agree with the FTT in *Carson,* that the eligibility criterion as regards the works being '*the construction of a building designed as a dwelling*' is by reference to the *design* of the building as a dwelling. In the present case, and in relation to the planning permission restriction of usage as a 'dwellinghouse' under Class 3C, we similarly find that the restriction of purpose does not prevent the property from being '*designed as a dwelling*' whereby Item 2 condition (a) is met. We are of the view that the prohibition for Class 3C purposes as a dwellinghouse under the planning permission does not render the property from being able to satisfy conditions under Item 2(a) and (d).

41. The architecture of section 35 VATA means that the eligibility criteria as concerns the person carrying out the works under section 35(1) take precedence over the consideration of eligibility as concerns the works under section 35(1A). The eligibility criterion that ultimately determines the appeal is by reference to s 35(1)(b) as concerns the person carrying out the works being in furtherance of a business.

Other considerations

42. HMRC's review conclusion referred to Guidance Notes *VAT431 NB Notes* which is entitled: 'VAT refunds for DIY housebuilders: Claim form notes for new houses'. Mr

Chudasama's submissions likewise refer to *VAT431 NB Notes*. Guidance notes represent the interpretation of HMRC of the relevant statute and have no force in law. Whilst we make no reliance on the guidance notes in reaching our decision, we have included the excerpts relied on by HMRC for completeness.

> 'Types of new builds eligible for the Scheme
>
> You are eligible for this Scheme if you, for reasons other than business:
>
> - Have constructed a new dwelling to be used either by you or your relatives as a family home for residential or holiday purposes.
>
> Types of new builds not eligible for the Scheme
>
> You are not eligible for this Scheme if you've:
>
> - Constructed a property that either you, or your relative, do not intend to live in yourselves but intend to sell or let out or use for any other business purpose – a business purpose also includes a dwelling built because you need to live where you work.'

43. HMRC draw the distinction between a person building a holiday home as a second home (additional to one's main residence) and a building designated to be a holiday let. The construction of a building for use as a holiday home by the person carrying out the works will *not* be 'in the course or furtherance of a business' for the DIY Housebuilders Scheme, as illustrated by *Irene Susan Jenning v HMRC* (TC00362), which was cited in the review conclusion letter. HMRC distinguish the appellant's case as not being 'on all fours' with *Jenning*, in that Mrs Jenning's holiday home was built for private use, and not built to be a holiday let in furtherance of a business.

44. We agree with the distinction drawn in this respect. Even if we are to consider that the appellant's case as using the property as a second home, the property remains one that was built first and foremost to be a holiday let, and is therefore built in furtherance of a business.

CONCLUSION

45. For the reason stated, the appellant's claim for repayment of input VAT incurred on expenses in the building of the property is not eligible for the DIY Housebuilders Scheme pursuant to s 35(1)(b) VATA because the property was built in furtherance of a business.

46. The appeal is accordingly dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

47. 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.

HEIDI POON
TRIBUNAL JUDGE

Release date: 22nd AUGUST 2023