



**TC01671**

**Appeal number TC/2009/13278**

*VAT – Do-It-Yourself Builders and Converters Scheme – VATA 1994 s35 & Sch 8 Group 5 Note (2)(c) - whether prohibition on separate use or disposal of property - appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**TIMOTHY WILLIAN STEVENS  
SALLY MARY STEVENS**

**Appellants**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S  
REVENUE AND CUSTOMS (*value added tax*)**

**Respondents**

**TRIBUNAL: Judge Malachy Cornwell-Kelly  
Mr Christopher Perry C. Eng.**

**Sitting in public at Vintry House, Wine Street, Bristol on 19 November 2010**

**The Appellants in person**

**Mr Robert Wastell instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents**

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## DECISION

### *Introduction*

5 1 This is an appeal made on 12 August 2009 against a refusal of the Commissioners  
on 24 September 2008 to allow a claim for a refund of value added tax amounting to  
£3,156.49 in relation to the Do-It-Yourself Builders and Converters Scheme. The  
question at issue is whether the appellants' property, Summerings Farm, Wheddon  
Cross, Minehead, was 'designed as a dwelling' for the purposes of section 35 and  
10 Schedule 8, Group 5, Note 2(c), of the Value Added Tax Act 1994 ('the Act').

### *The legislation*

2 The legislation applicable is section 35 of the Act and Schedule 8, Group 5, Note  
(2), of the Act.

3 Section 35, in so far as relevant, provides:-

15 *35(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*

20 *(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, in a claim in that behalf, refund to that person the  
amount of the VAT so chargeable.*

*35(A1) The works to which this section applies are-*

25 *(a) the construction of a building designed as a dwelling or a 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.*

30 *35(4) The notes to Group 5 of Schedule 8 shall apply for construing this section  
as they apply for construing that Group . . .*

4 Note (2) to Group 5 of Schedule 8 provides:-

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

5 *(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 terms of any covenant, statutory planning consent or similar provision; and*

10 *(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.*

#### *Facts*

5 In 1996, the appellants were granted planning permission to build a farmhouse,  
15 which they subsequently did and which is the property where they now live, called Summerings Farm. Summerings Farm now consists of a detached house with three bedrooms situated in some 100 acres of farmland. When outline planning permission under reference 6/15/96/103 was granted for this farmhouse on 24 September 1996 by the planning authority for the Exmoor National Park – shown on the permission as the  
20 Exmoor National Park Committee - it was said to be the subject of a “section 106 legal agreement tying the property to the land”.

6 An agreement under seal purporting to be made under section 106 of the Town and Country Planning Act 1990 was eventually produced to us (in circumstances which we relate below) made on 19 December 1996 between the appellants, Somerset  
25 County Council and the appellants’ mortgagees Lloyds bank Plc. The agreement recited that Somerset County was the local planning authority for the Exmoor National Park, and that the appellants had applied to the Council for planning permission to erect the farmhouse under the same reference number, 6/15/96/103.

7 The recitals went on to record that “the Council wishes to ensure that the said  
farmhouse remains in the same ownership as the [land]” and that “the Council is  
prepared subject to completion of this agreement to grant planning permission”. The  
agreement then provided that “the said farmhouse shall not be transferred, let or in  
5 any way disposed of separately from the [land]”.

8 The appellants moved into the farmhouse in October 1998 but did not obtain a  
certificate of completion until ten years later, on 13 August 2008. On 19 August  
2008, they submitted the refund claim the subject of this appeal. There is no dispute  
that the work referred to in the claim was done by the appellants themselves, that it  
10 complied with the planning conditions and that the claim was for the correct amount.

9 After correspondence between the parties, the claim was definitively refused on  
review in a letter from the Commissioners dated 19 August 2009, shortly after the  
appeal notice had been lodged.

10 We heard sworn evidence from both Mr and Mrs Stevens that they had sought  
15 information from the then Customs & Excise local VAT office about the conditions  
for a tax refund and were supplied with Notice 719, the May 2002 edition. The first  
official record of such a contact was in July 2004, from which it is apparent that the  
relevant public notice material was indeed supplied to the appellants, the main  
concern being to know when a refund claim could be submitted.

20 11 The next two such records are for 8 August 2008, a week before the completion  
certificate was given, showing an enquiry about completion of the claim and seeking  
details of where the claim had to be sent to. The appellants complained that nothing  
had alerted them, at these times or earlier, to the problem which subsequently became  
apparent concerning the disposal restriction under the section 106 agreement. Having  
25 heard the appellants’ oral evidence, we are not able to find that they definitely made  
enquiries of Customs and Excise about this aspect of matters in 1996 or later, still less  
that they were misled by anything they were told in reply.

12 The appellants also contended, with support from the planning authority, that the purpose of the planning restriction was to prevent the abuse which resulted from permission being given for new farmhouses which, only a short while later, were separated from the farmland they were supposed to be linked with and sold as  
5 independent houses in the countryside - for which permission would never have been given in the first place. This, they contended, should not lead to a tax discrimination by a sidewind where the farmhouse was built by a do-it-yourself builder.

13 There was also a suggestion in the correspondence that had the position been made clear to the appellants at the outset, the VAT in the cost of building materials could  
10 have been claimed as input tax in relation to the farm business. That is an issue which is not within our jurisdiction in this appeal, and the possibility of that course was specifically refuted by the Commissioners in their statement of case. Suffice it to say that that issue must be pursued, if at all, in another context.

14 At the hearing, we were not presented with a copy of the agreement of 19  
15 December 1996 with Somerset County Council, but merely with a blank pro-forma of such an agreement. Both the appellants said on oath that they could not be sure whether an agreement was in fact signed. Since the appeal effectively turned on the existence or otherwise of the prohibition contained in the agreement, we could not resolved the case fairly and justly, as required by the tribunal's rules, without  
20 knowing the position for certain. We therefore adjourned the case and issued a production order to Somerset County Council seeking a certified copy of any agreement in fact concluded.

15 We made it clear that the matter thus turned on the response of the County Council, and it appears that Crown counsel's note confirms that this was clearly  
25 understood at the conclusion of the hearing. A certified copy of the agreement which we have recounted at paragraphs 6 and 7 above was duly produced by the County Council. This fact was communicated to the parties and the Commissioners requested accordingly that the matter should be referred to us for a final decision. Unfortunately, that was not done and the case was listed for a further hearing on 5  
30 September 2011 before a differently constituted tribunal sitting at Bristol.

16 That tribunal, seeing the difficulty which had arisen, made a direction that the appellants should have an opportunity to make representations by 30 September 2011; in the event no representations were received from them. It therefore falls to us to determine the appeal in the light of the document now produced by Somerset County Council.

### *Conclusions*

17 The provision of the section 106 agreement noted at paragraph 6 above is clearly the type of prohibition envisaged by Note (2)(c) of Group 5 of Schedule 8. This conclusion is supported by reference to several decisions of the VAT & Duties tribunal cited to us, and the point is not in dispute. For the record, the decisions cited were: *Hopewell-Smith* [2000] VATD 16725, *Wiseman* [2001] VATD 17374, *Cartagena* [2005] VATD 19454, *Collins* [2005] VATD 19564, *Gilbin* [2007] VATD 20352, *Cussins* [2008] VADT 20541, *Sharples* [2008] VATD 20775, and *Bracegirdle* [2008] VATD 20889.

18 It would follow that the appeal must therefore be dismissed. However, the section 106 agreement as shown to us contradicts the planning permission granted by the Exmoor National Park Committee in the following particulars:

- First, the agreement was made on 19 December 1996, some three months after the outline planning permission was granted on 24 September 1996, notwithstanding that the permission stated that “This permission *is* the subject of a section 106 legal agreement tying the property to the land” (our emphasis).
- Second, the planning permission had stated that the Exmoor National Park Committee was the local planning authority for the Exmoor National Park, whereas the agreement recited that the County Council was the local planning authority for the Exmoor National Park.

- Third, the agreement recited that the County Council “is prepared subject to completion of this agreement to grant planning permission subject to further conditions in respect of the Development Proposal”, whereas outline permission had, as we have seen, already been granted by the Exmoor National Park Committee on 24 September with respect to an application bearing the same reference number as that cited in the agreement. (Detailed permission was also granted by the Exmoor National Park Committee on 25 September 1996.)
- Lastly, the agreement provided for the payment of the County Council’s legal expenses “prior to the issuing of the planning decision notice in respect of the development for which the Council is prepared to grant conditional planning permission”, whereas there is no evidence at all that any permission subsequent to that granted on 24 September was either issued or requested.

19 Section 106 of the Town and Country Planning Act 1990 provides that any person interested in land in the area of a local planning authority may enter into an obligation with respect to “restricting the development or use of the land in any specified way”. This does not appear to be a provision apt to cover an undertaking not to transfer, let or dispose of land. In any event, section 4A of the 1990 Act, inserted by section 67 of the Environment Act 1995 with effect from 19 September 1995, provides that where a National Park authority has been established for any area that authority is to be the “sole local planning authority for the area of the Park”. The events we are concerned with took place in September and December 1996, by when the provisions referred to were in force, and by when Exmoor National Park Committee was in existence.

20 It is difficult to resist the conclusion that the section 106 agreement made with Somerset County Council was not in accordance with these statutory provisions (since that body was not the local planning authority), that it was made on the basis of mistakes as to the facts relating to actual grant of planning permission, and that it was accordingly not a lawful exercise of the powers conferred by section 106 of the Town and Country Planning Act 1990.

21 It follows from that conclusion that there is not clearly shown to be a prohibition  
on the “separate use, or disposal of the dwelling” within the meaning of Note (2)(c) of  
Group 5 of Schedule 8. It may well be that the error in regard to this restriction can  
be rectified in planning law, but for the purposes of tax the case falls to be considered  
5 as matters stood at the date the claim for a refund was made and accordingly the  
appeal must in these circumstances be allowed.

22 This decision was released in draft to the parties on 7 November 2011 with a  
Direction that either party was at liberty to make representations on it or request a  
further hearing before 31 December 2011, in default of which the decision would  
10 become final. On 6 December 2011 the Commissioners indicated in writing that they  
did not wish to make further representations and did not seek a further hearing.

23 This document contains the 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  
15 Chamber) Rules 2009. The application must be received by this Tribunal no 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.

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**Malachy Cornwell-Kelly**  
**Tribunal Judge**

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**RELEASE DATE: 16 December 2011**