**18785**

***Sale of chalets or lodges in holiday development; restriction on use; not to be used as sole or main residence; whether zero rated or standard rated. VATA sections 30 Schedule 8 Group 5 Item 1 and Note 13..***

**EDINBURGH TRIBUNAL CENTRE**

**LOCH TAY HIGHLAND LODGES LIMITED**
**Appellants**
**- and -**

**THE COMMISSIONERS OF CUSTOMS AND EXCISE**
**Respondents**

**Tribunal: (Chairman): J Gordon Reid, QC., F.C.I.Arb.,**
**K Pritchard, OBE., BL., WS**

**Sitting in Edinburgh on 12 December 2001**

**for the Appellants** **D Graham, VAT Planning Group**

**for the Respondents** **D I K MacLeod, WS., Shepherd & Wedderburn, WS**

## DECISION

This is an appeal under section 73 of the Value Added Tax Act 1994, against assessments by the Commissioners of Customs and Excise ("Customs") for arrears of VAT for two periods, namely 1/9/99 to 31/8/00 and 1/9/00 to 30/11/00. The amounts of the assessments are £31,200 (plus interest) and £19473 respectively. In summary, the assessments relate to the sale of heritable property, lodges at the Appellant's development at Loch Tay. The Appellants have treated these sales as zero rated relying on Schedule 8, Group 5, Item 1, whereas Customs have treated the sales as standard rated, relying on Note 13 to Group 5.

The Appellants were represented by Mr D Graham, VAT Consultant, The VAT Planning Group Ltd, Edinburgh. Customs were represented by Mr D I K MacLeod, W.S, of Messrs Shepherd & Wedderburn W.S. Solicitors, Edinburgh. Neither party led evidence. An agreed bundle of documents was produced. There was no dispute about the authenticity, and/or the transmission and receipt of the documents contained in the bundle. In these circumstances, we make the following findings-in-fact:-

1. The Appellants are a limited company. They carry on business inter alia managing and renting their own property and as management and letting agents for third party owners; they also build and sell heritable property in Scotland including the lodges mentioned below and shares in such lodges. They were registered for VAT with effect from 1984.

2. Between 1/9/99 and 30/11/00, the Appellants sold or at least received income from the sale of, in the course of their business, lodges at their development at Loch Tay, Milton Morenish, Killin, Perthshire. These were the first grant of newly built dwellings constructed by the Appellants and constituted the first grant of a major interest in the dwellings or lodges in question.

3. The lodges are set in mature woodlands on a highland estate extending to about 140 acres. Amenities there include salmon and trout fishing, private harbour with free moorings, riding and an equestrian centre. The lodges are of a Scandanavian design with full central heating. There are similar lodges within the estate which are rented out as holiday accommodation. The lodges, which are subject of the appeal are part of a holiday complex within the highland estate. The grounds surrounding the lodges and related roads and

driveways are maintained by the Appellants. The owners of the lodges pay the Appellants a maintenance charge for that service.

4. When planning permission was granted by Perth and Kinross Council on 23/9/99 for the erection of four lodges at Loch Tay aforesaid, a condition of the grant was that "The lodges shall be used solely for holiday accommodation and shall not be occupied as the sole or main residence of any occupant". The reason stated for this condition by the Planning Authority was "To prevent residential use of the site in view of its location within a rural area and in accordance with the Planning Authority's policy of restricting sporadic development in the countryside".

5. In a letter dated 27/4/01 to Customs, an official of the Planning Authority expressed the view in relation to the lodges which are the subject of this appeal that "To live in the lodge for 365 days of the year as the sole or main residence would be in breach of planning and the council could instigate enforcement action to prevent this use. The reasoning behind the condition is that the lodge was granted consent as holiday accommodation within part of a complex of similar units. The residential environment is therefore different from that which would

be expected on a residential area. There is no requirement for private amenity space etc for lodges which would always be a requirement on permanent residences".

6. The four lodges were advertised for sale "freehold" and described *inter alia* as the "ultimate second/holiday home".

7. The Feu Disposition for each lodge contained the following clause:- "the Feuar shall not be at liberty to sell or dispone the subjects hereby disponed except as a whole or in one quarter shares, where the occupation attributable to such shares is as specified in the Schedule of Occupation annexed and signed as relative hereto and the said Chalet shall be used and occupied solely as a holiday dwellinghouse and for no other purpose and shall never in any way be sub-divided externally or internally, nor shall the same be occupied by more than one family except with the prior consent in writing of the Superiors". The Schedule referred to in that clause specified over a four year cycle, which periods in each of the four years each quarter share owner was entitled to occupy the lodge in question.

8. In the VAT Returns for the periods to which this appeal relates, the Appellants treated sales of such lodges as zero rated.

9. By letter dated 23/2/01, the Customs intimated their decision that the net VAT reclaimable should be reduced by the sum of £19,473 in respect of the quarterly periods from 1/9/00 to 30/11/00. The assessment related to income received from the sale of lodges owned by the Appellants and the latter's treatment of the sale or sales as zero rated.

10. By Note of Assessment dated 5/3/01, the Appellants were assessed in the sum of £31,200 plus interest in respect of the quarterly periods from 1/9/99 to 31/8/00. The assessment related to income received from the sale of lodges owned by the Appellants and the latter's treatment of the sale or sales as zero rated.

11. These decision proceeded on the basis that the sales referred to in finding-in-fact 8 should be standard rated. An internal review of these decisions was carried out by Customs. The decisions were adhered to and intimation given to the Appellants' agent by letter dated 13/6/01.

12. The arithmetical calculations leading to the figures referred to in findings-in-fact 9 and 10 are not in dispute.

Mr Graham produced a written skeleton argument. He began by emphasising that we were not concerned with the provision of holiday accommodation, which would be a standard rated supply of services, not goods. His principal argument was that neither planning condition nor the clause in the Feu Disposition referred to in our findings-in-fact prevented residence at a lodge throughout the year; nor did they prevent use by the grantee of the lodge as his principal private residence. The supplies in question were the first grant by a person constructing a building designed as a dwelling (1994 Act Section 30, Schedule 8 Item 1(a)(i)). The conditions do not prevent, but merely restrict the instances where the lodges could be used as the principal private residence. Accordingly, the supply ie the sale of the heritable property, should be treated as zero rated. Note 13 to Item 1 of Group 5 to Schedule 8 does not arise because the planning and feudal conditions do not prevent the use of the lodges throughout the year; and they do not prevent the use of the lodges as the grantee's principal private residence; there is no restriction on residing at the lodge throughout the year; there is thus no seasonal restriction on occupancy. Use as holiday accommodation need not be short term but could be for a substantial period. The planning condition allowed residence throughout the year and as the principal private residence of the grantee. Throughout the year does not mean 365 days. He relied upon *Haven Leisure Ltd 1990 VATTR 77) Livingstone Homes UK Ltd v CC&E ED 16649 17/5/00.* His submission in

summary was that as the supplied in question were zero rated, and Customs had treated them as standard rated, Customs decisions were not made to best judgement and the appeal should be allowed.

Mr MacLeod began by accepting that, but for the existence of Note 13 to Item 1, the supplies would be zero rated. He accepted too that the use of the lodges throughout the year ie the whole 365 days is not prevented by the planning and feudal conditions. But this, he said, was irrelevant. The building's use is not restricted by the grantee's use is. The plain purpose of the planning condition was to prevent residential use and sanction use only for holiday purposes. That could be seen from the stated reasons for the condition. He submitted that there was no difference between the planning condition and the feudal condition. *Livingstone* was either wrong or distinguishable. He relied on the fact that the lodges were advertised as "Ideal holiday second home". He drew our attention to the other authorities referred to below.

In our view, the arguments submitted on behalf of the Appellants cannot be accepted. Item 1 of Group 5 to Schedule 8 (which identifies supplies that are to be zero-rated) provides *inter alia* as follows:-

> *"1 The first grant by a person –*
> *(a) constructing a building-*

*(i) designed as a dwelling or number of dwellings; or*

*(ii) intended for use solely for a relevant residential or relevant charitable purpose; or*

*(b) …….[not relevant]*

*of a major interest in, or in any part of the building, dwelling or its site".*

Note 13 to this item provides as follows:-

*"The grant of an interest in, or in any part of-*

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

*(b) the site of such a building,*

*is not within Item 1 if-*

*(i) the interest granted is such that the grantee is not entitled to reside in the building or part, throughout the year; or*

*(ii) residence there throughout the year, or the use of the building as part of the grantee's principal private residence, is prevented by the terms of a covenant, statutory planning consent or similar permission".*

As presented to us, the issue in this appeal is whether either or both branches of Note 13 (i) and (ii) applies. If so, the grant is not within Item 1 and the supplies fall to be standard rated rather than zero rated. The only basis upon which Note 13 is said to apply is by reason of the planning condition and the clause in the Feu Disposition. Under the planning condition, the only use that can be made of the lodge is for holiday accommodation. That is what the first part of condition 4 says and must mean that whoever uses the lodge they must do so as holiday accommodation. That first part of itself,

excludes any other use. Other uses would include use as the grantee's principal private residence. The second part of condition 4 excludes occupation of the lodge by the grantee or anyone else as the sole or main residence of the occupant. The clause in the Feu Disposition quoted in the findings-in-fact, likewise requires the lodge to be used and occupied **solely** as a holiday dwellinghouse and **for no other purpose**. It, therefore also excludes use and occupation by the grantee and any person occupying with his authority, as the principal private dwelling house of that person. We consider that there is no material difference between "sole or main residence" and the statutory phrase "principal private residence". Neither party suggested there was.

Having identified the conditions of occupation and use imposed by the planning condition and the feuing condition, we return to Note 13 and ask ourselves three questions. First is the owner of the lodge entitled to reside there throughout the year? Second, is residence at the lodge throughout the year prevented by the terms of the planning condition? Third, is the use of the lodge or part of it as the grantee's principal private residence prevented by the terms of the planning condition? In order to answer the first question, we have to interpret the word *throughout*. It was submitted that *throughout* did not mean 365 days of the year. We disagree. *Throughout* means residence for the whole of the year, if a lesser period or periods were intended, the

word “during” would have been used instead of *throughout*. It seems to us plan that the intention of the feudal condition (and indeed the planning condition, although this is not relevant to branch (i) of Note 13) is to prevent year round occupation by the grantee owner or by his tenant. Such all year round occupation would be alien to the generally accepted nature of holiday occupation and use. **Use** throughout the year is different and the occupation eg by different persons on holiday for various periods covering *in cumulo* the whole year would be permitted. Accordingly, branch (i) of Note 13 applies and the supply of the lodges does not fall within Item 1. Zero rating is excluded and standard rating applies. As to the second question, it also seems clear that the planning condition is intended generally to prohibit long term residential occupation. If the clause in the Feu Disposition falls within the meaning of “covenant” then the same considerations apply. The use of the word “solely” in each condition and the second part of the planning condition put this beyond doubt. Accordingly, the answer to the second question is the whole year would be permitted. Accordingly, branch (i) of Note 13 applies and the supply of the lodges does not fall within Item 1. Zero rating is excluded and standard rating applies. As to the second question, it also seems clear that the planning condition is intended generally to prohibit long term residential occupation. If the clause in the Feu Disposition falls within the meaning of “covenant” then the same considerations apply. The use of the word “solely” in each condition

and the second part of the planning condition put this beyond doubt. Accordingly, the answer to the second question is Yes, residence at the lodge throughout the year by the grantee is prevented by the terms of the planning condition (and the feudal condition). Residence on holiday is not prevented as such but such residence would not endure throughout the year, year in year out. In these circumstances, Note 13(ii) applies to exclude the supplies from zero rating under Item 1 of Group 5 of Schedule 8 to the 1994 Act. As to the third question, we reach the same conclusion for essentially the same reasons. The conditions only allow holiday occupation and exclude occupation as one's principal private residence.

We have reached these conclusions on what appears to us to be a plain and common sense reading of the planning and feudal conditions, and the relevant statutory provisions. The authorities cited do not lead us to any other conclusion. *Livingstone Homes UK Ltd* concerned the sale by builders of holiday dwellings which they had constructed. There was a titled condition which provided that "all houses on the development shall be used as Holiday Dwelling Houses only and for no other purpose and shall never in any way be sub-divided". The issue was whether Note 13 (ii) applied to make the supplies standard rated. The Tribunal held there was nothing in the condition attached to the supply which restricted the use by the grantee of the holiday dwellinghouse as a principal private residence

on the basis that use as a holiday dwellinghouse and use as a principal private dwellinghouse were neither mutually excluded nor incompatible. We are unable to agree with this Tribunal's decision and the reasons for it. In our view, the Tribunal has ignored the word "only" and the phrase "for no other purpose". The condition of the supply was that the dwelling was to be used as a holiday house and for no other purpose. Another purpose might be to use it as a principal private residence. But that purpose is clearly excluded by the title condition. It does not matter whether use as a holiday house or a principal private residence are compatible. They may be compatible but they are not the same. The only use permitted is use as a holiday house. Nothing else. In our view, *Livingstone* was as Mr MacLeod ultimately submitted, wrongly decided. Various examples were advanced in *Livingstone* and this appeal to support the Appellants' arguments. It may be helpful if we indicate our views in relation to each of them as follows:-

a) Oil rig worker working two weeks on and two weeks off and residing at a lodge during his two weeks off. In our view, the oil rig worker is not on holiday during the two weeks off. He is not occupying the lodge as a holiday house but as his principal private residence. That use is expressly prohibited by the planning and feuing conditions.

b) Soldier living in barracks retaining the lodge as his principal private dwellinghouse, where he resides on leave. We consider that this too

would infringe the planning and feuing conditions because use as sole or main residence is expressly prohibited.

c) a teacher from another EC country employed by the local school and occupying the lodge during term time. Here the teacher is not on holiday and is not using or occupying the lodge solely as holiday accommodation. The planning and feuing conditions would be infringed.

d) An author from England who uses the lodge for long spells during the year as a place to write. This is no different from c) above.

e) All year round occupation by a retired couple. This is not occupation as holiday accommodation. If a holiday is a day on which work is suspended, then such occupation is not occupation on holiday. For a retired person, work is not suspended but terminated. As soon as a person retires, his home does not suddenly become holiday accommodation. If a retired couple resided permanently at one of the lodges, they would be in breach of the planning and feuing conditions because this would amount to use of the lodge as and only as a principal private residence, which is a use prohibited by the planning and feuing conditions. It is use for a purpose other than holiday accommodation. It is occupation and use other than as a holiday dwellinghouse.

In *Haven Leisure Ltd* LON/90/503Z 14/9/90, the issue was whether the premium for a forty year lease of a villa or chalet in a leisure park was exempt, or whether it was standard rated on the basis that it

constituted the provision of a holiday accommodation in a house. The terms of the lease were normal for long leases of flats on planned residential developments. The Tribunal held that the provision of holiday accommodation in a house was concerned with the supply of services. What the appellants in *Haven Leisure Ltd* supplied was a house not the services of holiday accommodation. We did not find this case to be of assistance in the instant appeal. The point at issue was different and the planning conditions referred to were materially different. The other issues discussed were not relevant to this appeal. Various statutory changes have been made since this decision; the main changes are summarised in *Ashworth* referred to below.

In *C&EC v Parkinson* 1989 STC 51, the issue was whether a conveyance of a bed of a river was excluded from exemption on the ground that this was the "granting of any right to take game or fish". It was held that the exclusion did not apply to the outright sale of freehold interests but only to lesser interests, accordingly, the exclusion or exception to the exemption did not apply and the conveyance was thus exempt. The issues discussed were not germane to the present appeal.

In *Cottage Holiday Associates Ltd v C&EC* 1983 STC 278, the appellant was assessed to VAT at the standard rate in relation to the supply of time share holiday cottages which took the form of an eighty

year lease to each tenant with the right to occupy for each of the eighty years. The appellant's argument that the supply qualified for zero rating was rejected by the Court (Woolf J) and tax at the standard rate was accordingly payable. The decision turned on whether such a lease amounted to the grant of a "major interest" in a building. It was held that it did not. Again, this case is not in point.

Finally, we were referred to *Barbara Ashworth v C&CE* LON 94/221A 22/12/94. There, the appellant was the assignee of a 99 year lease of a lodge with 98 years to run, which was one of 100 lodges at Isleham Marina, Cambridge. She was retired and lived thee as her principal private residence with her husband. About 50 of the lodges were similarly occupied, a few were let to short term holiday occupant and a few occupied as second homes. The lease contained a provision prohibiting occupation of the lodge in February in each year. This was based upon a planning condition applied when the Marina was being developed. The appeal related to Customs' decision that the ground rent and service charge payable by the appellant were subject to VAT and were not exempt. One of the statutory exclusions from exemption incorporated what is now Note 13 referred to above. The Tribunal held that the lease condition prohibiting occupation in February of each year meant that the appellant was not entitled to reside at the lodge throughout the year. The exclusion from exemption therefore applied. The Tribunal did not

need to and did not consider branch (ii) of what is now Note 13. the Tribunal thereafter considered whether the United Kingdom legislation exceeded the relevant terms of the EC Sixth Directive and produced an illegal inequality of treatment. The Tribunal held that it did and on that basis allowed the appeal. Neither party relied on this part of the Tribunal's decision. The decision does not cause us to change our views. If anything, the first part of the decision provides general support for the decision we have reached.

In these circumstances, we consider that Customs have correctly applied the law and that their assessment of the Appellant's VAT liability was made to best judgment. As previously noted, thee was no dispute on quantum. The appeal is therefore refused. Any application for expenses should be made within twenty-eight days of the date of release of this decision.

**T GORDON COUTTS, QC**

**CHAIRMAN**

**RELEASE DATE: 1 February 2002**

EDN/01/101