

## **9.10 Registration of Property Developers for VAT in advance of trading<sup>1</sup>.**

### **Criteria for registration for VAT in respect of property development in advance of taxable disposal or taxable letting**

#### **1 Introduction**

Arising from a decision of the High Court in the case of *Brendan Crawford, Inspector of Taxes v Centime Ltd.* (2005 No. 62R) (application to register for VAT in respect of a proposed property transaction), Revenue has reviewed the criteria to be applied in deciding whether to grant an application to register for VAT in such cases.

#### **2. General Statement of the Law - when is a supply of property taxable**

A supply of property (other than a self-supply) is liable to VAT only if all the following conditions are satisfied:-

- (i) The property must have been actually developed or re-developed in whole or in part after 31 October, 1972;
- (ii) The person making the supply must hold a taxable interest in the property. A taxable interest is either the freehold of the property or a leasehold interest which at the time the lease was created was for at least ten years which at the time the lease was created was for a least ten years. A lease of less than 10 years which gives the tenant the right to extend the lease for 10 years or more is regarded as a taxable interest;
- (iii) The person making the supply must dispose of a taxable interest. A disposal by way of surrender or assignment of a lease is a supply of an interest;
- (iv) The person making the supply must have been entitled to (as distinct from having received) a VAT credit, or deduction, in respect of development of the property, or, acquisition of the taxable interest and
- (v) The person making the supply must dispose of a taxable interest in the course or furtherance of business.

#### **3. Background**

Centime Ltd, a wholly owned subsidiary of the FAI, was incorporated for the purposes of developing a football stadium and venue for other events. It proposed to enter into a taxable lease to its subsidiary Landau Ltd., which would operate the stadium. Centime Ltd. agreed to purchase lands for this purpose and paid a deposit to a firm of solicitors as stakeholders. The agreement to purchase was conditional on planning permission being granted. The deal ultimately did not go through. Revenue refused VAT repayments sought by Centime Ltd. on the basis that the company had not yet complied with the conditions for repayment of input VAT as a taxable person.

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<sup>1</sup> O.I. 2006 No. 095

#### **4. Revenue Practice**

Revenue had imposed three conditions to be met before a person who would engage in taxable property transactions could register for VAT in advance of trading, namely:-

1. The person must have an interest in the property
2. Planning permission to develop the property must have been granted, and
3. The person must declare his intention to make a taxable disposal of an interest in the property.

#### **5. Appeal Commissioner's decision**

The Appeal Commissioner held that Centime Ltd. had shown objective evidence of intention to trade and were entitled to a VAT credit without having to wait for the actual exploitation of the business to begin. He further found, again based on ECJ case law, that the entitlement to VAT credits is retained even if the project does not proceed to the operational stage.

#### **6. High Court Decision**

Revenue, in turn, appealed this decision to the High Court. The High Court concluded that, there was more than ample objective evidence which would have allowed the Appeal Commissioner to come to the conclusion which he did. It was of the view, inter alia, that the Revenue criteria which required a party (before such a party might qualify as a taxable person) to have actually acquired an interest in the land was unsustainable. A future entitlement to land was, in the circumstances, sufficient. It was also of the view that the absence of planning permission does not demonstrate that there is not a present intention to develop. The fact that there is an apparently regular planning application in the course of being processed is objective evidence which is at least capable of supporting an intention to develop along the lines sought for planning permission.

#### **7. Criteria for registration**

Arising from the decision Revenue has reconsidered the criteria it sets for registration for VAT for property transactions in advance of trading. While each case must be taken on its merits, it is clear that the taxpayer need not yet have acquired a taxable interest in the property and that a contract which provides for future entitlement to the land may be taken as an indicator of intention to trade. Likewise the absence of planning permission in itself should not be considered sufficient reason to refuse registration while application by the taxpayer for planning permission can be considered an indicator of intention to trade. The third criterion listed under Revenue Practice above was not disputed.

The following minimum conditions which must be met before registration for VAT in respect of a property transaction is allowable, are therefore:-

- (a) The person must declare his/her intention to make a taxable disposal of an interest in the land and

- (b) That intention must be supported by objective evidence.

Objective evidence of intention to make a taxable supply of an interest could be gained, inter alia, from the following:-

- Evidence of acquisition of an interest in the land or of an entitlement to develop the land.
- Evidence of application for/obtaining of planning permission for development of the land.
- Evidence of funding for the proposed development e.g. copies of up to date bank statements and other correspondence identifying transactions, including any deposits for the prospective purchase of the land, which support the claim that the company's intention is to make a taxable supply of the land in question.

Other evidence would include some or all of the following:

- Copies of certificate of incorporation, the Memorandum and Articles of Association.
- List of Directors and Secretary
- List of shareholders and, if they are nominees, a note of who the beneficial owner is.
- Previous experience of the beneficial owners of the company in the business of developing property in the State
- A copy of the minutes of board meetings held which confirm the company's intention to trade and any decisions made which support the contention that development of the property by it will commence
- Any other evidence such as contracts for supplies of goods or services, purchase invoices, sales invoices.

## **8 Refusal of registration**

Note that a person has the right of appeal against the refusal to grant registration in accordance with Section 25 (1A) VAT Act 1972 (as amended).