Energy saving materials and planning permission

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The construction, maintenance and improvement of property is a key issue for almost all farmers. In this article Julie Butler considers two property related tax cases and their implications for the rural business.

Energy saving materials

Care with all work to farm property

Top topics for farmers (like the rest of the UK) are energy savings and VAT minimisation.

A recent Court of Appeal case, *Greenspace v CRC, Court of Appeal*, has emphasised the need to understand the detailed rules and is particularly important to the farming industry as so much of farm diversification is making best use of spare farm property for future sale and income.

The subject shows the need to be careful with all property VAT issues.

What is roof insulation and what is the supply of the roof?

Greenspace's main business was the supply and installation of insulated roof panels for conservatories.

HMRC considered this was a standard-rated supply and raised assessments. Greenspace appealed. It said the predominant characteristic of the panels was insulation and they therefore qualified for the reduced rate of VAT (5%) as energy-saving materials (VATA 1994, Sch 7A gp 2 note 1(a)).

Both the First-tier Tribunal and the Upper Tribunal dismissed Greenspace's appeal.

In the Court of Appeal, LJ Whipple delivered the judgement. She said the First-tier Tribunal had posed the right question in asking whether it was fair to interpret the words 'insulation for roofs' as including the type of roofing panels supplied by Greenspace. However, it made a material error in concluding that if the supply was not of insulation for roofs it must have been the supply of a roof.

Protection from the outside elements

The question for the Tribunal was whether the supplies were of insulation for roofs with no rider. If the supply was something more than insulation for roofs, it would fall outside note 1(a) and the reduced rate would not apply.

The judge concluded that Greenspace was not making a supply of insulation for roofs. The key point was that the panels were manufactured with a waterproof aluminium casing with protective powder coating around the Styrofoam. Without that, the products would be 'seriously defective because they would let the rain in'. From this, the judge inferred that the panels provide not only insulation for the conservatory on which they are installed but also protected the conservatory from the outside elements. These two characteristics were fundamental aspects of the product and as a result, the supplies fall outside note 1(a).

Greenspace's appeal was dismissed – this decision was disappointing for Greenspace and of significance for farmers. A large number of farmers are having to improve the various properties on the farm to both achieve better rental income streams and meet the stringent guidelines of the current legislation for rental properties. It is essential that all work carried out to farm property is forensically analysed by the farm bookkeeper to ensure the correct VAT treatment is applied. Warnings to farming clients of these potential traps and pitfalls should be highlighted by the advisers.

Planning permission but no construction doesn't provide mixed dwelling relief for SDLT

In a recent case *Ladson Preston Ltd and AKA Developments Greenview Ltd v CRC, Upper Tribunal (Tax and Chancery Chamber), 15 November 2022 UKUT 301*, it was found that a grant of planning permission but no actual construction of building does not qualify for Multiple Dwelling Relief (MDR).

The question is asked, what is MDR? MDR can be used to offset the amount of stamp duty paid when purchasing multiple properties in the same transaction. To be eligible to claim MDR, your transaction must be of at least two dwellings, or be of a single dwelling IF it is part of a 'linked transaction'. A 'linked transaction' is where multiple property transactions are carried out between the same buyer and seller, for example, transferring your personally held portfolio into your limited company. With linked transactions, the value of all properties is usually added together and then SDLT is applied, which often means the tax is higher than on an individual property. For this reason, it's well worth applying MDR to linked transactions!

The facts of the case were that Ladson Preston (LP) and AKA Developments Greenview Ltd (AKA) each acquired property over which planning permission had been granted for the construction of multiple dwellings before the effective date of each transaction. The dwellings were built in line with the planning permission. The companies claimed MDR on the basis that the existence of planning permission satisfied FA 2003, Sch 6B para 7, i.e. that a building counts as a dwelling for the purposes of MDR if it is in the process of being constructed or adapted for such use. AKA had undertaken some initial work on the site and argued that this was part of

the construction process. HMRC refused the relief and the First-tier Tribunal (FTT) dismissed AKA's appeal for MDR to apply.

Some physical manifestation of building work on the land

The case was taken to Upper Tribunal (UT) who agreed with the FTT that the view that the grant of planning permission for the construction of dwellings on bare land was not in itself enough to satisfy the requirements of para 7(2)(b) because, properly construed, there had to be 'some physical manifestation on the land' before it could be said there was a building in the process of being constructed for use as a single dwelling. It was not enough for MDR to intend to construct a building. The UT confirmed that there had been a grant of planning permission but no actual construction of a building. It was agreed that AKA had dug some boreholes at the site, but this was to test the ground rather than to form part of the building. The work did not constitute the building of a property. The UT therefore concluded that, at the date of the transaction, there was no building in the course of construction, so no relief for MDR. The appeal to the UT by AKA was also dismissed.

Level of physical manifestation

The UT's decision contains some useful analysis of the significance of the grant of planning permission. However, the UT left it to future FTTs to decide what level of physical manifestation of building work is required before a chargeable interest can be said to consist of dwellings in the process of construction or adaptation. Hence the relevance of the "muddy bricks" and "golden bricks" remains an issue of MDR. To explain further, tests to decide when a building under construction becomes a dwelling may include VAT's "golden brick" or the "muddy brick" (one line of bricks not necessarily above ground level) or perhaps the start of work to implement a planning consent. MDR should be claimed at the time of the property purchase. However, if there is overpaid stamp duty, it is also possible to submit a retrospective MDR claim up to 12 months from the filing date. The claimant may be asked to provide evidence of the multiple dwellings – this could be in the form of a surveyor's report or property floor plan. Such evidence is essential to be able to submit the claim and to be prepared for a tribunal. A portfolio of evidence is ideal but, failing that, there must be strong preparation of facts, which is essential.

The quirks of MDR are aligned to claims for mixed rate SDLT, where again quality evidence is essential. Mixed use SDLT for the purchase of small farms of commercial use and a residence can and should still qualify under the current legislation. Those clients purchasing small farms can use SDLT mixed use relief and it can be a very useful tax saving for genuine commercial operations with the appropriate evidence, as shown by the case of Gary Withers v HMRC [2022] TC00433. Indeed, these two rather negative Upper Tribunal decisions of Greenspace and AKA show the need for a fully informed farming team to support the farming operation in 2023 with farm diversification, greater utilisation of farm properties and moving towards "farming for the environment". All VAT and SDLT decisions are complex and the portfolio of evidence must be produced at "ground level" (pun intended). The current pressure on farm bookkeeping for the VAT returns and the property advice and forensic understanding for SDLT decisions will be more pronounced moving forward and farming clients and potential farming clients must

be warned of all that lies ahead. Both VAT and SDLT complexities can be ignored by professionals and ideally these cases highlight the need for understanding that is required by the farming industry.

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*The views expressed are the author's and not ICAEW's.

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