THE HIGH COURT

2005 No. 62 R

BETWEEN

BRENDAN CRAWFORD, INSPECTOR OF TAXES

APPELLANT

AND
CENTIME LIMITED

RESPONDENT

Judgment of Clarke J. delivered on the 21st October, 2005.

1. Introduction
1.1 In this case the appellant Inspector of Taxes ("the Revenue") appeals by way of case stated on a point of law from the determination of the Appeals Commissioner to the effect that the respondent ("Centime") is a taxable person for the purposes of s. 8 of the Value Added Tax Act 1972. In general terms a person who is a "taxable person" for those purposes is entitled to reclaim VAT paid out by them on inputs into their economic activity. A person who is not a taxable person is not so entitled. The reason why, therefore, the question as to whether Centime is or is not a taxable person is of importance to the parties is that if Centime is a taxable person it is entitled to reclaim VAT on inputs into its economic activity whereas if it is not, properly speaking, a taxable person it is not entitled to make such a reclaim. On foot of the view taken by the Appeal Commissioner (to the effect that Centime was a taxable person) the Appeal Commissioner confirmed VAT repayments in the amount of €667,165.26 which when allowance was made for VAT properly due in the amount of €7,528.82 left a net repayable amount of VAT in the sum of €659,636.44.

1.2 Having, in accordance with the Taxes Acts, expressed dissatisfaction with the decision of the Appeal Commissioner the Revenue bring the matter before this court on appeal by way of case stated.

1.3 Before passing on to the issues which arise in the case stated I might note that the decision of the Appeal Commissioner was given at a hearing on 14th June, 2002. The case stated is dated 28th January, 2005 which is in excess of 30 months later. I am aware that it is, in most cases, left to the parties to attempt to agree a case stated and that that process frequently leads to significant delay in the presentation of an agreed text for approval to the Appeal Commissioner concerned. I should also add that the delay in this case is by no means unusual in the context of attempts to agree the text of a case stated in Revenue matters. However it is important to note that the jurisprudence of the courts in this jurisdiction, relying at least in part on the jurisprudence of the European Court of Human Rights, has come, in recent times, to recognise the necessity for the supervision of matters before the courts in a manner designed to ensure the timely disposal of all litigation (see for example *Gilroy v. Flynn*, Unreported, Supreme Court, Hardiman J. 3rd December, 2004). Similar principles apply to quasi judicial tribunals such as the Appeal Commissioner which can have serious consequences for the rights of parties particularly where such tribunals are, in a sense, preliminary to the courts system. It seems to me that that it may well be necessary to give active consideration to the possibility of introducing improved methods for arriving at the text of a case stated so as to avoid the sort of delays which occurred in this case and occur in many other cases. In making this point I would wish to emphasise that no specific blame can be attached to any of the parties involved in the current case. The above comments should be taken as referring to the general issue of the need to introduce a more efficient system for ensuring the timely forwarding of a case stated to this court rather than being seen as a comment on anything specific that arises on the facts of this case.

2. The Facts
2.1 It is settled law that this court is bound by the findings of fact of the Appeal Commissioners save to the extent that it may be possible, in certain limited cases, for a party to persuade this court that the findings of fact made in a particular case are not properly supported by the evidence. No such challenge is made in this case and I must, therefore, consider the legal issues which arise on the basis of the facts as determined by the Appeal Commissioner. As set out at paragraph 5 of the case stated the facts found were as follows:-

> (a) The Respondent is a wholly owned subsidiary of the Football Association of Ireland, incorporated for the purpose of developing what is now known as Eircom Park, for use as a football stadium and as a venue for other events
>
> (b) By contract dated 19th January, 1999, the Respondent agreed to purchase lands from Place Properties Ltd. at Fortunestown, Tallaght, Dublin 24, comprising 50 acres for £13.5 m. The agreement was conditional on planning permission and provided for a deposit of £675,000. The deposit was paid to Arthur Cox & Co., solicitors as stakeholders. The deposit had been repaid to the Respondent at the date of the second hearing before me.
>
> (c) The Respondent incurred expenditure in excess of €4m, including VAT, in relation to the project.
>
> (d) On 1st June, 1999, the Respondent was registered for VAT pursuant to Section 9 of the VATA, 1972, as and from 30th October, 1998.
>
> (e) Application for planning permission was lodged with South Dublin County Council on 8th October, 1999 for the development of a 45,000 all seater recreational and performance area.
>
> (f) Evidence was given at the appeal hearing, which was not disputed, that planning permission issued in September 2000 and was appealed by the Respondent to An Bord Pleanála in October/November 2000. The Appeal hearing before An Bord Pleanála was listed for April 2001. An Bord Pleanála did not rule on the Appeal because the Respondent had decided on commercial grounds to abandon the project in March 2001. A lease between Centime Ltd and its subsidiary Landau Limited, the nominated operator of the project, was never executed. By notice dated 14th October, 1999, pursuant to Section 20 of the VATA, 1972, the Respondent sought repayment of Value Added Tax charged by suppliers for the period November 1998 to October 1999.
>
> (g) The Appellant repaid claims for the periods November/December 1998 €5,026.89, March/April 1999 €799.93 and January/February 2001 €1,065.31 and withheld the remaining claims on the basis that the Respondent had not yet complied with the three conditions required by the Appellant for the treatment of a property developer as a taxable person (the conditions were, in the opinion of the Appellant, derived from the ECJ case of Rompelman –v- Minister Van Financien, 1084, 3 CMLR 202) 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. The Appellant accepted that the Respondent complied with the third condition.3. The Conclusions

3.1 Having reviewed the arguments of both sides the Appeal Commissioner came to the following conclusions:-

(a) The appropriate test for establishing whether a person is a taxable person is whether that person has established a genuine declared intention to make a taxable supply and whether that intention can be properly supported by objective evidence. (Rompelman Paragraph 24).

(b) It is established "… that a person who has the intention, confirmed by objective evidence, to commence independently an economic activity … and who incurs the fist investment expenditure for those purposes must be regarded as a taxable person. Acting in that capacity, he has therefore … the right immediately to deduct the VAT payable or paid on the investment expenditure incurred for the purposes of the transactions which he intends to carry out and which gives rise to the right to deduct, without having to wait for the actual exploitation of his business to begin" (Goslar Paragraph 34). This principle was also recognised in Rompelman (Paragraph 23) and Inzo (Paragraph 16).

(c) Entitlement to input deduction having been granted, such entitlement is retained albeit the project does not proceed to the operational stage (INZO, Paragraph 20 and Grundstuckgemeinschaft, Paragraph 42).

(d) I accept the submissions of the Respondent that there is no legislative basis which either:

· allows the Appellant to require that a property developer must have a taxable interest in a property before VAT registration or refund can be made, or

· entitles the Appellant to require that a property developer must hold valid planning permission before granting a right to input deduction

(e) The Respondent has established to my satisfaction to my satisfaction that it had a clear intention to develop a football stadium which could also be used for other activities and, having arranged for commercial exploitation of those premises, would grant a long lease to Landau Limited, a fellow subsidiary of the FAI, who would act as operator of those premises.

(f) From the above analysis, I concluded that the Respondent is a taxable person and entitled to the input deductions claimed.

(g) I gave my decision to the parties at a hearing at Fitzwilton House on 14th June, 2002 and I confirmed VAT repayments in the amount of €667,165.26 and VAT payable in the amount of VAT in the sum of €659,636.44.

3.2 As is clear from both the facts referred to at paragraph 2 and the above conclusions of the Appeal Commissioner, a key issue in the appeal hearing before the Appeal Commissioner centered on the conditions or criteria which were applied by the Revenue (and which they asserted were derived from the decision of the ECJ in *Rompelman*) which needed to be met in order that a property developer be treated as a taxable person. This is an issue to which I will, necessarily, return.

4. The Legal Issue

4.1 It is clear that the issue before this court is a net one. The original Value Added Tax Act 1972 was, at least in significant part, designed to comply with Ireland's obligations under the law of the then EEC. The VAT Acts have, from time to time been amended for a variety of reasons but including securing conformity between Irish legislation and EU law. Insofar as relevant to these proceedings the relevant legislation governing the dispute between the parties is to be found in the sixth council directive of the 17th May, 1977 (as amended) and the VAT Act 1972 (as amended). The key provisions of the sixth directive are to be found in Article 4 where a "taxable person" is defined as meaning "any person who independently carries out in any place any economic activity specified in paragraph 2 whatever the purpose or results of that activity" and in Article 17(1) which provides that "the right to deduct shall arise at a time when deductible tax becomes chargeable".

4.2 The basic relevant provisions of domestic VAT legislation are as follows:-Firstly s. 12 of the VAT Act 1972 which in subs. (1)(a) provides:-

"In computing the amount of tax payable by him in respect of a taxable period, a taxable person may, insofar as the goods and services are used by him for the purposes of his taxable supplies or of any of the qualifying activities, deduct …

(i) the tax charged to him during the period by other taxable persons by means of invoices, prepared in the manner prescribed by regulations, in respect of supplies of goods or services to him".

4.3 Secondly s. 4 of the Value Added Tax 1972 which makes special provision in relation to the supply of immoveable goods (which are defined in s. 1 as meaning land). Section 4(2) in effect treats a disposal of what is called an interest in land as being a supply of goods to which VAT applies. An interest is defined in s. 4(1)(a) as "an estate or interest therein which, when created, was for a period of at least ten years". Furthermore s. 4(1)(a) requires that in order for VAT to apply to land, the land must have been developed by or on behalf of the person who actually supplies it. Therefore, and to this extent there is no controversy between the parties, in the ordinary way a person developing land and disposing of an interest (that is to say at least a ten year leasehold interest) in that land is engaged in the taxable supply of such land for the purposes of the VAT Acts and is therefore a taxable person entitled to deduct as a credit any VAT paid on inputs into the economic activity of that development and supply.

4.4 However, as is common case between the parties, the real issue in this case stems from the proper interpretation of a number of decisions of European Court of Justice ("ECJ") as to the proper interpretation of the sixth directive insofar as it relates to land. In

accordance with the jurisprudence of the courts in this jurisdiction it is necessary, where possible, to construe domestic implementing legislation in a manner designed to ensure that that legislation is consistent with obligations in European Law. It is not suggested, in this case, that there is any difficulty in so construing Irish domestic legislation. Therefore the real question comes down to one of the proper application of the jurisprudence of the ECJ to cases such as this. I now turn to that issue.

5. European Law

5.1 It is common case that the leading authority from which the relevant principles applicable to this case can be derived is the decision of the ECJ in *Rompelman v. Minister Van Financien* (1985) 3 CMLR 202. In *Rompelman* the taxpayers had acquired the right to future joint title to two units in premises on which construction had been proceeding for some time prior to their acquisition. The taxpayers declared to the relevant Dutch tax office that the premises would be leased to business users and an appropriate VAT refund claim was subsequently made. At the date of the claim the premises in question had not yet being leased and the Dutch Revenue rejected the claim on the grounds that no exploitation of the units acquired had yet been started because they had not yet been let. The taxpayers made the case that exploitation of an asset starts as soon as a right over it is acquired. Such a preparatory act, it was contended, must be considered as being part of the exercise of an economic activity because it is a necessary condition for the taking place of the activity.

5.2 At paragraph 24 of its judgment the ECJ said the following:-

> "So far as concerns the question of whether Article 4 is to be interpreted as meaning that a statement of intention to let a future asset is sufficient ground for holding that the asset over which rights have been acquired is going to be used for a taxable transaction so that a person who makes such an investment is to be considered as subject to tax on that basis, it should be observed in the first place that it is incumbent on the person who seeks to deduct VAT to establish that the conditions for exercising the right are fulfilled, and in particular that he satisfies the criteria for treatment as a taxable person. Secondly Article 4 does not prevent the fiscal authorities from requiring that the stated intention be confirmed by objective circumstances, such as the specific suitability of the proposed premises for commercial exploitation".

5.3 While I will return to the proper interpretation of *Rompelman* subsequent to reviewing certain other authorities which have followed on from it, it seems to me that on any reading of the above passage the true test is that a person is entitled to be treated as a taxable person provided that they have a genuine intention to deal with the asset in a manner which would qualify for treatment as a taxable person. That test is subject to the caveat that it is for the person making the claim to show that this is so and that, as part of that process, that person may be required to produce some objective evidence as to what their true intention was. In other words the mere statement by a person as to what their intention in respect of a particular asset is, or was at any material time, is not something which the appropriate authorities in a member state are bound to accept. Thus if a person is unable to produce any, or any sufficient, objective evidence as to what their true intention was, the relevant authorities are not obliged, necessarily, to accept a mere assertion on the part of such party as to what their intention in fact was. The reference by the court to the suitability of premises needs to be seen in that context. It is possible to envisage many cases where there may be significant doubt as to whether a party actually had a genuine intention to exploit premises in a particular commercial way having regard to the fact that such premises were unsuitable for the type of economic activity proposed.

5.4 That view of *Rompelman* can, in my view, be noted in each of the subsequent decision of the ECJ to which I have been referred. In *Intermcommunale Voor Zeewatercontziltung (INZO) In Liquidation v. Belgian State* (1996) ECR 1-857 (Case C110/94) ("INZO") the taxpayer, having commissioned a feasibility study on a proposed desalination project, and having acquired certain assets to that end was allowed to reclaim VAT notwithstanding the fact that it had decided to abandon the project, of its own volition, because of the unfavourable prognosis which emerged from the feasibility study. It should be noted that one of the issues which arose in INZO was that the relevant Belgian tax authorities had acknowledged the taxpayer's status as a taxable person prior to abandonment leading to the ECJ taking the view that once taxable status has been granted in respect of an activity, it would be contrary to the principles of legal certainty and legitimate expectation to permit such status to be withdrawn retrospectively in the light of subsequent events, in the absence of it being shown that its acquisition in the first place had been procured by abuse or fraud. That specific issue does not, of course, arise on the facts of this case where Centime has never been granted taxable status. However the ECJ did, in *INZO*, make certain general comments on what might be called the *Rompelman* test to the following effect:-

> (i) economic activities may consist of several consecutive transactions and preparatory acts must be treated as constituting economic activity (see paragraph 15 of the judgment)
>
> (ii) it would be contrary to the principle of neutrality if economic activity did not commence until property was actually exploited (paragraph 16)
>
> (iii) even the first investment expenditure for the purposes of the business may be regarded as an economic activity and, in this regard, the tax authority must take into account the declared intention of the business (see paragraph 17) and
>
> (iv) it is for the claimant of a deduction to show that the conditions for deduction are met and Article 4 does not preclude the tax authority from obtaining objective evidence in support of the declared intention (see paragraph 23).

5.5 Thereafter *in Goslar v. Breitsol* (2001) STC 355 the court affirmed the principles in Rompelman and INZO and went on at paragraph 38 to state the following:-

> "The arising of the right to deduct the VAT paid on the first investment expenditure is thus in no way dependent upon formal recognition of the status of taxable person by the tax authority. The only effect of that recognition is that such status, once recognised, cannot, save in situations of fraud or abuse be withdrawn from the taxpayer with retrospective effect, without infringing the principles of the protection of legitimate expectation and legal certainty".

Having noted the often quoted provision from *Rompelman* that a tax authority is not precluded from requiring objective evidence the court went on at paragraph 40 to state the following:-

> "In those circumstances it is for the National Court to check whether, taking account of the circumstances of the case in the main proceedings, and in particular the progress of the building works in mid May 1990, the declaration of the intention to commence economic activities giving rise to taxable transactions was made in good faith and is borne out by objective evidence".

5.6 In *Grundstuckgemeinshaft Schlosstrasse* (2000) ECR 1 (Case C – 396/98) the court confirmed the above principles in the following way. At paragraph 36 the court noted that:-

> "It must be borne in mind that a person who has the intention, confirmed by objective evidence, to commence independently an economic activity within the meaning of Article 4 of the sixth directive and who incurs the first investment expenditure for those purposes must be regarded as a taxable person. Acting in that capacity he has therefore, in accordance with Article 17 et seq. of the sixth directive the right immediately to deduct VAT payable or paid on the investment expenditure incurred for the purposes of the transactions which he intends to carry out and which give rise to the right to deduct, without having to wait for the actual operation of his business to begin …".

At paragraphs 41 and 42 the court went on to say the following:-

> "41. In those circumstances it is for the national court to verify whether, having regard to the facts of the case before it and, in particular, the fact that on June 11th 1993 the members of the Schlosstrasse still envisaged transferring the building permit to a third party immediately after its issue, the declared intention to commence activities which would give rise to taxable transactions was made in good faith and was supported by objective evidence.
>
> 42. In the absence of fraud or abuse and subject to any adjustments to be made under the conditions laid down in Article 20 of the sixth directive, entitlement to deduct, once it has arisen, is retained even if the taxable person has been unable to use the goods or services which give rise to a deduction in the context of taxable transactions by reasons of circumstances beyond his control. In such a case there is no risk of fraud or abuse capable of justifying subsequent repayment of the sums deducted".

5.7 It seems to me, therefore, that the principles which can be derived from the authorities and their application to the facts of this case are the following:-

> 1. The true test is as to the genuine intention of the party. That is to say does the party have a bona fide intention of engaging in economic activity which would qualify that party as a taxable person. In the context of transactions in relation to land in Ireland that means in practice, for most cases, that the person concerned has a genuine intention to develop land for the purposes either of its sale or the granting of a long lease (that is to say a lease of more than ten years).
>
> 2. It is for the national legal order to determine, in accordance with appropriate domestic rules, whether that test is met. In certain of the cases reference is made to "fiscal authorities" obtaining objective evidence. In other cases reference is made to the national court reaching decisions based on such evidence. It seems to me that there is nothing in the authorities that suggests that the decision making process in relation to the bona fide intention of a taxpayer should be any different to the manner in which a similar revenue issue would be determined, in the ordinary way, within the domestic legal order. There does not appear to me to be any basis for suggesting that fiscal authorities are given any greater discretion in questions as to the status of a party as a taxable person for the purposes of the 6th Directive than in any other similar revenue issues which such authorities may have to address. Applying that principle to the facts of this case it would seem that the initial decision on deductibility is, in the ordinary way, to be taken by the revenue subject to the entitlement of the taxpayer to have that decision reviewed, again in the ordinary way, by the Appeal Commissioner and, on a point of law, by this Court, and if necessary, the Supreme Court. There does not seem to me to be anything in either the European authorities, or as a matter of principle, of domestic law, which would confer any larger discretion upon the Revenue in a case of this type than would be available to the Revenue in any other case when an Inspector of Taxes has to reach a conclusion based on the facts as to whether a taxpayer has a liability. In all such cases the Inspector may make an initial decision, but subject to such decision, in most cases, shifting the onus of proof, the decision of the Inspector carries no additional weight at a hearing before the Appeal Commissioner who must decide the matter on the basis of the evidence presented to him. Thus it is, in my view, in any case where issues of this type are sought to be appealed to the Appeal Commissioner, a matter for the Appeal Commissioner to determine on the evidence before him whether the bona fide intention required by the authorities has been established. An appeal to this court should review the decision of the Appeal Commissioner on the basis of the established jurisprudence in that regard.
>
> 3. It is clear from *Rompelman* itself, and from many of the subsequent cases, that the fiscal authorities are entitled to insist on objective evidence to back up the stated intention of the taxpayer. It seems to me that where the matter comes before the Appeal Commissioner the Revenue, as a party to that appeal, are entitled to urge that the Appeal Commissioners must be satisfied on the basis of objective evidence that the necessary intention has been shown to be bona fide. In this case it is clear from conclusion (e) referred to above that the Appeal Commissioner was satisfied that Centime had a clear intention to develop and had a clear intention to commercially exploit the premises by means of granting a long lease. It also seems to me clear that the test adopted by the Appeal Commissioner as set out at paragraph (a) of the conclusions is correct. In those circumstances the only question that can arise is as to whether the Appeal Commissioner did not properly come to the conclusions which he did. It is in that context that it is necessary to address the Revenue criteria to which I have already made reference.

5.8 Insofar as the submissions of the Revenue to this court assert that the Revenues requirement of compliance with certain criteria was made "in pursuance of its (the Revenue's) authority under *Rompelman* such assertion fails to distinguish between the undoubted entitlement of the Revenue to seek objective evidence and a possible entitlement to impose absolute criteria which may not derive from the jurisprudence itself. I now turn to those criteria.

6. The Revenue Criteria

6.1 As appears from the case stated the Revenue, in applying *Rompelman*, imposed three conditions on persons seeking to be treated as taxable persons in respect of property development namely:-

> (1) a declared intention supported by,
>
> (2) planning permission and
>
> (3) an interest pursuant to s. 4 of the VAT Act 1972 in the property.

6.2 In relation to this latter point counsel for the Revenue (correctly in my view) referred to *Tempany v. Hynes* [1976] I.R. 101 as authority for the proposition that where, as here, only a portion of the purchase price (in this case 5%) is paid as a deposit, the purchaser acquires no legal interest in the property and only an equitable interest to the extent of the amount of the deposit paid. Having regard to those facts and the fact that the contract for sale was subject to certain conditions in respect of planning permission it was contended that Centime did not have a sufficient interest in the land. Similarly it is common case that for all of the

relevant period Centime had not obtained a grant of planning permission. When the project was abandoned the planning issue had only reached a stage where there had been a notice of intention to grant planning permission by the relevant local authority subject to stringent conditions with an appeal to An Bord Pleanála pending. In all those circumstances it was contended by the Revenue that the conditions 2 and 3 were not met. In that the Revenue would appear to be correct. However the real question would appear to be as to whether:-

> (a) the Revenue are entitled to impose such conditions as opposed to specifying matters such as planning status and the interest of the party concerned in the land in question as matters which may be taken into account; and/or
>
> (b) as argued by counsel for the Revenue, as a fallback position in reply, whether, even if the Revenue are not entitled to impose such conditions generally, the decision of the Appeal Commissioner may be taken to be wrong in the light of property taking into account the factors which arise in relation to those conditions.

6.3 The first thing that needs to be noted in this regard is that there would not appear to be anything in the VAT legislation which directly or indirectly authorises the imposition of such conditions. As appears from paragraph (g) of the facts found by the Appeal Commissioner the stated basis for the case argued on behalf of the Revenue Commissioners for the applicability of the conditions was that they were derived from *Rompelman* and the jurisprudence of the ECJ. No reliance is placed on a specific enabling provision of the VAT Acts. I now turn to that question.

7. The Revenue Criteria and Rompelman

7.1 The first of the Revenue criteria which is in controversy in this case is the requirement that in order to qualify as a taxable person that person must have an interest in the property. For the reasons indicated above, and placing reliance on the definition of an "interest" in relation to land contained in s. 4(1)(a) of the Value Added Tax Act, 1972, the Revenue clearly have used the term interest in a way which excludes uncompleted or conditional contractual entitlements. Such a view seems to me to be at complete variance with paragraph 23 of the decision of the ECJ in *Rompleman* itself. In that paragraph the court said the following:-

> "In this regard, it is not necessary to distinguish the various legal forms which such preparatory acts may take, in particular between the acquisition of a right to the transfer of the future ownership of property and the acquisition of the property itself. Furthermore, the principle that VAT should be neutral as regards the tax burden on a business requires that the first investment expenditure incurred for the purposes of and with the view to commencing a business must be regarded as an economic activity. It would be contrary to that principle, if such an activity did not commence until the property was actually exploited, that is to say until it began to yield taxable income".

7.2 It seems to me to be absolutely clear from the above passage that the question which is to be addressed by the authorities in any member state when considering whether an individual or entity with a stated intention to commence qualifying economic activity is bona fide engaged in that activity, has nothing to do with the legal form of the acquisition of the property but has everything to do with the substance of the situation. It is clear, therefore, that a future entitlement to land can, in an appropriate case, be sufficient. How then can it be said, that a person who has entered into a contract to acquire land, which is subject to a planning condition, must necessarily be taken not to have established the objective criteria necessary to show themselves to be a taxable person solely because the contract is conditional or uncompleted. In many cases the direct contrary would seem to me to be the case. On the assumption that the nature of the planning permission to which the contract is conditional is such as is demonstrative of a commercial intention consistent with engaging in economic activity which would in turn qualify that person as a taxable person then it seems to me that such a contract, far from debarring the taxpayer from qualifying as a taxable person, is, in itself, objective evidence of the intent of the taxpayer to engage in the activity contemplated. Save in unusual circumstances it would be unlikely that a person would enter into a contract to buy land subject to a particular form of planning permission being obtained unless there was at least a significant possibility that a development along the lines of the sought for planning permission was in contemplation. Far from being a barrier to the qualification of a party as a taxable person (as the Revenue criteria suggests) it seems to me that the existence of a contract subject to planning may of itself amount to *part* of the objective evidence which may establish the entitlement of the taxpayer to such status.

7.3 I say part of the evidence because, of course, there may well, on the facts of any individual case, be other matters which need to be taken into account. There may be reason to believe, from other factors, that the party, notwithstanding the clause in the contract, did not intend to develop the property *themselves* in accordance with the planning permission, if granted. Furthermore even if there be an established intention to develop by the taxpayer it is, of course, necessary that there be objective evidence to show an intention to exploit the developed land in a manner that would confer taxable status (by sale or long lease).

7.4 However so far as the facts of this case are concerned it seems to me that those facts amply demonstrate:-

> (a) that the purported imposition by the Revenue of a criteria which excludes persons who have only acquired a conditional contractual entitlement to land from qualifying as a taxable person in all circumstances is plainly at variance with *Rompelman* and cannot, therefore, be justified as being derived from that case.
>
> (b) on the facts of this case, particularly having regard to the conclusion of the Appeal Commissioner that Centime had an intention to exploit the property, once developed, by means of the grant of a long lease (which intention was supported by what the Appeal Commissioner necessarily concluded was a genuine draft of an agreement to enter into such a lease which was annexed to the case stated), the entering into by Centime of a contract to purchase conditional on planning, far from debarring it from qualifying as a taxable person, amounted to objective evidence that it was only interested in purchasing the property if it could develop it along the lines of the contemplated planning application. In those circumstances the contract amounts to objective evidence on which the Appeal Commissioner was more than entitled to rely as to the intention of Centime to develop.

7.5 Therefore, in summary on this aspect of the case, I have come to the view that the Revenue criteria which requires a party (before such party might qualify as a taxable person) to have actually acquired an interest in the land concerned is wholly unsustainable. For the reasons which I have set out above it seems to me to be inconsistent with *Rompelman* and the authorities which follow from it. There is no basis in Irish VAT law which would authorise the imposition of rigid criteria of a quasi statutory status into the test for determining whether a person properly qualify as a taxable person. It is obviously the case that on the facts of any individual case the Revenue (and where appropriate the Appeal Commissioners or the courts on appeal) should have proper regard, having regard to the circumstances of the case, to the ownership status of the land in question in assessing whether it has been established by objective evidence that the taxpayer has the necessary intention. However there does not seem to me to be any basis upon which it could be contended that a taxpayer could not have the appropriate intention objectively evidenced until such time as a sale had been completed or the full purchase price paid. Those matters may well affect the ability of the purchaser to

actually put his intention into practice. However where the purchaser has, as here, secured an entitlement to acquire the land it does not seem to me that the absence of a closure of the sale of such land is really, in most cases, a factor to be properly taken into account.

7.6 Indeed, as counsel for Centime pointed out, it is common practice in many cases of the commercial exploitation of land, the circumstances of which should qualify the developer as a taxable person, for the developer concerned never to acquire an interest in the land in the sense in which the Revenue use that term. Frequently contracts are entered into whereby the developer obtains a right to acquire and develop the land, develops it, and procures that the vendor execute a conveyance directly to the onward purchaser of the developed land. In such circumstances the developer never acquires an interest in the land. An application of this Revenue criteria would appear to exclude a developer who adopts that means of conducting his business from ever qualifying. However it is hard to see how, save in unusual circumstances, the fact that a developer chooses such a means of dealing with land which he wishes to develop, as opposed to a more conventional means of buying the land, developing it, and selling it on himself to third parties, could have any real effect on the assessment of the developers intention to develop.

7.7 All in all it is impossible to avoid the conclusion that the Revenue criteria in this regard has confused objective evidence of the intention to develop with objective evidence of a current ability to develop.

8. The Planning Criteria
8.1 This confusion appears to me to be even more in evidence in relation to the requirement that there be in place a planning permission. Clearly the existence of a planning permission is a necessary pre-requisite to carrying out the development. However its absence 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, on the contrary, is, it seems to me, objective evidence which is at least capable of supporting an intention to develop along the lines of the sought for planning permission. Why else, in many cases, is it being applied for? Again if coupled with other evidence as to the manner in which it is intended to exploit the property once developed this may be sufficient to establish the status of the person concerned.

8.2 All in all it seems to me therefore that the imposition by the Revenue of the criteria which they have established is neither authorised as a matter of Irish law nor, in the circumstances of this case, more importantly, is it consistent with the jurisprudence of the ECJ and therefore with the requirements of the sixth directive. Indeed if I am correct in the view which I have taken as to the proper interpretation of the jurisprudence in this area it would not be competent to introduce legislation in Ireland which would give effect to criteria similar to the criteria adopted by the Revenue in this case for such criteria, even if enacted by statute, would be inconsistent with the proper implementation of the sixth directive.

9. Conclusion
It is equally clear, for the reasons which I have set out above, that there was more than ample objective evidence which would have allowed the Appeal Commissioner to come to the conclusion which he did which was to the effect that there was a bona fide intention to develop and to exploit in a manner which would confer taxable status on Centime.

10. Some Additional Matters
10.1 I should not conclude without dealing with a number of less central matters which arose in the course of the hearing.

In response to a question from me it was made clear that Revenue practice was that once a party qualified under the criteria (that is to say acquired an interest in the land and had a planning permission) such party was permitted to reclaim expenditure incurred in relation to the project even though that expenditure was incurred prior to the party having met the criteria. This very issue seems to me to place in stark relief the difficulty of attempting to stand over the criteria which the Revenue have adopted. The test is as to whether the person concerned has the necessary intention objectively established. How can the intention of a party at a time when it applied for planning permission (which is of course the relevant criteria for determining whether that party should be entitled to deduct VAT paid in respect of expenditure incurred in making the planning application) be retrospectively determined as a result of the outcome of the planning application. It is a necessary consequence of the Revenue criteria that a different view is to be taken as to the intention of a party in making a planning application where that application succeeds on the one hand or fails on the other. In the former the Revenue will, in effect, retrospectively accept that the taxpayer concerned had established the requisite intention whereas in the latter case the Revenue will not do so. This seems to me not only to be illogical but also to be entirely inconsistent with the established jurisprudence of the ECJ.

10.2 In that regard it is also worthy of note that in a number of cases the ECJ has made clear that the entitlement to deduct is one which arises immediately. (See for example *Schlosstrasse*). How then can an immediate entitlement to deduct be squared with a retrospective assessment of the entitlement to deduct in the light of a future event over which the party has no control.

10.3 A second issue arose when I enquired as to the basis upon which the Revenue might have an entitlement to impose such criteria in the absence of an express statutory provision. Counsel for the Revenue indicated that such an entitlement might derive from the so-called "care and management" provisions of the Taxes Acts (see for example s. 849 Taxes Consolidation Act, 1997) which place the care and management of the operation of tax in the hands of the Revenue. As the matter was not fully debated I should not express any concluded view on this issue save to indicate that I would have significant doubt as to whether the care and management provisions of the Taxes Acts could be construed in a constitutional manner such as would entitle the Revenue Commissioners to impose absolute criteria, the effect of which might be to require a person to bear tax (or, as in this case, not obtain a refund) to which they are, *prima facie* entitled under the Taxes Acts in the absence of a specific statutory entitlement to impose such criteria which conforms with the requirements of the jurisprudence of the courts in relation to principles and policy. In saying that, however, I would wish to make clear that it is entirely appropriate for the Revenue Commissioners to issue guidelines which make clear to taxpayers the way in which the Revenue will exercise any discretion which the law confers as to the manner in which the Taxes Acts may be applied. Such guidelines have the merit of informing taxpayers as to how Revenue discretion is likely to be exercised and achieve the desirable end of making it more likely that any discretion which the Revenue may enjoy will be exercised in a similar manner in like cases. It is, however, the elevation of any such guidelines to matters which are applied as if they have the force of law that is open to serious question. That is particularly so where, as here, and for the reasons which I have analysed above, the criteria appear, in many respects, to be inconsistent with the law.

11. Answer
In those circumstances it is clear that in my view the proper answer to the question asked in the case stated is to the effect that the decision of the Appeal Commissioner that the respondent is a taxable person as set out at paragraph 10 of the case stated is correct in law.