TC02632

Appeal number: TC/2011/06999

VALUE ADDED TAX - land and buildings – election to waive exemption – whether on facts Appellant had notified HMRC of nature of its election – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

EXETER ESTATES LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE MISS J C GORT
MR IAN PERRY FRICS

Sitting in public in Bristol on 6 February 2013

Mr Joe Priday, Solicitor, appeared on behalf of the Appellant

Mr L Bingham, Officer of the Commissioners, appeared on behalf of the Respondents.

DECISION

1. This is an appeal against a decision of the Commissioners of 28 June 2011, upheld on review by a letter of 10 August 2011, that the Appellant ("Exeter Estates") had opted to tax all the land and buildings formally known as the Frank Tucker Yard & Buildings at Days Pottle Lane, Peamoor, Exminster, Devon EX2 9FL ("the site"). The appeal dated 7 September 2011 is made on the basis that HMRC have misunderstood the facts, that certain buildings and the land on which they stood had not been opted to tax and Exeter Estates sought the following:

> "Agreement that the extent of the option to tax is as described and/or update the original option to tax as had been already done and/or allow a new option to tax, backdated to the original effective date due to the fact the notification/clarification was made within 30 days of the original option to tax."

2. At the hearing both parties agreed that clarification of the Election to Waive Exemption made by Exeter Estates was required, there having been misunderstanding on both sides.

The Background

3. In 2006 a company F &T Consultants Ltd (now called Prydis) set up an investment fund (Exeter Estates) to purchase the site. Exeter Estates acquired the site from two sources, ET Holdings Ltd and Frank Tucker Commercials Ltd, negotiations started in 2006 but completion was not in fact until June 2007. On 18 January 2007 Exeter Estates wrote to HMRC stating that it was in the course of acquiring an existing trading business and enclosing a completed VAT 1. At the time it had been expected that completion would be on 31 March 2007 but in the event it did not take place until later.

4. On the VAT registration form it was requested that registration be backdated to 31 January 2007. At Part 3 Section 14 it was recorded that it had taken over the VAT-registered business from someone else as a going concern as from 31 March 2007, but Exeter Estates did not want to keep the previous VAT number.

5. On 24 January 2007 Exeter Estates notified HMRC's option to tax unit in Glasgow ("the OTT Unit") of its option to tax the site by reference to the Land Registry title number. The site is quite extensive in area and runs beside a dual carriageway. The Land Registry plan outlines the boundaries of the site in red and within the red lines are eight buildings outlined in blue. The site was (and still is) used in part as a petrol station, the buildings are warehouses and offices let out to various companies which are, in the main, substantial and well-known in the area.

The Law

6. Value Added Tax 1994 Schedule 10 provides at paragraph 3(2):

"An election under paragraph 2 above shall have effect in relation to any land specified, or of a description specified in the election."

7. The Interpretation Act 1978 stated at the relevant time Schedule 1:

" 'land includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land'…"

8. By Notice 742A of March 2002 the Commissioners set out in their Public Notice by paragraph 2.4 as follows:

"What is covered by the option to tax?"

"Land….. your option to tax covers all the land, and any buildings or civil engineering works which are part of the land….. if you later construct a building on land that you have opted, the building will not be covered by the option to tax."

This Public Notice was withdrawn from 1 June 2008 and from that date, HMRC has treated buildings constructed at a later time as covered by the option to tax.

9. From 1 June 2008 Schedule 10 at paragraph 18 (3) provides:

"If an option to tax –

(a) is exercised in relation to any land, but

(b) is not exercised by reference to a building or part of a building, the option is nonetheless taken to have effect in relation to any building which is (or is to be) constructed on the land (as well as in relation to land on which no building is constructed)."

10. VAT at 1994 at Schedule 10 paragraph (5) set out the conditions for revoking an option to tax which allowed a person to revoke an election if:

"(a) The time that has elapsed since the day on which an election had effect is:

(i) less than three months; or

(ii) more than 20 years

(b) In a case to which paragraph (a)(i) applies –

(i) no tax has become chargeable and no credit for input tax has been claimed by virtue of the election; and

(ii) no grant in relation to the land which is the subject of the election has been made which, by virtue of being a supply of the assets of a business to a person to whom the business (or any part of it) is being

transferred as a going concern, has been treated as an neither a supply of goods nor a supply of services; and

(c) The person making the election obtains the written consent of the Commissioners.

The Facts

11. We heard evidence from Mr N J Cross, a Chartered Certified Accountant and Company Secretary of Exeter Estates from 2 October 2006 until 31 May 2007. We also heard from a Mr G M Bagwell and Ms E Meechan, Officers of HMRC. We were provided with two bundles of documents and sundry witness statements and papers during the course of the hearing.

12. The issue in the case arose out of the Notification of the Option to Tax Land/or Buildings (Election to Waive Exemption) dated 26 January 2007. We were not provided with a copy of the original Notification although it was stated to be contained in the bundle provided by HMRC this was not the case. It had been submitted on line and a copy was produced at the hearing of the appeal.

13. The person at Exeter Estates who had been dealing with the issue at the time was a Mr Kenneth Holmes who unfortunately had died before the Tribunal hearing. Mr Cross had worked under him and was a party to all the discussions and correspondence relating to what was a complicated and large transaction. We heard from Mr Cross that at the time of the Notification the immediate intention was to continue trading in the same way as the vendor had and not to change the VAT status of the site in any way. The status was checked with the vendor who requested details from the unit in Glasgow, however the vendor was unable to obtain a copy from Glasgow of its own option to tax notification. It was suggested by Glasgow that from the detail behind the Title Number shown on the official Land Registry map what was intended to be opted to tax by Exeter Estates was correct, the warehousing land was under a separate Title Number which was shown on the official map, and as it was not intended to opt to tax the warehousing land, the vendor believed this answered the question. It was not disputed by HMRC at the hearing that the vendor had excluded the buildings from the opt to tax, nor was it stated that its VAT treatment, namely partial exemption, had ever been queried by HMRC. Exeter Estates' legal advisors were not happy with Glasgow's response to the vendor and advised Exeter Estates to seek clarification from Glasgow of the status of the option to tax with regard to the buildings. The intention was to develop the areas of the site which had no buildings on as quickly as possible and thence to sell the whole site. To this end Mr Cross provided the relevant details to Mr Holmes who called the unit in Glasgow with the intention of ensuring that the areas etched in blue on the Land Registry Title (namely the buildings) were excluded from the option to tax. It was Exeter Estates' intention to continue making exempt supplies of land in so far as the warehousing was concerned in accordance with the leases which were to be assigned to them as part of the purchase. There is a file note of Mr Holmes' telephone call dated 20 February 2007 which states:

"Spoken to Option to Tax Unit regarding Exeter Estates and the extent of the option to tax required under the terms of the draft sale and purchase agreement. It was suggested that although the Title number referred appears to exclude the warehouses in the Title Plan, it should nonetheless be clarified.

Agreed this is to be forwarded to the Unit and should expressly state the option is not being revoked, but merely clarified"

This telephone call was followed up by a letter, also dated 20 February 2007, to the Glasgow unit which is in the following terms:

"Further to my telephone conversation with yourselves, please see below the supplementary details as discussed for our client Exeter Estates Limited in order to clarify the option to tax requested. This is not a revocation. Authority has been previously provided.

SUPPLEMENTARY DETAILS FOR OPTION TO TAX

Effective date of option 24 January 2007

Title number: DN346949

Land Registry description: Lorry Yard and Buildings being land on south side of

Day Pottles Lane
Peamore
Exminster
Devon
EX2 9FL

Title plan attached – note option to tax to be limited to area etched red on enclosed plan, excluding buildings etched blue.

I trust this limits the scope of the option and I look forward to receiving confirmation of the option being in place."

14. On 5 March 2007 the Option to Tax Unit in Glasgow ("OTT") sent Exeter Estates a letter which stated:

"I acknowledge receipt of your correspondence notifying your election to waive exemption under **Schedule 10, Paragraph 2, VAT Act 1994**, in respect of your interest in the following property:

Address of Land/Property	**Effective Date of Election**
Frank Tucker/Lorry Yard and building **Being land on South Side of** **Days Pottles Lane** **Peamoor** **Exminster** **EX2 9FL** **Land Registry Title Number DN346949 – DN146949**	**24 January 2007**

I can advise that this election to waive exemption is in place with effect from the date shown above."

15. This letter was followed by a further letter from the OTT unit dated 27 April 2007 which was in only slightly different terms, none of them being material to the present appeal.

16. Exeter Estates subsequently submitted a large VAT repayment return for period 03/11. This repayment related principally to the construction of a new warehouse on the site. Mr Bagwell was the officer who conducted the site visit and there he met a director of Exeter Estates, a Mr Nick Evan, and junior accountant, Mr Graham Whalen. Mr Bagwell raised the issue of the option to tax at this meeting and from the documents produced and from the lack of any partial exemption calculations being produced, he concluded that the option to tax applied to the buildings as well as the land. In his evidence to us, Mr Bagwell stated that he was told that the option to tax had not been intended to cover the properties apart from the garage. He had asked to see the partial exemption calculations which he had expected would be produced to him on the site, but none were available, and the company's representatives present were unaware that such calculations were needed. In cross-examination Mr Bagwell accepted that it was explained to him that the business was carrying on in the same way as before and that Mr Evans did not understand the difference between exemption from tax and zero rating. Subsequent to the visit an assessment to tax in the sum of £205,675.41 was raised by Mr Bagwell.

17. Following this visit, on 9 May 2011 a letter was sent on behalf of Exeter Estates to Mr Bagwell setting out the position with regard to the option to tax as it understood it to be, namely that it was not believed that there had been an election to waive the exemption in respect of the buildings etched in blue on the land registry documents. By a separate letter also dated 9 May 2011 detailed Sage accounts and also partial exemption calculations were sent for all the relevant periods demonstrating that de minimis considerations applied.

18. A considerable amount of correspondence followed between the parties and various alterations were made to the assessment. Further to Exeter Estates' insistence that the buildings were exempted from the option to tax, Mr Bagwell made substantial enquiries of the OTT unit in Glasgow and confirmed to Exeter Estates that no additional information was held by the unit suggesting that any exclusions where indicated on the original option to tax applied for and received on 26 January 2007.

The documents referred to above, namely the record of the telephone conversation and the letter of 20 February 2007 which Exeter Estates believed had been sent to the OTT unit were provided to HMRC. The OTT unit disclaimed any knowledge of that letter, and we heard from Ms Meechan that, although there was a very highly organised method for dealing with correspondence that arrived at the unit, correspondence relating to a party which was not at the time registered for VAT, as was the present case, caused problems because although the post was always scanned in and given a unique reference number, there was sometimes difficulty in marrying up that number with a non-registered tax payer. She had personally searched both the name 'Exeter Estates' and the postcode and she accepted there was a possibility of error in marrying the paperwork because the system was set up for parties who had VAT numbers. With regard to the telephone call, a secure note is put on the electronic folder when there is such a call. She accepted that at the same time there had been delays at the unit in getting out acknowledgement because of the difficulty of marrying up information and there was a backlog because they were working under pressure.

19. The copy of the letter of 20 February 2007 had a reference number at the top of it and underneath was written 'Royal Mail'. However checks with the Royal Mail revealed that the number in question was not related to the Royal Mail and it was deemed to be an internal reference relating to Exeter Estates. HMRC were not prepared to accept that this letter had ever been sent to the OTT unit.

The Commissioners' Case

20. The Commissioners' case was that the buildings in question were the subject of the option to tax made in the Exeter Estates' original Notification of Election in January 2007. The evidence for this was the two letters from the OTT unit dated March and April 2007 which referred to land and buildings. It was submitted that this was not queried by Exeter Estates after receipt of the letters.

21. Examination of the documents held at the Land Registry gives no apparent reference to the buildings in question being excluded from the land. All the Land Registry map indicates is which buildings and land perimeter are included within the site by highlighting the building and land perimeters. It was questioned on behalf of the Commissioners whether the letter of 20 February was ever sent to the OTT unit.

22. It was the Commissioners' belief that there was a valid option to tax in place in January 2007 which included the buildings for which rent was being charged. It was not accepted that revocation of that option should be allowed on the basis that Exeter Estates' letter of 20 February 2007 was within 30 days of the original option being made. It was submitted that if the buildings were not covered by the option (which it was not accepted was the case) then the rental income would have been exempt from VAT. Exeter Estates had not completed partial exemption calculations for the receipt of rents from day one of receiving them. The calculations were not in place when the Commissioners first started the enquiry which supported the Commissioners' stance that the buildings were not excluded from the original option.

23. We were referred to the following authorities: *Finanzant Goslar v Breitsohl* C400/98, *Windsor House Investments Ltd* (decision No. 19666) and *Grenane Properties Ltd* TC00494. On the basis of the case of *Grenane* the Commissioners accepted that there were two clear elements in opting to tax, being the election and the notification of an election. It was submitted that in the present appeal the notification had been carried out and that there was need for the intention to opt to be evidenced, and the evidence in the present case did not show an intention in respect of the buildings. The Commissioners relied principally on the following:

(i) The buildings in question were included in the original option showing clear intention.

(ii) There appears to have been no attempt by Exeter Estates in relation to the Respondents letters of March and April 2007 to query what the Respondents had stated was covered by the option.

(iii) The Exeter Estates' representatives' correspondence of 20 February 2007 has been extensively searched for with a negative result.

(iv) No details of any Royal Mail involvement have been provided.

(v) If the buildings had not been opted as Exeter Estates contends, making its rental income exempt, why were partial exemption calculations not being undertaken which would have supported its belief that the buildings were not opted?

Reasons for Decision

24. The original document notifying the OTT unit, is ambiguous as was acknowledged by both parties at the hearing. The Respondents' interpretation of that document is entirely reasonable in the circumstances and no criticism of them can be made in respect of that interpretation.

25. Exeter Estates' note of its telephone call and letter of 20 February are both unambiguous. It was quite clearly not Exeter Estates' intention to opt to tax the buildings outlined in blue on the Land Registry document.

26. We accept that the letter of 20 February was sent by Exeter Estates. We find it more likely that the letter was either lost by the Royal Mail or at the OTT unit than that it was never posted. There is evidence before us that the unit was having difficulties in coping with its workload at the time and that the system was even less able to cope when the caller was not registered for Value Added Tax. It is possible that the OTT unit had not by 20 February 2007 dealt with the original OTT application of 27 January, as their letter of 5 March 2007 is the first document sent by them in respect of the notification. In that case there would not even have been a file on Exeter Estates open at the unit. There is no evidence from the OTT unit in relation to the phonecall, and we have no evidence as to whether or not an electronic file on Exeter Estates was open at the time of the call on 20 February 2007. It might be

expected that there would be a reference to the telephone call on the electronic folder given the very clear note of that phonecall produced by Exeter Estates.

27. No explanation was given by HMRC for the second letter sent by the OTT unit, namely that of 27 April 2007. There was no reason for Exeter Estates not to believe that, if the first letter had been written not having taken into consideration the communication of 20 February 2007, the second one had taken the call and the letter into account. We do not find that that letter demonstrates conclusively that the buildings had also been opted to tax in the circumstances. The letter appears to be a straight forward cut and paste address taken from the original online application. We consider it likely that the OTT unit considered that the reference to 'Lorry Yard and Buildings' on the Notification was a description of what was being referred to by Exeter Estates when it initially made its Option to tax rather than it being an intrinsic part of the address on the conveyance.

28. With regard to the unavailability of the partial exemption calculations to Mr Bagwell at the time of his site visit, there is, as was agreed by Mr Bagwell, no rule of procedure that demands such calculations be available at the time of a site visit, desirable though it might be. We accept the evidence of Mr Cross that Exeter Estates had not been aware that Mr Bagwell would be looking at the issue of the option to tax, nobody having been aware that that was an issue at the time, it was thought that the visit related solely to the construction of the new warehouse and the tax implications. HMRC appear to have taken no account of the speed by which the partial exemption calculations were subsequently produced to them, a relevant factor given the complication of the procedure and the period of time over which the calculations were made.

29. We also consider it relevant that Exeter Estates was taking over a business as a going concern and had adopted the same procedures as the previous owner of the site. This was made clear to HMRC in the correspondence following Mr Bagwell's visit. It is a matter which goes to intention, but is one which HMRC did not investigate, all their enquiries focussing almost exclusively on the non-receipt at the OTT unit of the letter of 20 February 2007.

Conclusions

30. In the circumstances we find that:

i) The original option to tax, whilst intended to be in respect of the land only, was in fact ambiguous and could properly be understood to relate to the land and buildings.

ii) It is unclear whether or not the OTT unit made a determination on the issue between 27 January and 20 February 2007.

iii) It was at all times the intention of Exeter Estates to opt to tax the land only and not the buildings.

iv) The above intention was clearly communicated to the OTT unit both by the telephone call and the letter of 20 February 2007.

v) There is no evidence that it was the case that a determination on Exeter Estates' OTT Notification had been made by the OTT unit before 20 February 2007, but in the event that this was the case, the call and the letter show a clear intention to revoke the option to tax in respect of the buildings on the land.

vi) If the Notification to opt to tax was not considered by the OTT unit before 20 February 2007, then, as stated above, the communications from Exeter Estate of 20 February 2007 make its position quite clear, that it was not opting to tax the buildings.

31. For all the above reasons we find that Exeter Estates did intend to opt to tax the buildings on the site and that this intention was clearly communicated to the Commissioners and evidenced by the letter of 20 February 2007. The fact that the OTT unit were unable to trace that letter does not as a matter of law mean that Exeter Estates did not send it.

32. Alternatively, if we are wrong in our conclusion that the letter of 20 February 2007 is evidence of the intention which relates to the original application, then we find that it is evidence of the revocation of the election apparently made by the application of 27 January 2007. In the circumstances this appeal is allowed and we direct that effect be given to it by the OTT unit.

33. This document contains 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 Chamber) Rules 2009. The application must be received by this Tribunal not 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.

JUDGE J C GORT
TRIBUNAL JUDGE

RELEASE DATE: 27 March 2013