TC02998

Appeal number: TC/2011/06693

Value Added Tax - Whether the Appellant made, and then notified, the election to waive the exemption from tax in relation to supplies of land - assessment on the Appellant based on three elections received by HMRC - confusion by HMRC in relation to the entity registered - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MICHAEL BRINKARD **Appellant**

-and-

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

TRIBUNAL: JUDGE HOWARD M. NOWLAN
SIMON BIRD

Sitting in public at Eastgate House in Cardiff on 8 October 2013

Adam Routledge of Controlled Tax Management Limited on behalf of the Appellant

Martin Priest, Higher Officer of the Solicitor's Office of HMRC on behalf of the Respondents

DECISION

Introduction

1. This Appeal was a relatively simple appeal in which HMRC had assessed the Appellant to VAT in the amount of £107,449 on 27 January 2009 in respect of various supplies of interests in land made by the Appellant. The assessments were made because HMRC had received, on three separate occasions, notification that the Appellant had elected to waive the exemption from tax in respect of the relevant land. The principal ground on which the Appellant's case was advanced was that he had either not made the election to waive the exemption, or that the notifications were either forgeries or documents sent to HMRC without his authority.

2. While the VAT issue, on which we are required to make a decision, was straightforward, it became apparent during the hearing that the VAT issue was a relatively minor and simple issue in a much broader chain of events that were complex, confused and extraordinarily unfortunate. While aiming not to over-complicate the VAT issue, we will need to summarise some of those events, first because they have some bearing on whether indeed the Appellant made and notified the relevant election to waive the exemption to tax, and because they illustrate the financial plight in which the Appellant is now placed.

The facts

3. The Appellant had for many years been a panel beater, repairing damaged cars, and also a professional spray-painter. He was a sole trader, and he worked on ex-MOD land near Cardiff of which he had some lease, the business being conducted in a leaking World War II Nissen hut. We understood that the land and the hut in question were leased to the Appellant by Associated British Ports PLC ("ABP"). The Appellant had never been registered for VAT purposes when solely conducting the panel beating trade because his turnover had always been below the registration threshold.

4. In or around the year 2000, the precise date being irrelevant, it appears that the Appellant became interested in acquiring from ABP approximately 2 acres of land relatively close to the location of his leased Nissen hut. The land in question was in a dilapidated state, and had not been actively used for a very long time. The Appellant considered, however, that if he bought the land, he ought to be able to manage a development of the land, building 12 small "industrial starter units". His original plan was to raise finance by re-mortgaging his house, and his ultimate intention was to lease them out for rent paid annually, so as to generate the equivalent of a pension for himself and his wife on his retirement. He admitted to us that he had had no previous experience in buying land for development, dealing with planning applications and raising finance, so that the project from the outset was a challenging one.

5. In September 2002, the Appellant duly purchased the land for £70,000 plus VAT of £12,250, having raised a loan on a re-mortgage of his and his wife's house. In September 2002 he also applied for voluntary registration for VAT purposes, the intention being that he would conduct the development activity also on a sole tradership basis. His then accountant had apparently advised him that it would be

beneficial to register for VAT purposes. The basis of this advice was not specifically revealed to us, and we saw no correspondence in relation to it. The suggestion that it would be beneficial to register did however appear to make sense for the two reasons that if he registered and waived the exemption from tax in respect of the relevant land, he would be able to recover the VAT charged in respect of the purchase, and the VAT in respect of later standard-rated supplies incurred by him in the course of the development, and the resultant need to charge VAT in respect of rent or sales proceeds eventually received would be irrelevant to most potential tenants or purchasers. This was on the basis that those tenants or purchasers of light industrial units could sensibly be assumed to be conducting taxable businesses for VAT purposes such that on rendering taxable supplies themselves, the VAT borne on either the rent or the purchase price paid for the developed properties would simply be off-set against those traders' output liabilities and would not represent an additional cost to them.

6. In September 2002 HMRC received the Appellant's application for VAT registration, the answer to question 24 on the form being that he did not expect to be making exempt supplies for VAT purposes. A form notifying HMRC of the Appellant's decision to waive the exemption to tax in respect of the relevant property was then sent to HMRC. Although the Appellant claimed that he did not sign the form, it appeared from the form received by HMRC in November 2002 that the form had been signed. The copy of it that we were shown was a poor copy and the signature shown on it was particularly unclear, but the signature did not look unlike many other examples of the Appellant's signature that were shown to us.

7. Somewhat before the purchase of the land, the Appellant had acquired a limited company, called Windmill Property Development Limited ("WPD") of which he was the director. The name of this company certainly suggested that it was to have some role in relation to the development, though HMRC's representative at the hearing indicated that HMRC had never, perhaps understandably, appreciated what this company's role was designed to be until the Appellant explained it to us in the hearing. According to the Appellant, the company had been formed in the belief that had he, in his personal capacity, sought to hire equipment such as a JCB, he would not have been taken seriously. By forming the company, he thought that the company would appear to have more standing and would be able to hire the JCB and acquire other materials etc. The Appellant explained that he had gifted the money raised for much of the development expenditure into the company to enable the company to hire and purchase the various items. We were unable to identify any legally sound role, as principal, that the company was performing, and we tentatively reached the conclusion that the company was best regarded as never having been anything other than a nominee for the Appellant in his personal, and sole tradership, capacity. HMRC's representative indicated that, whilst all this was news to HMRC, it was at least consistent with the fact that whenever expenditure, subject to VAT, had been incurred, the reclaimed VAT had been refunded by HMRC on the basis of the waiver of exemption, and no distinction had been drawn between expenditure being incurred by the owner of the land, i.e. plainly the Appellant personally, or by the company.

8. We must mention the two matters that appear to have led to all the confusion and the bitterness in this case. These two matters are very related. The first was that it transpired that ABT and the Welsh Development Agency (or some other successor or similar body) had very major plans to develop large areas of the adjacent land to the land purchased by the Appellant for a very sizeable housing development, but that ABT had made a serious mistake in selling the land to the Appellant because that small parcel of land was the only one under which there were sewers and access to

mains drainage. Accordingly ABT tried to buy the Appellant's land back from him, but the parties were unable to agree on an appropriate price and no such sale ever took place. This issue appears to have led to a long running dispute, with the Appellant claiming that various of his advisers had in some way been in direct dealings, effectively "behind his back" with the solicitors acting for the Welsh agency, and that part of the plan, concocted by the various advisers, was to render the Appellant liable to the VAT now claimed by HMRC so as to render the Appellant bankrupt. The dispute and negotiations about the sewers and the drainage have little to do with the VAT issue that we must decide, aside from that suggestion about intended bankruptcy. The wider significance of the dispute, however, has been that the Appellant has been embroiled in a bitter and long-running battle with various parties, including it seems various of his advisers. The extent of this dispute is amply illustrated by our recording that we were told that in order to solve the problem of access to the main drains, either ABP or the Welsh agency had eventually to secure a private Act of Parliament.

9. The related issue that emerged was that some of the drains under the Appellant's land possibly suffered from chemical contamination that might preclude some of the Appellant's intended development. Seemingly the only relevance of this is that the contamination risk has precluded the construction of two of the intended industrial units. Twelve were originally planned. Ten have been built. Numbering those units that have been built 1 to 10, we understand that unit 8 has been built but is unsaleable, apparently because of some form of charging order obtained by HMRC, and units 11 and 12 have not been built at all.

10. We must now record the facts in relation to the two more directly relevant issues of whether the Appellant or WPD were the registered entity for VAT purposes; and secondly the various submissions of Notices waiving VAT exemption in relation to supplies of interests in the relevant land. We will record both sets of events together, and chronologically, since one source of dispute in this case relates to whether the confusion about registration and de-registration could have any impact on the various notices waiving exemption.

(a) As we mentioned in paragraph 6 above, it was the Appellant who was registered personally in September 2002, and subject to the Appellant disputing the validity of the Notice of waiver of exemption, it was the Appellant who waived the exemption to tax in relation to the land.

(b) In early July 2003 the Appellant submitted a VAT return, with a covering letter, the letterhead of which had the Appellant's name above the address, then followed by the full name of WPD, and below that the rest of the address. HMRC enquired whether the different address from that held by HMRC for correspondence should be used in future, and when told that it should be, HMRC updated the address and then made the error of assuming that the registered person was WPD. This in no way reflected a "transfer of business as a going concern" from the Appellant to WPD, but was simply an administrative error admitted by HMRC.

(c) On 5 September 2006, HMRC received a second notification of waiver of exemption in respect of the same land.

(d) In early 2007 the Insolvency Service notified HMRC that WPD had become insolvent, and so HMRC de-registered it.

(e) In April 2007 both the Appellant and the Appellant's solicitors wrote to HMRC requesting confirmation of the Appellant's current registration status, and on 10 May HMRC responded by saying that the de-registration (strictly of course of WPD) had occurred in error, and that the Appellant should continue to use the originally designated registration number. On 14 May HMRC re-instated the Appellant's VAT registration number and showed the Appellant as being the properly registered person.

(f) On 27 June 2007 HMRC received a third notification of waiver of exemption, and in response to requests to confirm receipt of this to the Appellant's solicitors, HMRC did so confirm receipt of the notice.

(g) In September and early October 2007 the solicitors acting for the Appellant in relation to conveyancing matters, produced invoices reflecting the grants of 999-year leases over units 1 to 3 to the respective grantees, the invoices being prepared on a VAT-inclusive basis. We were told that these three units had been occupied informally on a rent-free basis for some period, but the formal grants of long leases were effected in September and early October 2007. During 2008, similar grants were made, and invoiced in the same way over units 4 to 7 and 9 and 10. Some of the invoices were signed (or appeared to have been signed) by the Appellant. Some invoices were unsigned.

(h) In his VAT return for the period 10/07, the Appellant returned and paid the VAT in respect of the grant of the 999-year lease over unit 1.

(i) On a visit to the Appellant's premises, HMRC discovered that although the Appellant had returned and paid the VAT in respect of unit 1, he had not returned the grants of the various other leases over units 2 to 7 and 9 and 10. This accordingly led to the issue of the assessment that is the subject of this Appeal.

11. The remaining facts that we must record are of very considerable importance though they appear to have no strict relevance in relation to the Appellant's potential liability to VAT. The facts in question are that, although the estimated sales proceeds of the grants of the 999-year leases over 9 of the units were £816,794, the solicitors dealing with the sales appeared to have applied only the following amounts in the way suggested below. £25,000 had been distributed to the Appellant. £325,000 had either been applied in repaying a debt, or was being reserved to repay the debt. We were told by the Appellant that there was other indebtedness that was not included in this figure of £325,000 which had not therefore been repaid. And £67,000 had been applied in paying the solicitors' legal costs. This left virtually £400,000 of the proceeds unaccounted for, and the Appellant said that he had been unable to obtain any amount out of that balance and unable to ascertain where the money was, or why it was being withheld. The apparent result of this inability on the part of the Appellant to access the missing funds appeared to lead to the result that the Appellant would be unable to meet the liability for VAT, were he to lose the present Appeal, at least until the funds could be traced and recovered.

The relevant law in this case

12. Relatively little attention was given by the parties to the two administrative errors on the part of HMRC, namely the error in substituting WPD as the registered person for VAT purposes in place of the Appellant, and the subsequent de-registration

of WPD. This was almost certainly because the registration of the Appellant personally had been reinstated, to the knowledge and at the request of the Appellant by 14 May 2007; it was after that date that the third notification of waiver of tax exemption was received by HMRC, and it was well after that date (in other words, commencing only in September 2007) that disposals of the various units were made. The question for us is whether these facts render irrelevant the two errors admittedly made by HMRC.

13. The other, more hotly debated, issue surrounds the curious position that there is a distinction between the decision or the election of a registered person to waive the exemption in relation to land, and the notification, in other words the subsequent notification of that election to HMRC. It is also clear law that even if an election has been notified to HMRC, if the person ostensibly giving that notification can establish that he or it never elected to waive the exemption, then the subsequent notification does not occasion the exempt status of land transactions if it can be established that the notification was made in error. "Error" in this context obviously means an erroneous notification that the election had been made, when in fact it had not been made, as distinct simply from an ill-advised election, followed by a notification of that ill-advised election.

The contentions on the part of the Appellant

14. The Appellant's various contentions were along the lines that none of the documents that appeared to have been signed by him had been signed by him. There were various suggestions that advisers, with whom he had fallen out, had forged or issued the notices without his authority or knowledge and had effectively conspired with the lawyers to the Welsh agency to bankrupt him. He had sought the opinion of a handwriting expert to ascertain whether his various signatures had been genuine. The advice was that they probably had been but this could not be said with absolute certainty. He also claimed to have no recollection of signing any of the forms. He suggested that his case was assisted by pointing out that it was obvious that the handwritten insertions into almost all of the documents (the notices, the returns, and the invoices) where the operative details had been given, had obviously been written by somebody else. This suggested that he had not seen, and not signed, the documents, whatever the advice in relation to the style of the signature.

The contentions on the part of the Respondents

15. The Respondents contended that:

- the admitted errors on the part of HMRC in changing the identity of the registered person, and subsequently de-registering WPD were irrelevant since the register had been fully corrected by mid-May 2007. After that date the third notification of waiver of the exemption to VAT for transactions in the relevant land had been made; that receipt had been acknowledged and confirmed by HMRC, at the request of the Appellant's lawyer, and all the transactions that occasioned the present liability to VAT post-dated all these events;
- there was no convincing evidence that the signatures on the notices and the invoices had been other than genuine signatures of the Appellant;
- having regard to:

    - the common sense observation that it did make sense in the present case for the VAT exemption to be waived;

- the initial advice to the Appellant from his accountant that registration was advisable, obviously with a view to the waiver of exemption and the recovery of input VAT;
- the fact that there was no evidence of miscommunication between the Appellant and those submitting the notices to HMRC evidencing the decision to elect;
- the fact that VAT was actually returned and paid in respect of the disposal of unit 1;
- and the fact that every invoice to grantees of the 999-year leases was prepared on a VAT-inclusive basis, some of them again being signed by the Appellant,

there was no ground for concluding that the Appellant had failed to make the election, or that the notifications of that or those elections had been made in error.

Our decision

16. We regret the decision that we must make in this case, because the feature that the Appellant appears to have succeeded in completing the great majority of his original bold project, and of having effectively sold the units at a profit, nevertheless appears to leave him with a tax bill that he is unlikely to be able to pay for reasons that he fails to understand, and that we certainly fail to understand. We find it extraordinary that approximately half the proceeds of the disposals have not been accounted for to the Appellant or any explanation proffered as to why or where they have been disbursed. We consider that this fact, namely that unfortunate circumstances have deprived the Appellant of the funds that on our understanding of the facts he should have, is why the Appellant has been forced to advance before us a contention for which there is little foundation. We entirely understand that he has been forced to advance the contention, under which he seeks to reinstate the exempt status of the various disposals and supplies of land, but we cannot reach a wrong decision out of sympathy.

17. There might have been some interesting issues, had the notification of waiving the tax exemption been made at some point when the Appellant's registration had been suspended, or had the registration been revoked (even by administrative error) after the making of the election. We give no indication as to what our answer to that would have been had the sequence of events been different. As it is, it seems to us that on the subject of HMRC's admitted administrative errors, they are eventually irrelevant. This is for the reason advanced by the Respondents, and recorded by us at the first bullet point in paragraph 15 above. In other words, the errors had all been corrected and the Appellant restored to the register by 14 May 2007. Thereafter a third election and notification was made, and it was only after that that disposals of the land were made.

18. One rather perverse point about the administrative errors is that if they had any effect, that would rather have been to undermine some of the claims for repayment of input tax, because doubtless they were made intermittently, and during the period when the registration was first switched to WPD, and WPD had later been de-registered. Fortunately HMRC has raised no issue in relation to this, and we would be extremely surprised if an administrative error by HMRC could have undermined the proper entitlement of the Appellant to recover input VAT. We are equally pleased that HMRC has taken no point, and properly taken no point in relation to the confusing split of roles between the Appellant and WPD.

19. We do not claim to be expert at analysing handwriting and signatures, but when the Appellant's own expert concluded that it was very likely that the signatures were the genuine signatures of the Appellant, we can only say that we agree. They looked to be absolutely consistent, and in a very individual style. The fact that the detailed wording inserted into forms was different was quite natural. It was obvious that the solicitors or accountants would fill in all the details and simply present the completed forms to the Appellant for signature. Virtually everyone will have had the experience of having completed forms put in front of them for signature, generally with a pencil cross to indicate where the claimant or applicant should actually sign, and virtually everyone will concede that signing such a form is not a memorable event likely to be fixed in their memory several years later. We consider that all the forms and invoices said to have been signed by the Appellant had indeed been signed by him.

20. It was quite clear that in the early days the Appellant had had no understanding of VAT. The advice ostensibly given to the Appellant by his accountant at the outset that we recorded in paragraph 5 above seemed entirely sensible, and we cannot now conclude that either then, or when the later waivers of exemption were made, the Appellant himself decided not to make the elections, and that it was only through confusion that his advisers submitted the signed forms. There was no cogent reason for not giving the waivers, and it is notable that during the hearing the Appellant never volunteered any reason as to why it was, or why he might have thought it, unwise to waive the exemption. Had the apparent and sensible advice of the original accountant been questioned, and had the Appellant or anyone suggested that for some reason it would have been more sensible to leave the exemption in place, we consider that there would inevitably have been some record of that debate, and an explanation for why the revised view was being advanced. There was no such evidence. We can readily now see that, deprived of half the proceeds of disposal, and facing a liability for a very substantial amount of VAT, the Appellant must regret that the exemption was waived. At the time when the elections were made, however, they were sensible; we cannot accept that the Appellant had some reason for reaching some different conclusion himself at any time, and we fail to see any evidence that he did not sign the elections, or that it was only through confusion that they were wrongly submitted.

21. Were there any doubt in relation to the above conclusion, and we consider that there cannot be, it is then relevant that the feature that all the invoices on the grants of the 999-year leases recorded VAT as being payable, and that in relation to the disposal of unit 1, VAT was both returned and paid, are further support for the clear conclusion that exemption had been waived. The only reason why the Appellant had to claim otherwise was that once he had been deprived, in the way that we fail to understand, of roughly half the proceeds of disposal, and had no funds with which to pay the tax, he obviously regretted the waiver of the exemption and had to seek to undermine it.

22 Our decision is that the waivers of exemption were made and notified and that they were valid. Accordingly the disposals of 9 of the units, including the one where VAT was actually volunteered and paid, were all taxable transactions and the assessment in this case is confirmed. The Appeal is thus dismissed.

Time to pay

23. We believe that the difficulties that the Appellant has encountered in relation to what in the first place was a brave and a sensible adventure have had a very serious effect on the Appellant. This is hardly surprising. The worst of the Appellant's problems are not the VAT problem that he faces as a result of this Decision, but the feature that he has no idea why he has not received 50% of the proceeds of the disposals of the 8 or 9 units, and he appears to have battles with numerous advisers. We believe that he was speaking literally when he referred to having camped for three days outside the officers of one of his supposed advisers, with sandwich boards advertising the fact that he was hoping to receive some papers from his own advisers. Quite apart, therefore, from being seriously affected by this long running dispute, and from having suffered a mild stroke, it appears that the Appellant would not be able to pay the tax in this case, at least unless and until he received some or all of the proceeds that he suggested were due to him. We therefore express the strongest hope and request that HMRC will seek to recover the tax in this case in a considerate manner, and will not simply remit the decision to computers in the "collection section" of HMRC that will pursue the Appellant for payment without considering all the surrounding circumstances.

24. We would like to record our thanks and respect to the Respondents' representative who clearly witnessed the pressure that the Appellant was obviously suffering, and who understood the difficulty that the Appellant would have in settling the debt owing to HMRC. We are confident that that representative will do his best to ensure that the request recorded in the previous paragraph is respected. The representative's approach to the case, whilst being entirely correct in the sense that we have also had to reach a correct decision ourselves, uninfluenced by sympathy, was sympathetic and admirable.

Right of Appeal

25. 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.

HOWARD M. NOWLAN

TRIBUNAL JUDGE

RELEASE DATE: 15 October 2013