[2021] UKFTT 0197 (TC)

TC08147

VAT – option to tax – notification – para 20 Sch 10 VATA – late notification – appeal against refusal – appeal made out of time -struck out.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/990

BETWEEN

WLLIAM NEWMAN **Appellant**

-and-

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

TRIBUNAL: JUDGE CHARLES HELLIER

The Tribunal determined the appeal on 27 May 2021 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because of the covid 19 pandemic

DECISION

Background

1. This decision relates to an application by HMRC to strike out Mr Newman's appeal. Behind the appeal lies a sad and complex story, not all of which is clear to me

2. Mr Newman was the tenant landlord of the Royal Oak pub. In 2014 the freeholder offered to sell it to him. He found a person to sell it on to, and on 22 May 2014 both the transfer to him and his sale completed.

3. On his purchase Mr Newman received an invoice from the sellers for £1.3m plus VAT of £234,000, and gave a VAT invoice to his buyers for £1.8m showing VAT of £360,000.

4. If his supply of the property was VATable this would leave him with a VAT liability of £126,000. But if his supply of the pub was an exempt supply then he could not properly give a VAT invoice to the buyer and the VAT shown on the invoice would be collectable from him under para 5(2) Sch 11 VATA as a debt to the crown. In that circumstance he would get no credit for the VAT he paid the seller.

5. The supply of an "old" property is exempt from VAT unless an effective option to tax has been made. Opting to tax is something which the taxpayer does. He can do it simply by deciding, although if he is well advised he will make some sort of formal record of his decision. Thus if Mr Newman made an effective option to tax before he sold the pub, his VAT bill would be £126,000, but if he did not make an effective election his input tax of £234,000 would not be creditable and the VAT of £360,000 he charged on the sale would be collectable as a debt due to the Crown.

6. By para 20 Sch 10 VATA, an option to tax does not have effect unless it is notified to HMRC "within the allowed time" and is in such a form and accompanied by such information as HMRC require in a notice they publish.

7. The "allowed time" means within 30 days of the exercise of the option, or such longer period as HMRC may allow. HMRC have published a notice which requires a form VAT1614A to be used but specifies no further information requirement.

8. Mr Newman did not notify HMRC of the making of an option to tax within the 30 day period. The events that ensued included the receipt of a demand from HMRC under para 5(2) for £360,000. Mr Newman appealed against HMRC's demand. The clarification of the nature of his appeal is related below.

The evidence and my findings of fact.

9. As evidence I had the documents in six PDFs. These included copies of correspondence with HMRC and between Mr Newman and his advisors. There were gaps in the tale. In addition to those matters set out above I find as follows.

10. An attendance note prepared by Mr Newman's solicitors dated 17 April 2014 records that Mr Nokes (Mr Newman's then accountant) advised that VAT would be payable on the sale and that he would be dealing with the VAT elements "including an appropriate VAT return and election".

11. The contracts for the sale and purchase of the pub specified that VAT was to be charged on each sale. Mr Nokes prepared a VAT invoice to go to Mr Newman's buyer.

12. It appears that no VAT return was made on time for the period ("07/14") in which Mr Newman bought and sold the pub (although a later nil return appears to have been made). Mr

Newman was not advised by his advisors to pay, and did not pay HMRC £126,000 within the prescribed time after the end of that period.

13. On 11 November 2014 Nr Nokes sent HMRC an application for Mr Newman to deregister for VAT.

14. A letter dated 25 January 2015 from Mr Nokes to HMRC says that a form for the correction of the 107/14 VAT return had been sent to the VAT unit and that Mr Newman was making arrangements to pay the VAT due.

15. In response to the deregistration application HMRC wrote on 26 January 2015 noting the sale of the pub and that Mr Newman had failed to submit a VAT return for the period. They had a copy of the VAT invoice Mr Newman had given his buyer. They said that as there had been no VAT return an assessment for £360,000, the VAT n the sale of the pub, would be issued.

16. Also on 26 January 2015 HMRC sent Mr Newman a notice of assessment for some £360k. The legend on the notice indicated that it was an assessment under section 73 VATA rathr than a demand for a debt due to the crown under para 5(2) Sch 11.

17. HMRC rang Mr Nokes on 13 April 2015 and there must have followed some discussion or correspondence, for on 1 October 2015 there was a meeting between HMRC, Mr Nokes and Mr Newman. The notes of the meeting indicate that HMRC explained the nature and effect of an option to tax, and that a nil return for 07/14 had been submitted.

18. On 19 May 2015 there was a meeting between Mr Nokes and HMRC

19. There was in the documents before me a form dated 23 June 2015 filled out to make corrections to Mr Newman's 07/14 VAT return so as to include both the VAT on the sale and the input VAT on the purchase. The form was unsigned. There was no clear indication as to who had provided it

20. On 6 October 2015 it appears that Mr Nokes sent HMRC a form 1614**H**, a form which related to getting HMRC's permission to a retrospective option, rather than a form 1614A which related to the notification of an option already made.

21. On 7 October 2015 Mr Nokes emailed Mr Newman to say that he has sent "opt to tax" to HMRC "to apply for it retrospectively".

22. On 11 November 2015 HMRC sent Mr Newman a demand under para 5(2) Sch 11 VATA for the sum charged as VAT on the invoice he had given to the buyer of the pub.

23. HMRC responded on 23 November 2015 to the 1614**H** form by recognising that in fact delayed notification (rather than retrospective permission) was being sought and asking for a signed statement from Mr Newman: (i) confirming the date the election weas made, (ii) confirming that all VAT had been accounted for and (iii) confirming that no exempt supplies had been made of the property in the last 10 years; in addition copies of the sales invoices were sought.

24. Between 23 November 2015 and 4 December 2015 Mr Newman sent watsapp messages to Mr Nokes chasing for action in reply to HMRC's action. Mr Nokes' replies struck me as evasive.

25. On 2 December 2015 Mr Newman wrote to Mr Nokes enclosing a signed form 1614**H** but saying "this does not appeal to be what is required". He asked why Mr Nokes submitted a nil VAT return for 17/14 on his behalf when Mr Nokes knew, because he had prepared the invoice given to Mr Newman's buyer, that there was a VAT liability for the period.

26. On 4 December 2015 a fully completed form 1614A which had been signed by Mr Newman (the signature looked to me to be of his name) on 24 November 2015 was sent to HMRC with evidence supporting the contention that the decision to opt had been made before the sale, copies of invoices and confirmation that no exempt supplies of the property had been made in the last 10 years. The letter said: "due to a clerical error opt to tax was not applied for". That to my mind indicated a lack of accuracy or a lack understanding of the relevant statutory provisions on the part of Mr Nokes.

27. On 9 December 2015 Mr Newman wrote to Mr Nokes asking how he would explain to HMRC that the £126,000 balance had not been returned or paid.

28. On 15 December 2015 HMRC wrote to Mr Newman's accountants in response to that letter saying that (i) an authorised signatory had to sign it (this was odd because it looked to me as if it had been signed by Mr Newman personally) and (ii) that they had not received confirmation that all VAT had been accounted for. The writer said "This has not been done and we require this to progress your notification". The letter did not in terms refuse to accept the notification, but it did not allow extra time. I saw no communication from Mr Newman's advisors in response to this letter.

29. Mr Newman chased Mr Nokes for action in early January 2016. Mr Nokes indicated that he would deal with the matter.

30. On 7 January 2016 Mr Nokes emailed Mr Newman and attached a form to amend the 07/14 VAT return so that it would show net VAT due of £126,000, asking Mr Newman to sign and return the form so that he could send it to HMRC. He also said that he was taking advice from Taxwise. Mr Nokes had further correspondence with Taxwise in January 2016.

31. On 8 January 2016 (this is the date on the letter. The List of documents gives it the date 18/10/21) Sanders Solicitors wrote to Mr Nokes recounting the 15 April 2014 meeting and noting that Mr Nokes had agreed to deal with the VAT return "and election", and sating that it was clear that Mr Newman's instruction was that Mr Nokes should "make the appropriate election" (which I take to mean the notification of any election).

32. In January 2016 Mr Nokes received advice from Taxwise.

33. In March 2016 Mr Newman engaged Appleton Richardson & Co to act for him. On 27 June 2016 HMRC wrote to Appleton Richardson & Co withdrawing the para 5(2) demand "so that a VAT return for the period 07/14 can be submitted". Appleton Richardson & Co then wrote to Mr Newman asking for authority to submit a return showing £360,000 output rax and £236,000 input tax. Mr Newman signed the latter to give that authority. Once submitted and the VAT paid, this should I think have satisfied HMRC's outstanding request in their letter of 23 December 2015. There was some correspondence with Taxwise in early 2016 but none before me which made any progress with seeking further time for notification

34. HMRC sent a series of demands to Mr Newman in September 2016

35. There was no evidence of any correspondence between the parties for over the next 5 months. (Lewis Nedas Law say in their Further Response (see below) that Mr Newman has no copies of any further correspondence n this period).

36. But it seems that at some time in this period that Mr Newman changed advisers, and that on 12 February 2018, a new advisor, Keith Barnes & Co wrote to HMRC arguing that Extra Statutory Concession 3.9 had not been applied so as to give Mr Newman effective credit for the input tax on his purchase of £234,000 against the para 5(2) demand for £360,000. HMRC's complaint division replied on 22 February 2018 saying that a review could be requested or an appeal be made to the tribunal. It seems that Keith Barnes & Co did not pursue a review or

received no compfot form it for in October they made a formal compmaint.HMRC dismissed the complaint on the basis that Mr Newman did not fall within the terms of the concession, and that Mr Nokes failed to provide the evidence sought in the late 2015 letters.

37. There was nothing in the evidence before me to explain why Keith Barnes & Co had not renewed Mr Newman's application for extra time for the notification of his option and seemingly had not advised Mr Newman to pay the £126,000.

38. On 5 October 2018 Keith Barnes & Co wrote to HMRC saying that Mr Newman had been the victim of a hit an run accident and asking for a second review of his complaint, and asking why the "late option" had not been accepted.

39. On 12 November 2018 HMRC replied to Keith Barnes & Co's request for a review of the reasons "|why we did not accept your client's late option to tax. They said:

> "Our records show that during the period November 2015 to January 2016 there were numerous instances where your client's agent, Nokes & Co, attempted to belatedly Opt to Tax, but failed to provide paperwork signed by Mr Newman, or any other evidence we requested. I can provide copies of our letters to Nokes & Co if you wish."

40. At some time in the autumn of 2018 Mr Newman was the victim of a hit and run accident. Also in the autumn of that year HMRC sent Mr Newman further demands.

41. Lewin Nedas Law took up the cudgels for Mr Newman in November 2018. They sought time from HMRC to investigate and on 5 February 2019 notified an appeal to the tribunal on his behalf.

42. HMRC have issued and have withdrawn penalty assessments.

Rights of Appeal

43. Section 83(1)(wa) VATA provides a right of appeal against HMRC's refusal to accept a late notification of an option to tax. Such an appeal must be notified to the tribunal within 30 days after the relevant decision unless the tribunal gives permission for it to be made later. The legislation does not specify whether the tribunal may remake HMRC's decision or whether its powers are limited to declaring an unreasonable refusal as invalid. Given that no particular policy issues are involved in the allowing of additional time (unlike for example a decision on whether to seek security for VAT) it seems to me that the tribunal would have jurisdiction to remake HMRC's decision if it were unreasonable.

44. Section 83(1)(p) provides a right of appeal against an assessment under section 73 (which permits HMRC to assess if VAT has been underdeclared). Such an appeal must be brought within 30 days of the relevant decision (or such longer period as the tribunal allow) and can only be pursued if the tax assessed has been accounted for or HMRC or the tribunal have agreed to a "hardship" application.

45. Section 83(1)(c) provides a right of appeal against a decision as to the amount of input tax which may be credited to a person.

46. As the Appellant's solicitors accept, there is no right of appeal to this tribunal against the pursuit by HMRC of the debt which becomes due to the Crown under para5(2) Sch 11when an invoice shows VAT but VAT is not due. But if the late notification of the option to tax were to be allowed by HMRC or the tribunal then there would be no such debt because the amount shown on the invoice would be VAT.

The Appeal history.

47. On 5 February 2019 Mr Newman sent in his notice of appeal. It (i) sought "hardship relief" so that he could appeal without paying the tax, (ii) explained that the appeal was late,

(iii)explained that the result he wanted was that his input VAT be allowable and his supply taxable, with net VAT of £126,000, and(iv) gave as the core of his grounds of appeal that

> "because of the failure by my then accountants, Messrs Nokes & Co, to 'opt for tax' on the sub-sale (and also probably the failure to account in the July 2014 VAT return that £126,000 was due, which return was submitted without my knowledge) HMRC now (in my view, wrongly) seek payment of the whole £360,075.00 on both the purchase and the sub-sale."

48. In answering the question as to why his appeal is late (see below), Mr Newman says that he has been in discussions with HMRC since 2015, that an extension of time was sought from HMRC in December 2018 and eventually an extension was agreed. He recounts the prosecution of his case by his solicitors in 2019. He does not however say anything about his circumstances or the way his dispute was progressed in the period between spring 2015 and winter 2018. The extension sought in December related to proceedings to recover monies from him.

49. On 7 May 2019 HMRC applied for the appeal to be struck out in the grounds that (i) there was no right to appeal to the FTT in respect of HMRC's claim that a debt was due to the Crown under para 5(2) Sch 11, (ii) the tribunal had no jurisdiction in relation to the operation by HMRC of extra statutory concessions (this must relate to the correspondence with Keith Barnes &Co in relation to the application of HMRC's ESC 3.9) and (iii) the Appellant had not paid or deposited the tax (or obtained "hardship" relief).

50. On 26 July 2019 Judge Mosedale sought clarification of the subject matter of the appeal and drew the parties attention to para 20 Sch10 and HMRC's power to allow late notification. She said "[t]he appellant should therefore tell the tribunal if he thinks the tribunal has jurisdiction because he considers that HMRC have refused to exercise that discretion in his favour".

51. In a Response of 9 August 2019 the Appellant's representative sought permission to "plead that HMRC were unreasonable not to accept the late notification of [Mr Newman's] option to tax particularly as they had notification of it as early as 26 January 2015".

52. In a letter of 12 September 2019 Judge Mosedale says that she understands the appellant wishes to challenge the decision to refuse late notification, and, while the tribunal would appear to have jurisdiction HMRC's position is that the decision was made on 23 November 2015 and therefore that the appeal is late. As a result, an application needed to be made to appeal out of time. She says that the appellant has not made an application for a late appeal and that would require at a minimum an explanation of why the appeal was made late.

The Appellant's application

53. In a Further Response of 25 September 2019 the Appellant addresses question of hardship, input tax and jurisdiction over debts to the Crown and says in relation to notification:

> First retrospective application. The earliest example (in the Appellant's possession) of a belated "opt to tax" form having been submitted to HMRC is in a letter from the Appellant's Accountant, Nokes & Co, to HMRC dated 26 January 2015…. This letter also confirms that a VAT652 Correction Form to account for the output tax had been sent to the VAT correction unit, as Nokes & Co had previously submitted a form showing no tax to pay in error.

54. The Response then recounts the history of the matter, and it is then submitted that all documentary evidence was sent to HMRC in Mr Nokes's letter of 4 December 2015 and that therefore the decision to refuse the belated notification was unreasonable. They suggest that HMRC's letter of 12 November 2018 is misguided.

55. In summary it is said that:

> "1) The Appellant wishes for time to pay the outstanding £100,000.00
>
> 2) The documentation enclosed clearly evidence the fact that HMRC refused to allow the Appellant to deduct input tax;
>
> 3) Mr Nokes repeatedly made belated notifications to Opt to Tax, albeit it may be that those notifications were not satisfactory to HMRC. If that is the case, the Appellant will happily divulge any further information required to correct the position;
>
> 4) The letter from Sanders Solicitors clearly confirms that there was an intention to charge VAT on the transaction;
>
> 5) The correspondence is clear that the net amount of VAT should have been properly assessed at £126,000.00 and there is no justification to charge £360,000.00;
>
> 6) The Appellant was perhaps late in making this Appeal, but there is good reason for this because the matter was being dealt with by Nokes & Co, Sanders Solicitors and Keith Barnes & Co on his behalf throughout the period between January 2015 to December 2018, at which point he instructed Lewis Nedas Law in relation to this appeal."

56. This further response does not give any account of events during 2017 or any detailed account of what, if anything, prevented Mr Newman from appealing at an earlier date. It does not explain how Mr Newman's circumstances prevented the lodging of an appeal, particularly in relation to 2017.

57. In their response HMRC say: that the Appellant had 30 days from HMRC's decision letter dated 23 November 2015 refusing the "retrospective" option to tax request made by the Appellant's Agent on 6 October 2015 to make an appeal. They say that so far as HMRC are aware, no further option to tax applications had been made by the Appellant.

58. Accordingly, they say that the deadline to submit an appeal was 23 December 2019 but the Appellant submitted its notice of appeal on 5 February 2019, thereby being 1184 days out of time.

59. They accept that under rule 5(3)(a) of the tribunal's rules, and s 83G(6) of the Act, the Tribunal may extend the time within which a person is required to comply with the time limit to bring an appeal. But they say that this power should not be exercised.

60. They say that in the notice of appeal dated 23 December 2019, grounds for a late appeal, the Appellant states that the appellant remained in contact with HMRC. However, HMRC have no record of a request for an extension of time to appeal to the Tribunal. They submit that, when an Appellant does not appeal in the prescribed time frame, the Respondents have a right to close a case. A significant time has lapsed since the expiration of the Appellant's appeal rights. Additionally, the Respondents will incur costs in litigating these appeals.

Discussion

61. It seems clear to me that the accounting for the VAT on Mr Newman's sale and purchase was mishandled in 2014 and early 2015 by those advising him. There was no evidence that any

of them timeously notified the election which they knew or should have known should be notified, or ensured that the transactions were reflected in a timely VAT return or in reports to HMRC, or advised him that the £126,000 VAT should be paid.

62. It also appeared that his early advisors had misunderstood the legislation because consistently they applied for retrospective opting rather than for allowing more time for the notification of an option already made.

63. It seems to me that the position is as follows.

64. If Mr Newman did not make an effective option to tax before 22 May 2014, his supply of the pub was exempt and he is not entitled to any input tax credit in relation to the sale to him; further, because he issued a VAT invoice for the sale when the transaction was not VATable, the VAT shown on the invoice is a debt due to the Crown under the provisions of para 5 Sch 11 VATA.

65. Thus if Mr Newman has not made an effective election: (a) any appeal on the grounds that HMRC have refused input tax credit is bound to fail, (b) no appeal lies to this tribunal against HMRC's action to recover the VAT shown on his sales invoice, and even if it did it would fail.

66. But if Mr Newman had made an effective option to tax his supply of the pub would have been VATable and he would have been entitled to input tax credit for the VAT on the its sale to him. In such a case an appeal would lie to this tribunal against a refusal by HMRC to allow the input tax credit, and also, once tax had been paid or "hardship" accepted, against any assessment. In this circumstance the question would arise as to whether these appeals were made late.

67. Thus the first and most important question is whether Mr Newman made an effective election before 21 May 2014.

68. I find that the evidence shows that Mr Newman did make an election before 21 May 2014. That is in my judgement shown by the reference to VAT in the sale contract, by the attendance note made by Sander Solicitors on 17 April 2014 and the reference to 'elections' therein, and by the letter from Sanders Solicitors of 8 January 2016.

69. Mr Newman may not have fully understood the way in which VAT on property sales worked or what precisely an election entailed or that it had to be notified to HMRC, but it seems clear to me that he delegated authority to his advisors to make the election on his behalf and take such steps as were necessary and assented to the making of the option.

70. However, an election is "effective" only if it is notified to HMRC within the "allowed time" and accompanied by such information as HMRC specify in their notice. The "allowed time" is 30 days or such longer period as HMRC may allow (para 20(2) Sch 10). Mr Newman's election was not notified within 30 days: the earliest intimation of an election in the papers before me was on 26 January 2015, more than 7 months after the election was made. Thus the election was "effective" only if HMRC allowed further time.

71. It is fairly clear to me that HMRC have not allowed a longer period for notification. Their letter of 15 December 2015 indicated that they wished for confirmation that VAT had been correctly accounted for. Even if the letter of 15 December 2015 was not a refusal the September 2016 demands were an indication that the notification had not been accepted. There was no evidence before me that that confirmation had been provided or that there had been any real engagement with HMRC as to how this should be done.

72. I should have some difficulty with the request for confirmation that tax had been properly accounted for. The request originates, I think, from para 4.2.1 of HMRC's notice 742A which in relation to *belated* notification says that HMRC would normally seek

> "evidence that output tax has been charged and accounted for and input tax claimed in accordance with the option"

73. My difficulty is that until the option is effective, that is to say in the case of belated notification such as that of Mr Newman, that HMRC have allowed extra time, no output tax is chargeable and no input tax is allowable. Thus HMRC are in effect seeking confirmation that the return was wrongly completed. It is for this reason that I suggest that some engagement with HMRC as to how the evidence sought should be provided would have been a reasonable response to their request.

74. Mr Newman's initial return for the 07/14 period did not reflect VAT in the sale or input tax on the purchase. Technically therefore it was correct. But it provided no comfort to HMRC that the VAT which would arise on the purchase and sale had or would be correctly accounted for. However the later amendment forms should have had the effect of amending the return so that it showed the position on the basis that the option was effective. What was not done was to pay the tax.

75. Mr Newman's initial advisors did not appear to have understood the vital importance of the need to obtain HMRC's agreement to extra time for the notification of the option or to appeal against any refusal – for without that extra time Mr Newman's appeals had no hope of success. Nor did they appear to have considered whether, given the information they had provided, they should appeal against HMRC's refusal of extra time. There is no specific appeal against that refusal in Mr Newman's Grounds of appeal, and this ground is only raised after Judge Mosedale's letter of 26 July 2019. Nevertheless it is at the heart of the matter and can reasonably be taken in these particular circumstances to be inherent in the appeal.

76. But even taking the later application to plead the issue as if it had been contained in Mr Newman's original grounds of appeal it is an appeal made in February 2019 against a decision made in December 2015, and so is more than 3 years late. That is serious delay.

77. If the pursuit of the appeal had foundered because Mr Newman could not find the funds to pay the £126,000, the evidence did not illuminate where the £360,000 paid by his buyer had had gone – save for the £234,000 which was paid to the seller. Thus if the delay in making an appeal was because the £126,000 had not been paid I could see no reason in the evidence before me for that being the case.

78. I accept that Mr Newman's wife was seriously in this period and that at one stage he was injured. He had children to look after. He also chased his advisors and seems to have changed them. I also accept that much of the early delay was occasioned by his advisors' lack of either understanding or action. But there was little evidence from Mr Newman as to the reasons why nothing had happened between 2016 and 2018 or as to the exact details of his own position. In these circumstances I do not think that his advisors' faults provide a good enough reason for allowing an appeal to be heard so late.

79. I therefore find that Mr Newman's appeal against HMRC's refusal to allow extra time be struck out.

80. As a result none of the other grounds of appeal have any prospect of success. I therefore strike them out too.

Conclusion

81. The appeal is Struck out.

82. I recognise that this is a result which provides HMRC with a windfall which the overall scheme of the legislation does not obviously intend. But I note that the ability of HMRC to allow more time for notification in para 20 Sch 10 is not time limited. HMRC might therefore consider whether, if the tax which would arise if the option were effective had been paid, they could allow the extra time sought.

Rights to appeal

83. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 01 JUNE 2021