TC04460

Appeal number:TC/2014/01400

VALUE ADDED TAX – transfer of a business as a going concern – grant of land – option to tax – Article 5(2A) VAT (Special Provisions) Order 1995 – requirement for exercise by transferee at the date of grant – whether belated notification effective for the purposes of Article 5(2A) – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NORA HARRIS **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MR NOEL BARRETT

Sitting in public in Manchester on 23 February 2015

Mrs Nora Harris appeared in person with assistance from her accountant Mr Michael Pickard

Mr Barry Sellers of HM Revenue & Customs appeared for the Respondents

DECISION

Background

1. The Appellant is Mrs Nora Harris who was in business running a general store and off-licence from 1 August 2000 until 31 July 2011. She was registered for VAT throughout that period. Mrs Harris' shop was in Chesterfield and she owned the shop premises which also comprised residential accommodation and a hairdressing salon. The hairdressing salon was rented out to a third party.

2. In August 2005 following discussions with HMRC Mrs Harris opted to tax the part of the property which comprised the hairdressing salon. The effect of the option was that from 1 August 2005 Mrs Harris had to charge VAT on the rent charged, but could fully deduct input tax on works carried out to the building. Mrs Harris has complained about the circumstances in which she says she was advised by an HMRC officer to opt to tax the building, however that matter does not fall within our jurisdiction.

3. On 1 August 2011 Mrs Harris sold her business and the building to her daughter. We are concerned in this appeal with the provisions relating to VAT on land and buildings when there is a transfer of a going concern. We set out below the statutory provisions in relation to the option to tax and the transfer of a going concern.

4. Following various issues in relation to valuation which we do not need to record, on 31 October 2013 HMRC assessed Mrs Harris to VAT of £6,995. This represented output tax on the sale price attributable to the hairdressing salon. HMRC contended that the conditions for a transfer of a going concern were not satisfied in relation to the supply of that part of the building.

5. We should note that a penalty was also assessed, but this was subsequently withdrawn and Mr Sellers who appeared for HMRC told us that it would not be re-issued. The appeal therefore is solely concerned with the assessment to VAT. Mrs Harris has appealed the assessment and has not issued a VAT invoice to her daughter.

6. Mrs Harris' daughter registered for VAT with effect from 1 August 2011. We were told that she had charged and accounted for output tax on the rental income with effect from that date. However she has not notified any option to tax to HMRC in relation to the hairdressing salon. She had never run a business before and had no knowledge at all of VAT when she took over the business.

7. Whilst are concerned in this appeal with the assessment made on Mrs Harris, we cannot help but observe that at first sight there may have been no loss of tax to HMRC. If the assessment stands, then Mrs Harris would be permitted to issue a VAT only invoice to her daughter for output tax on her supply of the hairdressing salon building. HMRC have confirmed in principle that is the position.

8. HMRC accepted in the hearing before us that if it is established that Mrs Harris' daughter has been charging VAT to the tenant, then that is good evidence that she had exercised the option to tax. HMRC would then have discretion to accept a belated

notification of her option to tax. It may then be possible for Mrs Harris' daughter to obtain input tax credit for the VAT payable by her to Mrs Harris.

9. At the hearing of the appeal it became apparent to us that the only argument Mrs Harris could put forward with any prospect of success was that her daughter had opted to tax the hairdressing salon. If HMRC were to accept a belated notification of that option then the conditions for a transfer of a going concern might be satisfied. If that analysis was correct as a matter of law then it seemed to us that the parties may be able to resolve the dispute by means of alternative dispute resolution.

10. In those circumstances the following issue of law arose as a preliminary issue:

> *Whether on its true construction the condition in Article 5(2A)(a) of the Value Added Tax (Special Provisions) Order 1995 requires not only that an option to tax has been exercised by the transferee on or before the relevant date but also that notification of that option has been given to HMRC on or before the relevant date, without any provision to extend the time for that notification*

11. HMRC were not in a position to make submissions on that issue at the hearing. Given the nature of the issue and the legal context Mrs Harris was content not to make submissions but to leave determination of the issue to the tribunal. We directed that HMRC make written submissions which we subsequently received.

Relevant Statutory Provisions

12. Many supplies of land including freehold land and buildings fall within the category of exempt supplies pursuant to *Group 1 Schedule 9 Value Added Tax Act 1994* ("*VAT Act 1994"*). However *Schedule 10* makes provision for a registered person to "*opt to tax*" any land. In those circumstances what would otherwise be an exempt supply is a taxable supply.

13. *Paragraph 19 Schedule 10 VAT Act 1994* provides that an option to tax has effect from the start of the day on which it is exercised. However *paragraphs 20(1)* and *(2)* provide that an option only has effect if notification of the option is given to the Commissioners within a time limit. They provide as follows:

> "*(1) An option to tax has effect only if –*
>
> *(a) notification of the option is given to the Commissioners within the time allowed*
>
> *(b) …*
>
> *(2) Notification of an option is given within the time allowed if (and only if) it is given –*
>
> *(a) before the end of the period of 30 days beginning with the day on which the option was exercised, or*
>
> *(b) before the end of such longer period beginning with that day as the Commissioners may in any particular case allow.*"

14. It is well established that HMRC have discretion to allow a period of longer than 30 days in which to notify an option, and that discretion is susceptible to appeal to this tribunal.

15. In the ordinary course the transfer of a business by a taxable person would involve a supply for VAT purposes of the goods comprised in the business. *Article 5(1) Value Added Tax (Special Provisions) Order 1995* provides relief from VAT where a business is transferred as a going concern as follows:

> *"(1) Subject to paragraph (2) below, there shall be treated as neither a supply of goods nor a supply of services the following supplies by a person of the assets of his business –*
>
> *(a) their supply to a person to whom he transfers his business as a going concern where –*
>
> *(i) the assets are to be used by the transferee in carrying on the same kind of business, whether or not as part of any existing business, as that carried on by the transferor, and*
>
> *(ii) in a case where the transferor is a taxable person, the transferee is already, or immediately becomes as a result of the transfer, a taxable person …"*

16. *Article 5(2)* excludes from that treatment a grant of land which would be exempt but for an option to tax unless certain conditions are satisfied. The conditions are set out in Article 5(2A) as follows:

> "*(2A) The conditions referred to in paragraph (2) above are that the transferee has, no later than the relevant date –*
>
> *(a) exercised an option in relation to the land which has effect on the relevant date and has given any written notification of the option required by paragraph 20 of Schedule 10 to the Act; and*
>
> (b) *notified the transferor that paragraph (2B) below does not apply to him*"

17. HMRC did not rely on any failure to comply with the condition in Article 5(2A)(b) and therefore we do not set out paragraph (2B).

18. The "*relevant date*" for the purposes of Article 5(2A) is defined in Article 5(3) as follows:

> "*… the date upon which the grant would have been treated as having been made or, if there is more than one such date, the earliest of them.*"

Decision on the Preliminary Issue

19. When Mrs Harris ceased trading and transferred the business and its assets to her daughter, subject to Article 5 there was a supply of those assets for VAT purposes. HMRC accept that in relation to all the assets other than the hairdressing salon, there was a transfer of a going concern. The effect of Article 5 was that for all the assets other than the hairdressing salon there was no supply for VAT purposes.

20. In relation to the hairdressing salon, HMRC submitted in writing following the hearing that the conditions in Article 5(2A) are not satisfied. In particular they submit that as at the relevant date, even if Mrs Harris' daughter had exercised an option to tax, she had not notified the option to HMRC. A belated notification, even if accepted by HMRC for supplies by Mrs Harris' daughter, would not satisfy the requirements of Article 5(2A)(a).

21. Mr Sellers for HMRC referred us to a judgment of Moses J as he then was in *Higher Education Statistics Agency Ltd v Commissioners of Customs & Excise [2000] EWHC Admin 311* (*"HESA"*).

22. In HESA the trader had purchased freehold premises at a public auction. The vendor had opted to tax the premises and it was accepted that the supply of the premises was a transfer of a going concern. HESA paid a deposit to the auctioneer at the auction which was held as agent for the vendor. At that time HESA had not opted to tax the land. By the time of the completion date however it had opted to tax the land and notified the option to the Commissioners in accordance with *Paragraph 20 Schedule 10 VAT Act 1994.*

23. The issues in HESA concerned identification of the relevant date. The trader contended that it was the date the deposit was paid, whilst HMRC contended that it was the date of completion. It was held that the relevant date was the date the deposit was paid and that as the trader had not opted to tax at that date there could be no transfer of a going concern.

24. Article 5 was cast in slightly different terms at the date of HESA's transaction. The equivalent condition was in Article 5(2)(b) and provided that there would be deemed to be no supply where:

> "*… the transferee has made an election in relation to the land concerned which has effect on the relevant date and has given any written notification of the election required by paragraph 3(6) of Schedule 10 to the Act, no later than the relevant date.*"

25. We do not consider however that the re-writing of Article 5 since HESA has altered the condition in any significant way for present purposes.

26. Counsel for the appellant in HESA argued that if the relevant date was the date the deposit was paid then it produced an absurd result. It would mean that someone bidding at an auction would have to have made the election before they knew whether their bid was successful. In response counsel for the Commissioners agued that if it were otherwise there would be uncertainty for the transferor if the treatment for VAT purposes could not be identified until completion.

27. Moses J stated at [21] that he did not think considerations of unfairness or uncertainty could displace what he regarded as the clear wording of the provisions as to the relevant date. At [6] and [22] he referred to the "*benign*" position under *Schedule 10* in the sense that an election could be made but notification could be given within a period of 30 days or such longer period as the Commissioners might allow. At [22] he contrasted that with the "*rigorous regime*" under Article 5:

> " *The election for the purposes of paragraph 2 of Schedule 10 is only relevant where the transferor is about to sell land. By way of contrast the election for the*

purposes of Article 5 of the 1995 order has a direct effect on the position of the transferor who, if the supply is not outwith the scope of VAT must account for the tax."

28. It seems to us that the distinction being made by Moses J was between a transferor who is selling or indeed renting land and has control over the status of the supply, and a transferor who is selling a business including land where the status depends on whether the transferee has opted to tax and notified the option. It is implicit that Moses J considered the latter regime to be more rigorous because it required certainty at the relevant date, both as to opting to tax and notifying the option to HMRC.

29. The distinction drawn by Moses J was not strictly necessary for the decision in HESA but it is clearly persuasive. We have to construe Article 5(2A) just as Moses J had to construe the equivalent provision, albeit we are concerned with the requirement for notification rather than exercising the option.

30. On any view the statutory language of Article 5(2A) requires the exercise of the option to be on or before the relevant date. There was no argument to the contrary in HESA which must be regarded as binding authority for that proposition. Moses J however was not concerned with notification because on the facts of HESA the option was exercised and notified to the Commissioners on the same date.

31. The notification that is required by Article 5(2A)(a) is "*any written notification of the option required by paragraph 20 of Schedule 10 to the Act*".

32. *Paragraph 20 Schedule 10* provides time limits for the giving of notification to HMRC. What we have to decide is how those time limits interact with the time limit in Article 5(2A) by reference to the relevant date. Mr Sellers contends that the time limit in Article 5(2A) by reference to the relevant date is immoveable and overrides the time limit in Paragraph 20.

33. It is understandable that Mrs Harris has not been in a position to engage in what must seem to be complicated legal arguments. We are conscious that we have not heard any legal submissions in response to those of Mr Sellers. It is with some diffidence therefore that we conclude that Mr Sellers' construction is correct. Paragraph 20 for present purposes does two things. It sets out the requirement for notification and also sets out a time limit for the giving of notification. Where notification is given within the appropriate time limit the option takes effect from the date on which it was exercised. To that extent, and only to that extent, does the notification operate retrospectively.

34. We consider that if Article 5(2A) were adopting the same approach to the time limit for notification as paragraph 20(2) it would have been drafted in very different terms. It could easily have incorporated the possibility of notification being given in accordance with the time limits in paragraph 20(2). It could easily have provided that the option had to be exercised by the relevant date, with notification of the option in accordance with the time limits in paragraph 20(2). It did not do so. We infer that the reason it did not do so was because Parliament saw the benefit of a more rigorous approach in the specific context of the transfer of a going concern, as against an option to tax in the ordinary course of a trader administering his ongoing VAT affairs. That was the distinction drawn by Moses J. It provides certainty to the transferor as to the VAT treatment on the sale of a business.

35. In the circumstances therefore we must answer the preliminary issue in the affirmative. On its true construction the condition in Article 5(2A)(a) requires not only that an option to tax has been exercised by the transferee on or before the relevant date but also that notification of that option has been given to HMRC on or before the relevant date, without any provision to extend the time for that notification.

Disposal

36. In the light of our decision on the preliminary issue it is clear that even if Mrs Harris' daughter did exercise an option to tax on 1 August 2011, the transfer of the hairdressing salon could not technically have been part of a transfer of a going concern for VAT purposes. There was no evidence before us and it has never been suggested that Mrs Harris' daughter ever notified an option to tax to HMRC by 1 August 2011.

37. Our decision on the preliminary issue therefore has the effect of disposing of the appeal. Output tax was due and there is no issue as to the basis on which the assessment was calculated. In the circumstances we must dismiss the appeal.

38. We fully sympathise with the position in which Mrs Harris finds herself. For a small business person this is a technical area of law. We are not however in a position to offer advice. Mrs Harris must look to an accountant or other professional adviser for advice. HMRC accepted in principle that Mrs Harris' daughter could obtain credit for the VAT assessed if she belatedly notified an option to tax and Mrs Harris issued a VAT only invoice to her daughter. It may be that there are time limits involved, in particular the 4 year cap which may bite on 31 July 2015. Mrs Harris and her daughter must therefore act promptly. We express the hope that HMRC might sit down together with Mrs Harris and her daughter to explain the implications for them both, more fully than we could properly do in this decision.

39. Mrs Harris' correspondence with HMRC contains various matters of complaint, including the circumstances of her original option to tax. Those matters should be addressed to the Adjudicator's Office if Mrs Harris wishes to pursue them.

40. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 9 June 2015