



TC06669

Appeal number: TC/2017/07133

VAT – refusal to accept belated notification of option to tax – whether reasonable – no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ROWHILDON LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
JOHN WILSON**

Sitting in public at Manchester on 7 August 2018

Mr Gibbon, of Omnis VAT Consultancy Ltd for the Appellant

Ms Carr, presenting officer for the Respondents

DECISION

Introduction

1. The appellant appeals against the decision by the Respondents (HMRC) to
5 refuse a belated notification to tax land and property at a site in Norwich with effect
from 1 July 2016.
2. It is agreed that the disputed decision is appealable under s83(1)(wb) and
s84(7ZA) Value Added Tax Act (VATA) 1994.

Relevant law

- 10 3. Part 1 of Schedule 10 VATA 1994 provides as relevant:

Requirement to notify the option

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- (1) An option to tax has effect only if—
- 15 (a) notification of the option is given to the Commissioners within
the allowed time, and
- (b) that notification is given together with such information as the
Commissioners may require.
- (2) Notification of an option is given within the allowed time if (and
only if) it is given—
- 20 (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.
- (3) The Commissioners may publish a notice for the purposes of this
25 paragraph specifying—
- (a) the form in which a notification under this paragraph must be
made, and
- (b) the information which a notification under this paragraph must
contain.
- 30 ...

Appellant's case

4. Ms Carol Allen, director and chief financial officer for the appellant, provided a
witness statement and gave evidence at the hearing, stating as follows:
- 35 (1) She explained that she and her co-director, Graham Lake, had agreed to
purchase the relevant property in early June 2016. On 30 June 2016, an informal
board meeting of the appellant had taken place to confirm the decision to
purchase the property. Following that decision, Graham Lake had asked her to
deal with the “necessary paperwork”.

5 (2) Ms Allen explained that this was a phrase which was regularly used in the business to mean, inter alia, that an option to tax should be made if needed as the property was non-residential. In this case, the lease documentation referred to a VAT charge in relation to the premium and so she concluded that an option to tax should be made in order to be able to recover the VAT.

10 (3) Ms Allen accepted that the board minutes did not expressly refer to a decision to opt to tax the property but stated that, as they would usually opt to tax non-residential buildings, it was not something which would be specifically set out. A reference to discussion of an option to tax would generally only arise where the property was not to be opted, such as where it was residential or where the vendor had not opted to tax the property.

(4) Ms Allen was asked why the consideration in the lease documentation did not refer to an option to tax. She explained that it would not necessarily do so.

15 (5) Ms Allen stated that the form VAT 1614A (Notification of an option to tax) was completed on 1 July 2016 by the company's management accountant and she signed it that day. The management accountant noted that the post for 1 July 2016 had been missed. A copy of the signed form was kept on file.

20 (6) Ms Allen believed that the form had been posted on the next working day, 4 July 2016, but confirmed that it had been sent by standard untracked post and that no log of outgoing post was maintained due to the volume of correspondence dealt with from the office.

25 (7) Ms Allen explained that, following a VAT enquiry in October 2016, it became clear that HMRC had not received the option to tax. She stated that HMRC was asked to accept the copy of the VAT 1614A form from the appellant's records as a belated notification with the option to take effect from 1 July 2016, the date on the copy form.

(8) In January 2017, HMRC requested proof of postage and evidence as to the making of the decision to opt to tax the property.

30 (9) On 9 February 2017, Ms Allen sent a letter to HMRC confirming that there was no proof of postage available. Her letter also included a copy of the board minutes, a copy of the computer records which showed that the form had been created on 1 July 2016 and that it is not possible to put an earlier date into the option to tax form than the date on which it is completed.

35 (10) Following further correspondence, on 10 July 2017 HMRC concluded that, as there was no proof of postage and the board minutes did not refer to the decision to opt to tax, they were not satisfied that the decision to opt to tax had been made in June 2016 and that they were therefore unable to agree a belated notification of an option to tax with effect from 1 July 2016, although they offered to agree an effective date for the option to tax of 16 September 2016, being the date on which the property was sold.

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5. At the hearing, the appellant's representative demonstrated the process involved in completing the VAT 1614A form on HMRC's website. The form must be completed online and then printed. It was demonstrated that the date of signature included in the form is not allowed by HMRC's systems to be backdated: an error

message is shown in red on the screen, stating that “The date must not be earlier than today”, where “today” is the date on which the form is being completed. It was also demonstrated to the Tribunal that the form cannot be printed whilst there are errors outstanding on the form.

5 6. The Tribunal was provided with a copy of the VAT 1614A form on which the date of signature was shown as 1 July 2016. For the appellant, it was submitted that given the restrictions imposed by HMRC’s systems as to the signature date, the form could not have been completed later than 1 July 2016.

10 7. It was submitted for the appellant that all of the evidence indicated that the decision to opt to tax had been taken on 30 June 2016 and that the form had been completed, printed and signed on 1 July 2016.

15 8. It was further submitted that the question of when the form had been posted was not relevant as the form had not been received by HMRC, and so this was not an appeal as to whether HMRC had received the form in time but, instead, an appeal as to whether HMRC’s decision to refusal to accept a belated notification with effect from 1 July 2016 was reasonable.

20 9. It was submitted that HMRC’s decision that there was insufficient evidence to show that the decision to opt to tax had occurred on or before 1 July 2016 failed to take into account the evidence that the form could not have been printed later than 1 July 2016 and, by failing to take that evidence into account, HMRC had not acted reasonably in exercising their discretion not to allow belated notification of an option to tax to take effect from 1 July 2016 as the date of the option to tax under para 20(2)(b) of Schedule 10 VATA 1994.

HMRC’s case

25 10. HMRC submitted that an option to tax requires, first, that a decision is made to opt to tax and, second, that the decision is notified to HMRC.

30 11. The notification of the decision to opt to tax is required by statute to be made within 30 days of the date on which the decision is made, or within such longer time period as HMRC in their discretion allow. Where a belated notification request is made for HMRC to exercise that discretion, HMRC need to consider whether there is good reason to refuse the notification.

12. HMRC guidance as to the exercise of this discretion requires that the facts are established and judgement is made as to whether the taxpayer made a decision to opt to tax at the relevant time, and is not exercising a retrospective option.

35 13. HMRC submitted that the evidence provided by the appellant was not sufficient to allow HMRC to exercise their discretion under 20(2)(b) of Schedule 10 VATA 1994. HMRC considered that the appellant should have queried the lack of response by HMRC to their notification on 4 July 216, rather than waiting until the VAT visit, and that there was insufficient evidence provided to show a positive decision to opt to tax the relevant property on 1 July 2016.

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14. HMRC submitted that the decision in *Nora Harris* [2015] UKFTT 265 (TC) confirms, at para 33, that "Paragraph 20 ... sets out the requirement for notification and also sets out a time limit for the giving of the 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".

Discussion

15. It is agreed that an option to tax cannot be made retrospectively but HMRC will accept a belated notification of an option to tax where there is evidence of a positive option to tax on the relevant date and no good reason otherwise to refuse. HMRC agreed that there was no "good reason" otherwise to refuse.

16. We find as a fact that the VAT 1614A form to notify the option to tax was completed on Ms Allen's instructions on 1 July 2016. Ms Allen is a director of the company and has authority to bind the appellant and we accept the appellant's evidence that the copy form could not have been printed later than that date. We note that HMRC did not dispute that the appellant's submission that the VAT 1614A form could not have been printed later than 1 July 2016.

17. We find as a fact that a positive decision to opt to tax the relevant site was made by the appellant on 1 July 2016. We note that it is clear that evidence of that positive decision was provided to HMRC.

18. HMRC's review decision letter to the appellant of 31 August 2017 confirmed that HMRC will normally accept a belated notification where documentary evidence is provided that the decision was made at the relevant time. HMRC indicated that correspondence with third parties referring to the option to tax, for example, would be acceptable evidence.

19. That review letter also states that "it is not necessary for HMRC to have concrete evidence of the decision to accept that it was made, but it is necessary to be reasonable satisfied that the business did actually opt to tax at the relevant time".

20. HMRC's review decision letter states that:

(1) "in the absence of the proof of postage the option to tax unit were correct to refuse the belated notification"

(2) "the lease agreement [has] no reference made to option to tax, therefore, I am satisfied that the lease agreement does not meet the needs of the belated notification date"

(3) "the minutes of the board meeting [do not make] any reference to a positive decision being made or agreed [and so] do not meet the needs of the belated notification date"

(4) "there has been no evidence produced to show a decision was actually made by you at any time prior to 16 September 2016"

21. The review decision letter makes no reference to the appellant's explanation in their letter of 9 February 2016 as to the fact that the copy VAT 1614A form provided to HMRC cannot have been printed from HMRC's systems later than 1 July 2016. Arguably, as the form is printed from HMRC's system, HMRC themselves should have been aware of this without the appellant explaining it to them.

22. In considering whether a decision made in the exercise of HMRC discretion has been made reasonably, we are required to consider whether, in reaching the decision, HMRC have acted in a way in which no reasonable person would have acted or whether they have taken into account matters that they ought not to have taken into account or disregarded matters that they ought to have taken into account (see, for example, *John Dee Ltd* [1995] STC 941, at 952 per Neill LJ).

Decision

23. We find that HMRC's decision that the appellant had provided no evidence of a positive decision to opt to tax the property on 1 July 2016 failed to take into account the evidence of the appellant that the copy form provided could not have been printed later than 1 July 2016. We find that this evidence is a matter which HMRC should have taken into account in assessing whether there was evidence of a positive decision to opt to tax on 1 July 2016.

24. As HMRC accept that there was no good reason for refusing belated notification with effect from 1 July 2016 other than their assessment that there was no evidence of a positive decision to opt to tax on 1 July 2016 we find that HMRC could not have been reasonably satisfied that there were grounds for refusal of the belated notification with effect from 1 July 2016 and that their decision was therefore not made reasonably.

25. The appeal is therefore allowed.

26. 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.

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**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 21 AUGUST 2018