



TC01938

Appeal number:TC/2011/02416

VAT – supply of land in connection with fundraising event by charity – option to tax under Schedule 10 VATA 1994 – interaction with exemption under Group 12 Schedule 9 VATA 1994 – supplies exempt – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SOUTHPORT FLOWER SHOW LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public at Manchester on 31 January 2012

Nigel Gibbon of Northgate VAT Consultants for the Appellant

Richard Mansell, advocate of HM Revenue and Customs for the Respondents

DECISION

Introduction

5 1. The appellant, as its name suggests, operates the annual Southport Flower Show. The issues in this appeal concern the appellant's income from licensing trade stands during the course of the show. The appellant contends that because there is an option to tax in place over the site of the show such income is taxable for VAT purposes. If that analysis is right the appellant will be able to reclaim input tax
10 attributable to the supply of licences. HMRC contend that the income is exempt from VAT.

2. Mr Nigel Gibbon appears on behalf of the appellant. Mr Richard Mansell appears on behalf of HMRC. They both agreed that there were no issues of fact, and that the appeal rested on a short point of construction of the Value Added Tax Act
15 1994 ("VAT Act 1994"). In the circumstances I heard no evidence from the parties. The background facts set out below which I take from the documents and the submissions of the parties were not in dispute.

3. The appellant organises the annual flower show at Victoria Park Southport. It has been registered for VAT since February 1987 when it took over the running of the show from Sefton Borough Council. The event is held once a year in August over a 4
20 day period. Tickets are sold prior to the event and on the gate. The appellant is a non-profit making company limited by guarantee and is registered with the Charity Commission. Its aims include promoting horticulture and maintaining Victoria Park.

4. Until 2009 the appellant was unaware of the existence of any relevant
25 exemptions from VAT, and accounted for VAT on all ticket sales. On 3 December 2009 VAT Specialists Limited wrote to HMRC on behalf of the Appellant. They were seeking confirmation that the main income of the appellant from ticket sales and a fundraising gala dinner was exempt from VAT under Items 1 and 2 Group 12 Schedule 9 VAT Act 1994. There followed correspondence in which HMRC
30 confirmed that the income concerned would be exempt from VAT subject to the conditions set out in Group 12 Schedule 9. In due course the Appellant submitted its VAT return for period 10/10 which claimed a repayment in the sum of £13,293.71. HMRC visited the appellant in January 2011 in connection with the repayment return. During the course of that visit and in subsequent correspondence HMRC confirmed
35 that the main income was exempt. However HMRC maintained that the income from trade stands, which the appellant had treated as a taxable supply, was also covered by the exemption and raised an assessment accordingly. At the hearing it was common ground that the appellant had exercised an option to tax Victoria Park many years ago.

5. The issue which I have to decide is whether the income the appellant derives
40 from trade stands is taxable or exempt for VAT purposes. The appellant contends it is a taxable supply. HMRC contends it is an exempt supply. There is no issue between the parties as to quantum.

The Law

6. Exemptions from VAT are set out in Schedule 9 VAT Act 1994. They cover a wide range of supplies of goods and services. For present purposes I am concerned with Item 1 Group 1 (land) and Items 1 and 2 Group 12 (fundraising events by charities and other qualifying bodies). Whilst reference was made in the correspondence and submissions to Items 1 and 2 of Group 12, nothing turns on whether the exemption is pursuant to Item 1 or Item 2. In so far as relevant those provisions read as follows:

Item 1 Group 1:

10 *“The grant of any interest in or right over land or of any licence to occupy land ...”*

Items 1 and 2 Group 12:

“1. The supply of goods and services by a charity in connection with an event –

15 *a) that is organised for charitable purposes by a charity or jointly by more than one charity,*

b) whose primary purpose is the raising of money, and

c) that is promoted as being primarily for the raising of money.

20 *2. The supply of goods and services by a qualifying body in connection with an event –*

a) that is organised exclusively for the body’s own benefit,

b) whose primary purpose is the raising of money, and

c) that is promoted as being primarily for the raising of money.”

7. There is provision in Schedule 10 VAT Act 1994 for a trader to opt to tax any land. The option is subject to various conditions which the parties agreed were not relevant for present purposes. The effect of the option to tax is set out in paragraph 2 Schedule 10:

“2(1) This paragraph applies if –

30 *a) a person exercises the option to tax any land under this Part of this Schedule, and*

b) a grant is made in relation to the land at any time when the option to tax it has effect

2(2) If the grant is made –

a) *by the person exercising that option, or*

b) ...

the grant does not fall within Group 1 of Schedule 9 (exemptions for land)”

5 8. The exemptions from VAT and the option to tax land transactions set out above derive from Articles 132, 135 and 137 of Council Directive 2006/112/EC. However both parties agreed that the issue was to be determined on a construction of the provisions of the VAT Act 1994 and also that there were no previous authorities bearing on the issue.

10 **The Appellant’s Submissions**

9. Mr Gibbon submitted that the purpose of Group 12 was to provide exemption for supplies that would otherwise normally be subject to VAT at the standard rate. In the case of the trade stand income, Group 12 was not needed to secure exempt status as the supply was already exempt under Group 1. Once exemption has been
15 established under Group 1, the option to tax does not change the fact that the basic liability is exempt. He emphasised the voluntary nature of the option to tax and suggested that once the option had been exercised HMRC could not “re-invoke” Group 12 in circumstances where the trader did not need the benefit of the exemption.

10. Emphasis was placed generally on the anti-avoidance provisions associated with the option to tax in Schedule 10. Those provisions specify circumstances when the
20 option to tax will be disapplied and there was no provision to disapply it in connection with charity fundraising. Parliament could not have intended Group 12 to have the effect of disapplying the option to tax because the provisions introducing the charity exemption pre-dated the option to tax provisions. If Group 12 were to have such
25 effect one would expect to see specific reference to it in Schedule 10.

11. It is necessary to look at the individual supplies first. Group 1 was the starting point, said Mr Gibbon, because there was a supply of land. The normal liability of a supply of land was exempt. Therefore it was not necessary to resort to Group 12. Having identified that Group 1 was in point, the election to tax took effect to take the
30 supply out of Group 1 and ensure it was treated as a standard rated supply.

12. Mr Gibbon embarked upon an alternative submission which involved looking at the nature of the trade stands and asking whether they were properly to be considered as a part of the “event” for the purposes of Schedule 12. However he accepted that such an argument would require findings of fact as to the precise nature of the event
35 and the relationship between the event and the trade stands. In the absence of such evidence he did not pursue the alternative submission and I say no more about it.

Respondents’ Submissions

13. Mr Mansell submitted that it was necessary to look at the facts at the time the supplies were made. The option to tax had been in place for many years. As a matter

of fact, therefore, the supply of land was standard rated. The effect of Item 1 Group 12 was to make all standard rated supplies in connection with the event exempt provided that the conditions in Group 12 were satisfied. For example, in Note 4 to Group 12 where more than 15 events of the same kind involving the charity are held in the same financial year then Item 1 does not apply to those events. If 16 events were to be held, then the supply would not be exempt under Group 12. In those circumstances the option to tax would bite and the supply would be excluded from exemption under Group 1.

14. Looking at the time of the supply, Mr Mansell submitted that it was not a question of hierarchy or precedence in determining whether Group 1 or Group 12 applied to exempt the supply. It was a question of identifying whether the supply was standard rated at the time it was made, and if so the exemption in Group 12 applied. There would be no need to have any provision in Schedule 10 to deal with the position. Nor was it a question of disapplying the option to tax. The option to tax took effect making the supply standard rated which then caused Group 12 to exempt the supply.

Decision

15. I agree with Mr Mansell that it is necessary to look at the issue as at the time of the supply. I do not think that Mr Gibbon argued otherwise. In that case the default position for present purposes is that VAT shall be charged at the standard rate on the supply of goods or services in the UK and the liability becomes due at the time of the supply (see Section 1 VAT Act 1994). Section 4 VAT Act 1994 states that VAT is chargeable on taxable supplies and “*a taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply*”. By section 31 VAT Act 1994 “*a supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 ...*”. The question, therefore, is whether the supply of trade stands by the appellant, at the time of the supply, is of a description specified in Schedule 9.

16. The supply in issue is certainly the supply of a licence to occupy land within Group 1. However it is also a supply by a charity in connection with a fundraising event which satisfies the description in Group 12. There is no suggestion in section 31 or in Schedule 9 that there is any hierarchy or precedence enjoyed by a particular description of supplies which are to be treated as exempt supplies to the exclusion of other descriptions. The answer to the question must be that the supply of trade stands is of a description contained in Schedule 9. In particular Group 12 of Schedule 9. At the time of the supply the trade stands were supplied in connection with the flower show and satisfied the conditions of Item 1 Group 12. The effect of section 31 is therefore to treat the supply as an exempt supply.

17. In my view it matters not that the supplies also fall within the description of a supply of land, but are excluded from exemption by the option to tax. The fact remains that they also fall within Item 1 Group 12 and fall to be treated as exempt. The option to tax does not exclude exemption by virtue of Group 12. Paragraph 2(2) Schedule 10 describes the effect of exercising the option. Where the option to tax is in

place the supply does not fall within Group 1 of Schedule 9. However for the reasons set out above the supply remains of the description in Group 12.

18. I do not consider that the absence of any provision in Schedule 10 disapplying the option to tax in cases of charity fundraising is at all significant. There is simply no need for such a provision because Group 12 does not operate to disapply the option to tax under Group 1. The option to tax has a specific defined effect which a trader can elect to implement. It remains effective in relation to all supplies by the appellant in relation to Victoria Park, subject to the express provisions of Schedule 10. Hence, if the appellant were to make a supply of the land which was not otherwise exempt under Schedule 9, the option to tax would remove exemption under Group 1. It is not a case of Group 1 being the starting point so that once exemption is established there is no need to look at the other descriptions in Schedule 9. That submission ignores the express terms of section 31, namely to consider if the supply is of a description contained in Schedule 9.

19. There was a suggestion in Mr Gibbon's submissions that because the exemption under Group 12 was intended to benefit charities it should not apply in circumstances where there was no benefit. I do not think it is possible to identify any general policy or purpose in Schedule 9 as a whole. In construing the Act it may be permissible to look at the policy or purpose behind specific exemptions within Schedule 9. However the parties' submissions were not directed towards any such policy considerations. I would be prepared to accept that the exemption for charitable fundraising events is intended as a matter of policy to benefit the charitable sector generally. Even if that is taken as read, it does not help with the present point of construction. The Group 12 exemption is generally to the advantage of charitable. In the present circumstances there happens to be an advantage to the appellant if the supplies of trade stands are not exempt. However that is a fact specific result which is not inconsistent with the general policy of benefitting the charitable sector by means of exemption. I do not consider that such policy arguments affect the construction I have placed on section 31 and Schedule 9.

20. For the reasons given above I find that the supplies of trade stands in connection with the flower show were exempt and the appeal is dismissed.

21. 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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TRIBUNAL JUDGE

RELEASE DATE: 17 February 2012

