



TC02064

Appeal number: TC/2010/07314

VAT – EXEMPT SUPPLIES – property – TOGC – option to tax – belated notification - whether appellant decided to opt to tax on or before completion – held no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ATCHEM LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GREG SINFIELD
DR CAROLINE SMALL**

Sitting in public at 45 Bedford Square, London on 28 May 2012

Mr Vijay Mehta, Director, for the Appellant

Mr Leslie Bingham, of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Atchem Limited (“Atchem”) against the decision of the Respondents (“HMRC”) to refuse to accept a belated notification of an option to tax a property under Schedule 10 to the VAT Act 1994 (“VATA”). It is not possible to make an option to tax retrospectively but HMRC will normally accept late notification of an option where the person can provide evidence that the decision to opt was made at the relevant time. The sole issue in this appeal is whether Atchem decided to opt to tax the property on or before completion of its purchase of the property so as to enable the transaction to be treated as a transfer of a business as a going concern (“TOGC”).

Legislation

2. Article 5 of the VAT (Special Provisions) Order 1995 provides that a TOGC is neither a supply of goods nor a supply of services and thus no VAT is chargeable. TOGC treatment can apply to the sale or transfer of a fully or partially tenanted property by a landlord to another person even where the option to tax has been exercised by the seller provided certain conditions are met. Where the seller has opted to tax the property, two conditions relevant to this appeal are:

- (1) the buyer must opt to tax the property by no later than the date on which the grant of the property would (apart from the TOGC rules) be treated as made; and
- (2) the buyer must also give written notification of the option to HMRC by the same date.

Evidence

3. Save for the date of the option to tax, the relevant facts were not in dispute. We were provided with a bundle of documents and both parties made submissions on the facts based on the documents. On the basis of the documents and the submissions of the parties, we find the facts to be as follows.

Facts

4. Atchem is primarily a retail chemist and pharmacy business. The company was registered for VAT with effect from 29 March 2004. In 2008, Atchem decided to purchase a chemist’s shop at Units 2 and 3 Cors Y Gedol, High Street, Barmouth, North Wales LL42 1DP (“the Property”) not to occupy it but as an investment property. The Property had been advertised for sale at an auction to be held on 17 April 2008. Three days before the auction, Mr Mehta, a director of Atchem, made an offer to buy the Property for £300,000, excluding VAT, which was accepted. On 16 April, the directors of Atchem held a Board Meeting to confirm the purchase of the Property “at the cost of £300,000 plus VAT”. The minutes of the meeting record that:

“The board confirmed the purchase of the property and confirmed that Mr Vijay Mehta should conclude the transaction and do the necessary that may be required to acquire this property under TOGC subject to advice from the solicitors [for Atchem].”

5 5. The owner of the Property was Urbanbuild (Special Projects) Limited (“the Seller”). The Property was let to a tenant, L Rowland & Co (Retail) Limited. The auctioneer provided a sale contract. Clause 15 stated that the purchase price was exclusive of VAT and that the parties would use all reasonable endeavours to procure that the sale would be treated by HMRC as a TOGC. The auctioneer’s Common
10 Auction Conditions referred, at Condition 15, in more detail to the obligations of the parties where they intend the sale to be a TOGC. Condition 15.3 stated that the buyer confirms that, among other things, it has made, or will make before completion, a VAT option. Condition 15.4 stated that the buyer is give the seller, as early as possible before completion, evidence that it has made a VAT option and notified it in
15 writing to HMRC.

6. On 2 May 2008, Atchem’s solicitors wrote to the Seller’s solicitors to ask “what action your clients are taking to confirm that this is a sale of a business as a going concern”. The Seller’s solicitors replied, in a letter dated 6 May 2008, that “our clients will be making the appropriate returns” and asking for a copy of Atchem’s
20 VAT registration certificate. On the same day, Atchem’s solicitors wrote to Atchem and stated:

“The contract does however provide that both parties will try to make the transaction a transfer of a business as a going concern which means that VAT will not be paid on the price. I have supplied your VAT registration number as
25 given to me by you to the sellers and asked them what they are doing to ensure that the transaction is indeed a TOGC so that no VAT will be payable.”

Mr Mehta said that he did not receive any other advice from the solicitors about TOGC treatment.

7. Completion of the sale of the Property took place on 16 May 2008. The sale
30 was treated as a TOGC and no VAT was charged. Atchem did not notify HMRC in writing that it had opted to tax the Property on or before 16 May 2008. Following completion, Atchem collected rent from the tenant but did not charge the tenant any VAT or account to HMRC for VAT in relation to the property until February 2011.

8. At a routine inspection of the Seller’s VAT records, HMRC asked to see
35 evidence that Atchem had opted to tax the Property in order to support the treatment of the sale as a TOGC. We were told by Mr Mehta that the Seller’s solicitors contacted Atchem and asked whether Atchem had opted to tax the Property. On or shortly after 3 December 2010, Atchem submitted a Form VAT 1614A ‘Notification of an option to tax land and/or buildings’ in relation to the Property to HMRC. The
40 form requested an effective date for the option to tax of 16 May 2008. HMRC replied, by letter dated 31 January 2011, setting out what evidence was required in order for HMRC to accept a belated notification of an option to tax and asking

Atchem to provide it. Atchem responded, by letter dated 9 February 2011, with a Form VAT 1614H 'Opting to tax land and buildings application for permission to opt'. As it clearly states, Form VAT 1614H must be used where a person has made exempt supplies of the property in 10 years prior to the option taking effect. On the
5 form, Atchem asked for the option to take effect from 22 February 2011. After further exchanges of correspondence, HMRC in a letter dated 3 May 2011, gave permission, subject to conditions, for Atchem to opt to tax the Property with effect from 22 February 2011.

9. Mr Mehta of Atchem wrote a letter dated 16 June 2011 to HMRC asking them
10 to make the option effective from 16 May 2008 so that the sale of the Property could be treated as a TOGC. After further correspondence, HMRC confirmed, in an undated letter sent on or about 18 August 2011, their decision refusing to accept Atchem's belated notification of an option to tax made in May 2008. Atchem appeals against that decision.

15 **Submissions by Atchem**

10. Mr Mehta on behalf of Atchem acknowledged that the company made two mistakes in relation to VAT and the Property. First, it did not notify HMRC in writing of its decision to opt to tax the Property within 30 days of the decision and on or before 16 May 2008. The second mistake was that it did not charge the tenant
20 VAT on the rent for the Property between May 2008 and February 2011.

11. Mr Mehta said that Atchem did not know that it had to notify HMRC that it had made the option to tax the Property. He acknowledged that he had seen the auctioneers' documents and that they referred to the buyer's obligation to notify the option but he frankly admitted that he had not read them carefully enough. Mr Mehta
25 said that Atchem was not properly advised by its solicitors. They did not tell Atchem that it needed to notify HMRC of the option. Atchem thought that the notification was dealt with by the Seller and this was what its solicitors had meant when they said "our clients will be making the appropriate returns".

12. Atchem accepted that because it had not notified HMRC before completion that
30 it had opted to tax the Property, the sale of the Property could not be treated as a TOGC. Mr Mehta said that Atchem had already paid the Seller the VAT. Nevertheless, the effective date of the option was important because of the effect it had on Atchem's ability to recover the VAT charged by the Seller on the sale. If the option took effect on 16 May 2008 then Atchem could recover all the VAT charged
35 immediately. If, however, the option took effect on 22 February 2011 then Atchem would only be able to recover part of the VAT charged through a series of adjustments under the Capital Goods Scheme.

13. Mr Mehta submitted that Atchem had decided to opt to tax the Property when it decided to buy the Property as a TOGC. Atchem relied on the minutes of the Board
40 meeting at which Atchem's directors confirmed that the Property would be acquired as a TOGC; the terms of the contract with the Seller; and the written communications between the Seller's solicitors and Atchem's solicitors.

14. Mr Mehta stated that the reason that Atchem did not charge the tenant VAT on the rent was because Atchem believed that TOGC treatment, where no VAT is charged on the sale of the property, also applied to the subsequent letting of the property. Mr Mehta submitted that the tenant was fully taxable and would have recovered any VAT charged on the rent so no VAT had been lost.

Submissions by HMRC

15. Mr Bingham referred to HMRC's policy in relation to the exercise of their discretion to accept a belated notification of an option to tax. It is set out in Business Brief 13/05 of 4 July 2005 and in paragraph 4.2.1 of Notice 742A 'Opting to tax land and buildings' (June 2010). In summary, HMRC will normally accept a belated notification if the person seeking to notify can provide evidence that the decision was made at the relevant time and that is not contradicted by inconsistent treatment of supplies of the property.

16. HMRC accepted, as do we, that there was no suggestion that Atchem was trying to avoid tax. HMRC's position was that they could not accept Atchem's belated notification because the company had not produced any evidence that it had decided to opt to tax the Property on or before 16 May 2008. HMRC's view remained that the minutes of the Board meeting on 16 April stopped short of evidencing a decision to opt. Further, the fact that Atchem did not charge VAT on the rents until February 2011 contradicted the assertion that the company had opted to tax the Property before then.

Discussion

17. An option to tax cannot be made retrospectively (see *Fforestfach Medical Centre v HM Customs and Excise* (2000) VAT Tribunal Decision No 16587) but, in certain circumstances, HMRC will accept a belated notification of the option. HMRC have said in Notice 742A that they will accept a belated notification where the person provides evidence that the decision to opt was made at the relevant time. The issue in this appeal is whether Atchem decided to opt to tax the Property on or before 16 May 2008.

18. There is no prescribed procedure for making an option to tax a property, merely deciding to opt is sufficient, but if there is no express record of the decision then it may be difficult or impossible for a person to demonstrate that it has opted in relation to a property. That is the position of Atchem in this appeal. As explained to Mr Mehta at the hearing, the burden of proof is on Atchem to establish that it decided to opt to tax the Property on or before 16 May 2008. Atchem must establish that fact on the balance of probabilities ie that it was more likely than not that it had decided to opt.

19. Our conclusion is that Atchem has not satisfied us that it decided to opt to tax the Property on or before 16 May 2008. We accept that Atchem had decided to purchase the Property as a TOGC but we are not satisfied that Atchem understood that that required a decision to opt to tax. Our view is that Atchem only became aware

that it had to opt to tax the Property and only decided to do so when it was informed that HMRC were asking the Seller for evidence of Atchem's option. We take this view for the following reasons:

5 (1) The minutes of the Board meeting on 16 April 2008 do not contain any reference to an option to tax. They confirm that Atchem decided to buy the Property at the cost of £300,000 "plus VAT" and as a TOGC. As VAT is not chargeable on a TOGC, this suggests some confusion as to the VAT treatment of the purchase of the Property. We do not consider that a decision to opt can be inferred from the minutes.

10 (2) Atchem used Form VAT 1614H in February 2011 after its initial attempt to notify an option was rejected. As is clear from its face, Form VAT 1614H is only appropriate where the person has previously made exempt supplies of a property. The fact that Atchem used Form VAT 15 1614H is consistent with Atchem not having opted to tax the Property previously.

(3) Atchem did not charge VAT to the tenant until February 2011. The failure to charge and account for tax is consistent with not having opted to tax the Property. We do not accept that because VAT is not charged on a TOGC (the key word is 'transfer'), it was logical of Atchem to conclude 20 that VAT should not be charged on a letting of the Property.

Decision

20. In view of our findings of fact, our decision is that the appeal must be dismissed.

Rights of appeal

25 21. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the Tribunal's 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 30 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this Decision Notice.

35 **Greg Sinfield**
TRIBUNAL JUDGE

RELEASE DATE: 13 June 2012