



TC02816

Appeal number: TC/2012/008326

VAT – Option to tax land (VATA Sch 10) – Whether option to tax of no effect on the ground that the relevant building was intended for use solely for a relevant residential purpose (VATA Sch 10 para 5(1)(b))– In the particular circumstances of this case, yes – Appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EBLEY HOUSE LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
 MR JOHN COLES**

Sitting in public in Bristol on 26 July 2013

Mr D Memery, VAT consultant, for the Appellant

Mr L Bingham, Higher Officer of the Solicitor's Office of HMRC, for the Respondents

DECISION

Introduction

1. This is an appeal under s 83 VATA against an assessment of VAT liability made by HMRC under s 73 VATA. The decision to make that assessment was notified to the Appellant by HMRC in a letter dated 4 November 2011, which concluded that the sale by the Appellant in July 2007 of a property known as “Ebley House” was liable to VAT at the standard rate, and was not exempt from VAT as contended by the Appellant.

10 The applicable law

2. Sales of property are normally VAT exempt. However, Schedule 10 VATA has the effect, amongst other matters, of enabling the owner of any land to make an option to tax that land, such that the sale of that land becomes a standard rated supply. It was explained to the Tribunal that the exercise of an option to tax may be advantageous for instance in cases where commercial property is refurbished for sale to a commercial buyer. The fact that such a sale is subject to VAT means that the developer can reclaim the VAT on the costs of the refurbishment as input tax. The buyer in turn can claim the VAT paid on the purchase of the property as input tax. On the other hand, if the buyer of the property cannot reclaim the VAT on the purchase as input tax, for instance in the case of a charity whose supplies are VAT exempt, the effect of an option to tax would from the buyer’s point of view be to raise the sale price of the property by the amount of VAT, which would make the purchase less attractive.

3. Paragraph 5 of Schedule 10 VATA provides:

- 25 (1) An option to tax has no effect in relation to any grant in relation to a building or part of a building if the building or part of the building is designed or adapted, and is intended for use—
...
(b) solely for a relevant residential purpose.

30 4. It is noted that there are provisions in Schedule 10 for revocation of an option to tax, in particular paragraph 23, although the Tribunal was not referred to these in argument.

35 5. There was some discussion at the hearing about the meaning of the word “intended” in paragraph 5(1). The provision does not expressly state who is required to have the relevant intention, the seller or the buyer. Presumably it must mean the buyer, since it is the buyer who controls the use to which the building will be put after the purchase is completed. If so, the effect of the provision, if read literally, would be that the operation of paragraph 5 depends solely on what the intention of the buyer actually was, regardless of what the seller was informed about the buyer’s intention, and regardless of what the seller may reasonably have believed the intention of the
40 buyer to be.

6. However, HMRC Public Notice 742A states in paragraph 3.4 that “Your option to tax will not apply if you supply a building, or part of a building, and the purchaser or tenant *informs you* that they will be using it solely for a relevant residential purpose” (emphasis added). This suggests that in the view of HMRC, the word “informs” does not have such a literal meaning. Alternatively, it may simply be that HMRC in practice applies paragraph 5 in a way more favourable to the seller than the wording of the paragraph itself.

7. It is noted that a later version of that Public Notice, dated June 2010, which post-dates the events material to this appeal, contains an additional sentence: “Whilst there is no requirement for a formal certificate to be given, we strongly recommend that you obtain confirmation of the intended use in writing and retain it with your VAT records”. On behalf of the Appellant, it was argued that this indicates that it is not a requirement of paragraph 5 that the buyer’s intention be formally confirmed in writing at the time of sale, and Mr Bingham did not seek to argue otherwise.

15 **The background facts**

8. The following facts have not been contested. The Appellant was incorporated in 2001, and was set up to renovate Ebley House with a view to its subsequent sale or rent. The Appellant opted to tax the property with effect from 21 November 2001. Ebley House was formerly a National Children’s Home which was set up as a nursery and home for very young children in 1921 and continued as such until 1997. Following its purchase of the property, the Appellant refurbished it with the intention of marketing it either as a boarding school or as offices. For a period, the property was used to house workers. In 2005, planning permission was given for a change of use to offices. In July 2007, the Appellant sold Ebley House to a charity then known as the Cotswold Chine School. That charity has now become (or has become part of) the Novalis Trust. At the time of the sale, the option to tax was still in place. The sale of the property was treated by the Appellant as being exempt from VAT.

9. The Appellant further points out that after the sale of Ebley House, it repaid to HMRC the input tax that it had previously reclaimed in respect of the costs of refurbishment of the property, given that the sale had been an exempt supply. Mr Bingham did not dispute that the Appellant had repaid the input tax. Mr Bingham did not concede that the amount or method of repayment were necessarily correct, but acknowledged that these were matters outside the scope of this appeal.

10. The Appellant’s case is that at the time of the sale, the Appellant took all reasonable steps to substantiate that the sale would be an exempt supply, and that the Cotswold Chine School had informed the Appellant’s director that Ebley House would be used as a residential school for children with learning difficulties. The Appellant therefore argues that by virtue of paragraph 5(1)(b) of Schedule 10, the option to tax was of no effect, and the sale was VAT exempt. The Appellant’s case is further that, in any event, the purchaser did in fact have that intention, and changed its plans only after the property was purchased.

11. HMRC does not dispute that the use of Ebley House as a residential school would be a “relevant residential purpose” for purposes of paragraph 5 of Schedule 10.

5 However, HMRC also contends, and the Appellant does not dispute, that use as a *non-residential* school would not be a “relevant residential purpose”. The HMRC case is simply that the Appellant has not discharged the burden of proving that the purchaser had the intention to use Ebley House as a residential school (as opposed to a non-residential school, or some other purpose), or that the Appellant genuinely or reasonably considered the purchaser to have this intention.

The documentary evidence

10 12. In dispute in this appeal is only a very narrow issue of fact. It has not been disputed that Ebley House was, for purposes of paragraph 5 of Schedule 10, “designed or adapted” for use for a relevant residential purpose. The only issue is whether it was “intended” for such use.

13. The main items of documentary evidence were the following.

15 14. A letter from the Appellant to HMRC dated 21 November 2001 (bundle 1, page 15) states the Appellant’s decision to opt to tax, and states as follows: “Ebley House has changed its use to office accommodation and we are nearing completion of a total refurbishment. We have a tenant willing to pay £40,000+VAT per annum”.

20 15. A letter from the Senior Planning Officer at Stroud District Council dated 9 June 2003 (bundle 1, page 145) confirms that the current authorised use of Ebley House under the Town and Country Planning (Use Classes) Order 1987 was C2 (residential institution), and that no subsequent planning approvals would be required for any proposed use that fell within C2. The letter stated that this was the personal opinion of the Senior Planning Officer and was not a formal determination under s 192 of the Town and Country Planning Act 1980.

25 16. A letter dated 13 June 2006 from Royds Solicitors to the Appellant (bundle 2, pages 41-43) refers to the proposed sale of the property, and states: “Before contracts are exchanged the Charity will need to be satisfied that the permitted use of the Properties will enable the same to be used as a day school and further educational facility and with ancillary residential uses ... The Charity will pursue its enquiries and discussions with the local planning authority in this respect and if necessary any
30 planning application ...”

35 17. A planning application was made by the Cotswold Chine School in respect of Ebley House in August 2006, that is, in the year before the sale occurred (bundle 2, pages 1-4). The application was for a “change of use for school”, and stated that the existing or last use was “C2 residential children’s home”. The intended operating hours were stated to be “school hours”.

18. On 25 September 2006, the Stroud District Council acknowledged that this application had been withdrawn (bundle 2, page 5).

40 19. A subsequent planning application was made by the Cotswold Chine School in respect of Ebley House in March 2007, several months before the sale occurred (bundle 2, pages 6-17). The application is for “Change of Use from B1 Office Use to

School”. The application preview on page 9 of the bundle indicates that the application is for a non-residential school.

5 20. On 16 May 2007, which was still before the sale occurred, Stroud District Council granted Cotswold Chine School planning permission for a non-residential school (bundle 2, pages 18-21).

10 21. A letter from a Mr Quinn of Gregg Latchams Solicitors and Notaries dated 8 June 2011 (bundle 2, pages 44-45) states: “Prior to issuing contract documentation to the school’s solicitors I discussed the VAT position with Roland Tanner representing Ebley House Limited and Stroudwater Redevelopment Partnership Limited. He mentioned to me that as regards the sale of the various properties in the ownership of Ebley House Limited, none of the properties were subject to VAT apart from the Ebley House in respect of which a VAT election had been made but that Ebley House Limited would not seek to charge VAT as, being a charity, the school could not recover VAT. ... I note that the sale contract makes statement that the sale price is inclusive of VAT. This should state in standard terms ‘inclusive of VAT if applicable’. ... My understanding was that part of Ebley House in respect of which an election had been made was to be regarded as inclusive of VAT if payable and that no VAT was payable in respect of the remainder of the properties ...”

20 22. A letter from Mr Memery to HMRC dated 29 June 2011 (bundle 1, pages 76-80) states that “Mr Tanner did not charge VAT for the reason shown by Mr Quinn [in the letter of 8 June 2011 referred to in the previous paragraph] and I can state that Mr Tanner was not aware of the appropriate law concerning relevant residential buildings”. The letter goes on to state that nonetheless, “when the company was involved in carrying out alterations to Ebley House before the sale, it converted the upper floors into dormitory style accommodation” and that from this “it was clearly under the impression that the intention was to use it as a residential home for children with special needs”. The letter goes on to refer to an “enclosed” report on the Cotswold Chine School which indicates that it has residential care provision based on the ideas of Rudolf Steiner, and that residence is between 39 and 52 weeks per year. 25 The “enclosed” report does not appear in the papers before the Tribunal. 30

35 23. A letter from the Novalis Trust dated 22 September 2011 (bundle 2, page 46), signed by both its Chief Executive and its Resident Architect and Project Manager, and copied to the Chair of the Trustees of Novalis Trust, states that: “I would like to confirm on behalf of the Board of Trustees that Ebley House was purchased on the 16/07/2007 by Cotswold Chine School with the intention to establish a private school. Planning permission and Listed Building Consent to legally confirm this possibility were granted prior to the purchase. Due to a change of strategy for the Trusts development, an application was made to change the use of Ebley House earlier this year”.

40 24. A letter from the Novalis Trust dated 3 May 2012 (bundle 2, page 113), signed by the same signatories and copied again to the Chair of Trustees, states that Ebley House was purchased “with the intention of establishing a private school, having previously obtained planning permission”. The letter goes on to explain that after the

purchase, the Cotswold Chine School changed its plans, and decided to use Ebley House as its headquarters and to provide support and therapy services for residents and students of Cotswold Chine School, Paradise House and Meadowbank.

5 25. A page downloaded from the website of the Novalis Trust on 5 December 2012 (bundle 2, page 47) indicates that the Trust manages and administers the education and care services provided by the Cotswold Chine School, a “school” for young people with emotional and behavioural difficulties and/or special educational needs, Paradise House, a “residential community” for adults with learning disabilities, and Meadowbank, a “single residential home” for adults with learning disabilities. The
10 page further indicates that the “Central Services” of the Trust are based at Ebley House, which has “vast rooms and extensive facilities”, and suggests that Ebley House is also used for in-house training, therapeutic services, group work and study groups.

15 26. A letter from the Novalis Trust dated 22 March 2013 (bundle 1, page 128), signed by the same signatories and copied again to the Chair of Trustees, confirms that “Ebley House ... [was] purchased by Cotswold Chine School with the intention to open a residential school”, that “Having had experience in running a residential school for over 50 years, this seemed a logical progression”, and that the premises and the permitted use of Ebley House “seemed the perfect match”. The letter goes on to
20 say that planning permission was obtained for a non-residential school “following advice to explore the versatility of the site”, but concludes that “the permitted use for a residential school” was “the reason for making this property so attractive”.

The witness evidence

27. Two witnesses gave evidence on behalf of the Appellant.

25 28. The first witness was Mr John Tanner, a director of the Appellant. He gave evidence amongst other matters as follows. The intention had been to sell Ebley House either as offices or as a residential institution. Its existing current permitted use was C2 (residential institution) so that it could be used for the latter purpose. Planning permission had also been obtained for B1 (offices) so that it could be used as
30 offices. Unless and until the site was actually used as offices, it remained C2, meaning that a purchaser could use the site for either purpose. The Appellant wanted to sell the property as offices, but the market for offices was simply not there, so it was marketed as a school. When it got close to the sale to Cotswold Chine School, Mr Tanner visited their premises in Minchinhampton, which was a residential home
35 for children with disabilities. During the visit, he was told that they also wanted to use Ebley House as a residential institution. After the sale of the property in June 2007, the Appellant’s accountant informed Mr Tanner that as it was an exempt sale, the input tax that had been reclaimed on the development costs would need to be repaid, and this was done in September 2007.

40 29. In cross-examination, Mr Tanner was asked about the planning applications made by the Cotswold Chine School for a *non*-residential school at Ebley House even before they purchased the property. Mr Tanner said that anyone can apply for planning permission for a property even if not the owner. Where planning permission

is given for a new use, the former planning permission remains in effect until the property is actually put to a new use. This meant that after planning permission was given for a non-residential school, the Cotswold Chine School had the option of using the property for either a residential or a non-residential school. It is common to have
5 3 or 4 different concurrent planning permissions on a site, just to keep options open. Mr Tanner said that he was not aware until after the sale that Ebley House was ultimately not used as either a residential or a non-residential school.

30. The second witness for the Appellant was Mr Chris Murphy, accountant, who gave evidence about the repayment of the input tax after the sale. He said that he did
10 not advise that the sale was VAT exempt, but had been instructed by Mr Tanner that this was the case.

The submissions of the parties

31. On behalf of the Appellant, Mr Memery submitted amongst other matters as follows. The HMRC Public Notice makes clear that it is not necessary to obtain a
15 certificate from the purchaser at the time of sale. A letter from HMRC dated 11 October 2011 (bundle 1, page 82) indicates that HMRC had agreed that “further evidence would be sought from independent sources, and that whatever those sources indicated, would be accepted as the final position”. The Novalis Trust have now confirmed that the intention was to use the building for a residential school. The
20 decision to treat the sale as an exempt supply was not based on the status of the purchaser as a charity, but on the use to which it was believed the property was to be put. The Appellant had taken all reasonable steps to ascertain the intended use of the property by the purchaser. Mr Tanner had visited Minchinhampton and seen the residential school there and had been told that a residential school was intended to be
25 established at Ebley House.

32. On behalf of HMRC, Mr Bingham submitted that the Appellant had not discharged the burden of establishing that the purchaser of the property intended to use it for a residential school. He referred to the fact that the property never was used
30 as a residential school; rather, planning permission had been obtained for a non-residential school even before the sale. It was submitted that some of the correspondence in the bundle was inconsistent with the Appellant’s case, in particular the letter from Mr Quinn (paragraph 21 above) suggesting that the decision to treat the sale as an exempt supply was based on the status of the purchaser as a charity rather than on the use to which the building would be put.

35 The Tribunal’s findings

33. Clearly it would have been preferable if the Appellant had obtained a certificate or other documentary evidence from the purchaser at the time of sale as to the intended use of the property. However, nothing in the legislation or Public Notice suggests that this is necessary, nor did Mr Bingham. In the circumstances, the Tribunal must
40 determine the purchaser’s intention as a matter of fact, on a balance of probability, based on the evidence before it.

34. There is evidence that suggests that Mr Tanner did not expressly address his mind to the terms of paragraph 5 of Schedule 10 at the time of sale. In particular, the letter

5 from Mr Memery of 29 June 2011 (paragraph 22 above) states that “Mr Tanner was not aware of the appropriate law concerning relevant residential buildings”. However, if the purchaser had the necessary intention for purposes of paragraph 5 of Schedule 10, the Tribunal sees nothing to suggest that the operation of that provision would be affected by the fact that the seller was unaware at the time of the relevant provisions of VAT law.

10 35. The Appellant has produced a letter from the Novalis Trust dated 22 March 2013 stating expressly that “Ebley House ... [was] purchased by Cotswold Chine School with the intention to open a residential school”. That letter postdates the sale by some 6 years. However, that is no reason why its contents should not be accurate. If the Novalis Trust had no recollection some 6 years after the event of its intentions at the time of purchase, it could be expected to say so. There is no suggestion that the Novalis Trust is not at arm’s length from the Appellant, and no apparent reason why anything said by the Novalis Trust in this respect should be viewed with any suspicion. The letter is signed by its Chief Executive and its Resident Architect and Project Manager, and it has been copied to the Chair of its Trustees. Such a letter is unlikely to be written without careful consideration being given to its contents.

20 36. Mr Tanner also gave evidence on oath that he visited the purchaser’s residential school in Minchinhampton prior to the sale, and was informed that the purchaser intended to use Ebley House as a residential school.

25 37. There are other matters that raise questions, such as the fact that the purchaser applied for planning permission for a non-residential school even before the property was purchased. However, Mr Tanner gave an explanation for this, namely that a purchaser of property may wish to keep its options open as to possible future uses, even if there is a particular intended use at the time of sale. This explanation appears to be supported by the 22 March 2013 letter of the Novalis Trust, which states that planning permission was obtained for a non-residential school “following advice to explore the versatility of the site”, but that “the permitted use for a residential school” was “the reason for making this property so attractive”.

30 38. While there is some evidence that may seem to point the other way, the Tribunal on its consideration of the evidence and arguments as a whole is satisfied on a balance of probability that at the time of sale, the purchaser intended to use the property as a residential school.

35 39. In the circumstances, it is unnecessary to consider whether it would be sufficient that the Appellant reasonably believed that the property was intended for use as a residential school, even if the purchaser in fact had a different use in mind. For completeness, the Tribunal finds on a balance of probability that the Appellant did reasonably believe that the property was intended for use as a residential school.

Conclusion

40 40. The appeal is allowed.

41. 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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15 **DR CHRISTOPHER STAKER**
TRIBUNAL JUDGE

RELEASE DATE: 6 August 2013