



TC03706

Appeal number: TC/2013/00652

VAT – land and property – validity of option to tax- student accommodation – two stage process – whether taxpayer had intention to opt to tax - no commercial sense - error by advisers- HELD –taxpayer’s actions at time and subsequent actions supported intention to exercise option – burden of proof not satisfied – option confirmed as properly made - appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

HONDURAS WHARF LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE RACHEL SHORT
MR CHRISTOPHER JENKINS**

Sitting in public at 45 Bedford Square London WC1B 3DN on 28 April 2014.

Mr Millinchamp of Hazlewoods LLP and Mr Graham for the Appellant

Mr Priest Higher Officer of HM Revenue and Customs for the Respondents

DECISION

5 1. This is an appeal concerning the validity of an option to tax in respect of land and property in Birmingham known as Pace House, 21 – 23 Summer Lane Birmingham B19 and specifically whether VAT is due on a sale by the Appellant of Pace House during the VAT quarter to July 2009, 07/09 amounting to £41,739 at the rate of 15%.

10 2. HMRC assessed the Appellant to VAT on the sale of Pace House on 13 February 2012. The Appellant requested a formal review which HMRC carried out and notified the Appellant on 14 September 2012 that the assessment had been upheld. The Appellant appealed to this Tribunal on 9 January 2013.

Background Facts

15 3. The Appellant (“Honduras”) is a property development company, incorporated in the UK. In 2004 Honduras acquired Pace House with an existing tenant, the Big Issue. The property was purchased with a view to development as student accommodation.

20 4. Honduras applied to be registered for VAT on 21 July 2004 stating that their business activities were “the acquisition and sale of land and property”. The VAT registration form (VAT 1) was signed by Mr Graham who is the sole director of Honduras. At the relevant time Honduras’ VAT matters were dealt with by “the VAT Consultancy”, external consultants. Honduras also had a bookkeeper who was employed on a consulting basis.

25 5. At the same time as the VAT 1 was submitted, an option to tax was submitted in respect of a property owned by Honduras known as Honduras Wharf. This document (VAT 1614) was signed by Mr Graham and prepared by the VAT Consultancy. The application included invoices in the name of the Appellant, one of which related to Pace House, not Honduras Wharf.

30 6. HMRC carried out a VAT check into Honduras’ 10/04 VAT period and on 24 November 2004 wrote to Honduras stating that input VAT had wrongly been claimed on two sites held by Honduras, including Pace House. The total amount of wrongly claimed VAT was £9,144.96.

35 7. On 17 August 2005 the VAT Consultancy sent HMRC notification of an option to tax (VAT 1614) for Pace House and another Honduras property 16 – 21 (the Globe Works) and 22 Cliveland Street. The option to tax on Pace House was to be effective from 20 July 2005. These documents were prepared by the VAT Consultancy but signed by Mr Graham and accompanied by a covering letter from the VAT Consultancy. It was followed by a letter of 19 August 2005 on Honduras’ notepaper
40 signed by Mr Graham referring to the two options to tax and asking for re-payment of

the input tax previously disallowed. HMRC wrote in response to Mr Graham at Honduras (not the VAT Consultancy) on 30 August 2005 confirming that the options had been made and again on 2 September 2005 stating that the input tax relating to the opted properties could be re-claimed.

5 8. After the option had been exercised VAT was charged on rent to the tenant at Pace House and related input tax was reclaimed. Mr Graham had a meeting with the tenant (the Big Issue) to notify them that VAT would be charged on their rent going forward.

10 9. HMRC wrote to Honduras on 20 February 2012 stating that VAT should have been charged on the sale of Pace House for the July 2009 VAT period. Honduras responded that VAT was not payable on the sale because no valid option to tax had been made.

The Law

15 10. The relevant legislation setting out the manner in which an option to tax should be made is at Value Added Tax Act 1994 (“VATA 1994”):

11. Group 1 of Schedule 9 VATA 1994 sets out the exemption applicable to supplies of land in the UK:

20 *“1. The grant of any interest in or right over land, or of any licence to occupy land, or, in relation to land in Scotland, any personal right to call for or be granted any such interest or right*”

12. Part 1 of Schedule 10 VATA 1994 sets out the effects of making an election to waive exemption from tax in respect of land in the UK (the option to tax) at paragraph 2(1):

25 *(1) Subject to sub-paragraphs (2), (3) and (3A) and paragraph 3 below, where an election under this paragraph has effect in relation to any land, if and to the extent that any grant made in relation to it at a time when the election has effect by the person who made the election, or where that person is a body corporate by that person or a relevant associate, would (apart from this sub-paragraph) fall within Group 1 of Schedule 9, the grant shall not fall within that*
30 *Group.*

13. It is common ground between the parties that exercising a valid option to tax is a two stage process as set out in HMRC’s Manuals VATLP 22360 and that the second stage of the process, the written notification to HMRC took place on 17 August 2005
35 in respect of Pace House.

“The process of making an ordinary option to tax is a two stage process. The first stage is making the decision to opt (or 'exercising the option'), the second is

notifying that decision in writing to HMRC to give it legal effect. Both stages are necessary for there to be a legally valid option to tax,”

The Evidence

5 14. We were provided with written witness statements from Mr Nigel Finlinson and Mr Timothy Hillier, both Officers of HMRC. These witnesses statements were taken as read and the witnesses did not appear before the Tribunal. Mr Graham also provided a written witness statement for the Appellant which was taken as read. Mr Graham was cross examined by Mr Priest.

10 **Mr Graham’s oral evidence.**

15 15. Mr Graham said that he could not re-call who had completed the VAT returns for Honduras at the relevant time. Honduras had no other employees other than him and no administrative or secretarial help. He confirmed that he signed the VAT forms for Pace House but did not complete them and said that he could not specifically remember signing the forms. He would have signed the forms without understanding their impact. He could not confirm who would have prepared the letter of 19 August 2005 to HMRC which was on Honduras’ headed notepaper. He explained that he would have briefly read this letter and assumed that if Honduras was able to re-claim any VAT that is what should be done. He could not confirm who would have advised him about this or who would have advised the VAT Consultancy to make the election on Pace House. His view was that the VAT Consultancy was under the misguided impression that they should make the option to tax on all of the Honduras properties but that this action was taken without any instruction from him.

25 16. Mr Graham confirmed that he had discussed the need to charge VAT on the rent on Pace House with the tenant, the Big Issue after the option to tax for Pace House had been exercised.

30 17. In response to questions from Mr Priest Mr Graham said that he had been involved with a number of property developments in Birmingham but knew nothing about the VAT option to tax until he started acquiring student accommodation (in 2002 to 3) which was when he developed his policy about when he would exercise an option to tax. Mr Graham confirmed that there were circumstances in which his intended use for a development could change, usually because of planning issues. He was involved with commercial and residential developments and would have had to consider the VAT treatment of all these types of building. His companies would have held about twelve different properties at any one time.

Appellant’s Arguments

18. The Appellant accepted that the burden of proof rested with them to demonstrate that HMRC’s assessments were incorrect. Honduras’ argument is that

making a valid option to tax is a two part process, both parts having to be done in order for an option to be valid; there has to be an intention to opt and the option has to be made in writing (on the VAT 1614 form). This is made clear in the *Grenane Properties* decision (*Grenane Properties Ltd v HMRC* [2010] TC 00494). There was
5 no dispute that the VAT 1614 form had been completed for Pace House but Honduras argue that the first part of the process did not occur; there was no intention on Honduras' part to make the option to tax.

19. Mr Graham said that he followed a standard approach to opting to tax properties he dealt with. He made an election in respect of residential buildings but not on
10 student accommodation because he understood that these buildings were "VAT adverse". Therefore it did not make commercial sense for him to opt to tax Pace House as this was intended for student accommodation. He had opted to tax other properties such as Honduras Wharf because this was intended for residential use.

20. Mr Graham did not dispute that he had signed the Pace House VAT 1614 form and the accompanying letter to HMRC of 19 August 2005, but said that he had not
15 understood the details of these documents. They had been prepared by his advisers on whom he relied, as indicated by the technical terminology used in the letter of 19 August 2005, which was on Honduras' headed notepaper but had not been prepared by Mr Graham. Honduras' advisers had misunderstood Honduras' intentions about
20 Pace House. The VAT Consultancy had acted on their own initiative and not on Mr Graham's instructions. The correspondence with HMRC referred to more than one option to tax and Mr Graham was confused by being asked to sign a number of forms at the same time. Mr Graham had not made a conscious decision to opt to tax Pace House.

21. Mr Graham referred to a number of other pieces of evidence which he said
25 demonstrated that the VAT Consultancy were confused about Honduras' intentions and had not got all of the facts correct on the VAT 1614. For example they had failed to correctly identify all of Mr Graham's company directorships. He also referred to later emails from him to the VAT Consultancy in February 2007 and Hazlewoods on
30 15 April 2008 which he said indicated that he did not think that an election had been made on Pace House. Much of his evidence on this point related specifically to the Globe Works property also held by Honduras and its change in use from student accommodation to residential, but Mr Graham suggested that we should extrapolate from the correspondence relating to Globe Works that the same confusion had arisen
35 in respect of Pace House. Mr Graham's general approach was not to tax student accommodation sites, as stated in his email to Mr Millinchamp of 12 August 2008 in respect of another site (the Island site) "No election as site being sold for students".

HMRC Arguments

22. HMRC do not dispute that a "positive intention" is required in order to make a
40 valid option to tax as made clear in *Grenane Properties*. They point out that as the sole director of Honduras, the intention of Mr Graham could be treated as the intention of the Appellant.

23. HMRC's view is that Mr Graham was aware of the effect of signing the option to tax form, he had experience in the property business through Honduras Wharf and so understood the choice he was making in respect of Pace House. They argue that any suggestion that Mr Graham could be absolved for his responsibility for making this decision by relying on his advisers is counter to authorities such as *Windsor House Investments Limited* ([2006] UK VAT V19666) which makes it clear that: "as a director..... he must be assumed to have intended the consequences of his own actions. A trader cannot hide behind his advisers, particularly where those advisers do not have authority to act on his behalf".

24. Mr Graham, and consequently Honduras, were aware of the implications of the option to tax and had implemented the option accordingly, including charging VAT on rent on the tenant at Pace House. The evidence produced by Honduras which suggests that Mr Graham had not understood the implications of his actions is circumstantial and not relevant to the extent that it arises from correspondence several years later.

Findings of Fact

25. On the basis of the evidence provided the Tribunal makes the following findings of fact:

26. Mr Graham as the sole director and employee of Honduras signed both the VAT form and the covering letter sent to HMRC concerning the Pace House option to tax on 17 and 19th August 2005 and HMRC's confirmation of that option was sent to Mr Graham.

27. Mr Graham was aware that VAT was charged on the rent on Pace House after this option was exercised and specifically discussed this with the tenant, the Big Issue.

28. Mr Graham was an experienced property developer who had dealt with commercial and residential properties as well as student accommodation who understood the purpose and result of exercising an option to tax.

29. Pace House was acquired by Honduras with the intention that it was converted into student accommodation, but it was possible that it could be converted for other uses, such as residential use, as occurred with the Globe Works property, depending on the planning permissions available.

30. At the time when the option to tax was made on Pace House, it did have a commercial purpose; to enable Honduras to re-claim the input VAT which had been suffered on related costs. This input tax was re-claimed by Honduras.

31. Mr Graham, as the sole director of Honduras, was the only person in a position to understand the commercial plans for Pace House and the impact of any VAT decisions on the property.

Discussion

32. It is clear that in order to succeed in this appeal the onus is on the Appellant to demonstrate that this VAT assessment is not correct.

5 33. The only question for the Tribunal is whether, on the evidence provided, it is clear that Honduras, acting through Mr Graham, had a positive intention to make the option to tax on Pace House in 2005. Both parties referred to the criteria for considering this question set out in *Grenane Properties*:

10 34. (i) *The documentary evidence*; For Pace House we have documentary evidence both of the option to tax form itself and the accompanying letter to HMRC both of which were signed by Mr Graham and the written response confirming that the election had been made and the VAT could be re-claimed which were written from HMRC to Mr Graham at Honduras. The documentary evidence suggests that there was an intention to make the option to tax at the time when the option was made by
15 Mr Graham.

35. (ii) *The explanation of any witnesses*; the Tribunal considers that contemporaneous evidence is to be preferred over subsequent evidence. There is no contemporaneous evidence that Mr Graham was confused over the documents which had been sent to HMRC. It is accepted that these documents were not prepared by Mr
20 Graham, but drafted on his behalf by the VAT Consultancy, but this does not necessarily indicate that Mr Graham did not understand the content of these letters. The only evidence that Mr Graham did not understand what he was signing at the time comes from later correspondence between Mr Graham and his advisers and Mr Graham's statements before this Tribunal.

25 36. (iii) *Any circumstantial evidence*; Mr Graham referred to his "rule of thumb" that he would not opt to tax student accommodation and his manner of dealing with similar properties and his later correspondence with the VAT Consultancy and Hazlewoods suggesting that he did not think that an election had been made at Pace House. Mr Graham's commercial understanding of how student accommodation
30 should be treated for VAT does suggest that Mr Graham would not normally have made an election for a property of this type. The remaining circumstantial evidence relates to Mr Graham's confusion about whether an election had been made over Pace House, but derives from correspondence some years after the actual election was alleged to have been made. Honduras referred at some length to later discussions
35 relating to their other property, Globe Works to substantiate Mr Graham's approach to dealing with VAT elections on properties held but the Tribunal does not consider that this is persuasive evidence of Honduras' intentions concerning Pace House at the time when the option was made.

40 37. (iv) *How the property was dealt with*; we know that the tenant was charged VAT on rent after the election was made on Pace House, that Mr Graham had a meeting with the tenant to notify them of this and that related input tax was re-

claimed. This suggests that the decision to opt to tax was followed through and its implications were understood.

5 38. The onus is on the Appellant to demonstrate, despite the documentary evidence and that fact that VAT was subsequently charged on rents on Pace House and input tax was re-claimed, that this does not reflect the taxpayer's intention at the time when the election was made. This is a difficult hurdle for the Appellant to reach in these circumstances and the Appellant's only real argument is that it would not have made commercial sense for him to make this election on Pace House because it was "VAT adverse" and that he did not understand the full implications of making the election at 10 the time when he signed the documents.

15 39. The decision in *Grenane Properties* demonstrates that it is possible to override the documentary evidence that there was a positive intention to make an option to tax, but the circumstances in that case were particular and are not replicated here; in the *Grenane* case the individual who gave the original instructions and who was in the best position to understand whether an option to tax should be made did not see or sign the VAT forms and was not involved in the decision making process. In this case, Mr Graham was the person who was in the best position to understand what was required and he signed the VAT forms and accepted confirmation of the election from HMRC. There is no evidence of the type of communication break down or failure of 20 administrative processes which led to the mistake in *Grenane*.

25 40. In the *Grenane* case VAT was not charged on the tenants after the option to tax had been made, but here we know that it was charged at Pace House. Finally, the option in *Grenane* made no commercial sense because of the type of property in question (residential). Whereas for Pace House we know that there was at least a short term commercial purpose in exercising the option, enabling Honduras to re-claim input tax, which was duly done.

30 41. We have taken account of Mr Graham's experience as a property developer and his role as a director of Honduras. He told the Tribunal that he was acquainted with property dealing and we think it is reasonable to assume that he would have recognised the significance of the option to tax, of which he told us he had some experience. We agree with HMRC that Mr Graham cannot hide behind his advisers when he is in the best position to understand his business and the optimum VAT treatment of the properties acquired by Honduras. As a director he should be relying on his advisers only if he is confident that they do understand his business.

35 **Conclusion**

40 42. We accept that it is necessary to have a "positive intention" to make a valid option to tax a property such as Pace House and that evidence as to what was in the taxpayer's mind at the time when an election is signed can be difficult to deduce. However, it would be a convenient set of tax rules which allowed a taxpayer to retrospectively change the tax result of his actions to guard against an unfavourable tax result by claiming that his intention was different than that suggested by contemporaneous documents and actual behaviour. We would expect this to be

possible only in rare circumstances and on the basis of compelling evidence as to the taxpayer's actual intention. No such compelling evidence has been produced by Honduras and for these reasons this appeal is dismissed.

5 43. 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
10 "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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**RACHEL SHORT
TRIBUNAL JUDGE**

RELEASE DATE: 11 June 2014

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