

Disapplication of the Option to Tax
Shurgard Storage Centres UK Ltd & West London Self-Storage Centre v HMRC

Shurgard wanted to acquire a self storage facility. The vendor had opted to tax the building but Shurgard did not want to opt to tax as it wished to keep its charges to customers down. In order to acquire the building VAT free under the TOGC rules (the vendor also operated a self store business from the site) Shurgard would have to opt to tax. Therefore, Shurgard sought to create the conditions under which the vendor's option to tax would be disapplied by the anti avoidance rules, as that was the only way for Shurgard to achieve its aim of acquiring a VAT free building without having to opt to tax and charge its customers VAT.

This involved making the building a capital goods scheme asset that would be occupied for exempt purposes by the vendor, financier of the development or someone connected with either. As Shurgard and the vendor were not connected, the only way to do this was to make Shurgard financier of a capital refurbishment of the building by the vendor that was subject to VAT and cost over £250k and hence would bring the building within the capital goods scheme. Shurgard would be in occupation of the building for exempt purposes. Both parties were keen that the business should not be disrupted during the refurbishment process.

Shurgard was granted a licence to occupy the premises, free of charge, before the works were being carried out. At that stage the vendor was no longer running the storage business and the income from it went to Shurgard. The freehold of the building was sold at a later date a few days after the refurbishment was completed. The works were carried out to meet Shurgard's specifications on Fire and Health and Safety matters.

The appellants argued the disapplication conditions were met as Shurgard had financed the development, which had cost over £250k, and the intention was that the building would be occupied for exempt purposes. HMRC argued that the disapplication conditions were not met. The expenditure did not create a capital item that was used in the course of the vendor's self storage business. The expenditure was incurred to sell the property, it was not a cost component of any supplies of self storage by the vendor, and it was incurred after the vendor had ceased to operate a self storage business. It was also not capital expenditure as the refurbishment was not a durable asset.

The Tribunal agreed with HMRC. The Tribunal accepted that there is a subjective and an objective test for the disapplication. The objective test is whether the asset is a capital item in a capital goods scheme (CGS). The subjective test is whether the intention is that it will become a capital item within CGS (in either case there must also be significant exempt or non business use).

HMRC did not pursue any abuse arguments, and withdrew the misdeclaration penalty it had issued, (no reason for this is given). HMRC also accepted that the sale of the other business assets could be a TOGC so VAT was only due on the building.