

Land and property

[British Eventing Limited v HMRC \[2010\] UKFTT 382 \(TC\)](#)

Summary

This case concerns the VAT treatment of a reverse premium; the assignment of a lease for nominal consideration; attribution of input VAT incurred on the lease premium; and HMRC's powers to refuse permission to opt to tax and confirms some important principles.

Background

The Appellant held an interest in land and buildings under the terms of a (VAT-exempt) lease (the head lease) from a government department. The head lease obliged it to maintain the buildings in good condition. It sublet the property (VAT-exempt) to a third party (the occupier) which occupied the property for taxable purposes. Following a fire which badly damaged one of the buildings, the Appellant received an insurance payment (£140k) which would only cover part of the cost of necessary repair works. The Appellant therefore negotiated with the occupier to assign its interest under the head lease to the occupier. The consideration payable by the occupier for the assignment would be £10. On assignment of the interest, the occupier would receive from the Appellant the £140k insurance payment plus an additional £200k.

The Appellant sought HMRC's permission to opt to tax in respect of the land (permission was necessary because it had made exempt supplies of the land and none of the conditions for 'automatic' permission was satisfied). HMRC refused permission, taking into account the value of the Appellant's previous exempt supplies (c. £9k per annum), the value of future taxable supplies if the permission was granted (£10) and the amount of input VAT which was to be incurred on the reverse premium (c. £60k).

The Appellant sought to argue that the £340k was:

- compensatory in nature and outside the scope of VAT;
- a dilapidation payment and not subject to VAT;
- held on trust for the occupier so that it could pay for the repairs and not subject to VAT;
- not consideration for the occupier doing something but merely to enable the occupier to discharge the obligation which fell on both of them (Mirror Group Plc, C-409/98);

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- exempt because, if the assignment was exempt, the payment to the occupier must also be (Lubbock Fine & Co, C-63/92)
- part of a single exempt transaction which took its nature from that of the assignment.

The Appellant also sought to argue that HMRC was not entitled to refuse it permission to opt to tax on the basis of the imbalance between the input VAT which it would incur on the £340k, in the event that the First Tier Tribunal held that the £340k constituted a taxable 'reverse premium', and that, irrespective of the value of the taxable assignment, the Appellant would be entitled to attribute the VAT on the reverse premium directly to the taxable assignment (this was common ground between HMRC and the Appellant). Direct attribution did not require or entitle HMRC to determine whether such an attribution (unlike an apportionment of residual VAT) yielded a fair result: that was implicit in direct attribution.

Held

The First Tier Tribunal firstly considered the Appellant's contentions that the £340k did not constitute a reverse premium and dismissed each in turn. In summary, the £340k was:

- the consideration for the occupier agreeing to do something, not retrospective compensation for some kind of breach of an undertaking;
- not a dilapidation payment, which would have been due by the Appellant to a landlord, not to the occupier;
- not held on trust, as there was no explicit or implicit trust arrangement;
- not an up-front adjustment of future rents due to the landlord, so Mirror Group was not applicable;
- not related to a surrender of an interest as in Lubbock Fine;
- not part of a single exempt transaction, it was a transaction in its own right, the supply being the agreement to enter into an onerous lease; and therefore
- taxable, as it was 'on all fours' with the ECJ's judgment in Cantor Fitzgerald International C-108/99, an inducement to enter into an onerous lease, in particular the obligation to carry out the repairs, i.e. a reverse premium.

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The First Tier Tribunal then moved on to attribution of the input VAT by the Appellant. Although the parties agreed that the attribution was directly to the assignment, the Tribunal did not agree. It did not consider that a cost of £340k could properly be regarded as a cost component of a supply made at a value of £10. Even though there were limited circumstances where VAT could be attributed retrospectively to earlier business supplies (e.g. post-deregistration input VAT), the Tribunal considered that the input VAT in this case would be residual to the Appellant's overall (and continuing) business and recoverable in accordance with its partial exemption position. Furthermore, the First Tier Tribunal considered that the assignment to which the parties had thought the input VAT attributable did not constitute a supply for VAT purposes because the nominal £10 did not constitute consideration, instead the transaction should properly be viewed as an assignment with a reverse premium of £339,990. Neither did it constitute a deemed supply of an asset of the Appellant's business (Schedule 4(5) VAT Act 1994) because it was of no value: the Appellant was willing to pay £340k to be rid of it.

Finally, the First Tier Tribunal considered that HMRC had been entitled to refuse permission to opt to tax. It was reasonable to decide that even direct attribution of the input VAT to output VAT of £1.75 was not a reasonable result, HMRC was also required to take into account the values of earlier exempt supplies, and it was required to decide whether a fair and reasonable outcome would result if the supply to which the option would apply were taxable. It would not, contrary to the Appellant's arguments, be contrary to fiscal neutrality if the assignment were not a taxable supply.

The appeal was therefore substantially dismissed, although the input VAT would be partly recoverable rather than wholly irrecoverable.

Comment

This case illustrates the complexities of VAT and property. Readers may benefit from subscribing to 4 Eyes Ltd [VAT Property Solutions](#), an online tool to assist with correctly identifying the VAT liability of construction projects.

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