Neutral Citation: [2023] UKFTT 359 (TC)

Case Number: TC08783

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/04357

VAT – appellant exercising option to tax (OTT) for eight years – property in question sold without charging VAT – assessments issued but not appealed – appellant informing HMRC that OTT invalid – HMRC exercising power to deem OTT to be valid – whether right of appeal against exercise of that power –whether HMRC acted unreasonably – whether appellant estopped from relying on earlier meeting with an HMRC officer – held, no right of appeal but in the alternative, appellant estopped and HMRC acted reasonably

Heard on 16 March 2022 and 6 March 2023
Judgment date: 4 April 2023

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

ROLLDEEN ESTATES LIMITED

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Salman Ali of Abram & Co, instructed by the Appellant

For the Respondents: Ms Margaret Nkonde (for the first hearing) and Mr Max Simpson (for the second hearing), litigators of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION AND SUMMARY

1. As is well known, the letting of property is an exempt supply under VAT law, but the owner can "opt" to tax the property and charge VAT on that supply. If the option to tax ("OTT") is exercised, the owner reclaims input VAT on costs such as repairs and maintenance, but charges output VAT on its supplies. The OTT provisions are set out at VATA, Sch 10.

2. A person does not need HMRC's permission before exercising an OTT, unless that person has already made exempt supplies in relation to that property – in particular, if the property has already been let without VAT having been charged. In that scenario, the person must apply to HMRC for permission to exercise the OTT, and permission will only be given if HMRC are satisfied that the input tax is fairly attributed as between the exempt period and the taxable period.

3. On 7 February 2008, Rolldeen Estates Ltd ("Rolldeen") sent HMRC copies of Form VAT1614A dated 28 January 2008, by which it applied to opt two recently purchased properties, the Jubilee Business Centre in Gate Street, Blackburn ("the Jubilee Centre") and a piece of land on the east side of Broughton Lane in Sheffield ("the Sheffield Land").

4. Rolldeen's Forms VAT1614A included confirmation that it had made no exempt supplies in relation to either property. Rolldeen repeated that confirmation in writing to HMRC on 25 February 2008. On 6 March 2008, HMRC issued a letter acknowledging that the properties had been opted to tax with an effective date of 10 January 2008. Rolldeen reclaimed VAT on repairs and other related property costs from that date, and its invoices to tenants included VAT.

5. The Jubilee Centre was sold on 2 March 2015 and the Sheffield Land on 20 January 2017, but in neither case was VAT added to the sale price. On 3 August 2017, HMRC issued Rolldeen with VAT assessments which included £50,000 relating to the failure to charge VAT on the sale of the Jubilee Centre and £4,710 relating to the failure to charge VAT on the sale of the Sheffield Land. The assessments were not appealed and applications for late appeals were not made.

6. On 12 November 2018, Mr Ali of Abram & Co, Rolldeen's new representative, provided HMRC with leases relating to the Jubilee Centre which were dated before 10 January 2008. He said these showed Rolldeen had made exempt supplies in relation to the Jubilee Centre before the date of the OTT, and that HMRC's permission had therefore been required before it could be opted, and no permission had been given. In other words, there was no valid OTT in place, even though Rolldeen had purported to exercise that option. On 4 February 2019, Mr Ali said that the position was the same in relation to the Sheffield land.

7. VATA, Sch 10, para 30 is a rarely used provision which allows HMRC retrospectively to dispense with the requirement for prior permission, and to treat a "purported option as if it had instead been validly exercised". On 6 March 2019, Officer Lorna McQuillan issued a decision stating that HMRC were exercising their discretion under Sch 10, para 30 to treat the Jubilee Centre and the Sheffield Land as opted with effect from 10 January 2008 ("the OTT Decision"). On 22 June 2019, Rolldeen appealed to the Tribunal against the OTT Decision.

8. At the hearing of the appeal on 16 March 2022, Rolldeen conceded the part of its case relating to the Sheffield Land, because Mr Ali accepted that no exempt supplies had been made in relation to that property before the effective date of the OTT. As a result, this decision deals only with the Jubilee Centre.

9. There were a number of issues:

(1) The facts as to what had happened in early 2008 were in dispute. Rolldeen's case was that HMRC already knew about the exempt supplies when Form VAT1614A was sent to them.

(2) VATA Sch 10 was rewritten with effect from 1 June 2008, and the rewritten provisions included para 30. The next issue was whether that deeming provision could be used in relation to a purported option which had an effective date of 10 January 2008, before it had come into force.

(3) If the answer to that question was yes, whether Rolldeen had a right of appeal under VATA s 83(1)(wb) against HMRC's exercise of their para 30 powers.

(4) Given that VATA s 84 (7ZA) provides that an appeal made under VATA s 83(1)(wb) can only be allowed if the Tribunal considers HMRC have acted unreasonably, the questions were:

(a) whether Rolldeen was estopped from making certain submissions about the reasonableness of HMRC's exercise of the para 30 power, because reliance had been placed on the "common assumption" that there had been no exempt supplies in relation to the Jubilee Centre before 10 January 2008, and

(b) whether HMRC had acted unreasonably for any other reason.

10. I decided it was in the interests of justice to allow the parties to provide further submissions on the issues set out above. Both provided an initial response, followed by a further response. In September 2022, having considered those submissions, I issued directions which included permission for both parties to provide witness evidence. There were then difficulties finding a date to relist the further hearing, which finally took place in March 2023.

11. Having heard and considered the parties oral and written submissions, I decided as follows:

(1) I agreed with Mr Ali and found as a fact that Officer Laura House, who carried out a compliance visit to Rolldeen on 29 January 2008, knew that exempt supplies had already been made in relation to the Jubilee Centre.

(2) Para 30 could be used to retrospectively validate the OTT, albeit only in relation to supplies made after 1 June 2008. That was sufficient for the purposes of this appeal, as the sale of the Jubilee Centre occurred on 2 March 2015.

(3) VATA s 83(1)(wb) gives a right of appeal against "any *refusal* of the Commissioners to grant any permission under, or otherwise to exercise *in favour of a particular person* any power conferred by, any provision of Part 1 of Schedule 10". In this case, HMRC did not refuse to exercise a power in Rolldeen's favour but instead exercised the para 30 powers of its own motion to Rolldeen's detriment. I therefore decided that Rolldeen had no right of appeal against the OTT Decision. Rolldeen's appeal is therefore struck out under Rule 8(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules ("the Tribunal Rules") because the Tribunal does not have jurisdiction to decide the case.

(4) However, for the reasons given at §60., the appeal position was not beyond doubt, and both HMRC and Mr Ali considered that there was a right of appeal. I therefore went on to consider in the alternative (ie on the basis that Rolldeen did have a right of appeal), whether HMRC had acted unreasonably, and found as follows:

(a) Although Officer House knew exempt supplies had already been made in relation to the Jubilee Centre, Rolldeen was estopped from relying on that fact, because both parties had shared a "common assumption" that the OTT had been valid, and the other tests relating to estoppel by convention set out by the Supreme Court in *Tinkler v HMRC* [2021] UKSC 39 ("*Tinkler*") were met.

(b) None of the other submissions made by Mr Ali as to why HMRC had acted unreasonably were made out.

(c) As a result, I decided in the alternative that Rolldeen's appeal would be refused.

12. The practical consequence of this decision, on either basis, is that the VAT of £50,000 which HMRC assessed on 3 August 2017 is due and payable.

THE EVIDENCE

13. For the first hearing of Rolldeen's appeal, HMRC provided two document bundles totalling 657 pages; these were supplemented with a further bundle of 183 pages for the second hearing. The bundles included:

(1) correspondence between the parties and between the parties and the Tribunal;

(2) the invoices for the purchase and sale of the Jubilee Centre;

(3) notes of the compliance visit by Officer House to Rolldeen on 29 January 2008, see further §21.ff;

(4) Rolldeen's bank statement for the week beginning 15 April 2006;

(5) various invoices to Rolldeen from suppliers, see further §24.;

(6) various invoices issued by Rolldeen to tenants of the Jubilee Centre between 2013 and 2017; and

(7) pro-forma template documents published by the Law Society which were stated to be leases between Rolldeen and other parties in relation to the Jubilee Centre in 2006 and 2007, see further §ff.

14. Officer Aidan Young, the compliance officer with responsibility for Rolldeen from February 2016, provided a witness statement. This summarised the history of the dispute and related correspondence. None of that evidence was challenged, and Officer Young did not attend to give evidence.

15. It was clear from the parties' submissions during and after the first hearing that the parties disagreed as to:

(1) what had happened during Officer House's compliance visit, at which she met Rolldeen's accountant, Mr Arian Mufid; and

(2) in relation to Mr Mufid's submission of form VAT1614A, which was signed by Rolldeen's director Mr Shaheen.

16. On 22 September 2022 I issued further directions, which included permission for both parties to provide witness evidence. However, HMRC did not tender Officer House as a witness, and Rolldeen did not tender Mr Mufid or Mr Shaheen. Neither Mr Simpson nor Mr Ali put forward any explanation for the non-attendance of these witnesses.

17. In *Barnes v Blackburn with Darwen BC* [2022] EWHC 2598, Davies J considered the approach to take when a party does not call a witness who might be reasonably expected to

be able to provide relevant evidence. He set out his view on one of the "commonly encountered situations" at [33]:

> "…where, for reasons which have not been sufficiently explained or justified, a party has not called a witness who was involved in the events in question on that party's side. If the absence of such a witness means that the party is unable to adduce oral evidence in relation to one or more of the factual issues in the case, whereas the other party has adduced such evidence, then it seems to me that the court must make its decision only on the basis of the evidence before it, even if that means there is no evidence from that witness to take into account when deciding the factual issues in dispute, and can take into account the absence of evidence from any witness from that party."

18. I respectfully agree. I have therefore decided this appeal on the evidence provided to me, and have made no adverse inference as the result of the non-attendance of Officer House, Mr Mufid or Mr Shaheen.

FINDINGS OF FACT

19. The findings of fact cover the period from the acquisition of the Jubilee Centre until Rolldeen's appeal against the OTT Decision.

Acquiring the Jubilee Centre and HMRC compliance visit

20. Rolldeen acquired the Jubilee Centre on 16 May 2006. As can be seen from the purchase invoice, the seller did not charge VAT.

21. Rolldeen's VAT return for period 12/07 was a repayment claim for £37,576,93. Officer House carried out a compliance visit on 29 January 2008; she met Mr Mufid at his office. There was a dispute as to what happened during that visit. I first set out the evidence, followed by the parties' submissions and my findings of fact.

22. Officer House's notes dated 30 January 2008 say (capitalisation in original):

> "Pre-cred for period 12/07
>
> Income received for this VRN all relate to EXEMPT supplies as they are either residential or commercial with no OTT in place. Checked invoices claimed in period 12/07 which mainly relate to the purchase of a property. The property is new offices and therefore VAT charged on the sale. However, there is no OTT in place at the time of the visit and will therefore be disallowed. Checked all purchase invoices from other periods and all I/T [input tax] relates to EXEMPT supplies.
>
> Discussed with the accountant and he will OTT the 2 commercial properties. He told me he had faxed over the OTT request for 6 Wellington Street while I was doing my visit. And will do one for Gate Street at Blackburn [the Jubilee Centre] ASAP.
>
> 30/1/08 Phone call to accountant to confirm he is unable to claim the I/T until the OTT is in place therefore the 12/07 return to be reduced to NIL."

23. Mr Mufid's notes of the same meeting, which HMRC accepted were contemporaneous and genuine, say:

> "Laura House VAT Officer visited the office in today's date 29 January 2008 about Rolldeen Estate Ltd VAT return for the period 12/2007. The meeting was for a VAT claim and to check the related repair receipts. She showed satisfaction over the documents however Mr Mufid has been advised to option to tax the properties. In detail the VAT1614A form and related

> issues discussed like non VAT lease agreements of current tenants and future output tax from properties."

24. Mr Ali said that it was clear from the above evidence that Officer House knew at the time of this meeting that exempt supplies had already been made in relation to the Jubilee Centre, and he relied on the following:

(1) Officer House's statement that the invoices she had checked for period 12/07 "mainly relate to the purchase of a property", and since the Jubilee Centre had been purchased recently, those invoices would have related to the Jubilee Centre.

(2) Mr Mufid's note said they had discussed the "non VAT lease agreements of current tenants". It followed, said Mr Ali, that Officer House had seen the lease agreements between Rolldeen and the tenants of the Jubilee Centre, and knew exempt supplies had been made.

(3) Various purchase invoices dating from before Officer House's visit, which Mr Ali said related to the Jubilee Centre.

25. Mr Simpson did not accept that this evidence was sufficient to prove that Officer House knew Rolldeen had made exempt supplies in relation to the Jubilee Centre. He said that Rolldeen had a number of leased properties and Mr Mufid could have been referring to any of them; Officer House's note did not mention having reviewed leases, but only the invoices supporting the input tax claim, and there was nothing to tie the purchases shown on the invoices to the Jubilee Centre rather than to any other property.

26. Having considered the evidence and submissions, I find as a fact that on 29 January 2008, Officer House established that Rolldeen had already made exempt supplies of let property to tenants of the Jubilee Centre. I make that finding for the following reasons:

(1) Officer House's contemporaneous note states that the invoices claimed in period 12/07 "mainly relate to the purchase of a property" on which VAT had been charged by the seller. That property was not the Jubilee Centre, because it is clear from the invoice that no VAT was charged when it was sold to Rolldeen. On this point I therefore agree with Mr Simpson that the bulk of the input tax claimed in period 12/07 related to a different property.

(2) However, Officer House said she had "checked all purchase invoices from other periods" and having done so, concluded that <u>all</u> the input tax related to exempt supplies. It is not possible for Officer House to have concluded that <u>all</u> the input tax claimed for other periods related to exempt supplies, unless she had looked at the documentation relating to those supplies.

(3) The Jubilee Centre was acquired on 16 May 2006 and it is reasonable to assume that at least some input tax would have been incurred in relation to that property between May 2006 and the end of period 12/07.

(4) Officer House therefore checked the invoices for supplies being made in relation to the Jubilee Centre.

(5) Mr Mufid referred to Officer House having discussed the "non VAT lease agreements of current tenants". Although he does not specify particular leases, it is reasonable to read the phrase as referring to all of the leases.

27. In coming to that conclusion I did not rely on the invoices included in the Bundle; I agreed with Mr Simpson that it was not possible to link any particular invoice to the Jubilee Centre.

The correspondence with HMRC about the OTT

28. On 7 February 2008, Mr Mufid faxed HMRC a copy of Form VAT1614A in relation to the Jubilee Centre. The Form asks this question:

> "Since 1 August 1989, have you made any exempt supplies of land or buildings? For example, you may have granted an interest in the land or buildings such as a lease, or a licence to occupy or another rights over the land or buildings."

29. The answer given by Rolldeen was "NO". The Form was signed by Mr Shaheen and was dated 28 January 2008 (the day *before* the meeting with Officer House). That date is inconsistent with Officer House's meeting note, which says that Mr Mufid agreed to do an OTT form for the Jubilee Centre "ASAP". Had the Form already been completed, it is highly improbable that Mr Mufid would not have said so. I find as a fact that the OTT form was completed after that meeting, and that the date given on its face is incorrect.

30. When the Form was received by HMRC it was not considered by Officer House, but by a different HMRC officer, Officer Bounds. On 12 February 2008, she wrote to Rolldeen saying that the Form did not give a date from which Rolldeen was applying to opt the Jubilee Centre, and asking Rolldeen to provide that date. Her letter then said:

> "In addition please confirm whether or not exempt supplies have been made by you in respect of the land/property between 1 August 1989 and the new date you wish the option to have effect. By this we mean granting a lease, licence to occupy or a right over land."

31. She continued by saying that if such supplies had been made, "prior written confirmation from HM Revenue & Customs will be required before you can opt to Tax unless you meet the conditions for automatic permission contained in the VAT notice 742A". She then said "It appears that you/your client may require permission from HM Revenue and Customs before being allowed to elect to waive exemption (opt to tax) on the property named above", and if that was the case, detailed information was required by way of response to a series of questions, which included:

> "What is the total value of exempt supplies made in relation to the land/ property prior to your election request and, if appropriate, give details of any grants made for a premium or prepayment of rent (i.e. when were such grants made, for what values and to what period of use of the building do they relate)?"

32. On 25 February 2008, Mr Mufid faxed HMRC an annotated copy of Officer Bound's letter. This included 10 January 2008 as the effective date of the OTT; the question at §30. was again answered "NO". The faxed document was signed by Rolldeen's authorised signatory, and by comparing that signature with the one on the OTT form, I find as a fact that this document was also signed by Mr Shaheen.

33. On 6 March 2008, Officer Bounds wrote to Rolldeen saying "I acknowledge your notification regarding your election to waive exemption" and confirming that the Jubilee Centre had been opted to tax with an effective date of 10 January 2008. On 21 April 2008, HMRC paid Rolldeen £37,576.93, being the full amount of its 12/07 repayment claim.

The charging of VAT, the sale and the assessment

34. Rolldeen began to charge output VAT to tenants of the Jubilee Centre. During periods 03/08 to 03/15 Rolldeen claimed input VAT of £122,797.94, some of which related to the Jubilee Centre.

35. The Jubilee Centre was sold on 2 March 2015, and VAT was not charged or paid. On 3 August 2017, HMRC issued Rolldeen with a VAT assessment for period 03/15; this included £50,000 of VAT due on the sale of the Jubilee Centre.

The documents sent by Mr Ali in November 2018

36. On 12 November 2018, Mr Ali sent HMRC pro-forma template documents published by the Law Society which were stated to be leases between Rolldeen and other parties in relation to their use of the Jubilee Centre during 2006 and 2007.

37. None of the pro-forma clauses of the template agreement have been modified or deleted and none of the documents are witnessed. In each case, above "Landlord" is written "M Shaheen" but the signature is entirely different to that on the other documents in the bundle which he signed. Above "tenant" is an indecipherable signature, no name is given. Other parts of the documents include the following:

(1) In relation to the first floor, occupation by Tyson Gym for £15,000 "per annual" [sic] from 01-02-2007 (corrected from 2008) to 31-01-2008

(2) In relation to "Unit 1-2", occupation by Autolabs UK Ltd for £12,000 "annual from 01-06-2006 to 31-05-2007".

(3) In relation to "3-4 Unit", occupation by RCCG Solution for "£13,500 (Annual)" from 02-10-06 to 30-9-2007.

38. Mr Ali said these documents showed Rolldeen had made exempt supplies before the effective date of the OTT; that HMRC's permission had therefore been required before the Jubilee Centre could be opted, and as no permission had been given, the OTT was invalid.

39. HMRC did not challenge the authenticity of the template documents. Instead, on 17 December 2018, Officer Young wrote to Mr Ali, saying:

> "The attachments do show that exempt supplies were made in respect to Tyson Gym, Auto Lab & RCCG Solutions for Jubilee Centre, Gate Street, Blackburn, Lancashire before an Option to Tax was granted on this property."

40. HMRC therefore accepted that the new documents showed that Rolldeen had made exempt supplies before 10 January 2008, the effective date of the OTT.

41. I do not need to make a finding as to the authenticity of the documents, because I have already found as a fact based on the contemporaneous meeting notes, see §26., that Rolldeen made exempt supplies to tenants of the Jubilee Centre before 10 January 2008. Moreover, as HMRC did not challenge the authenticity of the documents at any point, this was not in issue and it would have been unfair for the Tribunal to make a finding.

THE OTT DECISION

42. On 6 March 2019, Officer McQuillan wrote to Rolldeen saying that having taken all the information provided into account, and having consulted with technical experts:

> "I have concluded that with the discretion given to HMRC under The VAT Act 1994, Schedule 10, Paragraph 30 to purport your option to tax and treat it as valid."

43. Mr Ali asked for a statutory review of the OTT Decision. This was carried out on 22 May 2019 and the Review Officer upheld the OTT Decision. The review letter ended by saying "if you do not agree with my decision, you can ask an independent tribunal to decide the matter". On 22 June 2019, Rolldeen appealed the OTT Decision to the Tribunal.

THE LEGISLATION

44. I first set out the requirements for making OTT elections, and then the deeming provisions relating to purported options.

Making an OTT election

45. Officer Bounds acknowledged Rolldeen's OTT on 6 March 2008 and accepted that it was effective from 10 January 2008. On both those dates, the relevant provisions were set out in the version of Sch 10 which had formed part of VATA as originally introduced in 1994, albeit with some specific later amendments.

46. Sch 10, para 2 was headed "Election to waive exemption", and subpara (9) read:

> "Where a person who wishes to make an election in relation to any land (the relevant land) to have effect on or after 1st January 1992, has made, makes or intends to make, an exempt grant in relation to the relevant land at any time between 1st August 1989 and before the beginning of the day from which he wishes an election in relation to the relevant land to have effect, he shall not make an election in relation to the relevant land unless the conditions for automatic permission specified in a notice published by the Commissioners are met or he obtains the prior written permission of the Commissioners, who shall only give such permission if they are satisfied having regard to all the circumstances of the case and in particular to —
>
> (a) the total value of exempt grants in relation to the relevant land made or to be made before the day from which the person wishes his election to have effect;
>
> (b) the expected total value of grants relating to the relevant land that would be taxable if the election were to have effect; and
>
> (c) the total amount of input tax which has been incurred on or after 1st August 1989 or is likely to be incurred in relation to the relevant land,
>
> that there would be secured a fair and reasonable attribution of the input tax mentioned in paragraph (c) above to grants in relation to the relevant land which, if the election were to have effect, would be taxable."

47. Where a business such as Rolldeen had already made exempt supplies at the date it applied to OTT a property, HMRC were therefore required to consider the factors at (a) to (c) above before, deciding whether or not to grant the OTT application.

The new Sch 10

48. Sch 10 was entirely replaced with effect from 1 June 2008 by provisions set out in the Value Added Tax (Buildings and Land) Order 2008 (SI 2008/1146). Para 28 of the new Sch 10 essentially repeated the requirements for prior permission which were previously at para 9. Para 30 introduced a new power; it is headed "Purported exercise where prior permission not obtained" and reads:

> "(1) This paragraph applies if—
>
> (a) an option to tax was purportedly exercised in a case where, before the option could be exercised, the prior permission of the Commissioners was required under paragraph 28, and
>
> (b) notification of the purported option was purportedly given to the Commissioners in accordance with paragraph 20.
>
> (2) The Commissioners may, in the case of any such option, subsequently dispense with the requirement for their prior permission to be given under paragraph 28.

(3) If the Commissioners dispense with that requirement, a purported option —

(a) is treated for the purposes of this Part of this Schedule as if it had instead been validly exercised, and

(b) has effect in accordance with paragraph 19."

49. It was on the basis of this provision that Officer McQuillan issued the OTT Decision on 6 March 2019.

WHETHER PARA 30 COULD BE APPLIED, GIVEN THE EFFECTIVE DATE OF THE OTT

50. Article 1(1) of SI 2008/1146 provides that the new provisions came into force on 1 June 2008, and (apart from one exception which is not relevant to this case) had effect in relation to "supplies made after 1 June 2008". That start date was subject to the transitional provisions in Sch 2 to that Order.

51. Because Rolldeen's OTT was stated to be effective from 10 January 2008, before the deeming provisions in para 30 had come into force, I asked the parties for submissions on whether HMRC had the power to issue the OTT Decision.

52. Having considered HMRC's submissions, with which Mr Ali agreed, I find that the OTT Decision was validly made, for the following reasons:

(1) the para 30 power could be used by HMRC from 1 June 2008; no provision preventing it applying to purported OTTs given before that date;

(2) the only relevant restriction was that it only encompassed *supplies* made after 1 June 2008; and

(3) the supply in issue in this case was the sale of the Jubilee Centre on 2 March 2015.

RIGHT OF APPEAL?

53. The appeal rights for VAT decisions are to be found at VATA s 83. Section 83(wb) provides that a person can appeal (my emphasis):

> "any **refusa**l of the Commissioners to grant any permission under, or otherwise to exercise **in favour of a particular person** any power conferred by, any provision of Part 1 of Schedule 10."

54. Para 30 falls within Part 1 of Sch 10, and before the first hearing, both parties had proceeded on the basis that s 83(1)(wb) gave Rolldeen a right to appeal the OTT Decision. However, that appeal right is against a "refusal" by HMRC to exercise a discretion under Part 1 of Schedule 10. I therefore asked the parties for submissions on whether the OTT Decision came within s 83(1)(wb).

55. HMRC's written submissions said that Rolldeen did have an appeal right, and Mr Ali agreed. HMRC said that:

(1) The reference to "any refusal" is followed by the words "or otherwise" and this enlarges the scope of the provision.

(2) The reference to "in favour of a particular person" should be given a wide meaning, to encompass HMRC's refusal to agree to "the taxpayer's preferred option" or as "relating to a refusal to exercise a power in favour of a particular person in the way that the person considers correct".

(3) That reading "provides a more accessible and open access to justice", because if there was no right of appeal to the FTT, the only other route would be a claim for judicial review.

56. I disagree. The phrase "or otherwise" only expands the right so as to encompass not only refusals of "permission", but also other decisions not to exercise a power in a person's favour. It does not expand the meaning so as to encompass decisions made by HMRC on their own initiative, under the discretionary power given by the statute, which are neither a refusal to grant a permission nor a refusal to exercise a power in a person's favour.

57. The appeal right therefore exists where HMRC have refused to do something which a person has asked HMRC to do. Here, HMRC have not refused to do anything, they have instead deemed the purported OTT to have effect.

58. I do not accept that an appeal right should be implied simply because the alternative analysis would mean that a decision could only be challenged by judicial review. The Upper Tribunal (Warren J and Judge Bishopp) considered a similar submission in relation to fixed penalties in *Bosher v HMRC* [2013] UKUT 579 (TCC), and said at [39]:

> "It is true that judicial review can be costly and that a taxpayer such as Mr Bosher is exposed to the risk of an adverse costs order…; and it may well be correct that a taxpayer's costs in the Tax Chamber in dealing with the proportionality of a penalty will be (possibly substantially) less than the costs of the equivalent judicial review challenge in the Administrative Court (not least because of the different rights of audience). But that is no reason, in our view, for concluding that judicial review does not represent an adequate and effective way to protect the taxpayer's rights. The fact that there may be a cheaper and possibly more appropriate forum where the matter could be adjudicated does not mean that judicial review is either inadequate or ineffective. It is only if the hurdles facing a taxpayer in seeking judicial review are so great as to amount, in practice, to a denial of access to justice that the point has any validity; we cannot possibly conclude that that is so."

59. Mr Simpson put forward an additional submission in the second hearing, saying that Rolldeen's appeal should be regarded as being against HMRC's refusal to reverse its OTT Decision, and this would bring the case within s 83(1)(wb). However, that is not what happened. Instead Rolldeen appealed the exercise of the para 30 powers, it did not appeal HMRC's refusal to reverse its decision.

60. For the reasons set out above, I concluded that Rolldeen has no right of appeal against the OTT Decision. However, I also took into account the following:

(1) a person who applied for HMRC to exercise their para 30 powers to purport the OTT (because it was in their interest to have a valid OTT in place) would have a right of appeal if HMRC refused to use that power. There is thus an unusual lack of symmetry between that scenario and the position in which Rolldeen finds itself;

(2) both parties were of the view that there was an appeal right; and

(3) no case law was cited on this issue and I was unable to identify any.

61. I have therefore gone on to consider, in the alternative, what the position would be were I to be wrong, so that Rolldeen does have an appeal right.

WHETHER HMRC ACTED UNREASONABLY

62. If Rolldeen does have an appeal right, VATA s 84(7ZA) comes into play. This reads:

> "Where there is an appeal against such a refusal as is mentioned in section 83(1)(wb)
>
> (a) the tribunal shall not allow the appeal unless it considers that HMRC could not reasonably have been satisfied that there were grounds for the refusal, and
>
> (b) the refusal shall have effect pending the determination of the appeal."

63. Thus, the Tribunal can only allow the appeal if HMRC acted "unreasonably". It was common ground that this was to be understood in line with the principles established in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA), in which Lord Greene MR said at p 229:

> "…the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably.' Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority."

HMRC's knowledge?

64. Mr Ali submitted that it was unreasonable of HMRC to have exercised the discretion to deem the OTT to have effect, because they had failed to take into account the fact that Officer House had always known that Rolldeen had made exempt supplies before 10 January 2008. Mr Simpson submitted that Rolldeen were prevented ("estopped") from relying on this point.

The principles of estoppel by convention

65. In ordinary language, the principle of "estoppel" means that a person may be prevented from relying on a particular fact or argument in certain circumstances. In *Tinkler*, Lord Burrows gave the leading judgment with which Lord Hodge, Lady Arden and Lady Rose agreed. At [31] he accepted the following definition of "estoppel by convention":

> "This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter."

66. He said that it was no bar to the estoppel by convention that the mistake of the party raising the estoppel had not been instigated by the other party, or in other words, it did not matter that the party raising the estoppel "came to hold its mistaken belief in the first place as a result of its own error alone", see [32]. He went on to apply that principle in *Tinkler,* saying at [56]:

> "it is not a bar to estoppel that HMRC initiated the mistake or…was careless in relation to that mistake or induced the other party's mistake by a misrepresentation."

67. In *Benchdollar v HMRC* [2009] EWHC 1310 ("*Benchdollar*"), Briggs J (as he then was) set out the following principles at [52]:

> "(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.
>
> (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.
>
> (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.
>
> (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
>
> (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

68. Those principles were confirmed in *Tinkler*, where Lord Burrows expanded the first *Benchdollar* point by saying that for there to be a "common assumption", it was necessary that "something must be shown to have 'crossed the line' sufficient to manifest an assent to the assumption", see [50].

69. He then gave a further explanation at [51], in which he called the two parties "C" and "D". I first set out his text and then rephrase it so that C is HMRC (the party raising the estoppel) and D is Rolldeen:

> "It may be helpful if I explain in my own words the important ideas that lie behind the first three principles of *Benchdollar*. Those ideas are as follows. The person raising the estoppel (who I shall refer to as 'C') must know that the person against whom the estoppel is raised (who I shall refer to as 'D') shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for C's reliance on the common assumption."

70. Rephrased in the context of this appeal, the key parts of that passage would read:

> " [HMRC] must know that [Rolldeen] shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and [Rolldeen] must (objectively) intend, or expect, that that will be the effect on [HMRC] of its conduct crossing the line so that one can say that [Rolldeen] has assumed some element of responsibility for [HMRC's] reliance on the common assumption."

71. Lord Burrows continued at [52]:

> "It will be apparent from that explanation of the ideas underpinning the first three *Benchdollar* principles that C must rely to some extent on D's affirmation of the common assumption and D must (objectively) intend or expect that reliance."

72. Rephrased in the context of this appeal, the passage would read:

> "It will be apparent from that explanation of the ideas underpinning the first three *Benchdollar* principles that [HMRC] must rely to some extent on

> [Rolldeen's] affirmation of the common assumption and [Rolldeen] must (objectively) intend or expect that reliance."

Mr Ali's submissions

73. Mr Ali relied on the fact that Officer House knew about the exempt supplies before the OTT application was made, and thus HMRC were aware at all times that the statutory requirements to grant an OTT had not been satisfied. Despite that knowledge, HMRC did not consider the factors at (a) to (c) of Sch 10, para 2(9) (see §46.) and did not give the necessary prior written permission. In terms, this was a submission that Rolldeen had not "crossed the line".

74. Mr Ali also said that point (v) of *Benchdollar* was not satisfied because HMRC had suffered no "detriment". He relied on the fact that VAT had not been charged when the Jubilee Centre was purchased, saying that this was therefore not a case where a company had reclaimed input tax on the purchase under an invalid OTT, which HMRC were now out of time to recover.

Mr Simpson's submissions

75. Mr Simpson submitted that the principle of estoppel by convention was plainly engaged, because all the requirements in the list set out by Briggs J were satisfied:

> (1) From 6 March 2008, when Officer Bounds wrote to HMRC acknowledging that the Jubilee Centre was opted to tax, until Mr Ali's letter of 12 November 2018, both parties had proceeded on the common assumption that there was a valid OTT in place. Rolldeen had "crossed the line" so as "to manifest an assent to the assumption" when Mr Mufid submitted Form VAT1614A to HMRC and followed this with the letter to Officer Bounds. Both documents explicitly stated that Rolldeen had made no exempt supplies in relation to the Jubilee Centre, and both had been signed by Rolldeen's director, Mr Shaheen.
>
> (2) Rolldeen assumed responsibility for the common assumption when Form VAT1614A and the letter were sent to Officer Bounds.
>
> (3) HMRC had relied on the common assumption that the OTT was valid.
>
> (4) There was subsequent mutual dealing between the parties, because Rolldeen reclaimed input VAT on costs relating to the Jubilee Centre and HMRC had accepted that this VAT was validly deductible, and made any related repayments.
>
> (5) HMRC would suffer significant detriment if there was no valid OTT, because there would be no VAT on the sale of the Jubilee Centre. In addition to that £50,000, Rolldeen had claimed significant input tax in relation to the Jubilee Centre, forming part of the £122,797.94 included on its VAT returns during the period for which Rolldeen had owned the property. HMRC was unable to recover that VAT because the Jubilee Centre had been sold on 2 March 2015. Almost eight years has passed since that date, well outside the time limit for raising an assessment (see VATA s 77(1)(a)).

The Tribunal's view

76. I agree with Mr Simpson that all the principles set out in *Benchdollar* are satisfied for the reasons he gives. I also agree that by signing and submitting the form VAT1614A, and subsequently confirming the position in the letter to Officer Bounds, Rolldeen's conduct "crossed the line", because it must have objectively intended that HMRC would accept that no previous exempt supplies had been made.

77. Although I have found as a fact that Officer House knew there had been exempt supplies, that does not prevent the estoppel from operating. For whatever reason, Officer

House's knowledge was not taken into account when Officer Bounds issued the OTT letter. Failing to consider all relevant material was a mistake by HMRC, but as Lord Briggs said, "it is not a bar to estoppel that HMRC initiated the mistake or…HMRC was careless in relation to that mistake..."

78. Rolldeen is therefore estopped from putting forward the submission that HMRC acted unreasonably in failing to take into account that Officer House had known that Rolldeen had been exempt supplies before Mr Mufid sent the Form VAT1614A to HMRC.

Other submissions

79. Both parties made a number of other submissions about the reasonableness or otherwise of the OTT Decision.

Failure to check?

80. Mr Ali said that it is clear from publicly available information that HMRC open thousands of compliance checks every year, but they had not carried out such a check when they received Rolldeen's Form VAT1614A. He submitted that HMRC had acted unreasonably because they had not taken into account their own failure to carry out a compliance check.

81. Mr Simpson responded by saying that VAT is a self-assessed tax, so the onus is on taxpayers to ensure that the correct information is provided to HMRC. It is then a matter for HMRC to decide when and upon whom they carry out compliance checks. In Rolldeen's case, Officer Bounds relied on the signed Form VAT1614A and the subsequent written confirmation, and accepted they were correct. That was not unreasonable.

82. I agree with HMRC. The obligation is on taxpayers to complete forms correctly, and where, as here, a taxpayer has twice provided HMRC with incorrect information, that taxpayer cannot then blame HMRC for not having carried out a compliance check. To borrow the words used by Lord Greene MR, this is plainly not a factor which HMRC was "bound to consider".

Own occupation?

83. Mr Ali also relied on an anti-avoidance test at Sch 10, para 15(4). That provision, together with a related public notice which has the force of law, provides that if the grantor of a lease is in occupation of more than 2% of the leased property, the supply is exempt; it therefore follows that it cannot be opted.

84. Rolldeen's grounds of appeal, drafted by Mr Ali, said that "due to repair" Rolldeen had occupied 2% of the Jubilee Centre; as a result it failed that anti-avoidance test and also failed to satisfy the OTT requirements. Mr Ali said it was unreasonable of HMRC to exercise their discretion retrospectively to validate the OTT, given that it was in any event invalid for this further reason. In oral submissions, he said that throughout its ownership, Rolldeen had occupied a room in the Jubilee Centre for the purposes of rehabilitation and management and the room was more than 2% of that property.

85. Mr Simpson said that there was no evidence whatsoever to support this submission. I agree. Whether or not the anti-avoidance provisions are met is primarily a question of fact, and there were no documents, plans, leases, letters, agreements or witness statements relating to *any* occupation of the Jubilee Centre by Rolldeen, let alone sufficient evidence to show that it occupied more than 2%. It was plainly reasonable of HMRC not to take this point into account.

The purpose of the provision

86. For his part, Mr Simpson submitted that Rolldeen's situation was "exactly what para 30 was designed to address" because both Rolldeen and HMRC had operated on the basis that the OTT had been valid, and if HMRC were now prevented from retrospectively deeming the OTT to be effective, there would be a significant loss of tax.

87. Mr Ali's response was the same as that set out above, namely that as Rolldeen had not reclaimed VAT on the purchase, there was no real detriment to HMRC

88. I agree with Mr Simpson. This is exactly the sort of situation for which para 30 was designed. Both parties had proceeded on the basis that the OTT was valid, with Rolldeen reclaiming input VAT and HMRC allowing those claims, and Rolldeen charging output VAT to its tenants; that VAT would in turn constitute allowable input tax for those businesses.

89. As the statute puts it, notification of the option had "purportedly been given" to HMRC by Rolldeen, and throughout the period from receiving Officer Bounds' letter until it sold the Jubilee Centre, Rolldeen had "purportedly exercised" the OTT. It was thus entirely reasonable and appropriate of HMRC to deem the purported option to have been validly exercised.

OVERALL CONCLUSION AND APPEAL RIGHTS

90. On the basis that Rolldeen had no right of appeal, I strike out its appeal under Rule 8(1) of the Tribunal Rules because the Tribunal does not have jurisdiction to decide the case. In the alternative, if it does have a right of appeal, I find that HMRC acted entirely reasonably in issuing the OTT Decision, and I refuse that appeal. The practical consequence of my decision is that the £50,000 assessment, against which no appeal has been made, is payable by Rolldeen.

91. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 04TH APRIL 2023