



Press Summary

22 March 2023

Moulsdale t/a Moulsdale Properties (Appellant) v Commissioners for His Majesty’s Revenue and Customs (Respondent) (Scotland)

[2023] UKSC 12

On appeal from: [2021] CSIH 29

Justices: Lord Reed (President), Lord Briggs, Lord Sales, Lord Hamblen, Lady Rose

Background to the Appeal

The question that this appeal raises is whether Mr Moulsdale (trading as Moulsdale Properties) should have charged value added tax (“**VAT**”) on the sale price of a property which he sold to a purchaser who had no connection to him in September 2014.

Sales of land and buildings are generally exempt from VAT in accordance with Schedule 9 Group 1 to the Value Added Tax Act 1994 (“**VATA**”). However, paragraph 1 of Schedule 10 to VATA gives a taxable person an option to tax transactions relating to a particular parcel of land. Where the option to tax is exercised, VAT must be charged and accounted for to His Majesty’s Revenue and Customs (“**HMRC**”) whenever there is a sale of that land. Paragraphs 12 to 17 of Schedule 10 to VATA provide for compulsory disapplication of an option to tax in certain circumstances. If the option to tax is disappplied in accordance with those paragraphs, a sale of property where an option to tax has been exercised goes back to being a sale that is VAT exempt.

In 2001, Mr Moulsdale bought a building for a purchase price to which VAT was added because the seller had opted to tax the land on which the building was built. Mr Moulsdale then himself exercised an option to tax that land. This enabled him to claim back from HMRC the input VAT he had paid to the seller. In 2014, Mr Moulsdale sold the property to a company which was not registered for VAT. When Mr Moulsdale sold the property, he did not add VAT to the purchase price. Mr Moulsdale argues he did not charge VAT because Schedule 10 to VATA meant his option to tax was disappplied and so the sale of the property was VAT exempt. HMRC disagreed. HMRC’s position is that the sale was not tax exempt, and Mr Moulsdale should have charged the purchaser VAT and then paid that VAT over to HMRC.

Mr Mouldsdale was unsuccessful in challenging HMRC's decision before the First-Tier Tribunal, Upper Tribunal, and the Inner House of the Court of Session in Scotland. Mr Mouldsdale now appeals to the Supreme Court.

Judgment

The Supreme Court unanimously dismisses the appeal. Lady Rose gives the judgment, with which Lord Reed, Lord Briggs, Lord Sales and Lord Hamblen agree.

Reasons for the Judgment

The statutory provisions

The legislation which determines whether VAT is chargeable on the sale of land is Schedule 10 to VATA. The case turns on whether Mr Mouldsdale is a "developer" of the land as defined in paragraphs 12 – 17 of that Schedule. Unfortunately, because of the way the provisions are drafted there is a conundrum in the legislation when it comes to deciding whether Mr Mouldsdale is a developer of the land and hence whether the sale of the land is subject to VAT or is exempt from VAT. Under Schedule 10:

- (1) If Mr Mouldsdale did intend or expect the purchaser to pay VAT on the sale price for the building (that price being more than the minimum set of £250,000) then Mr Mouldsdale is a developer of the land. That would mean that paragraph 12(1) of Schedule 10 disapplies the option to tax, so that the sale of the land reverts to being an exempt transaction on which Mr Mouldsdale should not charge VAT.
- (2) However, if Mr Mouldsdale did not intend or expect that the purchaser would pay VAT on the price of the building (being more than the minimum of £250,000), then Mr Mouldsdale would not fall within the definition of a "developer of the land" and the option to tax would still apply, making the sale subject to VAT.

The effect of the relevant Schedule 10 provisions is therefore that if Mr Mouldsdale charges VAT then he is a developer of the land and VAT is not payable because the option to tax is disapplied but if Mr Mouldsdale does not charge VAT then he is not a developer of the land and the option to tax still applies to the sale so that he should charge VAT [4], [33-34].

The proper construction of paragraphs 12 and 13 of Schedule 10

Mr Mouldsdale and HMRC acknowledge the circularity problem created by the provisions of Schedule 10 and have proposed different solutions [38].

Mr Mouldsdale argues for a broad construction of the provisions. He contends that because he has exercised the option to tax in relation to the land, he did intend or expect that the purchaser would pay VAT on the purchase price of the land. On Mr Mouldsdale's solution, the VAT inquiry should stop here. Accordingly, because Mr Mouldsdale has the relevant expectation, he is a developer of the land, and the sale is therefore exempt, and he was correct not to charge VAT. Mr Mouldsdale argues that to avoid the circularity, one should not go on to reconsider the disapplication of the option to tax after concluding that the sale is exempt [39].

However, the Supreme Court holds that the narrow construction put forward by HMRC is the correct construction as it makes as much sense as one can of the legislation. The Supreme Court agrees with HMRC's solution that for the purposes of these provisions, in order to

decide whether the sale should bear VAT or not, the relevant intention or expectation as to whether the purchaser would pay VAT on a capital expense in relation to the building must be an intention or expectation about incurring VAT on some other cost, different from the actual price of the building itself [56], [67]. Thus, HMRC was correct that Mr Mouldsdale should have charged VAT on the sale price.

The Supreme Court holds that Schedule 10 is aimed at ensuring that exempt businesses cannot recover input tax [58]. This purpose would be defeated on the construction Mr Mouldsdale argues for. On his broad construction, the provisions would enable him to have the benefit of the option to tax the land as long as that was favourable to him but enable him to switch off the option to tax simply by selling it if he did not want to have to charge the purchaser VAT on the purchase price [60].

References in square brackets are to paragraphs in the judgment

NOTE:

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)