Exempt Supplies of Land:

1. **Group 1 Schedule 9 Value Added Tax Act 1994 (as amended)**
   
   1.1 Group 1 sets out when supplies of land are exempt (so that VAT is not charged on such supplies, unless the option to tax is exercised: see below).
   
   1.2 The basic rule is that the grant of any interest in or right over land or of any licence to occupy land is an exempt VAT supply, unless the grant falls within a number of exceptions that are standard-rated supplies as set out in the Schedule.
   
   1.2.1 The term grant includes an assignment or surrender: Note 1 to Group 1 Schedule 9 VATA 1994.

2. Pursuant to the Sixth European VAT Directive, article 13(b), “the leasing or letting of immovable property” is an exempt supply. Unless the landlord has opted to tax, then VAT is not chargeable on the rent payable by the tenant.
   
   2.1 It follows that the assignment or surrender of a lease are generally exempt supplies.
   
   2.1.1 Where a landlord pays consideration for the surrender by the tenant of an interest in land, the surrender is a supply deemed to be made by the tenant and is exempt unless the tenant has opted to tax.
   
   2.1.2 The assignment of a lease is deemed an exempt supply made the outgoing tenant to the assignee, unless the assignor has opted to tax.
   
   2.1.3 It is beyond the scope of this note to consider reverse surrenders, reverse assignments and reverse premiums.

3. **The Option to Tax (Formerly The Election to Waive Exemption) Schedule 10 VATA 1994, Substituted by the Value Added Tax (Buildings and Land) Order 2008 (as amended by subsequent statutory instruments)**
   
   3.1 The effect of exercising the option is that grants (e.g. dispositions) of land that were previously exempt now become taxable: para 2. The person exercising the option is called the opter.
   
   3.2 The law remains that an option to tax has effect in relation to the land specified in the option: paragraph 18(1).
   
   3.3 An option to tax has effect from (a) the start of the day on which it is exercised, or (b) the start of any later day specified in the option: paragraph 19(1).
3.4 An option to tax has effect only if notification of the option is given to HMRC (a) before the end of the period of 30 days beginning with the day on which the option was exercised, or (b) before the end of such longer period beginning with that day as the Revenue may in any particular case allow: paragraphs 20(1) & (2). Revenue and Customs recommend that recommend that the opter “keep a written record, showing clear details of the land or buildings you are opting to tax, and the date you made your decision” (para 4.1 VAT Notice 742A).

3.5 In TC03706: Honduras Wharf Ltd, the First-tier Tribunal (Tax) said -

“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.”

4. Option Exercised in Error

TC00494: Grenane Properties Limited

This appeal concerned the sale of a piece of development land. HRMC officers determined that in relation to the sale, the Appellant had failed to charge output tax, even though there was a pre-existing election to tax under paragraph 2(1) Schedule 10 VAT Act 1994.

The Court - being the First-tier Tribunal (Tax) - accepted that the election was made as the result of a misunderstanding between the Appellant company’s director and the company’s Accountants.

In this case, the Court accepted that the election to tax (using the former terminology) had been made, even though it had made no commercial sense to do so. Furthermore, a notification of election had been made.
The Tribunal also accepted that the Appellant did not treat the Property as VAT elected after the notification had been made.

Accordingly, the Appellant had not actually intended to make the election, and for this reason no valid election had been made.

5. Option Exercised Just Before Completion of a Sale

Marlow Gardner & Cooke Ltd v Commissioner of Revenue & Customs (2006) EWHC 1612 (Ch)

The seller of commercial premises opted to tax them before completion but notified HMRC of its decision afterwards. The sale price was £400,000 plus VAT.

At the time of the case, the legislation then in force called opting to tax an election to waive the exemption for VAT.

The High Court held that an election itself does not have to observe any formalities. What is required is that a sufficiently clear indication of intention to elect has to be sufficiently manifested or (so far as required) communicated.
An election is a two-stage process; the decision to exercise the option and then the notification to HMRC within the period of 30 days beginning with the date on which the election is made.

The election has no effect until the notification is made. The effect of a valid notification within 30 days is to make the effect of the election retrospective to the date of the election.

Therefore, the post-completion notification by the seller was valid, notwithstanding that at the time it was made after the seller had disposed of the land.

[Note: The same reasoning would apply to the exercise of an option to tax under current legislation.]

6. Evidence of Option Available?

Percival observes that it is sometimes difficult to establish whether the option to tax has been exercised due to the difficulty for the buyer of obtaining all relevant VAT records, for example when buying from a liquidator or receiver, or when there is a quick deal: Weightmans’ Commercial Property Focus, November 2009.

7. Purchase Price Always Exclusive of VAT?

**CLP Holding Company Ltd v Singh [2014] EWCA Civ 1103**

The contract for the sale of a freehold property was based on the Standard Conditions of Sale (4th edition).

Clause 1.4 of the Conditions provided that, 'An obligation to pay money includes an obligation to pay any value added tax chargeable in respect of that payment' and 'All sums made payable by the contract are exclusive of value added tax'.

The contract price was £130,000 and the sale was completed in 2006. However, the seller, as a VAT registered business, had opted to waive the VAT exemption in respect of the property in 1989.

In 2007, HMRC raised a notice of assessment requiring payment of VAT on the transaction.

The issue was whether the seller could compel the buyer to pay to the seller VAT at the then prevailing rate of 17.5%.

The Court of Appeal ruled that clause 1.4 of the general conditions, read in isolation from the remainder of the contract, was susceptible of only one reasonable interpretation, namely that any liability for VAT should fall on the buyer.

However, the contract had to be interpreted as a whole in the light of all of the circumstances of the parties’ relationship and the relevant facts surrounding the transaction as known to them. The Court, in so construing the contract, had little doubt that the parties had intended that nothing was or could become payable by the defendants over and above the specified purchase price of £130,000. One of the relevant factors was that the purchase price had been described as £130,000 but the contract did not specifically indicate that this price was exclusive of VAT.
8. VAT Position on Leasehold Service Charge Payments on Opted Land

8.1 Where a landlord has opted to tax commercial premises, the question of whether VAT is chargeable on any sums not consisting of rent that are payable by the tenant to the landlord is no longer straightforward as a result of the case of Field Fisher Waterhouse LLP v Revenue and Customs Commissioners C-392/11, where the Court of Justice of the European Union ruled that the VAT Directive must be interpreted as meaning that the leasing of immovable property and the supplies of services linked to that leasing may constitute a single supply from the point of view of VAT. It is for the referring (national) court to determine whether, in the light of the interpretative guidance provided by the CJEU in the Field Fisher judgment and having regard to the particular circumstances of the case, the transactions in question are so closely linked to each other that they must be regarded as constituting a single supply of the leasing of immovable property.

8.2 The problem is illustrated by the case of Honourable Society of the Middle Temple v Revenue and Customs Commissioners [2013] UKUT 0250 (TCC), where the landlord opted to tax but it did not charge VAT on charges made to its tenants for the supply of cold water, on the basis that such supplies are ordinarily zero-rated.

See paragraph 60 for the numerous principles derived from CJEU cases.

In this case, applying those principles, the First-tier Tribunal (Tax) ruled that because the tenants had no practical alternative to obtaining their supplies of water from their landlord, it followed that they could not choose to obtain water by way of a separate supply by a third party. Consequently, in this case the premises and the water were inseparable and indispensable, so that those elements had to be considered to be so closely linked that they formed, objectively, a single indivisible economic supply which it would be artificial to split. That supply was a single supply of the leasing of immovable property which was chargeable to VAT by virtue of the landlord’s option to tax.