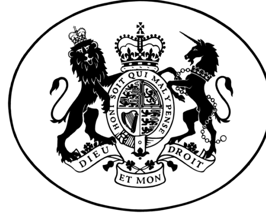

TC02617

Appeals numbered: TC/2011/0220 & TC/2011/0257

VAT – Whether sale of property subject to agreement for lease TOGC - on facts - yes – Whether assessment to tax made timeously – no – Whether vendor of property required to repay input VAT to reflect partially exempt use of property by purchaser – no – appeals allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) THE ROYAL COLLEGE OF PAEDIATRICIANS AND CHILD HEALTH

(2) COLERIDGE (THEOBALDS ROAD) LTD — **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS — **Respondents**

TRIBUNAL: JUDGE DAVID DEMACK

Sitting in public at Manchester on 4, 5 and 6 February 2013

Michael Conlon QC instructed by BNB Tax Advisors for the Appellants

James Puzey of counsel instructed by the solicitor and counsel of HM Revenue and Customs, for the Respondents

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DECISION

1. The appeals of the Royal College of Paediatricians and Child Health ("the College") and Coleridge (Theobalds Road) Ltd ("Coleridge") arise out of the sale of the building 5-11 Theobalds Road, London WC1X 8SH ("the Property") by Coleridge to the College, a sale which was treated as the transfer of a going concern ("TOGC"). The questions the appeal raise are whether the sale was such a transfer and, if it was, whether an assessment by the Commissioners for the VAT said to be due on the sale was issued within the statutory time limits. In the alternative, the Commissioners claim that, if VAT was not chargeable, Coleridge is required to adjust its input VAT deduction.

2. By letter of 5 July 2010 the Commissioners informed Coleridge that its purchase did not amount to TOGC and, since it had elected to waive VAT exemption, the transaction was a standard rated supply. The Commissioners refer to that as their "Preferred Decision". They further decided that, if the transaction was to be treated as a TOGC, Coleridge was required to adjust its input VAT deduction on refurbishment expenditure to reflect a change of use by the College ("the Alternative Decision"). On the same date the Commissioners informed the College of their decisions. And, by letter of 9 July 2010, they notified Coleridge of an assessment to VAT of £2,598,191 in respect of period 02/08.

3. Both Coleridge and the College required the Commissioners to review their decisions, but on 30 November 2010 the decisions were upheld.

4. On 29 December 2010 both Coleridge and the College appealed to the tribunal, and on 4 March 2011 it was directed that the appeals proceed and be heard together. I observe that the College has sufficient interest to bring its appeal as it was counterparty to the sale of the Property, and is contractually liable to indemnify Coleridge for any VAT found to be due.

5. The appeal against the Preferred Decision is brought under s.83(b) of the Value Added Tax Act 1994 ("the 1994 Act"); that against the Alternative Decision under s.83(c); and that against the VAT assessment under s.83(p).

6. Before me, the College and Coleridge were represented by Mr Michael Conlon QC, and the Commissioners by Mr James Puzey of counsel. They provided me with four agreed bundles of copy documents, one of which contained the authorities relied upon. Three witnesses were called to give oral evidence for the Appellant. They were Ms Claire Treacy, the head of tax and risk for Valad Property Group (of which Coleridge forms part), Michael John Poole, a chartered accountant who was at the relevant time director of internal services at the College, and Steven Anthony Botham, a chartered tax adviser and director of Covertax Chartered Tax Advisors, a tax adviser to the College. I also took oral evidence from two witnesses for the Commissioners. They were Simon David Emlyn Lewis, the officer who determined the sale of the Property not to be that of a TOGC, and Paul David Staniforth, the officer who made

the VAT assessment on Coleridge. It is from the whole of the evidence presented to me that I make my findings of fact.

The facts

5 7. The College is a registered charity whose activities are predominantly non-business or exempt, so that it is partially exempt for VAT purposes. It was registered for VAT on 23 July 1996, with a business activity of advancing education in child health and paediatrics.

8. Prior to 2008 the College occupied premises at 50 Hallam Street and Great
10 Portland Street, London W1. Part of those premises it let to the British Association of Perinatal Medicine ("BAPM"), a registered charity involved in paediatrics and child health which is affiliated to the College. Another part of the Hallam Street premises was let to the British Association for Community Child Health ("BACCH"), a charity with objects similar to those of BAPM, and which too is affiliated to the College.

15 9. Coleridge purchased the Property on 9 August 2005 and was registered for VAT on 9 August 2005. On 6 October 2005 it elected to waive exemption of the Property from VAT. Coleridge let the Property to tenants. In November 2006, Coleridge decided to refurbish the Property and had its tenants surrender their leases. Following surrender, in 2007 Coleridge proceeded with the refurbishment. It did so with a view
20 to re-letting the Property to new tenants. Its works created a capital item within the meaning of Part XV of the Value Added Tax Regulations 1995 ("the Regulations"). The cost of the works was £3,221,010 plus VAT of £563,676. On completion of the refurbishment works, Coleridge placed the Property on the market to let. It was thus carrying on a business activity of letting property, and so I find.

25 10. In 2007 the College wished to consolidate its activities into one building, and to dispose of the freehold of its existing buildings with vacant possession. It therefore instructed its surveyors to seek new premises and was informed that the Property was available. It was further advised that Coleridge might be prepared to sell, as opposed to leasing it. BAPM and BACCH wished to move with the College and remain its
30 tenants.

11. Terms for the purchase of the Property by the College were agreed with Coleridge, and it instructed its tax advisers to achieve the most VAT efficient structure for the purpose. The advice provided indicated that VAT could be saved if the purchase were to be structured as a TOGC. If LAPM were to enter into an
35 agreement for lease before the College entered into an agreement to purchase the Property, since Coleridge was carrying on a property business, it would constitute a TOGC.

12. In evidence, Mr Lewis and Mr Staniforth confirmed that the Commissioners do not give clearances as to whether a property transaction constitutes a TOGC, nor do
40 they give post-transaction rulings. Consequently, there was no question of Coleridge and the College being able to ascertain from the Commissioners their views on whether the sale of the Property to the College would qualify as a TOGC.

13. Before things were taken further, on 2 October 2007 the College elected to waive exemption from VAT over the Property.

14. The College introduced BAPM to Coleridge as a potential tenant of part of the Property. On 16 November 2007 Coleridge, in consideration of a premium of £1,000 plus VAT, entered into an agreement for lease for a single room in the Property with BAPM ("the Agreement for Lease"). The terms of the Agreement for Lease relevant for present purposes are the following:

"2. Conditionality

2.1 This Agreement and the grant of the Lease is conditional on the Landlord exchanging an unconditional contract for the sale of the freehold property known as 5 – 11 Theobalds Road, London, WC1 (of which the Property forms part) with The Royal College of Paediatrics and Child Health by 6th of November 2007 (the Condition).

2.2 If the Condition is not satisfied by the deadline stated in Clause 2.1 then this Agreement shall terminate absolutely and the Tenant hereby waives any rights claims and actions that it may have against the Landlord absolutely and clause 3.1.3 shall apply.

3. Grant of the Lease

3.1 The Lease

3.1.1 The Landlord shall grant and the Tenant shall take the Lease for a term of fifteen years from the Completion Date (subject to earlier determination as therein provided).

3.1.2 In consideration of the Landlord entering into this Agreement the Tenant shall on exchange pay to the Landlord a premium of £1,000 plus VAT and the Landlord shall produce within ten working days of this payment a valid VAT invoice in respect of such sum.

3.1.3 If the condition is not satisfied on the date specified in clause 2.1 or if completion of the Lease has not occurred by the 31st March 2008 the Landlord shall forthwith repay to the Tenant the said sum of £1,000 plus VAT together with any interest earned thereon.

3.1.4 The Completion Date shall be the date 21 days after the Landlord serves written notice on the Tenant that it requires to complete which notice must be served no later than 10th March 2008.

3.2 Rent

The rent first reserved by the Lease shall commence to be payable on the Completion Date in accordance with the provisions therefor contained in Clause 8 of the Lease.

6. Completion

5 6.1 Time

6.1.1 Completion of the Lease shall take place on the Completion Date.

10. General

10.1 Continuing effect

10.1.1 This Agreement shall remain in full force and effect after completion in
10 respect of any matters agreements or conditions which have not been done observed or performed before completion. “

15. The form of lease intended to be entered into was annexed to the Agreement for Lease. All the terms necessary to constitute a valid lease were present.

15 16. Later on 16 November 2007, Coleridge and the College exchanged contracts for the sale of the freehold estate in the Property (“the Sale Agreement”). Under the Sale Agreement the Property was sold for £17,445,000 plus VAT with the benefit of the Agreement for Lease and certain other assets. As the parties believed the transaction to be that of a TOGC, the Sale Agreement contained the following term:
20

“The Seller and the Buyer believe that the sale of the Property will constitute the transfer of the Seller’s business as a going concern which is free from Value Added Tax under Article 5 of the VAT (Special Provisions) Order 1995 and that accordingly (subject to the following provisions of this clause) VAT will not be
25 chargeable in respect of the sale.”

17. I accept a claim by Mr Conlon that the inclusion of such clauses is standard commercial conveyancing practice in agreements for the sale of properties believed to be TOGCs.

18. The Sale Agreement also provided for payment of a deposit of 5% of the sale
30 price to be paid to the vendor’s solicitors as stakeholders. (The effect of that term was to delay the date of supply until completion of the sale). The Sale Agreement further provided that if it was eventually determined that the transaction was not a TOGC, the College would indemnify Coleridge to the extent of the VAT determined to be due.

35 19. The sale of the Property to the College was completed on 15 January 2008. As the sale was treated as a TOGC no VAT was charged on it; the parties considered that the transaction was “de-supplied” under s.5(3)(c) of the 1994 Act and art. 5(1) of the Value Added Tax Act (Special Provisions) Order 1995.

20. Coleridge made its VAT return for period 02/08 by the end of March 2008. It showed "Nil" output tax.

21. On 20 March 2008, the College granted BAPM a 15 year lease of a room in the Property; and on 11 May 2008 it granted BACCH a 15 year lease of another room in the Property. At that stage the College intended to let surplus space on the fourth floor to a third party tenant. Although a prospective tenant was introduced by the College's agents, on 28 July 2008 the College decided not to go ahead with such a letting as it might require the space for its own purposes.

22. The parties to the sale of the Property considered the works carried out by Coleridge before the sale to create a Capital Goods Scheme ("CGS") item within Part XV of the Regulations. And as the sale was treated as a TOGC, the CGS rules transferred the liability to adjust input VAT deduction to the transferee. In addition, works subsequently carried out by the College also created a CGS item. In order to clarify the correct treatment, on 18 November 2008 the College's advisers wrote to the Commissioners "regarding its use and purchase of its premises at Theobald's Road". They included a "Checklist for Non-Statutory Clearance Application" in which they said:

> "The application concerns the adjustments that will need to be made by RCPCH [the College] under the Capital Goods Scheme rules in accordance with Regulations 112-116 Value Added Tax Regulation[s] 1995 following the purchase of new premises by RCPCH.
>
> RCPCH purchased the building at 5-11 Theobald's Road on 16 November 2007from Coleridge (Theobald's Road) Limited for £17,445,000. The purchase was not subject to VAT since it was treated as a transfer of a going concern…"

23. That information was repeated verbatim, except that the second paragraph was prefaced with the words "As a result", in Appendix B to the letter, a report entitled "Facts of the Transaction" prepared by BNB Tax Consultants.

24. The tax advisers' letter was acknowledged by email on 19 November 2008, and was followed by a telephone conversation between Mrs Basra of BNB and Mr Lewis on 12 December 2008.

25. By letter of 29 December 2008 to BNB Mr Lewis said that he could not "comment [on matters the subject of discussion on 12 December 2008]without visiting your client to make sure I understand all the facts and aspects of the proposed attribution including the current Partial Exemption method". The remainder of the letter dealt solely with matters relating to the CGS.

26. On 23 February 2009 Mrs Basra wrote to Mr Lewis with a number of documents relevant to CGS questions he had raised, and attached a copy of the College's accounts for the years ended 31 August 2006 and 31 August 2007 with copies of floor plans showing "current usage" of the Property including the rooms occupied by BAPM and BACCH. The 2007 accounts included the following note,

numbered 7, at p.22: "Contracts for the sale of the freehold property were exchanged on 16 November and the sale was completed on 15 January 2008…"

27. Mr Lewis visited the Property on 14 May 2009 when he was met by Mr Poole and Mr Botham. The visit started with the group making a complete tour of the building. Various questions Mr Lewis asked were answered. He requested copies of various documents, whereupon Mr Botham was said by Mr Poole to have handed him his own file. Both Mr Poole and Mr Botham made a note of what occurred. Mr Poole's note contained no reference to the purchase of the Property by the College being a TOGC. However, in his oral evidence Mr Poole claimed that the question of a TOGC was discussed.

28. Mr Botham's note, having dealt with the CGS, went on to say "SL [Mr Lewis] OK TOGC", claiming it to indicate that Mr Lewis was told and accepted that the purchase of the Property was a TOGC. Mr Botham confirmed that, having checked that Mr Poole held copies of all relevant documents in his file, he handed his own file to Mr Lewis. In evidence, Mr Botham claimed, and I accept, that his file included all key contracts relating to the purchase of the Property and the College's subsequent transactions in it, including the Agreement for Lease, the Sale Agreement, the leases to BAPM and BACCH, and the notification of the College's option to tax the Property.

29. Mr Lewis was unable to recollect having discussed the question of a TOGC or having received the file of documents from Mr Botham. His own note of the meeting concentrated exclusively on the CGS, he maintaining that it merited particular attention since in his experience many charities failed to understand the CGS input tax rules and frequently incorrectly calculated the adjustments due thereunder. It was plain from his evidence, and I find, that at the meeting he focussed his attention exclusively on the CGS, and totally ignored what he had been told about the TOGC. I found him to be an honest witness, but unable simultaneously to consider that both the TOGC rules and the CGS required consideration.

30. I am satisfied on the balance of probabilities that immediately following the meeting Mr Botham handed to Mr Lewis a file containing all the documents referred to in the final sentence of the penultimate paragraph. Thus, on 14 May 2009 the Commissioners had evidence of all the facts needed to enable them to make the assessment under appeal by Coleridge.

31. In every accounting period between 02/07 and 11/09 inclusive Coleridge's VAT returns showed the same pattern; substantial claims for input VAT on refurbishment expenses and "Nil" output VAT. In its return for period 11/09, made in December 2009, Coleridge reclaimed input tax on expenses relating to the Property.

32. There followed further correspondence between those representing the College and the Commissioners until, on 17 November 2009, Mr Lewis telephoned Mr Poole to ask the College to provide the various agreements relating to the purchase of the Property by the College following advice from a colleague that the claim of a TOGC might not be correct. The documents requested were emailed to the Commissioners

on 24 November 2009. (In the Amended Statement of Case, the Commissioners stated that they requested "further copies" of the documents in question – a point seized upon by Mr Conlon as indicating that they had already been supplied with the documents).

5 33. In a letter of 25 November 2009 Mr Lewis said that he had doubts whether the sale of the Property to the College was a TOGC, but in a further letter dated 8 January 2009 [sic] he apparently accepted the treatment. His acceptance was later withdrawn in a letter dated 29 January 2009 [sic] received by the addressee on 29 January 2010.

34. On 29 April 2010 Mr Lewis wrote to Covertax, as the College's agent, with 10 details of his conclusion as to the TOGC issue and the clawback.

35. As mentioned at [2] above, Mr Lewis issued the Commissioners' Preferred Decision and the Alternative Decision on 5 July 2010. On the same date Mr Staniforth wrote to Coleridge informing it that it was to be assessed to VAT on the sale of the Property to the College. He followed it on 9 July 2010 with the assessment under 15 appeal. In evidence, Mr Staniforth admitted that calculation of the tax assessed on Coleridge was a very simple matter: since Coleridge was a making fully taxable supplies it was merely a question of determining 17.5% of the sale price of the Property.

Issues for determination

20 36. In their letters of 5 July 2010, the Commissioners challenged the TOGC treatment of the sale of the Property on two main grounds:

a. The agreement for Lease was conditional on the College acquiring the Property before the lease began and if the College failed to acquire the Property then the agreement was to become void and the premium 25 refunded

b. No property rental business was actually being carried on by Coleridge and it therefore had no business to transfer.

37. In the Amended Statement of Case of 7 March 2012, the Commissioners argued that the assessment was made timeously under the one year rule in s.73(1)(a) of the 30 1994 Act as they did not learn the relevant facts relating to the TOGC until November 2009 when they received Coleridge's return for period 11/09.

38. In relation to the Alternative Decision, the Commissioners' letters of 5 July 2010 advanced the proposition that the owner of a CGS item, in calculating an input VAT adjustment, must take into account any intended exempt use by the new owner. 35 And, in the Amended Statement of Case, the Commissioners further contended that, immediately prior to the Agreement for Lease, Coleridge formed the intention of using the Property for both exempt and taxable supplies, so that reg.108(1) of the Regulations applied.

39. It was common ground that, against that background, the issues for my determination were:

i. Did the sale of the Property amount to a TOGC which was neither a supply of goods nor a supply of services?

ii. If not, was the assessment time-barred by s.73(c) of the 1994 Act?

iii. If the sale was within TOGC relief, was Coleridge liable to make adjustments of input VAT incurred on the works it carried out either under Part XIV or Part XV of the 1995 Regulations?

THE TOGC ISSUE

The legal framework

40. Section 4 of the 1994 Act charges VAT on any supply of goods or services made in the United Kingdom where it is a taxable supply made by a taxable person in the course or furtherance of a business carried on by him. Section 5A of and Schedule 4 to the 1994 Act have effect for determining what is, or is to be treated as, a supply of goods or services. By s. 5(2)(b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services. Para 4 of Schedule 4 to the 1994 Act provides that the grant, assignment or surrender of a major interest in land is a supply of goods. “Major interest” is defined in s. 96(1) to include the fee simple.

41. Section 31(1) of the 1994 Act exempts from VAT any supply specified in Schedule 9. Item 1 of Group 1 of that Schedule specifies inter alia the grant of any interest in or right over land. However, where an election under para 2 of Schedule 10 has effect in relation to any land, the grant of any interest in it is taxable.

42. Section 5(3)(c) empowers the Treasury by order to provide, with respect to any description or transaction, that it is to be treated as neither a supply of goods nor a supply of services. Article 5 of the VAT (Special Provisions) Order 1995 applies to a TOGC and, so far as material, provides:

> “(1) Subject to paragraph (2) below, there shall be treated as neither a supply of goods nor a supply or services the following supplies by a person of the assets of his business –
>
> (a) their supply to a person to whom he transfers his business as a going concern where –
>
> (i) the assets are to be used by the transferee in carrying on the same kind of business, whether or not as part of any existing business, as that carried on by the transferor, and

(ii) in a case where the transferor is a taxable person, the transferee is already, or immediately becomes as a result of the transfer, a taxable person …

(b) their supply to a person to whom the transfer part of the business as a going concern where –

(i) that part is capable of separate operation,

(ii) the assets are to be used by the transferee in carrying on the same kind of business, whether or not as part of any existing business, as that carried on by the transferor in relation to that part, and

(iii) in a case where the transferor is a taxable person, the transferee is already, or immediately becomes as a result of the transfer, a taxable person …

(2) A supply of assets shall not be treated as neither a supply of goods nor a supply of services by virtue of paragraph (1) above to the extent that it consists of –

(a) a grant which would, but for an election which the transferor has made, fall within item 1 of Group 1 of Schedule 9 to the Act; or

(b) …

unless the conditions contained in paragraph (2A) below are satisfied.

(2A) The conditions referred to in paragraph (2)above are that the transferee has, no later than the relevant date –

(a) made an election in relation to the land which has effect on the relevant date and has given any written notification of the election required by paragraph 3(6) of Schedule 10 the Act ..”

Article 5(3) defines “relevant date” as the date of the grant.

43. The domestic law provisions derive from Articles 19 and 29 of Council Directive No 2006/112/EC (“the Principal VAT Directive”) and must be read in conformity with European law. Mr Conlon identified two cases as relevant to the concept and purpose of VAT relief. In Case C-497/01 *Zita Modes Sarl v Administration de l’Enregistrment et des Douanes* [2005] STC 1059 the Court of Justice of the European Communities (“the ECJ”) emphasised that these provisions were intended to facilitate transfers of undertakings by simplifying them and preventing an overburdening of the transferee with VAT. A transfer covers intangible as well as tangible elements of an undertaking and the relief cannot be limited, for

example, by requiring that the transferee must carry on the same type of activity. In Case C-444/10 *Finanzamt Ludenscheid v Schriever* [2012] STC 633 the taxpayer sold the stock and fittings of a sports shop but merely granted a leasehold interest in the shop premises. The ECJ held that an overall assessment had to be made and that there could be a transfer of assets for the purposes of TOGC relief if, taken together, the elements transferred were sufficient to operate the business as an economic activity.

Submissions and Conclusion

44. Mr Conlon maintained that it was apparent from the above that, for the purposes of TOGC relief, the assets of a business could sometimes consist of a property which was, or was to be, let. He referred to the guidance the Commissioners published in Notice 700/9 (March 2002), and particularly that relating to partly-let properties:

> "7.2 **Examples of when a business can be transferred as a going concern**.
>
> If you:
>
> * own the freehold of a property which you let to a tenant and sell the freehold with the benefit of the existing lease, a business of property rental is transferred to the purchaser. This is a business transferred as a going concern even if the property is only partly tenanted.
> * …
> * …
> * own a property and have found a tenant but not actually entered into a lease agreement when you transfer the property to a third party (with the benefit of the prospective tenancy but before a lease has been signed) there is sufficient evidence of intended economic activity for there to be a property rental business capable of being transferred.
> * …"

45. Mr Conlon observed that the situation where the transferor had entered into an agreement for lease prior to sale, but a lease had not actually been granted, arose in *Dartford Borough Council v HMRC* [2007] Decision No.20423, a case that could not be distinguished from the instant one. There it was held that the disposal of a development site by its owner with the benefit of the agreement for lease fell within TOGC relief. In observing that the Commissioners' decision that it did not so fall had been based on a misunderstanding of the legal nature of an agreement for lease, the Tribunal said:

> "15. It is clear that [the Commissioners] had no idea what an agreement for lease was and thought it no more than 'a statement of intent to lease'".

46. A key part of the reasoning in *Dartford* derived from *Walsh v Lonsdale* (1882) 21 Ch D 9 where, at 14, Lord Jessel MR stated:

> "The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case where both parties admit that relief is capable of being given by specific performance…"

47. Mr Conlon added that, subsequent to the *Dartford* case, the Commissioners had recognised that only part of a site could be held to be a TOGC by including in the most recent edition of Notice No.700/9/08 (April 2008) at 6.3 seventh indent a statement that there is a TOGC:

"If you…

- Have a partially-let building this is capable of being a property rental business, providing that the letting constitutes economic activity. This may include electricity sub-stations or space for advertising hoardings providing that there is a lease in place."

48. Finally, in relation to this point, Mr Conlon brought to my attention the following statements in HMRC's Guidance Manual:

> **"VTOGC6420 – Property Rental Business: Sale of An Existing Building**
>
> The most common situation is where the freeholder of a building currently let to tenants, sells it to another person with the benefit of the lease. There is no need for the whole property to have been let out. Part may be vacant or the freeholder may occupy part of the premises himself. The transfer of the building with the tenants is still a TOGC.
>
> …
>
> **VTOGC6460 – Land and Property: Property rental business: minimum occupation**
>
> HMRC has frequently been asked to define how small the part of land or building that is rented to a third party needs to be for HMRC to treat the transfer as "business" for TOGC purposes.
>
> It is our view that it is not possible or desirable to specify in terms of floor space or other percentages what a limit should be. It is important to look at each case and the precise circumstances.
>
> A property business can be a partially let building and can be part of a TOGC providing that the part that is let constitutes economic activity. This may include electricity sub-stations or space for advertising hoardings providing there is a lease in place".

49. Mr Puzey maintained that the College's reliance on the decision in *Dartford* was misplaced, for in that case the chronology and facts made it apparent that there was effectively a property rental business in existence which the appellant was transferring. That contrasted with the instant case where the purchaser provided a prospective tenant to the seller in order solely to give the appearance of a property-letting business which was to be "transferred back thereafter". He submitted that there was simply no substance in the College's claim that there was the transfer of a business or part thereof.

50. Mr Puzey observed that in the assessment letter of 5 July 2010, as an indication that the sale of the Property was simply that and not a TOGC, the conditional nature of the Agreement for Lease was pointed out. Unless the College agreed to buy the Property, the Agreement for Lease would never come into effect, and Coleridge would have no agreement for lease with BAPM.

51. He rejected a claim by the College that, following the exchange of agreements on 16 November 2007, the Agreement for lease came into effect so that Coleridge was bound to grant a lease to BAPM, and BAPM was bound to accept it; and, similarly, Coleridge was bound to sell the Property to the College, and the College was bound to complete: thus the College subsequently carried on Coleridge's property business. Mr Puzey maintained that that argument was mistaken; it elevated form over substance. What happened in 2007 was carefully planned and a choreographed exchange of documents and funds in order to allow the College to take the Property VAT-free. The conditionality of the Agreement for Lease was a feature which illustrated how hollow the exercise was. Although the sale of the Property was expressed to be subject to the Agreement for Lease, it did not amount to a business transfer because BAPM was in reality not part of Coleridge's business and would never be.

52. For that purpose, Mr Puzey relied on the following passage from the judgment in *Kenmir v Frizzell* [1968] 1 All ER 414:

> "In deciding whether a transaction amounted to the transfer of a business, regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another."

53. He also claimed that, in determining how the assets to be transferred were to be used, evidence of the parties' intentions was relevant, *CEC v Padglade Ltd* [1995] STC 602.

54. Mr Puzey also relied on the judgment of Gibson J in *Lord Fisher v CEC* [1981] STC 238 where at 246 the judge listed six indicia assisting in analysing whether an activity was properly regarded as a business. Mr Puzey submitted that there was no business activity between Coleridge and BAPM, and none was intended. The purpose of the Agreement for Lease was to create the appearance of the transfer of a business, and Coleridge agreed to facilitate that. BAPM and BACCH were existing tenants of the College at Hallam Street, and it was always intended that they should move with

the College to its new premises. BAPM would never pay rent to Coleridge pursuant to a lease of part of the Property.

55. Following a disclosure request made by the Commissioners late in 2012, the College disclosed advice provided to it by BNB, the flavour of which clearly indicated an intention to structure the sale of the Property to the College to avoid the payment of VAT. Mr Puzey submitted that BAPM was provided to Coleridge by the College's advisers as a prospective tenant in order to assist the VAT position of the College, an arrangement said to pose "no risk".

56. As Mr Conlon observed, correctly in my judgment, the Commissioners' case against TOGC relief was essentially based on the single point that in substance Coleridge had no property business to transfer. And, as he further claimed, that could not possibly be correct. Coleridge was a VAT registered property company that owned a substantial asset in the form of the Property which it was actively engaged in marketing following its refurbishment. Mr Conlon maintained that the *Lord Fisher* case must be read in the light of the most recent European case law on economic activity, namely the case to be found at [2012] STC 1085 which I may shortly refer to as *Kolpania.* There it was held by the Court of Justice of the European Union (by which the ECJ is now known) that the economic activities referred to in art 9(1) of the Principal VAT Directive could consist of several consecutive transactions and preparatory acts, such as the acquisition of business assets and the purchase of immovable property, should themselves be treated as constituting business activity. I further agree with Mr Conlon in his claim that the Property and its associated building contracts were assets which Coleridge intended to, and did, exploit. Coleridge did have a business activity. Further, the College did intend to grant leases to BAPM and BACCH, attract third party tenants and hire out rooms.

57. I further agree with Mr Conlon that various sub-points on which the Commissioners rely add nothing to their case. Nevertheless, I shall now deal with them. First, he observed that they relied on the "conditional" nature of the Agreement for Lease. He contended that they had misinterpreted that document; on exchange of the Sale Agreement the Agreement for lease became unconditional. If, on 15 January 2008, the College had failed to complete, BAPM could have sought an order for specific performance against Coleridge. The sale was, therefore, in substance a TOGC of a property business. All that was needed was for the transferor to have agreed to grant a lease, which the transferee in fact granted. As the Commissioners' own guidance explained:

> "There is a business transferred as a going concern even if the property is only partly tenanted…
>
> …when you transfer the property to a third party (with the benefit of the prospective tenancy but before a lease has been signed) there is sufficient evidence of intended economic activity for there to be a property rental business capable of being transferred". (Notice No 700/9/02)

> "The most common situation is where the freeholder of a building currently let to tenants, sells it to another person with the benefit of the lease. There is no need for the whole property to have been let out. Part may be vacant or the freeholder may occupy part of the premises himself. The transfer of the building with the tenant is still a TOGC." (HMRC Manual VTOGC 6420).

58. In my judgment, as Mr Conlon submitted, the Commissioners have misunderstood the effect of the *Dartford* case. It cannot be distinguished, and I propose to follow it. I decide the first issue in favour of the appellants.

THE TIME BAR ISSUE

59. As I have decided the first issue in favour of the Appellants, strictly speaking it is unnecessary for me to deal with the second issue. However, since this case may go further, I propose to deal with it.

Legal framework

60. Section 73(1) of the 1994 Act provides that where it appears to the Commissioners that a return is incomplete or incorrect they may assess the amount due to the best of their judgment. The 1994 Act provides time limits to ensure legal certainty by protecting the taxpayer from tardy assessments. Section 73(6) provides, so far as material:

> "(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and may not be made after the later of the following-
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) One year after evidence of facts sufficient in the opinion of [the Commissioners] to justify the making of the assessment, comes to their knowledge ….

61. Section 77(1) of the 1994 Act lays down a "long-stop" time limit of four years

Submissions and Conclusion

62. Mr Conlon noted that the application of those rules had been considered in a number of cases, and the principles were helpfully summarised by the Upper Tribunal in *ERF Ltd v HMRC* [2012] STC 1738. In that case the issue was whether an assessment for VAT and penalties should have been made more than one year before the date it was actually made when, according to the taxpayer, the Commissioners had sufficient evidence to justify an assessment. It was held that the Commissioners had acted reasonably in awaiting a further report from the taxpayer's accountants on quantum and culpability which they had been invited by the taxpayer to receive and consider. The assessment, based on that further report, was held to be in time. At [25]

the Upper Tribunal stated the principles derived from the judgment of Dyson J in *Pegasus Birds Ltd v CCE* [1999] STC 95 as follows:

The legal principles to be applied

1. The commissioners' opinion referred to in s 73(6)(b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.

2. The evidence in question must be sufficient to justify the making of the assessment in question (see *Customs and Excise Comrs –v- Post Office* [1995] STC 749 at 754 per Potts J).

3. The knowledge referred to in s 73(6)(b) is actual, and not constructive knowledge (see *Customs and Excise Comrs –v- Post Office* [1995] STC 749 at 755). In this context, I understand constructive knowledge to mean knowledge of evidence which the commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.

4. The correct approach for a Tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners. The period of ne year runs from the date in (ii) (see *Heyfordial Travel Ltd –v- Customs and Excise Comrs* [1979] VATTR 139 at 151, and *Classicmoor Ltd –v- Customs and Excise Comrs* [1995] V&DR 1 at 10).

5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on *Wednesbury* principles, or principles analogous to *Wednesbury* (see *Associated Provincial Picture Houses Ltd –v Wednesbury Corp* [1947] 2 All ER 680, [1948] KB 223) (see *Classicmoor Ltd* –v- *Customs and Excise Comrs* [1995] V&DR 1 at 10-11, and more generally *Jon Dee Ltd –v- Customs and Excise Comrs* [1995] STC 941 and 952 per Neil LJ).

6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in s73(6)(b) of the 1994 Act".

63. The Upper Tribunal also addressed the question of whose opinions were significant for those purposes, again relying on Dyson J in *Pegasus Birds*:

"The person whose opinion is imputed to the commissioners is that person who decided to make the assessment. It does not matter that he or she may not be the person who first acquired knowledge of the evidence of the facts which are considered to be sufficient to justify making the assessment. The knowledge of

all officers who are authorised to receive information which is relevant to the decision to make an assessment is imputed to the commissioners".

64. Mr Conlon maintained that the assessment was made out of time; it was made in respect of the prescribed period ending on 29 February 2008 on 5 July 2010, and was notified to Coleridge on 9 July 2010. It was thus out of time under the "2 year rule" in s. 73(6)(a) of the 1994 Act.

65. He added that the Commissioners were able to rely on the "one year rule" in s. 73(6)(b) of the 1994 Act if, and only if, facts sufficient in their opinion to justify making an assessment first came to their knowledge on or after 5 July 2009.

66. In Mr Conlon's submission, the evidence demonstrated that the Commissioners knew all the facts for making an assessment at a point in time earlier than 5 July 2009. In particular, they knew:

a. The identity of all the parties

b. That Coleridge had treated the sale of the Property as a TOGC

c. In consequence, Coleridge had not charged VAT on its sale

d. That the Property was sold with the benefit of an Agreement for Lease between Coleridge and BAPM

e. The amount of the sale consideration

f. The date of the sale; and

g. That Coleridge had made its return for period 02/08, in which the sale took place, without accounting for VAT on it

67. Mr Conlon submitted that no further facts were needed in order to make an assessment; the jigsaw was complete. Even if negotiations were continuing with the College's advisers in relation to the CGS, that was irrelevant to the TOGC issue. There was nothing to prevent the Commissioners making a valid protective assessment within the time limit laid down by the 2 year rule.

68. In contrast, Mr Puzey emphasised two points arising from the appellants' claim that Mr Lewis was provided with the property transaction documents on his visit on 14 May 2009. First, as was pointed out by Dyson J in *Pegasus Birds*, it was not facts of which the Commissioners must be in possession, but evidence of facts, and evidence was the means by which facts were proved. Secondly, he maintained that it was a matter for the opinion of the officer concerned as to when or if he had sufficient evidence of facts to justify the making of an assessment; the only way in which an officer's judgment might be impugned was on *Wednesbury* principles (see *Cumbrae Properties (1963) Ltd v CEC* [1981] STC 799 at 805).

69. Mr Puzey noted that the assessment had been made against Coleridge in respect of the accounting period 02/08. However, the VAT return on which Coleridge had reclaimed the VAT on property expenses occasioning the enquiry was its 11/09 return, received by the Commissioners in December 2009. It was Mr Staniforth who had considered that return and made the assessment. Mr Puzey acknowledged that Mr Lewis had begun to consider the TOGC question as the result of his enquiries, and observed that the consideration had resulted in his requesting the property transaction documents which the Commissioners received on 24 November 2009. Mr Puzey submitted on that basis that the evidence of facts as to the transactions on which Mr Lewis and Mr Staniforth relied was contained in the documents received on 24 November 2009; had Mr Lewis previously been supplied with those documents he would not have had to ask for them again.

70. Lastly, whilst it was true that Coleridge's VAT return for 02/08 was received by the Commissioners on time, Mr Puzey contended that they could not have known that the company had not declared VAT on the sale to the College because they had no evidence of the transactions until they received the documents on 24 November 2009; nor had they any breakdown of what Coleridge had declared in relation to the Property until Mr Staniforth made enquiries in January 2010.

71. Mr Conlon responded by submitting that it was disingenuous of the Commissioners to suggest that Coleridge's return for period 11/09 triggered the need to investigate and assess. Coleridge's returns for every period from 02/07 to 11/09 showed the same pattern; substantial claims for input VAT on refurbishment expenses and "Nil" output tax. Once the Commissioners knew, in November 2008, that Coleridge had sold the Property, it must have been obvious to them that no VAT had been charged on the sale. They had all the information necessary for an assessment by 14 May 2009.

72. I entirely agree that the Commissioners had all the information they needed to make the assessment on 14 May 2009, so that I hold that the assessment was made out of time.

THE CLAWBACK ISSUE

73. As I mentioned earlier, the clawback issue is relevant only if the appellants succeed on the TOGC issue. And, since they have done so, I must deal with it.

Legal framework

74. Part XIV of the Regulations prescribes rules for the attribution of input VAT to taxable supplies and implements Articles 173 to 185 of the Principal VAT Directive. Part XV of the Regulations implements Articles 187 to 192 of the Principal VAT Directive and sets out the CGS. This is a special regime whose purpose is to enhance precision in the attribution and deduction of input tax on capital assets, that is certain assets of high value typically used in the business over a long period: see Case C-62/04, *Centralan Property Ltd v CCE* [2006] STC 1542.

75. Regulation 108 of the Regulations provides a basic rule for adjusting input VAT deduction where there is a change in the intended use of inputs. However, the basic rule does not apply (and the more precise CGS applies) where input VAT is incurred on a capital item.

76. It is common ground that the works carried out by Coleridge made the Property a capital item within reg, 113(h) of the Regulations to the value of the works. It is also common ground that the works carried out by the College itself created a further capital item within reg.113(h) (although that is not relevant to the appeal).

77. Mr Conlon claimed that, in simple terms, the CGS is intended to operate in the following way. When a taxable person incurs input VAT on a capital item, such VAT is immediately deductible in full subject to normal rules. The first interval begins on the day he first uses the item and ends on the last day of his tax year. In the case of a reg.113(h) item, the adjustment period is a total of ten intervals. Each subsequent interval, after the first, generally corresponds with his tax year. In each subsequent interval the use of the item is reviewed. If there is a change in the extent to which it is used for taxable supplies, compared with the first interval, this is expressed as a percentage ("the adjustment percentage"). A calculation is made by multiplying one tenth of the input VAT originally incurred by the adjustment percentage. A payment is then made to, or by, the Commissioners. If a capital item is disposed of before the end of the adjustment period, this triggers a one-off adjustment and requires a positive or negative payment depending upon whether the disposal is exempt or taxable. The adjustment must be made on the return for the next but one period following the end of the tax year. Special rules apply where, as in the instant case, the disposal falls within TOGC relief. In broad terms, the transferee takes over the CGS history of the item and is liable for any adjustments which arise in any remaining intervals.

78. Regulation 99(1) defines "tax year". This, together with other definitions, has effect for Part XV. Regulation 112(2) provides:

> "(2) Any reference in this Part to a capital item shall be construed as a reference to a capital item to which this Part applies by virtue of regulation 113, being an item which a person who has or acquires an interest in the item in question (hereinafter referred to as "the owner") uses in the course or furtherance of a business carried on by him, and for the purpose of that business, otherwise than solely for the purpose of selling the item".

79. Regulation 113 sets out the items to which the CGS applies. Regulation 113(h) is relevant here:

> "(h) a building which the owner refurbishes or fits out where the value of capital expenditure on the taxable supplies of services and of goods affixed to the building, other than any that are zero-rated, made or to be made to the owner for or in connection with the refurbishment or fitting out in question on or after 3 July 1997 is not less than £250,000".

80. Regulation 114(3)(c) provides for an adjustment period of ten successive intervals and regulation 114(4)(e) provides that, in the case of a capital item within regulation 113(h):

> "… the first interval shall commence on the day the owner first uses the building … which has been refurbished or fitted out in question, and shall end on the day before the commencement of his tax year following that day".

81. Regulation 114(5) provides for each subsequent interval to correspond with, broadly, the owner's tax year. However, this is subject to regulation 114(5A) which, so far as relevant, provides:

> "(5A)On the first occasion during the period of adjustment applicable to a capital item that the owner of the item –
>
> (a) …
>
> (b) …
>
> (c) …
>
> transfers the item in the course of the transfer of his business or a part of his business as a going concern (the item therefore not being treated as supplied) in circumstances where the new owner is not, under regulation 6(1) above, registered with the registration number of and in substitution for the transferor,
>
> the interval then applying shall end on the day before he … transfers the business or part of the business (as the case may require) and each subsequent interval (if any) applicable to the capital item shall end on the successive anniversaries of that day".

82. Regulation 115 prescribes the method of adjustment and regulation 116 prescribes that the taxable use of a capital item shall be determined in accordance with partial with the partial exemption rules or as agreed with HMRC.

83. In connection with the drawback decision, Mr Conlon drew my attention to statements contained in the Alternative Decision and the Amended Statement of Case. In the former, the Commissioners said:

> "The new owner stands in the shoes of the old for the purposes of any VAT rights or obligations attaching to the asset and the old owner must take planned uses by the new owner into account in forward looking VAT decisions, such as setting the initial deduction of input tax on unused or part used supplies. In particular, the fact that [the College] intended to occupy the property as successor to Coleridge and largely for purposes that do not attract input tax deduction, and this is known when the agreement to lease with BAPM is made, means that the first use of the property is not wholly taxable."

84. In the latter document, he observed that the Commissioners put their case slightly differently, arguing that the Agreement for Lease and the Sale Agreement must be considered as a single whole. At 21.4.2. they said:

> "Immediately prior to the point of first use of the property (which occurred at the time the Agreement for Lease was entered into) Coleridge formed an intention to use the property for both taxable and exempt purposes (namely use by Royal College for the purposes of its business). In accordance with regulation 108(1)…Coleridge was required to make an adjustment."

85. For ease of reference, regulation 108 is set out below:

> "(1) This regulation applies where a taxable person has deducted an amount of input tax which has been attributed to taxable supplies because he intended to use the goods or services in making either –
>
> (a) taxable supplies, or
>
> (b) both taxable and exempt supplies,
>
> and during a period of 6 years commencing on the first day of the prescribed accounting period in which the attribution was determined and before that intention is fulfilled, he uses or forms an intention to use the goods or services concerned in making exempt supplies or, in the case of an attribution within sub-paragraph (a) above, in making both taxable and exempt supplies.
>
> (2) Subject to regulation 110 and save as the Commissioners otherwise allow, where this regulation applies the taxable person shall on the return for the prescribed accounting period in which the use occurs or the intention is formed, as the case may be, account for an amount equal to the input tax which has ceased to be attributable to taxable supplies in accordance with the method which he was required to use when the input tax was first attributed and he shall repay the said amount to the Commissioners.
>
> (3) For the purposes of this regulation any question as to the nature of any supply shall be determined in accordance with the provisions of the Act and any regulations or orders made thereunder in force at the time when the input tax was first attributed".

Submissions and Conclusion

86. Mr Puzey opened his submissions on the clawback question by observing that where a business is transferred in a TOGC there is a "universal succession" between the transferor and the transferee "in which one person takes over all of the rights and obligations of another (here, of course, limited to all of the VAT rights and obligations in relation to the business transferred)" (see [46] of the Advocate-General's opinion in *Zita Modes*). Consequently, he maintained that the TOGC had to

be looked through for VAT purposes with the transferor and transferee viewed as effectively the same person in relation to the assets transferred and VAT matters.

87. The ECJ in *Centralan* summarised the criteria for input tax deduction, which Mr Puzey submitted was fundamental to the exercise by Coleridge of its right to deduct in the present circumstances:

> "54. It follows that the decisive criterion for the deduction of input VAT is the use of the goods and services concerned for taxable transactions. As the Court has already held, it is only to the extent that an item is used for the purposes of his taxable transactions that a taxable person may deduct from the VAT for which he is liable to the VAT paid or payable in respect of that item (Case C-291/92 *Armbrecht* [1995] ECR I-2775, paragraph 27). It is thus clear from the case-law that the use to which the goods or services are put, or are intended to be put, determines the extent of the initial deduction to which the taxable person is entitled under Article 17 of the Sixth Directive and the extent of any adjustments in the course of the following periods, which must be made under the conditions laid down in Article 20 of that directive (see, to that effect, Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 15, and Case C-396/98 *SchloBstraBe* [2000] ECR I-4279, paragraph 37)."

88. In what he claimed to be putting the Commissioners' case simply, Mr Puzey said that their position was that Coleridge knew immediately prior to the taxable grant of the Agreement for Lease to BAPM that the use of the Property on transfer to the College would be for both taxable and exempt purposes. The effect of the TOGC (if it occurred) was to place the College in the shoes of Coleridge. There was no supply. Furthermore, the first use by Coleridge of the capital item, namely the grant of the Agreement for Lease, was linked ineluctably to that transfer whereupon the intended use of the Property was to be both for taxable and exempt purposes. Thus, as in *Centralan*, it was necessary to take account of the series of transactions as a whole and together in order to determine the intended use of the Property and therefore the extent to which Coleridge's initial deduction of input tax in full fell to be adjusted.

89. Albeit that the *Centralan* case concerned the EU provisions which led to the United Kingdom's CGS, Mr Puzey noted that those provisions were in the same section of the Directive as those enabling 'clawback' under reg.108 of the Regulations. Furthermore, there was every reason for the 'basic' rule in reg.108(1) to apply immediately prior to the first use of the Property (the point at which the CGS came into play), because at that point the intended use of the Property was known to Coleridge, i.e. use by the College for taxable and exempt purposes. It was common ground that once capital expenditure was being addressed by the CGS, other adjustment mechanisms were ruled out; but the CGS did not start until first use of the asset, reg.114(4). Regulations 108(1) and 108(2) provided that where input tax had been deducted on the basis of an intention to make taxable supplies (as in the instant case) but that intention changed to one of making taxable and exempt supplies, then the initial attribution of input tax should be adjusted on the return for the period in which the intention was formed.

90. Mr Puzey maintained that what the appellants had sought to argue in the instant case was that, despite there being a TOGC (on their case), and despite the fact that the TOGC was bound up with the Agreement for Lease, that agreement should be separated out from the TOGC and the intended ongoing use of the Property, and that the latter should be ignored because "use by the Royal College is not use by Coleridge". Mr Puzey submitted that that overlooked the requirement in reg.108 (recognised by the ECJ in *Centralan*) to have regard to the intended use where that intention changed from that initially formed.

91. He further claimed that it was not a novel or unusual approach to require input tax incurred prior to the first interval of the CGS to be adjusted to reflect a change of intended use, and that allowed a baseline figure to be calculated for use in that first interval. In claiming that "the basic rule under reg.108 does not apply (and the more precise CGS applies) where input VAT is incurred on a capital item 1, oversimplified the position. There was nothing to prevent adjustment or a clawback of input tax immediately before the first use of the Property, which set the baseline for the CGS. Nor was there any reason why there should be. Payback or clawback could act to make the attribution of input tax in place at first use the most accurate one available, reflecting the whole intended use over the economic life of the asset. Subsequently, the CGS could take over, and further adjust if actual use over the economic life turned out to be different from expectations. That approach was set out in Public Notice 706/2/02 at para 6.4.

92. In *CEC v Briararch Ltd* and *CEC v Curtis Henderson Ltd* [1992] STC 732, the High Court recognised that clawback assessments at the point of first use must take into account all definitely planned future uses, and the fact that in those cases there had only been exempt supplies at the point of first use, did not mean that the intended taxable use could be ignored. The position was the same in the instant case, save that the first use was taxable, but the intention was for taxable and exempt use to follow inevitably. It was inevitable because the first use, i.e. the grant of the Agreement for Lease, was conditional upon the College agreeing to purchase the Property whereupon mixed use would follow. Coleridge knew that prior to those linked and pre-ordained transactions occurring on 16 November 2007.

93. In summary, Mr Puzey submitted that the appellants had, following advice, to construct an arrangement which allowed Coleridge the benefit of full input tax recovery, but which relieved the College of the consequences that would otherwise follow from its mainly exempt or non-business activities. The arrangements were not effective in law because they elevated form over substance, and ignored the reality of the situation.

94. Mr Conlon observed that he did not understand the Commissioners' reasoning in support of the Alternative Decision, and submitted that it appeared to be based on a misinterpretation of the Regulations. I entirely agree.

95. Mr Conlon explained the appellants' analysis in the following way. Coleridge created a capital item by refurbishing the Property, reg.113(h) of the Regulations. Coleridge was the "owner" of the item within the meaning of reg 112(2) and intended

to use the Property in the course or furtherance of its property business. The Property was opted. Accordingly, any intended supply of it would be taxable. Coleridge in fact made a taxable supply on 16 November 2007 by entering into the Agreement for Lease with BAPM in consideration of the premium. The subsequent sale to the College would have been a taxable supply, but for the TOGC relief. Coleridge never intended to make, nor did it make, any exempt supply of the Property. Regulation 108 was simply not in point. On completion of the sale, Coleridge ceased to be owner of the capital item, and was entitled to full recovery of input VAT under the standard partial exemption method. The College then became the owner within the meaning of reg.112(2): see reg 114(5A). Use of the item by the College was not use by Coleridge. The CGS provided a special rule for adjustment of input VAT, which then became the responsibility of the College. Coleridge was not liable to repay input VAT which was fully recoverable to reflect party exempt use by the College.

96. In the instant case, Mr Conlon submitted that the purpose of the CGS was achieved, and the principle of fiscal neutrality was respected. The College acquired the Property as a TOGC, and was required to make capital adjustments to reflect the partially exempt use. As the College waived exemption, any letting or sale of the Property by it was taxable.

97. It appeared to Mr Conlon that the Commissioners' case for disallowing an unspecified proportion of Coleridge's input VAT between 1 June 2007 and 14 January 2008 rested on reg.108 and the cases of *Briararch/Curtis Henderson* and *Centralan*.

98. Mr Conlon claimed, and I accept, that reg.108 is engaged only where the taxable person intends to use the inputs for taxable supplies but, before that intention can be fulfilled, he uses the inputs to make exempt supplies. As Coleridge made no exempt supplies, there was no basis for applying reg.108.

99. The facts of *Briararch/Curtis Henderson* pre-dated the introduction of the CGS, and concerned an intervening exempt supply made before the intended taxable supply. Those cases and *Centralan* all concerned circumstances where the successive supplies were made by the same person (the taxable person seeking to reclaim input tax). Accordingly, Mr Conlon submitted they were distinguishable; they contained nothing to support the proposition that the taxable person must have regard to exempt use of the property by a third party.

100. I agree with the case on clawback presented by Mr Conlon in its entirety. It follows that I allow Coleridge's appeal against the Alternative Decision.

Overall conclusion

101. I allow the appeal in its entirety.

102. 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.

5

DAVID DEMACK
TRIBUNAL JUDGE

10 **RELEASE DATE: 27 March 2013**