Neutral Citation: [2022] UKFTT 364 (TC)

Case Number: TC08614

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/01860

*VALUE ADDED TAX- preliminary hearing on whether LLP opted to tax – yes - and whether sale constituted a transfer of a going concern – no - accompanied by applications to strike out the appeal on the grounds of (1) lack of standing and no appealable decision – application refused- (2) an abuse of process amounting to a collateral attack on the final determination of a court of competent jurisdiction – application granted - and (3) on the basis of no reasonable prospect of the appellants' case succeeding – application granted.*

**Heard on: 09 September 2022**
**Judgment date: 06 October 2022**

**Before**

**TRIBUNAL JUDGE RUTHVEN GEMMELL WS**

**Between**

**ROBERT FREDERICK BINFIELD AND LISA SUSANNA BINFILED Appellants**
**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**
**Respondents**

**Representation:**

For the Appellant: Andrew Young, Counsel

For the Respondents: Joseph Millington, Counsel

## DECISION

### INTRODUCTION

1. With the consent of the parties, the form of the hearing was by video and attended by all participants remotely. The remote platform was the Tribunal video hearing system. The documents to which the Tribunal was referred are contained in bundle of documents comprising of 533 pages received by the Tribunal on 05 September 2022 and an out of time bundle and Skeleton Argument by the Appellants which was received late and out of time date 08 September 2022. This omitted to include an email setting out HMRC's objections to allowing a late appeal which they said was sent to HMCTS on 22 July 2022. The parties had received this email and the note of objections.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. Robert Frederick Binfield (RB) and Lisa Susanna Binfield (LB) - and collectively as (BB) - appealed against decisions of the Commissioners for Her Majesty's Revenue and Customs (HMRC) contained in a letter dated 21 April 2021.

4. HMRC stated that the decision and option to appeal given to BB had been a mistake as the taxpayer in question was LP Investment Properties LLP (LPIP) a limited liability partnership incorporated on 10 November 2006, with its own legal personality which is separate from that of its members, and which was dissolved on 28 July 2015. BB had both been members of LPIP.

5. HMRC applied to the Tribunal, without prejudice:

1. In accordance with Rule 8(2)(a) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the 2009 Rules"), for the Tribunal to strike out this appeal on the basis that the Appellants do not have standing to appeal on behalf of a limited liability partnership that has been dissolved, and that no appealable decision was issued to that limited liability partnership; and/or

2. In accordance with its power to regulate its own procedure provided by Rule 5(1) and/or Rule 8(3)(c) of the 2009 Rules, for the Tribunal to strike out this appeal as an abuse of process because it amounts to a collateral attack on the final determination of a court of competent jurisdiction: and/or

3. In accordance with Rule 8(3)(c) of the 2009 Rules, for the Tribunal to strike out this appeal on the basis that there is no reasonable prospect of the Appellants' case succeeding.

6. The background to this case was concisely set out in the judgement of the Criminal Court of Appeal on 25 October 2019 as follows:

"The Appellant [RB] is an accountant with his own practice which had as a client a Malcolm Cooper. Mr Cooper owned various units at Arklow Trading Estate, Deptford which he let out to other enterprises ("the Arklow units"). In 2006, the Appellant and an employee of Mr Cooper's, Lee Reeves, set up LPIP which, with the assistance of a mortgage from Nationwide, bought the Arklow units from Mr Cooper for £3.8m. As landlord, LPIP thereafter collected rental income from the tenants of the

units which was used to pay the mortgage payments. For some reason which is not apparent, Nationwide failed properly to register its charge on properties.

7. LPIP was registered for VAT with registration number 886253096 ("the 886 number"). VAT is generally not payable on land transactions; but it is open to the purchaser of land to enter into an "option to tax", such that VAT liability attaches to its transactions with that land. LPIP entered into an option to tax in respect of the Arklow units. That option was irrevocable so that, even if (e.g.) LPIP's VAT number was deregistered, that would not invalidate it and the sale of the units would still be treated as a taxable supply.

8. The business affairs of LPIP have been described as "chaotic". In August 2008, the 886 VAT number was deregistered for failures to lodge VAT returns, but in May 2010 it was reinstated on application by the Appellant [RB]. However, due to a failure to submit returns to Companies House, the company received a number of warnings before in fact being dissolved and struck off the register on 28 June 2011. As a result, the 886 VAT number was deregistered again from 1 July 2012.

9. LPIP was by this time in financial trouble because of falling commercial property values and rental income which was insufficient to pay the mortgage instalments. Nationwide decided to take steps to enforce its security and then realised not only that its charge on the Arklow units had not been properly registered, but that LPIP had been dissolved. Consequently, Nationwide made an application to the High Court for LPIP to be re-registered as a company, which it was on 20 September 2013. The Nationwide charge was registered shortly thereafter.

10. By this time, the property market was improving. Nationwide wanted the properties sold and the mortgage repaid from the proceeds of sale, and they had the right under the mortgage to take charge of the sale, but LPIP wished to sell the Arklow units privately to maximise its own return. The property was advertised and interest in it was shown by, amongst others, Anthology Deptford Limited ("Anthology"). Following negotiations, a purchase price of £8.5m was agreed which, because of the option to tax to which we have referred, attracted a 20% VAT charge of £1.7m. LPIP duly provided Anthology with a VAT invoice for £10.2m, using the 886 number; and Anthology paid that sum which included £1.7m VAT which was accountable to HMRC in the hands of LPIP. The addition of tax was of little if any real concern to Anthology, because, having paid over the VAT to LLIP, as a trading company it expected to be able to recover it from HMRC. It applied to "opt to tax" the properties, and, in its first VAT return, claimed repayment of the £1.7m from HMRC. However, that tax was not immediately repaid."

**Facts**

11. LPIP registered for VAT on 24 November 2006 and on 7 December 2006 purchased land at Arklow Trading Estate, Arklow Road, London SE14 6EB (Arklow estate).

12. LPIP had opted to tax (OTT) in accordance with Schedule 10 of the Value Added Tax Act 1994 (VATA) and VAT was applied to it rents which it received.

13. LPIP's OTT was notified to HMRC in respect of the sale of Arklow estate defined with reference to 11 units comprised in two title numbers in the Land Registry.

14. On 12 June 2014, LPIP sold Arklow estate to Anthology Deptford Limited (Anthology). It was not sold by RB, LB or BB.

15. It was a condition of the purchase of Arklow estate by Anthology that the sale be completed with vacant possession of all units. Anthology requested, in an email to LPIP's estate agent on 1 May 2014, amendments to the contracts of sale to include "removal of all mention of outstanding leases because we are completing the purchase with vacant possession". The purchase price was stated to be £8.5 million.

16. Clause 10 of the contract of sale made clear that the sale was subject to VAT and included the clause 'the buyer will pay to the seller an amount equal to the VAT chargeable on any supply made by the seller under or pursuant to this contract as an additional consideration'.

17. On 3 June 2014, LPIP's estate agent emailed Anthology to advise that "the remaining tenants will be out by the weekend".

18. On 12 June 2014, LPIP purported to issue a VAT invoice number 063222 to Anthology "on the sale of Arklow Road site as per contract dated 7 May 2014" (the Invoice).

19. The Invoice showed a gross sale amount of £10.2 million of which £1.7m was VAT. The invoice bore the VRN 886253096. This VRN had been deregistered on 30 October 2012.

20. On 20 October 2014, Anthology applied for VAT registration and notified an OTT for Arklow estate. On 6 January 2015, Anthology submitted a VAT return to HMRC reclaiming the £1.7 million VAT element on the Invoice which it had paid to LPIP on the purchase of Arklow estate.

21. On 15 January 2015, HMRC notified Anthology that the Invoice displayed an invalid VRN for LPIP. On that date RB applied to re-register LPIP for VAT.

22. On 2 February 2015, HMRC notified Anthology that its VAT payment claim in respect of the purchase of Arklow estate had been refused.

23. On 17 March 2015, LPIP was registered, and VAT was backdated to 7 June 2014, under a new VRN 207588685. LPIP's first VAT return, to cover the period 7 June 2014 to 30 April 2015, was due by no later than 7 June 2015.

24. On 18 March 2015, LPIP's solicitors emailed Anthology's solicitors to advise that they had been placed in funds of £950,000 effectively as part of the indemnification of Anthology's VAT repayment claim, which at the time had not been accepted by HMRC. This sum had been transferred to LPIP solicitors' client account from the account of LPIP on 16 March 2015.

25. A replacement VAT invoice in respect of the sale of Arklow estate was sent to Anthology's solicitors. The replacement invoice was dated 12 June 2014 and bore the VRN 207588685 (the 2nd Invoice) and which contained the charged VAT of £1.7 million on the agreed price of £8.5 million.

26. On 1 April 2015, Anthology submitted a VAT return reclaiming the £1.7 million VAT on the 2nd Invoice, which Anthology had paid as a sum of VAT to LPIP on the purchase of Arklow estate. Anthology's VAT repayment claim was approved by HMRC on 9 April 2015 and paid on 17 April 2015.

27. No VAT return was submitted on behalf of LPIP for the period 7 June 2014 to 30 April 2015 by the due date of 7 June 2015, the period which covered the sale of Arklow estate to Anthology.

28. On 25 June 2015, BB were arrested in respect of the VAT default of LPIP.

29. On 26 June 2015, LPIP paid HMRC the sum of £535,000 in respect of VAT under the VRN 207588685, although no VAT return was filed. That payment was made on 26 June 2015.

30. On 28 July 2015, LPIP was dissolved. LPIP was the VAT registered entity separate from BB and it ceased to exist upon dissolution.

31. In their skeleton argument, dated 8 September 2022, which was received late by the Tribunal and by HMRC, BB stated that steps were being taken to restore it.

32. This was in relation to circumstances where LB was making a personal injury claim against LPIP having suffered personal injury as set out in a report by a consultant forensic psychiatrist, Dr Laker, dated 30 August 2022.

33. BB claim that "as a matter of practice, the court will almost certainly reinstate the LLP". LPIP was not reinstated at the date of the hearing.

34. On 26 May 2017, the VRN of LPIP, 207588685 was deregistered and backdated to 29 July 2015 being the day after LPIP's dissolution.

35. On 14 November 2018, in the Crown Court at Chester, RB was convicted by a jury of taking steps with a view to the fraudulent evasion of tax contrary to section 72 (1) of VATA.

36. Subsequent to this hearing the Crown Court had considered confiscation proceedings which BB stated had been postponed to await the outcome of "the FTT appeal". BB also stated, "following any decision of the FTT, the matter of the criminal conviction will return to the Court, of appeal for consideration of the appeal against conviction of RB".

37. There had also been an appeal to the Criminal Court of Appeal on 25 October 2015 at which fresh evidence was admitted. RB's appeal against his conviction was dismissed.

38. The Criminal Court of Appeal recorded that "LPIP had entered into an option to tax in respect of the Arklow units. That option was irrevocable so that even if (e.g.) LPIP's VAT number was deregistered that would not invalidate it and the sale of the units would still be treated as a taxable supply"

39. The Court said: " LPIP was of course liable to account to HMRC for that sum of VAT which it had received from Anthology. However, it did not do so".

40. On 10 December 2018, RB was sentenced to 16 months imprisonment suspended for 18 months. The presiding judge stated, "a conclusion that I reach was that the defendant (RB) had not sought to keep the VAT concerned, rather, had dishonestly delayed in submitting a VAT return in order to have the use of those monies before accounting for them in a VAT return".

41. On 18 September 2018, for the purposes of his criminal defence, RB had asserted that he intended to account for VAT in the ordinary way and in his signed defence statement stated he believed that "VAT was chargeable on the sale and so he added it as an item on the invoice believing that the VAT number was still valid. As a matter of law VAT was chargeable and in levying it there was no intention to cause a loss to anyone or anything else or gain for himself or his wife. He intended to account for it in the usual way".

42. At the Tribunal hearing, however, it was stated that RB had consistently not accepted that the sale by LPIP of Arklow estate was taxable. Instead, he believed the sale was a transfer of a going concern [TOGC].

43. RB also stated that he had only accepted that the transaction was taxable because his criminal case, senior, counsel had said so.

44. In addition, at the Tribunal hearing RB stated that the same defence team had told RB "to make a payment of VAT in the issue to avoid a custodial prison sentence" and that he followed that advice.

45. At the hearing, the Tribunal sought clarification from RB as to the membership of LPIP and was advised that the original members were LB and a Peter Windsor who RB said was a nominee for him. RB stated that the reason for this was to avoid his or a Mr Lee Reeves' names appearing on any documents in the acquisition of properties for LPIP as to do so would mean that the sale would have been blocked by the sellers.

46. The Tribunal asked RB who Peter Windsor was, and RB explained that the name had been invented, "as a joke", by the Lee Reeves and was an entirely fictitious person although documents had been signed on behalf of this fictitious person and returned to the Registrar of Companies in respect of the LLP as if it were a true legal entity.

47. These statements were contrary to RB's statement under caution dated 16 June 2016 when he said "yes" to the statement "Peter Windsor is the nominee director or in this case the LLP designated member for Mr Lee Reeves".

48. RB confirmed in the same statement that he had nevertheless run the property side of the [LPIP] business. LB was a member of LPIP in order to obtain a mortgage from Nationwide as RB had had a previous mortgage with Nationwide which had run into arrears, and they would not lend again to RB.

49. In LB's statement also in relation to the criminal trial, she had stated that RB's business partner was Lee Reeves and RB explained that his name was not included in any of the membership documentation of LPIP. The contract of sale of Arklow estate clearly noted that Lee Reeves was not an owner of the Arklow estate or a member of LPIP, but nevertheless was a party to the sale. LB stated that Lee Reeves had received his share of the proceeds of sale.

50. Specifically, the contract of sale dated 7 May 2014 for Arklow estate was between LPIP and Anthology and Lee Reeves and stated in relation to the latter that "Mr Reeves hereby consents to the sale and completion of the Property and acknowledges that he has no interest in the seller [LPIP] or in the property".

**HMRC's submissions**

51. HMRC say that no appealable decision has been issued to LPIP which was the relevant taxable person and which partnership was dissolved on 28 July 2015. Since that date LPIP cannot have taken any action.

52. The letter dated 18 September 2020 sent on behalf of BB purports to contain a "voluntary disclosure" under section 80 VATA which provides at section 80 (1):-

*(1) Where a person—*

*(a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and*
*(b) in doing so, has brought into account as output tax an amount that was not output tax due,*
*the Commissioners shall be liable to credit the person with that amount.*

53. Section 80 (2) provides: -

*(2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.*

54. On 4 December 2018, BB had purported to submit a VAT return on behalf of LPIP declaring the VAT due on the sale of Arklow estate. LPIP cannot have submitted a VAT return at that time as it did not exist. Similarly, LPIP did not exist at the time the purported appeal was lodged.

55. HMRC say that the First-tier Tribunal has no jurisdiction to hear a case where the appellant is no longer in existence and refer as authority to *Wimpole Interiors Ltd v HMRC* [2014] UKFTT (TC). This case related to a company where there was no intention of seeking the company's restoration.

56. Accordingly, HMRC's letter 21 April 2021, setting out HMRC's view of the sale of Arklow estate, was not an appealable decision issued to a taxable person. BB's letters dated 18 September 2020 and 15 January 2021 cannot have been sent on behalf of LPIP.

57. Notwithstanding that HMRC's letter did invite BB to make an appeal if they disagreed with the decision, this does not allow HMRC to confer jurisdiction on the Tribunal.

58. Although it is assumed by BB that LPIP will inevitably be restored, because of a claim being brought by LB for personal injury against the LLP, HMRC say that if it was true, it would be caused by the LLP and brought by a member of the LLP but HMRC are unable to comment on whether a duty of care is applicable.

59. HMRC say that RB's position is to create the conditions whereby they seek to use the First-tier Tribunal to further their case on a different factual basis to that put forward in a criminal case. They invite the FTT to come to a different decision with the aim of taking it back to the criminal court and criminal Court of Appeal to try and convince them that despite a five-week trial for fraudulent evasion of VAT and an unsuccessful appeal to the Court of Appeal that the whole trial was a mistake because VAT was never due.

60. HMRC say that this is an express attack on the criminal division of the Crown Court's decision, and it is abusive. HMRC say that given all the contemporaneous evidence and documents at the time of the trial it is fanciful to suggest that the sale of Arklow estate was not subject to VAT.

61. HMRC say that RB having been convicted of fraud is subject to confiscation proceedings and he seeks to argue that he did not benefit if it is assessed that the conviction was wrong on the basis that as no tax was ever due and that he could not be guilty of a fraud in relation to it.

62. HMRC say he should not be allowed to do so because it is an abuse of process and BB's case is simply unsustainable given what has gone before.

63. They say that BB's grounds of appeal ignore all the cannon of previous documents for example the issue of an invoice for the sale with a charge for VAT which was issued prior to any criminal legal advice.

64. If, as RB now contends that he "consistently did not accept that the transaction was taxable" then all that was said and put forward at the criminal trial must be untrue. RB's claim that he was led to this course of action by his counsel at the criminal hearing, given the ethical and professional obligations pertaining to such counsel, is suspect. At all times BB including LB, who was a member and RB, the decision-maker for LPIP, consistently asserted that the transaction was taxable.

65. This also begs the question of why LPIP issued a VAT invoice, if RB consistently accepted that the transfer was a TOGC. Similarly, when Anthology's claim for repayment was refused because of the cancelled VRN, why did LPIP /RB reregister LPIP for VAT if RB believed that no tax was payable and why did LPIP put their legal representatives in funds for the VAT payments?

66. The contract for sale was not for the sale of a letting business but for the transfer of land with vacant possession which LPIP took specific steps to arrange.

67. While accepting this was a preliminary hearing, HMRC took the Tribunal to case law concerning the application of the law relating to TOGCs which they say is relevant to their application to claim an abuse of process and for strike out on the grounds that there is no reasonable prospect of a case succeeding. HMRC referred to the case of *Zita Modes Sarl V Administration de 'Enregistement et des Domaines* (Case C-497/01) (*Zita Modes*) which was considered by the Tribunal in *Intelligent Managed Services Limited v HMRC* [2015] UKUT 341 (TCC) (*IMSL*) where the following principles were distilled: -

> "(1) In order for there to be a transfer of a totality of assets, or part thereof, the assets transferred must together constitute an undertaking capable of carrying on an independent economic activity.
> (2) This is to be distinguished from a mere transfer of assets.
> (3) The nature of the transaction must be ascertained from an overall assessment of the factual circumstances, which includes the intentions of the transferee, as determined by objective evidence, and the nature of the economic activity sought to be continued.
> (4) The transferee must intend to operate the business, or the part of the undertaking, transferred and not simply to liquidate the activity concerned immediately and sell the stock, if any.
> (5) Although succession to the business is not a condition, but a consequence of the application of the no-supply rule, the nature of the transaction must be such as to allow the transferee to continue the independent economic activity previously carried on by the seller.
> (6) Arbitrary distinctions are to be avoided, where those distinctions do not apply by virtue of the wording or purpose of Articles 19 and 29, and the principle of fiscal neutrality must be respected."

68. Zita Modes at paragraphs 39 and 40 stated

> "The context of Article 5(8) and the purpose of the Sixth Directive, as set out in paragraphs 36 to 38 of this judgment, make it clear that that provision is intended to enable the Member States to facilitate transfers of undertakings or parts of undertakings by simplifying them and preventing overburdening the resources of the transferee with a disproportionate charge to tax which would in any event ultimately be recovered by deduction of the input VAT paid.
>
> Having regard to this purpose, the concept of 'a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof' must be interpreted as meaning that it covers the transfer of a business or an independent part of an undertaking including tangible elements and, as the case may be, intangible elements which, together, constitute an undertaking or a part of an undertaking capable of carrying on an independent economic activity, but that it does not cover the simple transfer of assets, such as the sale of a stock of products."

69. Consequently, HMRC say that selling land with vacant possession is not selling a letting business and indeed the tenancies of the letting business of LPIP were brought to an end before transfer. Accordingly, what is left is simply a transfer of assets.

70. HMRC refer to :- *Zita Modes* at paragraphs 43,44 and 45 stated; -

> "Secondly, concerning the use which is to be made by the transferee of the totality of assets transferred, clearly Article 5(8) of the Sixth Directive does not contain any express requirement as to that use.
>
> However, it is apparent from the purpose of Article 5(8) of the Sixth Directive and from the interpretation of the concept of 'a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof' which flows from it, as set out in paragraph 40 of this judgment, that the transfers referred to in that provision are those in which the transferee intends to operate the business or the part of the undertaking transferred and not simply to immediately liquidate the activity concerned and sell the stock, if any.
>
> On the other hand, nothing in Article 5(8) of the Sixth Directive requires that the transferee pursue prior to the transfer the same type of economic activity as the transferor."

71. HMRC say that there was no totality of assets transferred sufficient to carry on an economic activity and refer to paragraph 31 of IMSL

> "The principles established by *Zita Modes* were followed by the Court of Justice in *Finanzamt Lüdenscheid v Schriever* (Case C-444/10) [2012] STC 633.[*Schriver*].In that case the questions before the Court were whether there was a transfer of a totality of assets in a case where stock and fittings of a retail outlet were transferred, but there was only a lease of the premises to the purchaser, and whether it was relevant in that regard whether the premises had been leased on the basis of a long-term contract, or for an indeterminate term subject to termination by either party at short notice."

72. HMRC refer to *Schriver* at paragraphs 32,37 and 38:-:-

> "32. It follows from the foregoing considerations that an overall assessment must be made of the factual circumstances of the transaction at issue in order to determine whether it is covered by the concept of the transfer of a totality of assets for the purposes of the Sixth Directive. In that context, particular importance must be attached to the nature of the economic activity which it is sought to continue.
> […]
> 37. It is also necessary, in order for Article 5(8) of the Sixth Directive to apply, for the transferee to intend to operate the business, or the part of the undertaking, transferred and not simply to liquidate the activity concerned immediately and sell the stock, if any (see, to that effect, Zita Modes, paragraph 44).
> 38. In that regard, it follows from the Court's case-law that the intentions of the purchaser can - or, in certain cases, must - be taken into account in the course of an overall assessment of the circumstances of a transaction, provided that they are supported by objective evidence."

73. Accordingly, HMRC say that the intentions of the transferee can and in certain circumstances must be taken into account and is contrary to BB's assertion that VAT is classified objectively and not subjectively and their claim that HMRC's assertion that intention is relevant for establishing a TOGC is not demonstrative 'of a complete misunderstanding of VAT law'.

74. HMRC refer to paragraphs 37 and 38 of *IMSL*:-

> "It is necessary therefore to have regard to all the circumstances in determining whether the transaction is a mere transfer of assets, or of an undertaking which can carry on an independent economic activity. That must be considered both from the perspective of the transferor, and what is transferred, and from the perspective of the transferee, who must intend to operate the business as a continuation.
>
> In focusing as well on the intentions of the transferee, the Court in *Zita Modes* was making clear that those intentions could mean that something that would, from the transferor's perspective, and on an objective assessment of the assets transferred, be the transfer of an undertaking capable of carrying on an independent economic activity, would not satisfy that test if the transferee instead intended to liquidate the activity. Such an intention would mean that what had been transferred for the purpose of Article 19 would merely be a transfer of assets. That that was the focus of the Court's attention is clear from the reference made by the Court, at [48], to the interpretation of the concept of transfer which it set out at [40]; that interpretation drew the distinction between the mere transfer of assets and a transfer of assets constituting an undertaking having the relevant characteristics."

HMRC similarly refer to *HMRC v Royal College of Paediatrics* [2015] UKTU 38 (TCC) at paragraph 28 Mr Justice Birss stated:

> "It seems to me that a critical point arising from these mainly European authorities (with some UK cases too) is that for a transfer to fall into the relevant class there are two things which have to be transferred. First, of course, an asset must be transferred. However, something else has to be transferred as well. That further element is referred to variously as a business, an undertaking, or an

> economic activity (or part of such a thing). Merely transferring an asset on its own will never be enough to satisfy the test. In order to work out whether the necessary second element has been transferred; one needs to look at all the relevant circumstances. The test is one of substance not form. The circumstances can include the intentions of the parties."

75. At paragraph 42 Mr Justice Briss continued:-

> "I recognise that Coleridge had a letting business relating to the Property in 2005/2006. As the judge found, Coleridge did have a business activity which amounted to the exploitation of the Property. It was an asset of that business. Moreover, it is also true that the Royal College intended to and did let the Property to tenants after buying it from Coleridge. At one stage Mr Conlon submitted that the agreement between Coleridge and BAPM was not necessary and that the transfer would still have been a TOGC without it. Mr Conlon later withdrew that submission. In my judgment he was right to withdraw it. The fact that the seller had a business letting a property before a sale and the buyer buys the property with an intention of letting the property too would make no difference. If the sale of the Property had been simply a transfer of the freehold and nothing else then I cannot see how it could possibly be a transfer of a going concern. Something else had to be transferred as well as the property and all that further element has to have the appropriate characteristics."

76. HMRC say that something else had to be transferred and there was no such additional transfer to Anthology other than the sale of property with vacant possession. This, HMRC say, is fatal to the prospects of a successful case proceeding.

77. Similarly in *Haymarket Media Group v HMRC* [2022] UKFTT 168 (TC), HMRC say that the FTT properly considered as part of the circumstances "the intention of the parties" (see heading to paragraph 88).

78. BB's purported appeal essentially seeks to argue that the sale of the Arklow estate was a TOGC even though neither of the parties at the time of the transaction understood or intended it to be such a transfer. This is a novel submission and is being misconceived.

79. The suggestion that the sale of Arklow estate "was a going concern of the business of letting out commercial units for rent" is contrary to all the evidence and is unsustainable.

80. The contract for the sale of Arklow estate related that the site was sold with vacant possession. On 3 June 2014, the seller's agent confirmed that "the remaining tenants will be out by the weekend". LPIP had difficulty removing tenants and two were still in the building on the day that exchange was to take place.

81. HMRC refer to the witness statement of Martin Smith the owner of a business which was a tenant of LPIP which was given notice that the estate was being "sold for development". An email from the Financial Controller of Anthology dated 13 January 2015 to HMRC stated "To give you some background to the VAT reclaim on our first return, this is due to the acquisition of a site for development. The majority of the claim therefore relates to land, the VAT invoice for which I attach now."

82. Throughout the criminal trial RB maintained that LPIP had treated the transaction as taxable.

83. In BB's skeleton argument, it was stated that RB was told to make a payment of VAT in the issue "to avoid a custodial sentence". HMRC say that that payment was made before criminal proceedings were started and before he had received legal advice in relation to the criminal charge.

84. HMRC say that not only were RB's submissions to the criminal court made on the basis that tax was payable, but the same basis was also presented to the Criminal Court of Appeal. Accordingly, at no stage during his trial or appeal did RB claim that no VAT was due. The matter was apparently overlooked until a new lawyer reviewed the case.

85. HMRC say that the purported appeal is a collateral attack on the final decision of a criminal court of competent jurisdiction and is an abuse of process. They refer for authority to *Hunter v Chief Constable of West Midlands Police* [1982] AC 592 and refer to Lord Diplock

> "My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

86. The Hunter case was a claim by members of the 'Birmingham Six' for damages, for the same alleged assaults against the police, after murder convictions had been decided in light of the trial Judge's decision on voir dire that there were no assaults by the police prior to confessions. The House of Lords considered whether this action was an abuse of process of court and whether fresh evidence was admissible and stated:

> "Held dismissing the appeal, that where a final decision had been made by a criminal court of competent jurisdiction it was a general rule of public policy that the use of a civil action to initiate a collateral attack on that decision was an abuse of the process of the court; and that such fresh evidence as the plaintiff sought to adduce in his civil action fell far short of satisfying the test to be applied in considering whether an exception to that general rule of public policy should be made, which, in the case of a collateral attack in a court of coordinate jurisdiction, was whether the fresh evidence entirely changed the aspect of the case"

87. Notwithstanding that LB was acquitted of all charges in the criminal case, it is intended that LPIP on the assumption that it is reinstated would intervene in the appeal, if her claim for damages were competent. LB was a member of LPIP at the time it was dissolved, and it would still be an abuse of process as the aim of the appeal is to further RB's appeal.

88. In *Hunter* reference was made, at page 8 to

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

89. HMRC say the principle in *Hunter* applies to those initiating collateral attacks and BB have initiated this collateral attack by purporting to submit a voluntary disclosure on behalf of a dissolved LLP.

90. Whereas HMRC deny that LPIP or BB are liable to credit any amount of output tax under section 80 (1) VATA (or any other provision), any such liability only arises "on a claim being made for the purpose" (section 80 (2) of VATA). BB, therefore, sought to pursue a claim for a credit of output tax with the stated purpose of facilitating a second appeal to the Court of Appeal Criminal division. BB occupy positions directly analogous to the claimants in Hunter and their appeal should be dismissed as abusive.

91. The purported voluntary disclosure of 18 September 2020 was submitted: (i) after RB was convicted of an offence of dishonesty relating to the failure of LPIP to account for output tax in the sale of the Arklow estate; (ii) after RB had purported to submit a VAT return on behalf of LPIP declaring the output tax due on that sale; and (iii) after the Court of Appeal (Criminal Division) had dismissed RB's appeal against his conviction. This sought to go behind both the findings of the Crown Court and Court of Appeal and the previously stated position of RB.

92. Not only do BB seek to go behind the decisions of the Crown Court and Court of Appeal (Criminal Division), but they also seek to do so on a basis that directly contradicts the statements made by RB during those criminal proceedings. There had never been any issue that VAT was chargeable on the sale of the Arklow estate. RB's defence expressly accepted that VAT was so chargeable: RB denied any dishonest intention and claims that whatever the parties thought they were doing or intended to do at the time of the sale of the Arklow estate is irrelevant. HMRC say that is not a sustainable proposition.

93. HMRC say that there is, in any event, no reasonable prospect of the purported appeal succeeding. The grounds of appeal accurately summarise all the circumstances of the sale of Arklow estate. There is no fresh evidence within the grounds of appeal. The only reported change of circumstances since RB's unsuccessful appeal to the Court of Appeal (Criminal Division) appears to be that "Mr Benfield solicitors post-conviction sought tax advice which contradicted the view of criminal counsel".

94. BB's grounds of appeal incorrectly assert that "the classification of the transfer of Arklow estate for the purposes of VAT is not amenable to intention." The appeal, therefore, is pursued on an incorrect legal basis, namely, that whatever the parties thought they were doing, or intended to do, at the time of the sale Arklow estate is irrelevant. That is not a sustainable proposition concerning the authorities referred to by HMRC.

95. All the contemporaneous evidence is consistent with the sale of the Arklow Estate being chargeable to VAT. RB never disputed that charge to VAT, either during a

lengthy criminal trial or an appeal to the Court of Appeal (Criminal Division). The novel suggestion now advanced that the sale of the Arklow Estate was a TOGC is unsustainable. The grounds of appeal: (a) ignore all RB's previous statements confirming that VAT was properly chargeable; (b) ignore the charge to VAT on invoices issued by LPIP; (c) ignore the re-registration of LPIP for VAT for the purpose of facilitating a claim to input tax by Anthology; and (d) ignore the terms of the contract for sale that VAT was chargeable and that the Arklow Estate was to be transferred with vacant possession.

96. HMRC refer to the Court of Appeal in ***ED&F Man Liquid Products -v- Patel*** *[2003] EWCA Civ 472* at [10] where it was Held:

> '…where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini trial: see per Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable: see the note at 24.2.3 in Civil Procedure (Autumn 2002) Vol 1 p.467 and Three Rivers DC v Bank of England (No.3) [2001] UKHL/16, [2001] 2 All ER 513 per Lord Hope of Craighead at paragraph [95].'

97. There is no real substance in any of the factual assertions made in the grounds of appeal. All the assertions in the grounds of appeal are contradicted by contemporaneous documents (and significantly, earlier admissions by RB). This purported appeal should be disposed of at an early stage to save the cost and delay of trying an issue the outcome of which is inevitable. The proposed appeal is fanciful and based upon an erroneous understanding of the applicable test to determine whether a TOGC was made.

98. HMRC say that in considering this matter it is necessary to look past the fact that LB was acquitted of all charges in relation to the action against her husband and instead to consider the effect on the administration of justice.

99. The initial response was to reinstate the partnership and the sole aim of this is to challenge the conviction. In any event the appeal has no reasonable prospect of success.

**BB's submissions**

100. BB say that notwithstanding the tax was due by LPIP, they were given a decision by HMRC and a right to appeal. It is correct that LPIP was dissolved but attempts have been made to reinstate it and if they are successful, it would make an application to join the appeal.

101. BB say they made a voluntary disclosure in terms of a letter dated 18 September 2020 stating that the transaction was a TOGC and accordingly VAT was not chargeable and sought to amend the VAT return filed on 4 December 2018 to reflect the position.

102. BB say that HMRC's response dated 18 December 2020 which among other issues stated that it had been adjudicated and determined by the Crown Court during RB's trial that VAT was, as a matter of fact due on the transaction and due to HMRC.

Furthermore, that the VAT return filed on 4 December 2018 was filed after RB's conviction and is consistent with the correct findings of the Crown Court and accordingly the VAT return could not be amended. HMRC say that they are bound by the Crown Court's decision, which is wrong.

103. BB say that "with all due respect to the Crown Court, the issue of VAT liability was never addressed or considered. Had it been addressed the Court would have recognised that liability was a question of law rather than of fact for a jury to determine. The inescapable conclusion is that the Court would have followed Community law and in doing so would have found the transaction was not taxable.

104. BB say that the Crown Court has not made any binding ruling on HMRC and nor could it.

105. BB say that jurisdiction to hear this appeal is granted by virtue of section 83 of the Value Added Tax Act 1994 which states "an appeal shall lie with respect of the following matters". Section 83 (a) engages in the issue of the cancellation of registration which is a factor in this appeal; section 83 (b) engages so far as "the VAT chargeable on the supply of any goods or services, is an appealable matter" and section 83 (c) engages since BB decision retains the right to an amount of input tax to be credited to Anthology.

106. Section 84 (2) provides a condition that an appellant must have made the returns he is required to make under paragraph 2 (1) of schedule 11 and is paying the amount shown on those returns as payable by him. BB say, "this limitation has no impact on the appellants in this appeal".

107. BB say that section 84 (4)(a) VATA sets out: "where there is an appeal against the decision of the Commissioners with respect to, or to so much of any assessment as concerns, the input of tax that may be credited to any person or the proportion of input tax under section 26"

Accordingly, section 84 does not limit the right of appeal to the person that is assessed or has been refused credit. The appeal may be against the decision concerning 'any person'. In any event in this case the decision is directly addressed to BB

108. It is for the FTT to decide whether BB have sufficient interest much in the same way the Administrative Court would acknowledge an application for permission for judicial review. For instance, the Federation of Technological Industry was able to intervene over decisions to dispute input tax and this led to a hearing before the CJ EEC. The Federation, however made no supplies itself.

109. BB say that notwithstanding the preliminary issue is one of strike out, the substantive issue is straightforward, and the law is clear that VAT may be charged on supplies of goods or services.

110. BB say that whereas HMRC assert that there should have been a charge to VAT on the supply of an industrial estate, as a matter of fact, units of the industrial estate were rented out.

111. As a matter of fact, following the transfer of the industrial estate, the units continue to be rented out. Since this was a business that not only could have continued

but did continue then as a matter of law there was a Transfer of a Going Concern (TOGC).

112. BB say that the intention of the parties to a transaction are irrelevant to the objective classification of the transaction and in particular to the classification as to whether a transaction is an TOGC.

113. The decision of a jury in the criminal proceedings cannot change the legal classification of the transaction. At this time, the Crown Court has postponed confiscation proceedings to await the outcome of the FTT appeal. Following any decision of the FTT, the matter of the criminal conviction will return to the Court of Appeal the consideration of the appeal against the conviction against RB. RB says that the FTT is an expert tribunal and is the best place for the issue of whether tax was payable on the transaction between LPIP and Anthology or whether it was a TOGC.

114. BB say that HMRC's lack of grasp of the issues is revealed in their skeleton argument where they say "there can be no doubt that the sale of Arklow estate is subject to VAT. It was treated as such by both parties to the transaction". BB say there must be doubts, particularly when a jury decided the issue without them having been addressed as to the law on the topic".

115. Despite the bold assertion that there can be no doubt, HMRC go on to plead case law in respect of TOGCs. However, the case law must be set against the facts which at this time had not been determined by the FTT. The only way HMRC's arguments can be resolved is for FTT to hear the appeal.

116. BB say that HMRC have asserted the appeal grounds incorrectly as not amenable to intention".

117. BB say this is a remarkable assertion which demonstrates a complete lack of understanding of VAT law. They say VAT is classified objectively and not subjectively. As an example, they say that where a parent buys shoes for a particularly large child the shoes may be classified as standard rated notwithstanding the intention is to supply them to a child. The intention and purpose do not make the shoes zero rated. Intention and purpose have no place in the objective classification of a taxable transaction.

118. The transaction with Anthology was about the sale of industrial units let out for rent which the previous owners had opted for tax (FTT). Accordingly, there was a charge to VAT on rents. LPIP purchased the Arklow estate with the option for tax, which could not be easily removed (as it runs with the land.) BB say that Anthology continued to charge VAT to its tenants at least in relation to "some of the units" after the sale.

119. They say that vacant possession does not determine anything which would be a natural condition of any sale as otherwise a purchaser would be stuck with the leases of the previous owners. BB say there was a continuity of business and that it does not matter about emails exchanged between LPIP and Anthology in advance of the transaction. The matter of whether there was a TOGC should be a question of law for the FTT to consider objectively.

120. In doing so, BB would wish to see proper evidence of the VAT returns of Anthology for a longer period than those exhibited by HMRC in their bundle for the hearing and the relevant leases.

121. In relation to *Zita Modes*, BB say the case is straightforward and that you should look at the objective basis of the transaction and, if you do, you see a TOGC. It is necessary to look at the objective pieces and interpret them from their objective features. In this case there was disclosure by BB.

BB say that HMRC's position regarding abuse of process is misconceived. They refer to Mr Justice Briggs, as he then was, in *The Secretary of State for Business, Innovation and Skills v. Nadham Singh Potiwal* [2012] EWHC 3723 at paragraph 6:-

> "Counsel were agreed that the principles relevant to the Secretary of State's application to strike out are to be found in the decision of the *Court of Appeal in Secretary of State for Trade and Industry v Bairstow [2003] EWCA Civ 321.* Mr Bairstow had been the chairman and joint managing director of Queen's Moat House plc ("QMH") until dismissed in August 1983. QMH successfully resisted his claim for damages for wrongful dismissal by proving allegations of misconduct, breach of duty and breach of his service agreement by Mr Bairstow. At a trial before Nelson J in 1997 to 1998, Mr Bairstow had his appeal dismissed in May 2001. In subsequent disqualification proceedings against him he sought by way of defence to re-litigate those allegations, but on an application by the Secretary of State at a pre-trial review Pumfrey J held that he was bound by the findings made against him in those earlier proceedings. The Court of Appeal allowed his appeal from that decision. After a lengthy review of the authorities, the Vice-Chancellor held that they established the following propositions:
>
> "A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court.
>
> (a) If the earlier decision is that of a court exercising a criminal jurisdiction, then, because of the terms of ss. 11 to 13 Civil Evidence Act 1968, the conviction will be conclusive in the case of later defamation proceedings but will constitute prima facie evidence only in the case of other civil proceedings. ...
>
> (b) If the earlier decision is that of a court exercising a civil jurisdiction, then it is binding on the parties to that action and their privies in any later civil proceedings.
>
> (c) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such re-litigation would bring the administration of justice into disrepute."

122. They say that in relation to the two-part test in paragraph 6 (c), the fact is that the legal tax issues were never considered by the Crown Court or by the jury. Furthermore, the Crown Court itself has postponed the confiscation proceedings to await any decision of the FTT.

123. HMRC were not a party to the Crown Court trial. LB was acquitted of all charges so how could it be said she is bringing an abusive appeal?

124. They also refer to *Hunter v Chief Constable of West Midlands (Hunter)*where at paragraph the judge stated:

> "In the instant case the relevant final decision by a competent court in which the identical question sought to be raised has been already decided is the ruling of Bridge J., on the voir dire in the murder trial, that Hunter's confession was admissible. Initially his ruling may have been provisional in the limited sense that up to the time that the jury brought in their verdict he had power to reconsider it in the light of any further evidence that might emerge when the whole question of the circumstances in which the confession was obtained was gone into again before the jury on the question of the weight to be attached to it: *Reg. v.Watson (Campbell)* [1980] 1 W.L.R. 991 . But his ruling became final when the trial ended with the return of the jury's verdict of guilty and the pronouncement by the judge of the mandatory sentence of life imprisonment. Bridge J. thereupon became functus officio. His ruling that the confession was not obtained by the use of violence by the police, as Hunter had alleged, could thereafter only be upset upon appeal to the Court of Appeal (Criminal Division)."

125. BB say this is authority for the proposition that it is the identical question that was being asked whereas in this case it is in relation to a question that was never asked.

126. In *Hunter* they rely at page 11:-

> I can deal with this very shortly, for I find myself in full agreement with the judgment of Goff L.J. He points out that on this aspect of the case Hunter and the other Birmingham Bombers fail in limine because the so-called 'fresh evidence' on which they seek to rely in the civil action was available at the trial or could by reasonable diligence have been obtained then. He examines also the two suggested tests as to the character of fresh evidence which would justify departing from the general policy by permitting the plaintiff to challenge a previous final decision against him by a court of competent jurisdiction, and he adopts as the proper test that laid down by Earl Cairns L.C. in *Phosphate Sewage Co. Ltd. v. Molleson (1879) 4 App.Cas. 801* , 814,namely that the new evidence must be such as 'entirely changes the aspect of the case.'

127. BB say that no-one considered whether it was a sale of a building or a transfer of an industrial estate and much of the evidence in the criminal trial is not relevant.

128. They say that at the confiscation proceedings in the Crown Court the judge had exceptionally postponed those proceedings to allow this appeal to the FTT. BB are not asking the FTT to set aside a criminal conviction but that much of the evidence in the criminal trial is not relevant to the tax treatment of the transaction.

129. They say these issues were not put before the Crown Court nor the Criminal Court of Appeal. The aim of having the FTT decide the issue is to draw a distinction between what people might say and what the FTT might objectively decide.

130. BB say there is a real prospect of success because of the fact they have highlighted that Anthology was opted for tax, had tenants, and that there was a continuance business of the tenancy. Accordingly, it would be premature to strike out.

131. Notwithstanding that HMRC have disclosed a number of Anthology's tax returns they do not go into the future sufficiently and that in any event further information such

as the leases entered into by Anthropology would be necessary in relation to establishing the transaction as a TOGC.

**Decision**

Jurisdiction

132. The Tribunal considered that it had jurisdiction in terms of section 83 of VATA, subject to Sections 83G and 84. BB stated that in terms of section 84 (4) (a) the right of appeal is open to 'any person' and is not limited to the person that is assessed or has been refused credit.

133. At the hearing, BB's counsel had failed to include a copy of the legislation he wished to refer to in the Bundle before the Tribunal and had assumed that a copy of Tolleys's Orange Handbook was available to the Tribunal. As this was a video hearing and not at a Tribunal Centre no copy was readily available.

134. Subsequently, the Tribunal noted that Section 84 (2), referred to by BB's counsel and in BB's skeleton argument, had been omitted by The Transfer of Tribunal Function and Revenue & Customs Appeals Order 2009 art. 1 (2) Schedule 1, paragraph 221 (2).

135. This provision was, however, enacted in a similar way by revisions made by the same Order including Section 84 (3) with the effect that for an appeal to succeed the tax must be paid. BB say this is a limitation which has no impact on their appeal.

136. HMRC have issued a decision and given a right to appeal even though in retrospect they considered this was an error.

137. HMRC's argument was that as they did not or could not be liable to credit BB, as opposed to LPIP, The Tribunal agreed with the submission made by BB that section 84 (4) (a) did not preclude BB from having a right of appeal because the credit was not made directly to them.

138. The Tribunal accepted BB's submissions in relation to jurisdiction and proceeded on that basis.

Abuse of Process

139. RB's evidence and the case put forward at his criminal trial was that LPIP had treated the sale of the units to Anthology as taxable and accordingly VAT was payable. Clearly if no VAT was payable then there could have been no fraudulent evasion of it, contrary to section 72 (1) VATA.

140. RB was the person controlling LPIP and the Tribunal did not find it credible that that he and LB, based on their statements made for their trial, thought 'consistently' that no tax was payable as the sale was instead a TOGC and only said the tax was payable at the Crown Court, and again at the Criminal Court of Appeal, on 'the advice of their legal defence team'.

141. Similarly, the Tribunal did not find it credible that LPIP had paid £535,000 to HMRC because of 'the advice of their legal defence team' that this was necessary to

"avoid a custodial sentence", as this payment was made only the day after BB were arrested.

142. As stated by the Vice-Chancellor in *Court of Appeal in Secretary of State for Trade and Industry v. Bairstow;- "* a collateral attack on an earlier decision of a court of competent jurisdiction may be, but is not necessarily, an abuse of the process of court if "the parties to the latest civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of process of the court to challenge the factual findings and conclusion of the judge and jury in an earlier action if (i) would be manifestly unfair to the party to the later proceedings that the same issues should be relitigated or (ii) to permit such re-litigation would bring the administration of justice into disrepute"

143. HMRC was not a party to the earlier proceedings and BB now challenge the factual findings and conclusions of the judge and jury in an earlier action. BB say that the issue of the tax treatment was not considered in detail by the court or the jury in the criminal trial.

144. The Tribunal considers that the reason for this, on any common sense and logical basis, was that the issue was not raised because it was accepted throughout that it was a taxable transaction and that was the raison d'etre of there being a criminal prosecution for fraud.

145. The Tribunal consider, as outlined below, that the intentions of the parties are relevant to the creation of a TOGC. Based on the weight of evidence before the Tribunal, the same issues would be relitigated as any starting point would need to consider the evidence given on oath and under caution which was that the members of LPIP treated the transaction as taxable and not, consequently, as a transfer of a TOGC.

146. The Tribunal could not consider circumstances whereby the whole evidence given to a criminal trial that the transaction was taxable could suddenly be discarded, almost as though it had not taken place, as being anything other than, as Lord Diplock put it 'bringing the administrative justice into disrepute among right-thinking people'.

147. The administration of justice depends upon the evidence being given to any court or tribunal being the "truth, whole truth and nothing but the truth". The evidence given to both the Crown Court and the Criminal Court of Appeal had, therefore, to be truthful and not subject to perjury. Whereas the Crown Court has not made any binding ruling on HMRC, and nor could it, it did hold a trial whose whole basis was that there was fraudulent behaviour in relation to tax due to HMRC.

148. Accordingly, the Tribunal considers that if the FTT were to decide that a hearing should take place to reassert the very basis on which a court and a jury had been led to believe by BB was the basis of a transaction would bring the administration of justice into disrepute.

149. The Tribunal does not accept that the legal tax issues were 'not considered' when in fact they were to the extent that tax was self-evidently considered to be payable.

150. The Tribunal could not see that there was any 'fresh evidence' available now that was not available at the time: - a) the transaction was treated as taxable on exchange, b) at the time of the Crown Court hearing and c) at the time of the appeal to the Criminal Court of Appeal.

151. BB accepted that if the Tribunal did not rule in favour of a hearing to consider the tax treatment of the transaction, then this could equally be used for a second appeal to the Criminal Court of Appeal who could then hear submissions from the relevant legal team.

Reasonable prospects of success

152. BB's principal submission is that the issue of whether the transfer of the unit was a TOGC is entirely an objective exercise and distinct from what people might say or have said or is deduced from their intentions.

153. It is on this basis that BB say the matter should be decided by a specialist tribunal, the First-tier Tribunal, and say that the Crown Court has postponed confiscation proceedings until that Tribunal has reached a decision or not.

154. The Tribunal hearing was presented with an outline of the law and case law relating to TOGCs with reference to whether the Tribunal should strike the case as having no reasonable prospects of success as well HMRC's claim that the appeal is an abuse of process.

155. There was clearly a transfer of assets, and the question was whether there was a transfer of a totality of assets, or part thereof, which 'must together constitute an undertaking capable of carrying on an independent economic activity'.

156. On the evidence submitted at the hearing it was not clear that the nature of the transaction allowed Anthology to continue the independent economic activity previously carried on by the seller.

157. The Tribunal when considering the case law it was referred to is not persuaded by BB's submissions that VAT is classified only objectively, and not subjectively, and that intention and purpose have no place in the objective classification of a taxable transaction.

158. It is clear from the authorities that a TOGC requires an asset to be transferred but also that something else has to be transferred as well. As Mr Justice Birss (supra) stated:- "That further element is referred to variously as a business, an undertaking, or an economic activity (or part of such a thing). Merely transferring an asset on its own will never be enough to satisfy the test. In order to work out whether the necessary second element has been transferred; one needs to look at all the relevant circumstances. The test is one of substance not form. The circumstances can include the intentions of the parties."

159. BB referred to an example of objectivity as when a parent buys shoes for a particularly large child whose shoes may be classified as standard rated [because of the shoe size, notwithstanding the intention is to supply the child. BB say the intention and purpose do not make the shoes zero rated.

160. The Tribunal considered that it is necessary to consider intention and clearly the shoes have been classified as standard rated because that is the intention of the retailer.

161. HMRC's VAT Notice 714 –Young children's clothing and footwear provides: -" After you have decided that the item is an article of clothing or footwear, and that it is not made of fur, you must then decide whether or not the item is designed for young children. This will normally be done either on the basis of the item's physical measurement or on the body size of the child it's intended to fit.

162. This clearly indicates that intention is relevant, and the notice also gives the retailer a right to satisfy HMRC of the VAT treatment if various set measurements are not met which would involve an element of subjectivity

163. In the same way the Tribunal consider that the intentions of all the parties, and not just the transferee, are required to be considered so as to look at all the relevant circumstances to ascertain if the 'second element' is present to constitute a TOGC.

164. On this basis, the Tribunal consider that there is no reasonable prospect of success as it does not believe that either RB or LB would be credible witnesses when claiming, as they do now, that the sale of the units to Anthology was a TOGC.

165. LB as a member of an LLP, LPIP, and was aware or should have been aware that the submission of a document showing Peter Windsor as nominee for another individual was untruthful as Peter Windsor did not exist.

166. RB, at the Tribunal hearing, contradicted his previous statement to say that Peter Windsor was supposed to be nominee for him whereas previously he had said he was a nominee for Lee Reeves.

167. The statements made in relation to the criminal trial by both RB and LB were quite clear in their belief that tax was payable on the transfer to Anthology. RB similarly considered the transaction as taxable in his appeal to the Criminal Court of Appeal.

168. LPIP issued a VAT invoice showing the VAT and the payment was made to HMRC. It was not credible that this payment had only been made on the advice of RB's legal defence team, which is understood included senior counsel, 'to avoid a custodial sentence' given that it was made the day after BB were arrested.

169. The Tribunal, accordingly, grant HMRC's application to strike out the appeal on the grounds that to proceed would be an abuse of process which amounts to a collateral attack on the final determination of the court of a competent jurisdiction.

170. The Tribunal similarly grant HMRC's application to strike out the appeal on the basis that there is no reasonable prospect of BB's case succeeding, for the reasons stated.

## RIGHT TO APPLY FOR PERMISSION TO APPEAL

171. 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.

**WILLIAM RUTHVEN GEMMELL WS**
**TRIBUNAL JUDGE**

**Release date: 06th OCTOBER 2022**