12 Transfer of a Business as a Going Concern (‘TOGC’)

Section 49 and Article 5 Value Added Tax (Special Provisions) Order 1995

The transfer of a business (or part of a business) as a going concern is potentially a non-supply and, therefore, disregarded for VAT purposes. In a property context this can be relevant to both occupiers and investors.

The purpose of the TOGC provisions is twofold:

(1) to help businesses by improving their cash flow and avoiding the need to separately value assets which may be liable at different rates, or are exempt and have been sold as a whole, and

(2) to protect the revenue by removing a charge to tax and entitlement to input tax where the output tax may not be paid to HMRC.

Where TOGC treatment applies no VAT needs to be charged on the value of the assets. This can be important to the parties as it prevent the transferee suffering a cash flow disadvantage on the payment of the VAT which would otherwise be chargeable. TOGC treatment can also provide a real saving in a property transaction because the consideration is VAT-free, so reducing the SDLT charge (if it is not a TOGC and VAT is due, then SDLT will be due on the VAT element).

The VAT-free treatment as a TOGC is mandatory where it applies. If VAT is charged in error, the purchaser has no legal right to recover it from HMRC, and should look to the vendor to reimburse it. HMRC’s attitude will, however, largely depend on whether or not the vendor has accounted to them for the VAT.

12.1 The legal framework for TOGC treatment

Article 19 of the VAT Directive provides that:

‘In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and that the person to whom the goods are transferred is to be treated as the successor to the transferor.

Member States may, in cases where the recipient is not wholly liable to tax, take the measures necessary to prevent distortion of competition.

1 SI 1995/1268
They may also adopt any measures needed to prevent tax evasion or avoidance through the use of this Article.’

Article 29 of the directive gives effect to article 19 in relation to services.

The UK rules in this respect are in article 5 of the VAT (Special Provisions) Order 1995 which is made under section 5(3)(c). Article 5(1) provides that, subject to the special rules in article 5(2) which apply where certain property assets form part of a TOGC:

‘there shall be treated as neither a supply of goods nor a supply of services the following supplies by a person of 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 or a person defined as such in section 3(1) of the Manx Act;

(b) their supply to a person to whom he transfers part of his 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 or a person defined as such in section 3(1) of the Manx [VAT] Act.’

12.2 The general conditions for TOGC treatment

*Article 5(1) Value Added Tax (Special Provisions) Order 1995*

(1) The transferred assets must be business assets transferred as part of a going concern.

(2) The transferee must use the assets acquired in carrying on the same kind of business as that carried on by the transferor.

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2 See 12.8 below
3 SI 1995/1268
(3) The transferee must be a taxable person or as a result of the TOGC become a taxable person.

(4) Where only part of a business is transferred, that part must be capable of separate operation.

These general conditions are considered in detail at 12.4 to 12.7 below. The three additional conditions which apply to certain property assets are considered at 12.8.

12.3 TOGCs: Some drafting points

Even where a transfer appears to fall within article 5, the best course of action is to have a clause dealing with VAT in the agreement, because there is always a risk that a sale will in fact fall outside the TOGC treatment provided for in article 5.

Accounting for any VAT on the sale is the liability of the vendor and it is for him to decide whether TOGC treatment applies. When acting for the vendor it should be ensured that the vendor reserves the right to recover VAT from the purchaser in addition to the price in the event that the sale falls outside article 5.

The dangers of not dealing with VAT clearly in the sale documentation are illustrated in CLP Holding Company Limited v Singh and Kaur4 where the Court of Appeal considered whether a purchaser was liable to pay VAT on the purchase price of a freehold commercial property. The contract, which incorporated the Standard Conditions of Sale (Fourth Edition), stated that sums payable were VAT exclusive and any obligation to pay included an obligation to pay VAT in respect of that payment. However, the Special Conditions, which took priority over any conflicting Standard Conditions, defined the ‘Purchase Price’ as £130,000. The Court held that the sale contract, properly construed, did not oblige the purchaser to pay VAT in addition to the Purchase Price. The vendor, therefore, had to account to HMRC for VAT out of the £130,000 it received.

The Court’s reasoning was that it is necessary to consider what a reasonable person, with ‘all the background knowledge’ at their disposal, would have understood the contracting parties to have meant. Of critical importance seems to have been that the purchase price was agreed and paid a considerable time before completion. The vendor, through its lawyers, confirmed that it had received ‘all of the sale monies of £130,000 on this matter’, with no mention of VAT. In response to the standard requisition

4 [2014] EWCA Civ 1103
seeking confirmation of the exact amount payable on completion there was again no mention of VAT.

The vendor should, initially, also look for an indemnity against interest and penalties. If there is a real doubt about whether the provisions of article 5 will apply, the vendor should consider requiring the purchaser to deposit an amount equivalent to the VAT that may become due pending application to HMRC for unofficial clearance although this can only be sought where ‘an unusual aspect has been identified in a potential TOGC.’

The vendor’s right to recover VAT from the purchaser can, with one exception, be made conditional on him providing the purchaser with a valid tax invoice. However, when in the exceptional case the vendor is deregistering for VAT purposes after the sale his right to recover any VAT which is due should not be fettered in this way, since once he has deregistered he cannot issue a valid tax invoice.

VAT on the sale may be recoverable by the purchaser as input tax but not in all cases – for example, it will not be recoverable as of right where it should not have been charged because the provisions of article 5 apply to the transfer – so it is also in the purchaser’s interest to get it right. VAT is likely to be a cash-flow cost to the purchaser even where it is recoverable.

When acting for the purchaser, the stance should be that the vendor must take a view as to whether or not article 5 applies and once he has decided, he should either charge VAT or not, as the case may be. However, in many circumstances the vendor will insist on being able to recover any VAT that is payable from the purchaser in addition to the price. If this is the case then the purchaser should always require that any payment of VAT is conditional on receiving a valid tax invoice. In most cases, this should not present the vendor with any difficulties. As mentioned above, it is only when the vendor is proposing to de-register for VAT purposes that difficulties will arise because then the vendor will not be able to issue a tax invoice.

12.4 General condition (1): business assets transferred as part of a going concern
The TOGC rules do not apply to the transfer of non-business assets of a taxable person.

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5 See paragraph 9.1 of VAT Notice 700/9/12 ‘Transfer of a business as a going concern’ (December 2012)
The business whose assets are being transferred probably needs to be trading, or only closed temporarily, although it does not need to be profitable and could be in receivership. In VAT Notice 700/9/12,\textsuperscript{6} HMRC say that:

'There must be no significant break in the normal trading pattern before or immediately after the transfer. The "break in trade" needs to be considered in the context of the type of business concerned, this might vary between different types of trade or activity. For example, HMRC do not consider that where a "seasonal" business has closed for the "off-season" as normal at the time of sale, that there has necessarily been a break in trade. In addition, a short period of closure that does not significantly disrupt the existing trading pattern, for example, for redecoration, will not prevent the business from being transferred as a TOGC.'

HMRC see a VAT group as a single entity for these purposes, so that, for example, the letting of a property to another member of a VAT group is not a business capable of TOGC treatment and the tribunal in Intelligent Managed Services Ltd\textsuperscript{7} (where the transferee was making supplies only to a group member), in effect, agreed with this view.

Until the decision of the First-Tier Tribunal in Robinson Family Limited\textsuperscript{8} HMRC considered that there must be a ‘transfer’ of the assets in the sense of a ‘handing over’ of something owned by the transferor to the transferee, so that the grant of a lease which is the creation of a new asset out of an existing asset could not form part of a TOGC. HMRC also used to be of the view that the asset transferred must continue to exist after the transfer, so that the surrender of a lease which then merges with the superior interest could not be the transfer of an asset to which TOGC treatment applied. This was sometimes dealt with by means of a ‘declaration of non-merger’.

The facts in Robinson Family Ltd were that in 2004 a property development company purchased a 125 year lease of a site in Belfast, and redeveloped it, constructing six commercial units. The company’s lease prohibited assignments of part so when the company subsequently sold one of the new units, it granted a sub-lease of it. The company did not account for VAT on the sale, treating it as a TOGC on the basis that it was the transfer of a property letting business. HMRC had accepted that sufficient preparatory acts had been undertaken by the company to constitute a letting business.

\textsuperscript{6} ‘Transfer of a business as going concern’ (December 2012) at paragraph 2.3.6
\textsuperscript{7} [2013] UKFTT 741 (TC)
\textsuperscript{8} [2012] UKFTT 360 (TC)
HMRC issued an assessment charging tax on the sale on the basis that the creation of the sub-lease was not the transfer of an asset. The tribunal allowed the company’s appeal holding that the unit was an asset of the company’s letting business, which it had transferred as a going concern:

‘79. While not technically binding on this Tribunal, the Tribunal’s decisions in the case of Fox\(^9\) and Morton Hotels\(^10\) were very helpful. In the former case, the Tribunal upheld the transfer of a business notwithstanding that the transferee carried on business in terms of occupation on a different legal basis from that of the original deemed transferor.

80. In the Morton case the Tribunal again relied on the substance as against the form and, in that particular case, held that there was a TOGC even though the transferor had owned the freehold of the business premises and the transferee had entered into a sale and leaseback of the premises so that, at the end of the transaction, it occupied as a tenant rather than as a owner of the freehold.

81. The principle of substance over form is clearly well established and is one which the Tribunal finds amply applies in the current factual situation. It seems wrong to this Tribunal that a transferor should be denied the ability to treat the transfer of a business as a "non supply" simply because it is (as in this case) required to document it in a particular way.

82. In such situations, one must look to the substance of the transaction and, where the transferee is, in effect, carrying on exactly the same business as the transferor, then prima facie the TOGC Provisions should apply.’

Following the decision in Robinson Family Ltd, HMRC announced three shifts in policy\(^11\):

(1) accepting in principle that the surrender of a lease can be a TOGC for VAT purposes;

(2) confirming that the change announced in Revenue & Customs Brief 30/12\(^12\) on whether the grant of a lease can be a TOGC applies generally and is not confined to property letting businesses; and

\(^9\) (VTD 18441)
\(^10\) (VTD 20039)
\(^11\) Revenue & Customs Brief 27/14 ‘VAT: changes in policy on TOGCs’ (9 July 2014)
\(^12\) ‘HMRC’s position following the decision of the tax tribunal in the case of Robinson Family Ltd’ (16 November 2012)
(3) accepting that a person acquiring a completed dwelling or relevant residential or charitable business as part of a TOGC inherits ‘person constructing’ status and is capable of making a zero-rated first grant of an interest.\(^{13}\)

Section 12.9 below says more about TOGC treatment for a property letting business.

*Morland & Co plc*\(^{14}\) concerned the sale of 98 tenanted pubs. The seller was an investor which had been letting the properties to a brewer which had then sub-let them as tied houses, whereas the buyer was a brewer who let the pubs itself. The sale was not subject to the leases to the investor. The operation of the public houses had not formed a part of the seller’s business, since it had leased them to a single customer. Accordingly, the seller had not transferred part of its business as a going concern.

**Availability of TOGC treatment before trading commences – selected case law**

A sale of development land to another developer was seen as a TOGC in *The Golden Oak Partnership*\(^{15}\) where the vendor had undertaken preliminary work including the construction of driveways and provision for electricity, gas and sewerage. *The Golden Oak Partnership* was distinguished in *Gulf Trading and Management Ltd*,\(^{16}\) where the tribunal held that a sale of development land was not a TOGC. In this case the vendor had merely erected fencing and engaged surveyors and architects.

In *Dartford Borough Council*\(^{17}\), the Council sold land to an investor, with the benefit of an agreement for lease to a supermarket chain of part of the proposed development. It had spent over £7 million on preparatory work, including work to roads, power lines and a watercourse. The Tribunal rejected HMRC’s contention that the sale was not a TOGC and allowed the appeal, finding that ‘at the time of sale the appellant was carrying on an economic activity’ in relation to the site. The investor was continuing the economic activity of obtaining rental income from the site, which had previously been carried on by the council. Accordingly the sale of the freehold constituted the transfer of a going concern.

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\(^{13}\) See 4.3.1 above for more detail
\(^{14}\) (VTD 8869)
\(^{15}\) (VTD 7212)
\(^{16}\) (VTD 16847)
\(^{17}\) (VTD 20423)
In *Royal College of Paediatricians and Child Health* terms for the purchase of a property for occupation by the College were agreed with a seller, and the College 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 (as the College was partly exempt). To achieve this result, existing tenants of the College (who occupied part of its existing building and who intended to move with it) entered into an agreement for lease of part of the property with the seller before the College entered into an agreement to purchase the property. The advice was that since the seller was carrying on a property business, this would be sufficient to make the sale to the college a TOGC. The tribunal agreed that the sale of the building subject to that agreement for lease was the transfer of a property leasing business, and its transfer to the appellant was a TOGC. In coming to this conclusion the tribunal followed *Dartford* as:

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 [in *Dartford*] 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’”

It is a well established principle of English law that equity looks on that as done which ought to be done so where, for example, possession is held under an agreement for a lease, of which specific performance would be ordered, the parties are treated in equity as being in the same position with regard to their respective rights as if a lease had been granted.19

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18 [2013] UKFTT 202 (TC)
19 *Walsh v Lonsdale* (1882) 21 ChD 9, (CA); *Zimbler v Abrahams* [1903] 1 KB 577 (CA); *Gray v Spyer* [1922] 2 Ch 22 (CA); *Tinsley v Milligan* [1994] 1 AC 340 at 370, (HL), per Lord Browne-Wilkinson; *Jerome v Kelly (Inspector of Taxes)* [2003] STC 206. The maxim may be applied twice, e.g. where V agrees to sell to P, who agrees to grant a lease to T: *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580 (CA)
12.5 General condition (2): assets to be used by the transferee in carrying on the same kind of business

In *Zita Modes Sarl v Administration de l’Enregistrement et des Domaines* the European Court was asked whether the transferee had to carry on the same type of economic activity as the transferor and held that it did not. However, the transferee had to carry on the business and not shut it down. The tribunal in *Intelligent Managed Services Ltd* agreed with HMRC that this latter statement justified the UK’s restriction that the same business must be carried on by the transferee even though this wording does not appear in the VAT Directive.

The Tribunal said:

‘Although the phrase the ‘same kind of business’ does not appear within Article 19, it is clear from the decision of the ECJ in *Zita Modes*... that, for there to be a ... TOGC the transferee must intend to operate the business transferred, i.e. the business of the transferor. It must therefore follow that this will inevitably be the same kind of business as that previously carried on.

As such, in our judgment, the ‘same kind of business’ requirement in Article 5(1)(a)(i) of the VAT (Special Provisions) Order 1995, is, clearly compatible with EU law as stated in *Zita Modes*...’

*Zita Modes Sarl* concerned the sale of a Luxembourg clothing business to a perfumery business. The European Court held that, where a Member State had introduced non-supply treatment for TOGCs, this must apply:

‘to any transfer of a business or independent part of an undertaking. ... The transferee must however intend to operate the business or the part of the undertaking transferred and not simply immediately to liquidate the activity concerned and sell the stock, if any.’

This second condition is about the transferee’s intentions at the time of the transfer – it is not about what actually happens although this might be the best evidence of the intentions), nor about what the transferee could have done. The transferee does not need to intend to carry on the same kind of business for very long. An intention immediately to sell the business, or to close it down, will prevent TOGC treatment.

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20 (Case C-497/01) [2005] STC 1059
21 [2013] UKFTT 741
22 *Hartley Engineering Ltd* [1994] VATTR 453 distinguishing the earlier decision of the High Court (QB) in *CCE v Dearwood Ltd* [1986] STC 327
In the light of the decision of the tribunal in *Kwik Save Group plc*,\(^23\) HMRC do not generally see a TOGC arising in the context of a sub-sale. If A agrees to sell to B, and B agrees to sell to C, there are successive supplies A-B and B-C, rather than a potential TOGC A-C, even if completion is direct from A to C and B never carries on business using the transferred assets.

There are further issues with property transactions where the purchaser is a nominee. These are looked at in \textbf{12.10} below.

\textit{Selected case law - same kind of business}

In *ICB Ltd*\(^24\) the purchase of two quarries was not a TOGC, since the intention of the transferee was not to carry on a quarrying business but to acquire a convenient source of raw materials for use in an existing business. The transferee had not purchased any goodwill, debtors or work in progress.

In *Bo Jones*\(^25\) the tribunal found that the sale of nightclub premises which the purchaser was intending to convert to a restaurant was a TOGC because the nightclub remained open for a week after the purchase. The tribunal found that the purchaser had, in fact, purchased the night club as a going concern.

In *Hallborough Properties Ltd*\(^26\) a company which carried on a property investment business purchased a head lease. The seller who was a developer had granted a 25-year underlease a year before the sale, and had opted to tax. The buyer also opted to tax, and reclaimed input tax on the purchase of the head lease. HMRC rejected the buyer’s claim on the basis that the sale constituted a TOGC. The tribunal dismissed the buyer’s appeal, holding that the letting and management of the property was a part of the seller’s business, consisting of the receipt of rental income, notwithstanding that it was a developer not a property investor, and this was the same kind of business as that for which the buyer was intending to use the head lease.

\textbf{12.6 General condition (3): transferee must be a ‘taxable person’ or, as a result of the TOGC, become a taxable person}

A ‘taxable person’ is defined in section 3(1) as a person who ‘is, or is required to be registered under this Act’. If the transferor is a ‘taxable person’ the transferee must already be a taxable person, or must immediately become a taxable person as a result of the transfer. The latter is

\[^{23}\] [1994] VATTR 457
\[^{24}\] (VTD 1796)
\[^{25}\] (VTD 6141)
\[^{26}\] (VTD 10849)
often the case, since the transferee must take account of the turnover from the transferring business, or from the part being transferred, in determining when and whether it must register.27

The rules do not allow for the transferee to be VAT-registered in another jurisdiction, other than the Isle of Man.

If the transferor is not a taxable person, the status of the purchaser is irrelevant.

12.7 General condition (4) Transfer of part of a business capable of separate operation

If part of a business is being transferred, it must be ‘capable of’ separate operation. This is normally taken to mean that the part being sold must not depend on other business activities of the vendor which are being retained by him. It is not necessary for that part to be operated separately. The sale of one let property out of a portfolio, or of one shop out of a chain, could qualify as a transfer of part capable of separate operation.

12.8 Additional conditions for certain property assets to be included in a TOGC

Article 5(2), 5(2A) and 5(2B) Value Added Tax (Special Provisions) Order 1995

Three further conditions have to be complied with where the assets of the business include land or properties which would be subject to VAT if they were sold otherwise than as a TOGC. The following property assets fall into this category:

(1) property over which the transferor (or a relevant associate’ of his within the meaning of paragraph 3, Schedule 10) has exercised the option to tax and the supply of which to the transferee would ‘but for’ that option be exempt as falling within Item 1, Group 1, Schedule 9;

(2) the freehold in a partly constructed building (other than a building designed as dwellings or for relevant residential or charitable use) or civil engineering work;

(3) the freehold in a building (other than a building designed as dwellings or for relevant residential or charitable use) or civil engineering work which was completed in the previous three years.

If the business to be transferred includes the above kinds of property assets TOGC treatment will only be available where:

27 Section 49(1)
TRANSFER OF A BUSINESS AS A GOING CONCERN

(1) the purchaser opts to tax the property and that option to tax has effect from the earliest tax point\(^{28}\) in respect of the property asset (the ‘relevant date’); and
(2) written notification of that option to tax is given\(^{29}\) to HMRC on or before the relevant date; and
(3) the purchaser notifies the vendor by the relevant date that the anti-
avoidance provisions in article 5(2B) Value Added Tax (Special Provisions) Order 1995 do not apply to it (see below).

These additional conditions apply if the transaction would, without TOGC treatment, be standard rated, either because the transferor has opted (and the option would have effect in relation to it) or because the sale is of a freehold new building or civil engineering work.

If these conditions apply and the purchaser fails to meet them, the transfer of the property asset will not be (or form part of) a TOGC and will be taxable at the standard rate.

'Relevant date' - Higher Education Statistics Agency Ltd v CCE\(^{30}\)

A company ('HESA') purchased a rented property at auction. The vendor had opted to tax the property, and it was accepted that the letting of the property constituted a business. Following the exchange of contracts (and payment of a deposit), HESA opted to tax the property. Customs issued a ruling that tax was chargeable on the transfer.

HESA appealed, contending that the effect of article 5 of the Value Added Tax (Special Provisions) Order 1995 was that the transfer should not be treated as a supply. The tribunal\(^{31}\) rejected this contention and dismissed the appeal. The transfer was to be treated as a supply, unless the transferee had opted to tax ‘no later than the relevant date’. The effect of article 5(3) was that the relevant date was the date of the contract, rather than the date of completion. The tribunal observed that conveyancing solicitors were generally aware of HMRC’s view that ‘where it is intended that the transfer of otherwise taxable property is to be regarded as the transfer of a going concern, then the purchaser must elect prior to the tax point relating to the transfer’.

\(^{28}\) For tax points see 2.2 above
\(^{29}\) In VAT Notice 742A ‘Opting to tax land and buildings’ (April 2014) HMRC say that ‘By ‘notified to HMRC’ we mean that the purchaser has properly addressed, pre-paid and posted the appropriate form or letter to us (or faxed it to us)’
\(^{30}\) [2000] STC 332 (QB)
\(^{31}\) (VTD 15917)
HESA appealed to the High Court, which upheld the tribunal decision. Moses J held that ‘the relevant date is the date when the deposit was paid’. Since HESA had not opted on or before that date, it was liable to pay output tax on the purchase. (The requirement to notify the exercise of the option by the relevant date was not introduced into article 5 until 18 March 2004.)

As well as notifying HMRC of the option, the purchaser must notify the vendor that the provisions of article 5(2B) of the Value Added Tax (Special Provisions) Order 1995, do not apply to him. This is normally included as a standard clause in the sale agreement and sometimes takes the form of a warranty.

The transferee (which for this purpose includes a ‘relevant associate’ within the meaning of paragraph 3, Schedule 10) cannot give this notification if either of two conditions is met:

1. The asset that is to be transferred to him is a ‘capital item’ in his hands, whether or not the transfer is regarded as a non-supply under the TOGC rules.
2. His supplies of the property asset ‘will, or would fall, to be exempt supplies’ because of the application of the anti-avoidance rules in paragraph 12 of Schedule 10.

TOGC treatment depends on the notification being given, so there can still be a TOGC if the notification is incorrect.

Although article 5(2B) is intended as an anti-avoidance measure, it can be a problem in normal commercial transactions. An example would be where the purchaser is obtaining finance for its acquisition of a property from a bank that is coincidentally a major tenant, or a member of whose corporate group is a major tenant. This will normally mean that the purchaser’s option will be disapplied under the anti-avoidance rules in paragraph 12 of Schedule 10, (although only in relation to supplies under the lease to the bank) so that it cannot give the necessary notification to the vendor that article 5(2B) will not apply. The purchaser will incur VAT, not all of which (because of the exempt letting to the bank) will be recoverable.

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32 By the Value Added Tax (Special Provisions) (Amendment) Order SI 2004/779
33 Described in 9.14 above
34 See Budget Notice 30/04 ‘VAT: Commercial buildings – anti-avoidance’ (17 March 2004) for a description of the scheme the provision (along with the anti-avoidance rules introduced at the same time into paragraph 12, Schedule 10) was intended to counter
12.9 Property letting and TOGCs
The sale of let property may qualify for TOGC treatment if it the sale of a property letting business or part of such a business. As noted in 12.4 above, HMRC do not see the letting of a property between members of a VAT group as a business capable of TOGC treatment. So there is no TOGC if the only tenant is VAT grouped with either the vendor or the purchaser.

Where a number of properties are sold together, only some of which are tenanted, the question can arise whether there is a single TOGC or whether each property must be considered separately. For example, a developer may build various commercial units and wish to sell them. The units may be un十anted, but tenants may be being actively sought, and some units may be tenanted, or they may all be let.

In Notice 700/9/12, HMRC say (at paragraph 6.4.1) that:

‘The transfer of a number of sites or buildings where some of the sites or buildings are let, or partially let and some are unlet, needs to be considered on a case by case basis. The nature of the sites or building and their use are all factors for consideration. It is important to look at whether the assets can be identified as a single business or an identifiable part of a business. In addition all the [other conditions for a TOGC] would need to be met. For example the sale of a chain of shops or pubs could be a TOGC whereas the sale of a grouping of disparate properties might not.’

12.9.1 TOGCs of properties let or held to let - HMRC’s views
VAT Notice 700/9/12 gives some examples of HMRC’s views on TOGCs and non-TOGCs in the context of investors and others disposing of property that is held to let.36 HMRC’s examples are reproduced below in the form of a table.

35 ‘Transfer of a business as a going concern’ (December 2012)
36 Ibid – see sections 6.2 and 6.3
<table>
<thead>
<tr>
<th>Capable of being a TOGC</th>
<th>Not capable of being a TOGC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sale with the benefit of an existing lease or sub-lease</td>
<td>Sale subject to temporary occupation only without the right to occupy after sale</td>
</tr>
<tr>
<td>Sale when let but subject to initial rent-free period and sold during that period</td>
<td>Sale of empty property which is being marketed</td>
</tr>
<tr>
<td>Sale when let but not yet occupied by tenants</td>
<td>Sale of lease granted out of freehold</td>
</tr>
<tr>
<td>Sale of freehold(^\text{38}) when tenant has been found and agreement for lease in place but before lease signed so purchaser takes subject to agreement for lease</td>
<td>Grant of sublease(^{39})</td>
</tr>
<tr>
<td>Sale of a site by a developer which consists of a mixture of let and unlet, finished or unfinished properties to a single purchaser</td>
<td>Sale where existing lease from vendor is surrendered before completion even if tenants under a sublease remain in occupation(^{40})</td>
</tr>
<tr>
<td>Sale of freehold(^{41}) of one of a number of let properties owned by seller</td>
<td>Sale of freehold to an existing tenant of the whole premises as the transferee would not be carrying on the same kind of business as the transferor</td>
</tr>
<tr>
<td>Sale of partially-let building provided that ‘the letting constitutes economic activity’</td>
<td>The grant of a lease to the new owner of a business carried on from the building which the previous tenant has sold as a going concern after surrendering his existing lease</td>
</tr>
<tr>
<td>The purchase of the freehold and leasehold of a property from separate sellers without the interests merging, provided that the purchaser continue ‘to exploit the asset by receiving rent from the tenant’</td>
<td></td>
</tr>
</tbody>
</table>

\(^{37}\) Query the tenability of this position now given the decision of the First-tier Tribunal in Robinson Family Limited – see discussion in \(^{12.4}\) above  

\(^{38}\) Logically the same should hold good for the assignment of a head lease  

\(^{39}\) See footnote \(^{37}\) above  

\(^{40}\) This appears to be based on the decision in Morland & Co plc (see \(^{12.4}\) above)  

\(^{41}\) Logically the same should hold good for the assignment of a head lease
12.10 TOGCs and transfers to nominees

Where property is held on trust, it is usually the beneficiary, rather than the nominee or legal owner, who is seen as making the supplies to tenants. The TOGC rules do not deal with this adequately where the transferee is a nominee, since those rules require it to be the transferee who carries on the business.

To deal with this, HMRC accept that the vendor, nominee purchaser and beneficiary can agree that the beneficiary will be treated as the transferee for the purposes of the TOGC rules. This only applies where the business being transferred is a property letting business, and where the identity of the beneficial owner is known to the transferor.

HMRC suggest the following form of wording:

‘X, Y and Z confirm that they have agreed to adopt the optional practice set out in Customs’ Business Brief 10/96 in relation to the purchase of the property pursuant to an agreement dated () between X and Y.

Following the transfer of the property Y will hold the legal title as nominee for Z, the beneficial owner.’

Alternatively the point can simply be written into the sale agreement, provided the beneficiary is a party to this.

The arrangement is optional. If it is not used, the sale will be treated as a supply to the nominee, and not as a TOGC.

Further details are in VAT Notice 700/9/12.

12.11 TOGCs: summary of main VAT consequences

Where the transfer of assets is a TOGC it is not a supply and no VAT is chargeable. There is a saving if the sale would otherwise be subject to both VAT and stamp duty land tax. There are no VAT cash-flow considerations for the parties.

12.11.1 Input tax

HMRC have confirmed that input tax related to a TOGC, for example, on professional fees, is recoverable according to whether the activity transferred is taxable or exempt. For the transferor, input tax on expenses

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42 ‘Transfer of a business as a going concern’ (December 2012)
43 In VAT Notice 700/9/12 ‘Transfer of a business as a going concern’ (December 2012) at 2.6
44 Originally in Business Brief 08/01 (2 July 2001) now in VAT Notice 708 ‘Partial exemption’ (June 2011) at paragraphs 15.5 to 15.7
that relate wholly to the transfer (for example, legal fees) should be treated as an overhead of that part of the business being transferred. For the transferee, the input tax on costs that relate wholly to the acquisition of assets acquired as a result of a transfer of a going concern, will be recoverable to the extent that they will be used in making taxable supplies. This is based on the judgment of the European Court in *Abbey National plc v CCE*45.

The facts of *Abbey National* were that a company, which was a member of a banking group, carried on a life assurance business and held a number of properties as investments. It sold a property which it had let out, and in respect of which it had opted to tax. The sale of the property was treated as the transfer of part of a business as a going concern. The representative member of the group reclaimed input tax on the solicitors’ fees in relation to the transfer.

HMRC issued an assessment on the basis that, since a TOGC was not a supply for VAT purposes, the input tax on the legal fees could not be directly attributed to taxable supplies and had to be treated as residual input tax within regulation 101(2)(d) VAT Regulations. The representative member appealed and the High Court referred the case to the European Court for a preliminary ruling on the question of whether, in circumstances where a member state had exercised the option in article 5(8) of the Sixth Directive, the transferor might deduct the VAT on the costs of the services acquired in order to effect the transfer.

The European Court ruled that where, in accordance with article 5(8) of the Sixth Directive:

‘the transfer of a totality of assets or part thereof is regarded as not being a supply of goods, the costs incurred by the transferor for services acquired in order to effect that transfer form part of that taxable person’s overheads and thus in principle have a direct and immediate link with the whole of his economic activity. If, therefore, the transferor effects both transactions in respect of which value added tax is deductible and transactions in respect of which it is not’, it followed from article 17(5) Sixth Directive47 that he may deduct only that proportion of the value added tax which is attributable to the former transactions. However, if

45 (Case C-408/98) [2001] STC 297
46 Now article 19 of the VAT Directive which is the vires for the UK TOGC rules
47 Now article 173.1 of the VAT Directive
the various services acquired by the transferor in order to effect the transfer have a direct and immediate link with a clearly defined part of his economic activities, so that the costs of those services form part of the overheads of that part of the business, and all the transactions relating to that part of the business are subject to value added tax, he may deduct all the value added tax charged on his costs of acquiring those services’.

12.11.2 Capital goods scheme
Where a business (or part of a business) which includes capital items falling within the capital goods scheme\(^\text{48}\) is transferred as a going concern, the transferee has to continue to operate the scheme in respect of those capital items for the remainder of the adjustment period on the basis of the transferor’s original input tax attribution but by reference to the transferee’s use of the item\(^\text{49}\). This can result in additional recovery of input tax by the transferee or a claw-back of input tax previously reclaimed by the transferor from the transferee by HMRC.

The transferee will need access to the transferor’s capital goods scheme records to be able to comply with this obligation and this should, where possible, be provided for in the contractual documentation otherwise the transferee will have to rely on the provisions of VATA referred to in \textbf{12.11.3} below to get the necessary information.

12.11.3 Business records
The preservation of the records of the transferor’s transactions remains, with effect from 1 September 2007, the responsibility of the transferor, unless HMRC, at the request of the transferor, direct otherwise.\(^\text{50}\) The transferor must make documents, information and records available to the transferee to the extent necessary for him to meet his VAT obligations.\(^\text{51}\) In addition, HMRC may disclose to the transferee any information relating to

\[\text{\footnotesize \text{\cite{48} For the capital goods scheme see \textit{11.4} above}}\]
\[\text{\footnotesize \text{\cite{49} By reason of regulation 112(4)(a) VAT Regulations which may, however, be called into question by the decision of the European Court in \textit{Staatssecretaris van Financiën v Pactor Vastgoed BV} (Case C-622/11) (10 October 2013 unreported) that ‘the Sixth Directive must be interpreted as precluding the recovery of amounts due following the adjustment of a VAT deduction from a taxable person other than the person who applied that deduction’}}\]
\[\text{\footnotesize \text{\cite{50} Regulation 6(3)(f) VAT Regulations}}\]
\[\text{\footnotesize \text{\cite{51} Section 49(4) and 49(5)}}\]

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the business whilst it was operated by the transferor to enable the transferee to meet his VAT obligations.\textsuperscript{52}

\textbf{12.11.4 Registration/deregistration}

The transferee will generally need to register for VAT, if it is not already registered. This will necessarily apply if the transferor was registered or should have been registered, and the transferred businesses turnover counts as the transferee’s in determining whether and when the transferee should register.\textsuperscript{53} Provided the transferee is not already VAT registered he may take over the transferor’s VAT registration number following a TOGC by using Form VAT 68.\textsuperscript{54} Any VAT liabilities would be transferred with the VAT registration number.\textsuperscript{55} If the whole business is transferred, the transferor will generally need to deregister.

\textbf{12.11.5 Transfers into VAT groups}

If the transferee is a member of a partly exempt VAT group, it may have to account for VAT on a ‘self-supply’ of any assets included in the TOGC, the supply of which would otherwise be subject to VAT.\textsuperscript{56}

\begin{flushleft}
\textsuperscript{52} Section 49(6) \\
\textsuperscript{53} Section 49(1)(a) \\
\textsuperscript{54} Regulation 6 VAT Regulations \\
\textsuperscript{55} Ibid \\
\textsuperscript{56} Section 44
\end{flushleft}
About Ann

Ann Humphrey is a tax solicitor and worked for 16 years in the City of London before setting up her own practice, Ann L Humphrey, in 1993. She specialises in business tax, property tax and VAT. The Legal Experts Directory 2012 listed Ann as an expert in the field of VAT and indirect tax and she is also widely recognised as an authority on Stamp Duty Land Tax (SDLT). In February 2015 she published a book titled ‘VAT and Property’ and she has co-written one of the leading books on SDLT which is due to be updated in 2015.

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VAT and Property

This section on TOGC is from Ann’s book on ‘VAT and Property’. It was published in February 2015 and to purchase please visit this link: http://www.spiramus.com/en/Book/13455/VAT_and_Property.html?=togc

Note from Ann on the Royal College of Paediatricians and Child Health case referred to on page 238

On page 238 of VAT and Property I briefly gave my thoughts on the slightly surprising outcome before the First-tier Tribunal in Royal College of Paediatricians and Child Health. That case has now been heard by the Upper Tribunal. One of the issues was whether the sale of an opted property by a developer subject to a conditional agreement for lease constituted a transfer of a going concern. Michael Conlon QC failed to work his magic for a second time before the Upper Tribunal (in the form of Birss J). Michael did however succeed for the taxpayer on the ground that HMRC’s assessment was time-barred. If I could make an amendment to this passage of the (now published) book I would add that I don’t agree with Birss J’s reasoning on the TOGC point.