TC01863

Appeal numbers: **TC/2009/13822**
TC/2010/05183
TC/2010/07643

VALUE ADDED TAX – whether tax on supplies was input tax on the basis that it was tax on goods or services to be used for the purpose of a business to be carried on by the Appellant – whether (and when) the Appellant had formed the intention of carrying on a business – Rompelman v Minister van Financïen considered and applied – declared intention by the Appellant that it had formed the intention on the acquisition of an historic estate – whether (and from when) there was objective evidence to support such declared intention – evidence considered – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

MACAW PROPERTIES LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (*Value Added Tax*) **Respondents**

TRIBUNAL: JOHN WALTERS QC
SONIA GABLE

Sitting in public in London on 26, 27 and 28 October 2011

Rupert Baldry QC and Oliver Conolly, Counsel, instructed by Smith & Williamson LLP, for the Appellant
Denis Edwards, Counsel, instructed by the Solicitor for HMRC, for the Respondents

DECISION

1. The Tribunal heard a consolidated appeal against an assessment raised by the Respondents ("HMRC") on the appellant, Macaw Properties Limited ("Macaw") on 6 August 2009 in the sum of £199,537 to recover amounts paid to Macaw as input tax for the VAT periods 06/08 to 09/08 inclusive and HMRC's decisions to refuse input tax claims made by Macaw as follows: for the VAT period 12/08 in the sum of £33,225.14; for the VAT period 03/09 in the sum of £16,653.00; for the VAT period 06/09 in the sum of £28,214.26; for the VAT period 09/09 in the sum of £76,919.70; for the VAT period 12/09 in the sum of £14,608.58; for the VAT period 03/10 in the sum of £11,444.24; and for the VAT period 06/10 in the sum of £41,324.23. In total £421,926.15 of VAT is in issue.

2. Macaw was incorporated in 1999. Its ultimate parent company is St. Ledger Investments Limited ("St. Ledger"), whose shareholders are three brothers, Marcus, Paul and Giles Newbold (to whom we shall refer by their respective first names). They are the sons of Clifford Newbold ("Clifford") and his wife, Dorothy Newbold ("Dorothy"). Paul, Giles and Clifford are the directors of Macaw. Marcus is an employee of Macaw.

3. The purpose of the incorporation of Macaw in 1999 was that it should acquire the freehold of Wentworth Woodhouse and its estate of some 83 acres. The estate included a mansion house, Wentworth Woodhouse ("the Main House"), a stable block incorporating an indoor riding school ("the Stable Block") and some college buildings ("the College Buildings") as well as some smaller structures, including a camellia house ("the Camellia House"), gardens and parkland. The purchase price was £2.1 million and carried no VAT, the supply pursuant to which the estate was purchased being exempt for VAT purposes.

4. The Main House is an extremely large mansion house dating from the early 18th century. It is of the highest architectural quality and historical importance, being Grade 1 listed. The evidence of Christopher Cotton, the architect called as a witness by Macaw (see below), is that the Main House contains over 25 rooms of the very highest order, which contrasts with 20 such rooms in each of Buckingham Palace and Windsor Castle, 8 such rooms in Blenheim Palace and 3 such rooms in Castle Howard. The Main House has the longest formally designed house façade in the country (the East Front). At the time of its acquisition by Macaw, however, it was on the "Buildings At Risk" register maintained by English Heritage, because of its state of relative dilapidation.

5. The Stable Block is also an extremely large structure, also dating from the 18th century and also of great architectural and historical importance, and also Grade 1 listed.

6. The College Buildings are relatively modern (having been constructed since the Second World War) and are of no architectural or historical importance.

7. The principal issue in the appeal is whether or not, at the time(s) Macaw received the supplies made to it in respect of which it claims credit for input tax, it intended to make taxable supplies for the purposes of the Value Added Tax Act 1994 ("VATA").

8. Macaw, through the evidence of Marcus and Giles, contends that it has at all relevant times intended to use the properties on the Wentworth Woodhouse estate, in particular the Main House and the Stable Block, to make taxable supplies. Further, it contends that its subjective intention is confirmed by objective circumstances proved by its evidence adduced in the appeal. Macaw's case is that it has at all relevant times intended to use the Main House and the grounds in the estate (or most of them) for the purposes of a high class hotel and the Stable Block for the purposes of a taxable letting business, by conversion of the Stable Block into commercial premises.

9. The Main House is used, and Macaw intends to continue to use it, also for the purposes of exempt lettings of specified parts of the Main House (particular suites of rooms) as dwellings used by members of the Newbold family. The claim for input tax takes account of this use and Macaw does not intend to claim any tax referable to it. The claim is principally referable to the intended use of the rest of the Main House (and grounds) as a high class hotel.

10. HMRC resists the claim on the basis that Macaw has failed to provide sufficient objective evidence to confirm its alleged intention to use the estate for the purpose of making taxable supplies.

The law

11. It is convenient to set out first the law applicable to this issue.

12. Section 24 VAT Act 1994 ("VATA") relevantly provides that 'input tax' 'in relation to a taxable person' means:

> '(a) VAT on the supply to him of any goods or services;
>
> …
>
> …
>
> being … goods or services used or to be used for the purpose of the business carried on or to be carried on by him.'

13. In *Rompelman v Minister van Financïen* (Case 268/83) [1985] 3 CMLR 202, the Court of Justice ("ECJ") examined the question (central to this appeal) of when an economic activity can be considered to begin, in the context of an acquisition by Mr and Mrs Rompelman of the right to future joint ownership of two units in premises under construction together with the usufructuary interest in the land pertaining thereto.

14. The ECJ in the *Rompelman* reference interpreted article 4(2) of the Sixth VAT Directive [see now: article 9.1 of Directive 2006/112/EC], which provided as follows:

> 'The economic activities referred to in paragraph (1) [definition of 'taxable person' as any person who independently carries out any economic activity] shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered as an economic activity.'

15. The ECJ described the question referred as 'in essence':

> 'whether the acquisition of a right to obtain the future transfer of the title to part of an immovable asset which has yet to be built, with the intention of letting such part in due course, can be considered to be an economic activity within the meaning of article 4(1) of the Sixth Directive.' (see: *ibid.* Judgment para. 14)

16. The ECJ answered this question in the sense that the acquisition of such a right *may* be regarded as an economic activity within article 4(1) of the Sixth Directive. But the ECJ added the rider that the tax administration can require that the declared intention of the acquirer, that he intends to let the asset, is supported by objective evidence 'such as the planned premises being specifically suited to commercial exploitation' (*ibid.* para. 25 and *dispositif*).

17. The ECJ applied the principle laid down in *Rompelman* in the later reference *Intercommunale voor Zeewaterontzilting (in liquidation) v Belgian State* (Case C-110/94) [1996] STC 569 ("*INZO*"). In that case, the organisation INZO had been set up with the intention of developing processes for turning sea water and brackish water into drinking water with a view to its distribution. It paid VAT on a study of the profitability of a desalination plant, which was repaid to it by the Belgian tax authority. However, in view of profitability problems identified in the study, INZO never embarked on the activity envisaged and was put into liquidation. The tax authority claimed repayment of the VAT recovered by INZO on the ground that the study could not be described as an 'economic activity' and that INZO was not a taxable person.

18. The ECJ held that where a tax authority had accepted that a company which had declared an intention to commence an economic activity giving rise to taxable transactions had the status of a taxable person for VAT purposes, the commissioning of a profitability study could be regarded as an economic activity, even if the purpose of the study was to investigate to what degree the activity envisaged was profitable. Except in cases of fraud or abuse, the status of taxable person for the purposes of VAT could not be withdrawn retroactively (see: paragraphs 18 to 21 and 24 of the Judgment).

19. Input tax is creditable on the basis that the taxable person possessed the requisite intention at the time the expenditure attracting the tax is incurred, even if subsequently the project proves abortive – at any rate by reason of circumstances

beyond his control (*Belgium v Ghent Coal Terminal NV* (Case C-37/95) [1998] STC 260.

20. This approach was adopted by the VAT and Duties Tribunal (Chairman: J. Gordon Reid QC) in the Scottish appeal of *Beaverbank Properties Ltd. v Commissioners of Customs and Excise* (2003) VTD 018099. That was a case of a property project which proved abortive because planning permission could not be obtained. The planning application which was made proposed a mixed/retail leisure development comprising a 40,000 square feet multiplex cinema, a non-retail development extending to about 70,000 square feet, a family type public tavern/restaurant, and a fast food restaurant, together with customer car parking spaces and provision for access (*ibid.* p.4). Thus although the project was never approved, and no purchase of the property by Beaverbank took place, and Beaverbank had no identifiable tenants in mind, they nevertheless had identified the nature of the project. Beaverbank would have elected to waive exemption on acquisition of the property. The Tribunal assessed the evidence as to Beaverbank's intention at the relevant time, testing it by objective criteria such as the standards and thinking of ordinary businessmen. It found that throughout the period when the speculative costs in issue were incurred, it was Beaverbank's intention, had the project proceeded, to elect to waive exemption and make taxable supplies in respect of the land – further that any ordinary and prudent businessman would, in the same circumstances, have formed the same intention (*ibid.* p.27). The Tribunal held that Beaverbrook was entitled to credit for the input tax incurred on the speculative costs in issue.

21. The Tribunal in *Beaverbank* had had regard to the decision of the High Court (Stuart-Smith J) in *Ian Flockton v Commissioners of Customs & Excise* [1987] STC 394 in determining how Beaverbank's intention should be ascertained. The test is a subjective one (i.e. the determination of the trader's subjective intention) but regard must be had to all relevant circumstances including any objective criteria consistent or inconsistent with the trader's declared intention.

22. We discerned no significant difference in the approach to the law urged on us by the parties. HMRC's case for denying credit as input tax for the tax on the expenditure incurred by Macaw was that 'the objective evidence in this case does not support [Macaw's] claimed intention to make taxable supplies as (or as part of) a hotel operator' (to quote paragraph 17 of Mr Edwards's Skeleton Argument). Macaw, of course, disputed this and Mr Baldry QC submitted that the evidence demonstrated that Macaw 'possessed the intention to make taxable supplies from the date of the purchase of the freehold of Wentworth Woodhouse and its estate onwards (see: paragraph 56 of his and Mr Conolly's Skeleton Argument).

The evidence

23. The question for our decision is therefore one of fact. Accordingly, we review the evidence presented to us (which we accept, unless a contrary indication is given). Marcus made two Witness Statements, Giles made one Witness Statement and Christopher Cotton RIBA, AABC, an architect and partner in the firm Purcell Miller Tritton LLP ("PMT"), made one Witness Statement. All three of these

witnesses for Macaw gave oral evidence and were cross-examined. Anthony Rowe, an Officer of HMRC, also made a Witness Statement, gave oral evidence and was cross-examined. Besides extensive documents exhibited to these Witness Statements, we had two files of documentation.

24. Macaw acquired Wentworth Woodhouse and its estate on 22 June 1999 by purchase for a consideration in cash of £2,166,609.80. The purchase moneys were borrowed at interest from Macaw's parent company, St Ledger, and the borrowing was secured by a charge on the land.

25. Relevant recent history of Wentworth Woodhouse and its estate was that it had been acquired in 1989 from parties connected to the historic owners of Wentworth Woodhouse by a Mr W.G. Haydon-Baillie ("Mr Haydon-Baillie"). Mr Haydon-Baillie's acquisition was subject to certain restrictive covenants and there was provision that in the event of such restrictive covenants being released, varied or modified a payment recognising (though reflecting only one-half of) the uplift in value occasioned thereby would be due to the vendor parties or persons connected with them. The restrictive covenants included a covenant not at any time to use or permit or suffer the Main House to be used for most commercial purposes, including the purposes of a hotel. In 1998 a bank as mortgagee of the estate obtained an order for possession of it and subsequently went into possession. The bank was the vendor in the transaction by which Macaw (or St Ledger) acquired the estate.

26. Officer Rowe put in evidence the judgment of Mr Justice Morgan on 5 July 2007 in the litigation brought by Mr Haydon-Baillie referred to below (see: paragraph 69 below) (neutral citation number: [2007] EWHC 1609 (Ch)) from which it appears that Paul gave the best and final offer (of £2,100,054) which was accepted by the vendor bank on the closing date for receipt of final offers, which was 30 April 1999. Each bidder was to give full details with its offer of the proposed use of the property. The judgment goes on to state that the bank and its advisers were impressed by [Paul's] unconditional offer and his intention that the property would be used as a family dwelling, which would not interfere with any of the restrictive covenants affecting the property (*ibid.* paragraph 93).

27. On 9 February 1988, before Mr Haydon-Baillie's acquisition of Wentworth Woodhouse and its estate, planning permission had been granted for the Main House to be converted into a hotel. However this planning permission lapsed thereafter.

28. Shortly after Macaw's acquisition of the estate, Paul received unsolicited approaches from at least two parties interested in negotiating terms for creating a hotel in the Stables or at the Main House and, in one case, proposing the Main House as accommodation for 'a growing antiques business'.

29. Just under 18 months after its acquisition, St Ledger (presumably representing Macaw and the Newbold family interests), on 15 December 2000 took the advice in conference of Mr Christopher Boyle, Counsel. An attendance note (made by a

representative of Macaw's then solicitors, Gordon Dadds) was in evidence (although not Counsel's instructions). We quote below from the attendance note. According to it: Counsel gave a tentative view that St Ledger would not be liable under the covenants for any payment representing uplift in value by reason of not being privy to the contracts providing for it. Further advice was given about the possibility of lifting the restrictive covenants. Counsel explained that St Ledger's task would be to try to prove to the Lands Tribunal that the covenants no longer benefit the land for whose benefit they were originally imposed. In respect of that land (retained by parties connected with the historic owners of Wentworth Woodhouse), which was described as farmland and a deer park, Counsel said:

> "We must try to think of every conceivable reason why the land would benefit from *not* having a hotel/residential development/religious centre etc!"

30. Although the implications of this statement were debated at the hearing, it is clear to us that this sentence refers to the research which would need to be done in order to prepare a case for lifting the restrictive covenants.

31. Counsel went on to advise in relation to St Ledger's 'strategy'. He is reported as saying:

> 'You must begin by working out exactly how you wish to develop the land. When this has been decided you should submit a planning application. …
>
> Planning permission will need listed building consent (and the support of English Heritage will be crucial here). However, planners do not take restrictive covenants into account when making their decision. When you have planning permission you can then approach the Lands Tribunal. They are unlikely to go against a planning decision made by the Secretary of State (or his officers at Local Government level).'

32. Counsel added that:

> 'there is no reason, barring that of expense, why you should not complete a number of planning applications, for housing/for a hotel/a restaurant.'

33. Counsel also gave some advice concerning a complaint St Ledger evidently had that damage from pheasants, for which the parties connected with the historic owners of Wentworth Woodhouse, who owned land adjoining the Wentworth Woodhouse estate, were responsible, was doing to plants in the garden, including £6,000 worth of new plants waiting to be planted.

34. Finally, St Ledger's representatives are recorded as saying that they were happy to go away and think about the various options discussed, and also that they 'were quite happy if the whole process took three years' and they 'understood it would be expensive'.

35. Schedules to the trading and profit and loss accounts in the accounts of Macaw for the years ended 31 March 2001 to 2010 inclusive were in evidence. These record that revenue amounts spent on 'repairs and maintenance' were as follows:

2001	£345,342

2002	£40,202
2003	£124,506
2004	£172,458
2005	£299,288
2006	£266,319
2007	£153,504
2008	£95,574
2009	£171,594 (including £73,084 on 'pipes and drainage')
2010	£98,980

36. In addition, Marcus's evidence was that Macaw had incurred £77,847 revenue expenditure on repairs and maintenance in the year ended 31 March 2000 and that amounts of capital expenditure on additions had been recorded in the accounts of Macaw as follows:

2001	£137,412
2002	£412,243
2003	£67,288

37. Marcus's evidence was that the Main House was taken off the English Heritage 'Buildings At Risk' Register on 22 May 2003 as a result of the work that had been done up to that point. The letter bearing that date from English Heritage to Clifford states:

> 'On our internal database, [Wentworth Woodhouse] is being archived as 'Repaired' with the following comments which are for internal reading only:
>
> The house is now re-occupied and there are resident caretaking staff. The worst roofs have been recovered, with others overhauled and regularly inspected. An on-going programme of re-servicing, redecoration and maintenance has improved the condition of the building.'

38. Essential repairs to the buildings (chiefly if not entirely the Main House) were carried out first. The expenditure relates, in general terms, to repairs, gardening costs and the costs of architectural and other plans and surveys carried out. Marcus described the works of repair and maintenance carried out in the initial two or three years of Macaw's ownership as '"the basics" namely re-plumbing, re-wiring, the installation of a fire alarm system and the installation of new boilers in the Main House'.

39. From December 2003 to April 2006, Macaw engaged the services of CGMS Consulting ("CGMS"), a firm specialising in advising on planning and development in relation to historic buildings. CGMS advised Macaw on strategy and liaised with the planning department of Rotherham Metropolitan Borough Council, on behalf of Macaw, in relation to planning issues.

40. Marcus's evidence was that CGMS's advice was that the best plan was to apply for permission in two stages – first in relation to the Stable Block and then in relation to the Main House. The rationale for this two-stage process was that it was thought to be 'less provocative' than applying for permission in one stage, and also that if planning permission were obtained for the Stable Block to be

converted to business use, and the income derived from it proved to be insufficient for the upkeep of the Main House, this would provide a rationale for an application to develop the Main House.

41. A one-stage approach was thought to be 'provocative' because English Heritage was hostile at this time to developments of historic buildings as hotels.

42. Christopher Cotton, whose firm, PMT, became involved with Macaw at a later stage (in 2007), explained this in his Witness Statement, as follows:

> 'English Heritage, together with all statutory consultees and approving bodies, do need to be fully convinced through reasoned justification in relation to changes of use of Listed country house [*sic*] into hotels. The Georgian Group, who will be a statutory consultee to any approval, do as a matter of policy object to the principal reuse of country houses for hotels. This is because there are many examples where an original house is of a modest size and has resulted in unsympathetic extension to achieve a viable number of bedrooms and other accommodation, damaging the heritage value and character.'

43. Christopher Cotton however went on to say:

> 'However, I do not regard this as an insuperable obstacle due to the exceptional size of Wentworth Woodhouse. Consultation with the Georgian Group on this approach [which occurred long after 2004] has been constructive.'

44. On 30 September 2004, Dr Nicholas Doggett, Historic Buildings Consultant of CGMS, wrote to the Chief Executive of the Rotherham Metropolitan Borough Council ("the Council") on behalf of Paul, whom he described as 'the owner of Wentworth Woodhouse', 'to explore with you the possibility of obtaining planning permission for development … in order to secure the full repair and long-term future of the house, stable block and surrounding park land at Wentworth Woodhouse'.

45. The letter stated that Dr Doggett and Paul had been in discussion with English Heritage for some months and agreement had been reached on a number of points. The letter went on:

> 'Other important areas of common ground with English Heritage include recognition of the importance of the house continuing in use as a private house, although [Paul] and I are perhaps even more committed to this view than are English Heritage. In the past, planning permission has been granted for its conversion to a hotel and exhibition centre and as recently as 1999 the Planning Brief appeared to regard it as almost inevitable that there would be proposals to change its use. Happily this has not occurred owing to the intervention of [Paul] and his family but the essential thing now is to ensure that this does not happen in the future. Certainly, continuing use of the house as a private dwelling is consistent with the Government guidance contained in PPG 15- Planning and the Historic Environment that "*the best use (of a listed building) will very often be the use for which the building was originally designed, and the continuation or reinstatement of that use should certainly be the first option when the future of a building is being considered.*"' (original emphasis)

46. The gist of the letter is that Macaw would wish to effect improvements to the estate considered desirable by English Heritage, e.g. the removal of modern college buildings, but would be unwilling to do so 'without securing in return

some form of development to bring further benefits to the heritage asset and provide for its long-term future'.

47. The letter states that Macaw did not 'wish to discount some form of appropriate development within the vicinity of Wentworth Woodhouse' but was particularly keen to obtain permission to develop on a 'distant site' within the estate. An exploratory meeting with the Chief Executive and representatives of English Heritage was proposed.

48. In evidence, Marcus and Giles said that the wording of the letter to the effect that Paul was committed to keeping the Main House as a private residence was inaccurate or at any rate overstated. Marcus pointed to the 'more nuanced' section of Dr Doggett's letter where he says that 'although it is currently the case that various restrictive covenants on the property prevent the house from being turned to other uses, this may not always be so, nor would they necessarily be applicable to another owner in the future'.

49. We, however, regard this passage as having been inserted to put the Chief Executive on notice that if the estate passed to another owner, that owner might not be so keen for the Main House to continue in use as a private house.

50. On 30 November there appears to have been the meeting proposed between Dr Doggett, Paul, English Heritage and the Council. Dr Doggett wrote a follow-up letter to the Council stating that it was proposed that a Conservation Plan would be prepared and asking that the Council liaise with English Heritage to produce a Brief for the Conservation Plan. The Brief would contain the Council's and English Heritage's requirements for the planning future of the site.

51. Mr Thornborrow, the Conservation and Urban Design Officer of the Council, had a site meeting with Paul in early February. According to a letter Mr Thornborrow wrote to Dr Doggett on 18 March 2005, Paul 'conducted [him] around the principal apartments identifying some of the work he [had] already done and [was] currently undertaking, and indicating some of his future proposals.'

52. Mr Thornborrow said in that letter that this was 'one of the biggest mansions in the UK and [he was] somewhat daunted by what might be involved in the preparation of a brief, so delayed while [he tried] to learn a little more about Conservation Plans'. He gave an indication in the letter of points which a Conservation Plan should cover.

53. Over the winter of 2004-2005 some quite extensive works were done to the garden at the Main House including the creation of a large new herbaceous border, for which the consent of English Heritage was obtained on 29 November 2004.

54. On 5 April 2005, Macaw granted an assured shorthold tenancy of a suite of rooms in the Main House ("the Existing Suite") to Clifford and Dorothy.

55. There was another meeting on site between Mr Thornborrow and Dr Doggett on 18 May 2005. The idea for a Conservation Plan at this stage modified to an idea for a Management Plan. Dr Doggett wrote to Mr Thornborrow on 16 June 2005 about what the Plan might achieve. He said that the Plan needed to be seen in the context of potential development with the objective of securing the property's sustainable and long-term future as a country house in an appropriate landscape setting.

56. Mr Thornborrow eventually replied on 18 October 2005, but by this time Paul, Marcus and Giles decided that in view of the pace of progress achieved by CGMS, other professional advisers should be retained.

57. At a meeting of the Historic Houses Association in November 2005, Marcus made contact with Rural Solutions ("RS"), a firm of planning consultants specialising in the conversion of rural properties. RS were retained to advise.

58. We have a copy of a letter written by Marcus to William Fry of RS and dated 3 April 2006. In it he refers to a recent meeting between them and that he had contacted Mr Thornborrow at the Council, who had given him access to the planning file in which he discovered 'the lost Hotel Scheme that was approved in 1988'. The plans were only on microfiche and the scheme was for an approximately 300-bedroom hotel. He identified the architects of the original scheme and the building surveyor and suggested that the original drawings of the scheme might be obtainable from them. Marcus's evidence was that the scheme was for the conversion of the Main House, the Stable Block and the college buildings to hotel use at 'different levels of luxury'. Difficulty was experienced in obtaining any original drawings, but some became available in April/May 2007 at a cost of £15,000 plus VAT. Marcus decided not to acquire them, his evidence being that it was clear that new hotel plans would need to be created from scratch and that the expense of acquiring the 1988 plans would be wasted.

59. In October 2006, RS produced a 329-page report entitled "Development Review: The Stables, Riding School and Redundant Education Campus". This report did not address possible uses for the Main House.

60. On 19 April 2007, Paul signed a 'Confirmation of Instructions' on behalf of Macaw, whereby RS were instructed in the 'Design and Planning of Hotel and Business Centre Scheme at Wentworth Woodhouse, Wentworth, Rotherham'.

61. This marked an abandonment of the 'two-stage' approach which Marcus said that CGMS had advised. His evidence was that '[he was] unsure of when we decided to do a single stage approach'. He explained RS's delay in advising a single stage approach by saying that initially RS would have done what Macaw asked them to do (i.e. the two-stage approach originally recommended by CGMS) and only later, as the relationship developed, would RS have started to advise on a change of approach. In any event, RS produced, in April 2007, an architectural brief with the stated objective of securing planning and listed building consent for

the delivery of a hotel and business centre at Wentworth Woodhouse (the Main House, the Stable Block and the other buildings or their site).

62. In around April 2007, PMT were selected as architects for the proposed development and they provided services to Macaw from 3 August 2007. PMT have advised in relation to the preparation of a Conservation Management Plan which went through several drafts and has been finalised and agreed with relevant interested parties. PMT have also advised in relation to a Master Plan, a Strategic Plan and a Visual Condition Inspection Report.

63. Christopher Cotton's evidence is that PMT recognised from an early stage that it would be necessary to work sequentially through a number of key project stages in order to establish the greatest likelihood of securing the required planning permissions for change of us. He described these stages as: (i) the preparation of measured surveys of the buildings and site; (ii) the preparation of Conservation Management Plans to cover landscape and buildings; (iii) the preparation of a Visual Condition Report; (iv) the preparation of Concept Options Proposals; (v) the preparation of a Masterplan Feasibility Study; (vi) the preparation of Outline proposals; (vii) the preparation of a Scheme Design; and (viii) Applications for Planning Approval and Listed Building Consent. He notes that extensive consultation takes place at each stage to establish a project that is sustainable and viable.

64. In January 2008, Macaw instructed Humberts Leisure ("HL"), chartered surveyors and advisers on the leisure business and property. Marcus's evidence was that HL were asked to arrange some initial meetings with potential operators of a hotel at the Main House, to undertake a review of the potential for creating a hotel at the Main House and to make recommendations in the light of the response from potential operators.

65. Christopher Cotton's evidence was that in April 2008 he took the Master Plan which PMT had prepared (and which bears that date) to English Heritage. The Master Plan shows proposals for a 5-star hotel in the Main House, office development in the Stables, a multi-purpose conference and exhibition space in the adjacent Grade I Riding School, and business B1 use in the adjacent Mews Court and the College Buildings. It also gives detailed proposals for access and parking and for accommodation within the Main House, Stable Block and other premises.

66. Christopher Cotton also said in evidence that he saw no insurmountable problems in the way of the development of the Main House as a hotel from the aspects of (i) security, having regard to the Trans-Pennine Way footpath which runs close to the Main House, (ii) funding, having regard to potential funders of the perceived 'heritage deficit', namely the National Lottery Heritage Fund, English Heritage, the European Regional Development Fund and the Getty Foundation, and (iii) structural problems.

67. Other professional advisers have been retained, including The Landscape Agency (to produce a Landscape and Visual Risk Assessment), Rex Proctor & Partners (quantity surveyors) and Brooks Ecological Ltd. (*inter alia* to produce a bat survey of the buildings and site).

68. In the summer of 2005, Clifford was awoken in his room in the Main House by a loud cracking noise. Inspections confirmed that cracks had appeared in the walls of some rooms in the Main House. Macaw engaged the services of Ove Arup & Partners Ltd ("Arup"), structural engineers, to investigate the stability of the ground under the entire site. Arup identified structural problems caused by mining near the Main House and damage has been notified under the Coal Mining Subsidence Act 1991 (as amended by the Coal Industry Act 1994). Marcus's evidence is that claims are ongoing and that this has been a major distraction in terms of time and energy which Macaw could otherwise have devoted to the development project.

69. On 29 April 2005, the previous owner of Wentworth Woodhouse, Mr Haydon-Baillie, issued a claim against 14 defendants including Macaw and members of the Newbold family which, among other things, contested the validity of Macaw's acquisition of the property. By an order dated 21 December 2007, Mr Justice Morgan struck out the vast majority of the claims as having no prospect of success. Macaw and the Newbold family were also distracted somewhat from the development project by this matter.

70. On 2 December 2005, Macaw entered into various transactions (of a sale and leaseback character) concerning the Main House and the estate with the object of raising funds (£604,000) to reduce its indebtedness to St Ledger which had grown to over £4.8m. The family were advised that these transactions were at market value. The transactions were:

- The surrender by Clifford and Dorothy to Macaw of their shorthold tenancy of the Existing Suite.
- The grant to Clifford and Dorothy by Macaw of an assured shorthold tenancy of a different area of the Main House ("the King George IV Suite") at £1,500 per month plus service charges to cover a fair proportion of utility costs.
- The grant of a 20-year head lease of the estate by Macaw to a nominee company, SW1 Nominees Limited ("SW1"), for a peppercorn rent. This head lease was subject to the tenancy of the King George IV Suite already granted to Clifford and Dorothy.
- The declaration by SW1 that it held the head lease in trust for Macaw absolutely.

- The grant by SWI to Macaw of an underlease for 20 years minus 3 days of an area of the Main House comprising the Existing Suite and certain other rooms ("the New Existing Suite Rooms") for a peppercorn rent.

- The sale by Macaw of its freehold reversionary interest in the estate to Marcus, Paul and Giles for a consideration of £390,000.

- The sale by Macaw of the underlease of the New Existing Suite Rooms to Marcus, Paul and Giles for a consideration of £214,000. Service charges are also payable under the underlease.

71. Clifford, Dorothy and Giles have lived at the Main House for more of their time than Marcus and Paul. Marcus and Paul are based in London and occasionally stay at the Main House. Since 2005 they have used the New Existing Suite Rooms.

72. On 19 October 2007, Smith & Williamson Limited ("S&W"), on the instructions of Macaw, applied to register for VAT with effect from 20 October 2004 (a date 3 years before) with a view to reclaiming VAT on expenditure incurred from that date. The main business activities stated in the VAT registration form were 'Property Investment and Development Company'. Relevant statements in S&W's letter were:

> 'For the last few years Macaw has been planning to develop the stable block and to demolish the adjacent derelict buildings and construct commercial buildings. The buildings will be leased to third party businesses, and Macaw will notify HMRC of its option to tax before completion of the buildings. An option to tax is not being made at this stage as the buildings have not yet commenced construction.
>
> As you would expect with a development involving Grade I property, the pre-planning process is very complex, involving research liaison with English Heritage, etc., and therefore takes a considerable amount of time before planning permission is obtained. In addition to the development of the stable block area, our client is also seeking planning permission to develop the central section of the main house into a hotel. Please note that during the period of these developments, our client will be in a VAT repayment position.'

73. On 6 May 2008, HMRC issued a Certificate of Registration for VAT to Macaw with an effective date of 23 October 2004. The trade classification applied to Macaw was 4110 – 'development of building projects'.

74. Before this, on 5 March 2008, S&W submitted an option to tax notification letter from Macaw (signed by Paul) to HMRC, but apparently that letter was not forwarded to HMRC's Option to Tax National Unit. An option to tax notification from Macaw (again signed by Paul, and again dated 5 March 2008) was therefore sent by S&W to that Unit on 18 July 2008 requesting that the option take effect from 5 March 2008. The second option to tax covered the estate, including the Main House, but S&W in their letter stated:

> 'Please note that our client currently leases part of the main house, which is highlighted yellow on the plan, for residential use. As residential accommodation is not affected by an option to tax, and the company does not wish to reclaim any input tax relating to the exempt

residential areas, we assume that permission to opt to tax is not required. Please note that it is our client's intention to convert the main house into a hotel, but as it is a grade I listed property, it may take a number of years before permission is granted.'

75. The option to tax was accepted by HMRC with an effective date of 5 March 2008, by a letter dated 8 August 2008. The position regarding the option to tax and its significance to the appeal was debated at the hearing. We deal with this matter further below under the heading 'The question of the option to tax'.

76. On 11 September 2008 a VAT assurance visit was carried out by HMRC in relation to Macaw's first VAT return (for the period 06/08). For the purposes of the return, S&W had applied a special partial exemption method and wrote in a letter dated 11 September 2008 to HMRC requesting approval for the method.

77. Input tax repayment claims were met by HMRC for the periods 06/08 and 09/08, but, on 6 August 2009, an assessment was made to recover the repayments made for those periods and HMRC also decided to refuse repayment claims made for the periods 12/08, 03/09 and 06/09.

78. We record that on 21 March 2011, English Heritage wrote to Christopher Cotton at PMT indicating its support for 'the sensitive adaptation of the original stable block to suit modern business and commercial use' and for the 'redevelopment of the later college buildings'.

79. Marcus also gave evidence that funding for the progress of Macaw's project until the claim against the Coal Authority is resolved is assured from St Ledger, which has a portfolio of residential property in London and is in a position to support Macaw. Once the claim against the Coal Authority has been resolved Macaw's intention is to secure external funding for the project once planning permission and listed buildings consent has been obtained.

The question of the option to tax

80. The original option to tax notification letter from Macaw, dated 5 March 2008, was exhibited by Officer Rowe. It differs from the notification sent on 18 July 2008 in that in the original letter of 5 March 2008 the option is stated to be made in respect of 'the stable bock and adjacent buildings in the grounds of Wentworth Woodhouse' whereas the letter of 18 July 2008 enclosed a different letter (also dated 5 March 2008) which stated that the option was made in respect of the Main House as well. S&W's letter (dated 7 March 2008) covering Macaw's original letter of 5 March 2008 did include a statement that 'Macaw also intends to convert the main house into a hotel …' – a reference to a letter from S&W to HMRC dated 19 October 2007.

81. The original version of the option to tax notification letter dated 5 March 2008 contained a confirmation that 'no exempt supplies have been made in respect of this property'. The later version contained a confirmation that 'no exempt supplies (apart from residential letting of part of the main house) have been made in respect of this property'.

82. This confirmation ignored the fact that on 2 December 2005 (as recorded above) Macaw sold its reversionary interest in the estate to Marcus, Paul and Giles for £390,000. This was clearly an exempt supply. Officer Rowe states that HMRC was not informed about this exempt sale until HMRC received S&W's letter to them dated 18 March 2009 (after Macaw had been registered for VAT).

83. Whereas generally there are no restrictions on the exercise of an option to tax in relation to land, although an option to tax has effect only if notification of the option is given to HMRC within the allowed time (paragraph 20, Schedule 10, VATA), the position is different if within 10 years before the day on which a person wants the option to take effect that person has made an exempt supply to which a grant in relation to the land gives rise (paragraph 28(1), Schedule 10, VATA).

84. This is the position with regard to the option to tax any part of the estate because within 10 years before the purported exercise of the option, Macaw had made such an exempt supply.

85. In these circumstances an option to tax normally requires the prior permission of HMRC (paragraph 28(2), Schedule 10, VATA). HMRC will only give such permission if they are satisfied that there would be a fair and reasonable attribution of relevant input tax to relevant supplies (paragraph 28(3), Schedule 10, VATA).

86. There is, however, provision for HMRC subsequently to dispense with the requirement for prior permission, in a case where an option to tax has been purportedly exercised and notification thereof given to HMRC, but HMRC's prior permission was required under paragraph 28, Schedule 10, VATA. If HMRC dispenses with the requirement for prior permission the option is treated as if it had been validly exercised. See paragraph 30, Schedule 10, VATA.

87. Mr Edwards, for HMRC, argued that because Macaw needs the agreement of HMRC to opt to tax the estate (and, in particular, the Main House) either in terms of prior permission under paragraph 28(2), Schedule 10, VATA or a dispensing with the requirement for prior permission under paragraph 30, Schedule 10, VATA, it follows that Macaw cannot form the intention to make taxable supplies of interests in the property until it receives such agreement (which has not happened).

88. Mr Baldry's answer to this point was twofold. First, he said that this point only arises so far as Macaw's intention is to make taxable supplies of interests in the property. Supplies made by Macaw in the course of the trade of operating a hotel from the property would be taxable in any event (because they would be supplies in the course of catering or covered by the exception from exemption in item 1(d), Group 9, Schedule 9, VATA). If, as Marcus suggested in his second Witness Statement, Macaw entered into a joint venture with a hotel operator (such as a potential operator introduced by HL – see paragraph 64 above) any supplies would be taxable without the need for an option to tax. Secondly, even if the

validity of an option was relevant, for example if Macaw proposed to transfer the property to another entity (perhaps jointly owned with a potential operator) for that entity to operate the hotel, the validity of an option still remains irrelevant because the only point at issue is whether Macaw intended to make taxable supplies, not its knowledge of VAT law, or the validity of its option to tax.

89. We consider that HMRC's point would only have the force claimed for it if it were impossible as a matter of law to make taxable supplies by operating a hotel from the Main House. Plainly that is not the case. Macaw could, as a matter of law, operate a hotel from the Main House without making any supplies of the property itself. Even if it wished to make supplies of the property itself (which would *prima facie* be exempt) as a step towards operating a hotel from the Main House and an option to tax was needed in order to render such supplies taxable, then the question at issue would be whether Macaw could reasonably have entertained the expectation that HMRC would agree to the necessary option to tax becoming effective. On the evidence before us we conclude that it was at all relevant times reasonable to suppose that HMRC would agree to this, provided a fair and reasonable attribution of relevant input tax to relevant supplies was made (paragraph 28(3), Schedule 10, VATA). There is no basis for us to conclude that Macaw would not have made such a fair and reasonable attribution. Therefore we conclude that there is nothing in the circumstances surrounding the option to tax (or the purported option to tax) which affects the main question for our determination in the appeal, which is whether and when Macaw formed an intention to operate a hotel from the Main House.

The parties' submissions on the main issue

90. Mr Baldry submitted that Macaw's intentions at the time of its receipt of taxable supplies (from 20 October 2004) was to make taxable supplies and that its activities were preparatory in relation to such supplies. We make the point that the effective date of VAT registration was 23 not 20 October 2004 and an important question for us to whether and to what extent Macaw on 23 October 2004 intended to make taxable supplies.

91. Mr Baldry also submitted that all the evidence confirmed the assertions given in evidence by Giles (a director of Macaw), Marcus (an executive employee of Macaw) and Christopher Cotton (Macaw's consultant architect) that Macaw's subjective intention was to make taxable supplies 'at all material times and in particular after 20 October 2004'. In particular, reliance was placed on the level of expenditure concerned on the Main House and the garden, and the fact that it was designed to benefit the Main House as a whole and not merely the parts which the Newbold family have occupied from time to time. Reliance is also placed on the extensive and expensive professional services retained by Macaw which are, Mr Baldry submitted, only explicable on the basis that Macaw had a commercial end in view with regard to the Main House. He also submits that it is important to bear in mind that the very large size of the Main House and its history in providing accommodation for guests would make its conversion to a hotel 'a natural use for it'. He also submits that the delay to the project is due to several factors outside Macaw's control, *viz:* the limited resources of St Ledger,

which provided the financing of the project, the legal case against the Coal Authority commenced in 2005, the legal dispute with Mr Haydon-Baillie, the need to win the support of English Heritage and the fact that such a project is inherently a long-term one.

92. Mr Edwards's case is that the evidence provided by Macaw does not objectively confirm an intention to operate a hotel from the Main House. Besides pleading the uncertainty with regard to HMRC's permission for an option to tax to be effective (see above), Mr Edwards emphasises the fact that no application for planning permission for the conversion or use of the Main House to a hotel has yet been made. He submits that the project is not viable and describes it as 'pie in the sky'. He submits that, because the option to tax is invalid, Macaw is not properly capable of being registered for VAT purposes, its registration is invalid and it is not a taxable person. He draws attention to the fact that the Main House continues to be used as a private dwelling, which is the only use which can be made of it 'in light of its development status'. He submits that there is no commercial plan projecting an economic model to run the Main House as a hotel. He states (correctly) that no minutes of meetings have been provided confirming when Macaw formed the intention to make taxable supplies from the property, and, in particular, to use the Main House as a hotel. He submits that such documentary evidence as there is supports the view that, when the estate was acquired, there was no intention to use it for business purposes (reference is made to the letter from Dr Doggett to the Council of 30 September 2004 and the passages referred to above from Morgan J's judgment in the litigation brought by Mr Haydon-Baillie).

Discussion and Decision

93. As stated above (at paragraph 7), the principal issue in the appeal is whether or not, at the time(s) Macaw received the supplies made to it in respect of which it claims credit for input tax, it intended to make taxable supplies for VAT purposes. Macaw has contended that it has always intended to use the properties at the estate to make taxable supplies and that there is ample evidence to support that proposition (see: the Skeleton Argument of Mr Baldry and Mr Conolly at paragraph 2). HMRC resist the appeal on the grounds that the evidence provided by Macaw does not objectively confirm an intention to operate a hotel from the Main House (see: Mr Edwards's Skeleton Argument at paragraph 2).

94. All the argument and evidence deployed related to this issue of intention. None of it related directly to the issue(s) of how much (if any) input tax would be creditable on the basis of any finding we might make on the issue of intention.

95. Therefore this Decision is a decision in principle on the issue of intention and we direct the parties to agree (if possible) the quantum of any input tax creditable on the basis of this Decision. If agreement is not possible, there will be liberty to re-list the appeal for further argument on the remaining disputed issues. In particular, we make no decision on the point raised by Mr Edwards that any supplies received by Macaw before it sold the freehold of the estate on 2 December 2005 could not be attributable to the use of the Main House as a hotel.

96. In *Rompelman*, the ECJ laid down a rule which we paraphrase as one which provided that an intention to make taxable supplies was sufficient to vest a transaction carried out in pursuance of that intention with the character of an economic activity for VAT purposes. Where the transaction is a receipt of a taxable supply of goods and services, the consequence will be that the VAT on the supply will normally be creditable as input tax. It may not be creditable in full, of course, if the partial exemption rules or some other applicable rules restrict the amount that is creditable.

97. Recognising that the establishment of a relevant intention to make taxable supplies (which is a subjective intention on the part of the person concerned) gave rise to the possibility of administrative difficulties and uncertainty, the ECJ in *Rompelman* added the rider that the tax administration can require that the declared intention is supported by objective evidence. *Rompelman*, of course, concerned an acquisition of a right to obtain the future transfer of title to part of an immovable asset which was yet to be built, and the declared intention was that the acquirer intended to let the asset. In those circumstances, the ECJ added (*ibid.* at paragraph 25) that the objective evidence which could be required would be evidence, for example, that the planned premises were specifically suited to commercial exploitation.

98. We derive from *Rompelman* the proposition that a subjective intention must, in order that it may be effective in making transactions carried out in pursuance of it economic activities for VAT purposes, be an intention that is supported by objective evidence showing that the intention was possible (in the sense of not being impossible) of achievement at the time of the transaction in question. We accept Mr Baldry's submission that *Rompelman* did not lay down that the evidence needed also to show that the intention was commercially viable or even reasonable. It is enough that the intention is *bona fide* and, we would say, not in practical terms so close to being impossible that it could be said to be wholly fantastic.

99. *INZO* provides general support for this view but is not entirely on point because in that case the ECJ's decision was that where a tax authority had accepted that a company had the status of a taxable person by reason of its intention to commence an economic activity, that status could not be withdrawn retroactively, where the case was not one of fraud or abuse, even if the activity was abandoned as a result of a profitability study which the taxable person had commissioned.

100. In this case, although Macaw has been registered as a taxable person with effect from 23 October 2004, Mr Edwards, for HMRC, supported by Officer Rowe, has submitted that the registration is not valid. The basis for this submission is that no effective option to tax has been exercised or could be exercised without the agreement of HMRC (which has not been obtained). We have considered the question of the option to tax above and, for the reasons given, we have concluded that Macaw was able to form an intention to make taxable supplies even before receiving such agreement of HMRC. It follows that we can

see no reason why Macaw's VAT registration should be regarded as invalid. We add that we agree with Mr Baldry's submission that a registration must be regarded as valid once made by HMRC, if it is not formally cancelled by HMRC. We note in this connection that HMRC have express power under paragraph 13(3) of Schedule 1, VATA to cancel a VAT registration with effect from the day on which a registered person was registered if they are satisfied that that he was not registrable on that day. No steps to implement that power have been taken in this case so far as the Tribunal is aware. If this point is to be definitively decided, it would be appropriate to do so on an appeal against a cancellation of VAT registration.

101. Returning therefore to the main point in issue in this appeal, Marcus and Giles, on behalf of Macaw have both made a declaration that Macaw had the subjective intention of operating a hotel from the Main House from the time of the acquisition of the estate in 1999. It is a matter of ascertaining whether that intention is *bona fide* and not in practical terms so close to being impossible of achievement that it could be said to be wholly fantastic and, if it passes that test, whether it is supported by objective evidence. As a subsidiary matter we also consider whether there is any objective evidence supporting Macaw's declared intention to put the Stable Block and the College Buildings to use in making taxable supplies.

102. No serious challenge was mounted to the *bona fides* of Macaw's declared intention. Any such challenge would effectively have required a submission that this was a case of fraud or abuse and would have been required to be specifically pleaded – which it was not. We can therefore accept that Macaw's declared intention was *bona fide*.

103. Was Macaw's declared intention so close to being impossible of achievement that it could be said to be wholly fantastic, or, to use Mr Edwards's phrase, 'pie in the sky'?

104. Mr Edwards submitted that the evidence showed that Macaw's project of operating a hotel from the Main House lacked financial viability, project viability and feasibility. He referred in particular to the difficulty of persuading a hotel operator to be involved because of the location of the Main House, the potential financial problems in raising the £120m to £125m thought to be necessary to achieve the project, the structural issues connected with the claim against the Coal Authority, the lack of a proper business plan, the problems of access to the Main House for visitors and others, the problems of traffic control, the proximity of the Trans-Pennine Way footpath.

105. Although we agree that these are potential difficulties, we accept Christopher Cotton's evidence in relation to security, funding and structural problems, that they are not (at any rate obviously) insurmountable. We also note that in 1988 planning permission had been obtained for hotel use in all the relevant buildings, including the Main House and that we have seen unsolicited letters sent to Paul from two third parties shortly after Macaw's acquisition

showing interest in converting the Main House and Stable Block for commercial use (including hotel use).

106. Our task is not to take a view on the potential viability of the project as viewed at 1999 or a later date, but to decide whether Macaw's declared intention was 'pie in the sky'. On the evidence we conclude that it was not.

107. We turn to looking at the extent to which Macaw's declared intention of operating a hotel business from the Main House was supported by objective evidence.

108. The extract from Morgan J's judgment (referred to at paragraph 26 above) indicates that at the time of the purchase of the estate in 1999, Macaw and the Newbold family had the intention that the Main House would be used as a family dwelling.

109. This is confirmed by the evidence of Dr Doggett's letter of 30 September 2004 (see paragraphs 44 to 47 above) in which he stated that 'Paul and I are perhaps even more committed [than English Heritage] to [the importance of the house continuing in use as a private house]'. We reject the evidence of Marcus and Giles that this was inaccurate or an overstatement. There is no objective evidence on the basis of which we could accept their assertions to that effect.

110. The note of the conference with Mr Christopher Boyle of Counsel on 15 December 2000 provides no objective evidence of an intention on the part of Macaw to use the Main House as a hotel. Instead the note reports Counsel as saying that Macaw 'must begin by working out exactly how you wish to develop the land. When this has been decided you should submit a planning application'. We conclude from this evidence that any commercial use which Macaw might make of the estate was at that point undecided. It was important to Macaw then to be advised as to the prospects of lifting the restrictive covenants and their liability for any payment representing uplift in value consequent on lifting them. This was, so to speak, background knowledge which Macaw and the Newbold family needed to have. We conclude that they wished to have it before forming any definite intention as to commercial use.

111. The expenditure of significant sums in the early years on repairs and maintenance and additions (including expenditure on the gardens) is not, in our opinion, evidence one way or the other as to Macaw's intention to operate a hotel business from the Main House. It is explicable on the basis that Macaw intended that the Main House should be used as a residence for the Newbold family. It is also explicable on the basis that a top priority for Macaw and the Newbold family was to repair the Main House to the point where it was removed from English Heritage's 'Buildings At Risk' Register. It was so removed on 22 May 2003.

112. Furthermore, there is no objective evidence to support the assertions made by Marcus and Giles that CGMS had advised Macaw to apply for planning

permission in two stages, first for the Stable Block and then in relation to the Main House. CGMS were engaged between December 2003 and April 2006. There is no documentary evidence to the effect that CGMS advised Macaw that English Heritage would be hostile to the conversion of the Main House to hotel use. We are not prepared to assume that such advice was (or would have been) given. As Christopher Cotton said, the exceptional size of the Main House militates in favour of its use as a hotel.

113. Again, the instruction to CGMS to produce a Conservation Plan (or a Management Plan) seems to us to be neutral in that it neither supports nor undermines the case that at the time of giving the instruction Macaw intended to operate a hotel business from the Main House. The instruction seems to us to have been a necessary consequence of the acquisition of highly important listed buildings on the 'Buildings At Risk' Register.

114. On the other hand, the letter written by Marcus to William Fry of RS on 3 April 2006 does seem to us to evidence an intention to use the Main House as a hotel, or at least seriously to consider such use. Before that date Marcus had met Mr Thornborrow of the Council, who had given him access to the planning file concerning the hotel scheme for which planning permission had been given in 1988. There followed some work in tracking down the original plans. We consider that this would not have been done if Macaw had not had an intention of some sort to operate a hotel business from the Main House, for otherwise the plans would have been of no or marginal use – there was never a suggestion that Macaw intended to operate a hotel business from the Stables or any other(s) of the buildings.

115. Definitive evidence of Macaw's intention to operate a hotel business from the Main House is the 'Confirmation of Instructions' signed by Paul on behalf of Macaw on 19 April 2007, whereby Macaw instructed RS in the 'Design and Planning of Hotel and Business Centre Scheme at Wentworth Woodhouse, Wentworth, Rotherham'. This more or less coincided with the appointment of PMT and the start of Christopher Cotton's involvement.

116. Mr Edwards laid great stress in his submissions on the delay in applying for planning permission (at the time of the hearing of the appeal, this had not yet happened). We do not consider that this delay negates the evidence of an intention to operate a hotel business from the Main House. We regard as perfectly reasonable Macaw's explanation that an application for planning permission and listed buildings consent is the last stage in the process and that those applications have, in practice, to be very carefully prepared – see: Christopher Cotton's evidence at paragraph 63 above, which we accept. This may not be the position with an average conversion project, but the characteristics of any project involving the Main House, or indeed the Stable Block, are far from average due to the extraordinary characteristics of the buildings concerned.

117. Similarly, we are not influenced by the fact that an application for registration for VAT purposes was made as late as 19 October 2007. There are

several possible reasons for that, apart from the suggestion that no intention to carry out taxable transactions was made until shortly before that time. In any case that evidence, such as it is, does not outweigh the earlier evidence pointing to the relevant intention having been formed, which is referred to above.

118. Having considered all the evidence, we have concluded that the objective evidence supports the proposition that Macaw's declared intention of operating a hotel business from the Main House was formed some time before 3 April 2006 (Marcus's letter to William Fry of RS – see: paragraph 114 above). We conclude that the intention was formed on or around 1 January 2006.

119. We note that Mr Rowe objects that if input tax recovery is allowed on the basis that Macaw had an intention to make taxable supplies, then 'there is no time pressure or other element of compulsion which will make Macaw engage in business activity'. We do not consider this is a consideration which is relevant to the question of whether (or the extent to which) objective evidence supports Macaw's intention to make taxable supplies. *INZO* suggests it is not. If at some stage HMRC were to form the view that Macaw no longer had the intention, they could, of course, give consideration to the exercise of their powers to cancel Macaw's registration for VAT purposes.

120. Finally, we consider the evidence that Macaw had an intention to make taxable supplies in relation to the Stable Block and the College Buildings. Given the ineffective nature of the option to tax the Stable Block and the College Buildings to which we have made reference above, the question at issue regarding the possibility of Macaw making taxable supplies of the Stable Block or the College Buildings is whether Macaw could reasonably have entertained the expectation that HMRC would agree to the necessary option to tax becoming effective. As with the parallel question in relation to the Main House, we have concluded on the evidence before us that it was at all relevant times reasonable to suppose that HMRC would agree, provided a fair and reasonable attribution of relevant input tax to relevant supplies was made (paragraph 28(3), Schedule 10, VATA). There is no basis for us to conclude that Macaw would not have made such a fair and reasonable attribution. Therefore we conclude that there is nothing in the circumstances surrounding the option to tax (or the purported option to tax) which affects the question whether and when Macaw formed an intention to make taxable supplies in relation to the Stable Block or the College Buildings.

121. We have concluded above that as at the date of the conference with Counsel (15 December 2000) any commercial use which Macaw might make of the estate was undecided. Macaw engaged the services of CGMS in December 2003 and on 30 September 2004 Dr Doggett wrote to the Council informing them that Paul (and therefore Macaw) wished to 'remove' the College Buildings and hinting that Macaw would wish 'some form of financial return' by development on a 'distant site' to enable the restoration of the Main House to continue. We consider that this it is likely that Macaw had in mind at this stage the development of the Stable Block by turning it to commercial use to support the restoration of the Main House. Accordingly we conclude that the intention to make taxable

supplies in relation to the Stable Block had been formed before 23 October 2004, and probably much earlier than that.

122. Our decision in principle is that Macaw had the intention of making taxable supplies in relation to the Stable Block before 23 October 2004 and had the intention of making taxable supplies in relation to the Main House on and after 1 January 2006. The appeal is allowed in part on that basis. As stated above, this is a decision in principle and the quantum of input tax recoverable in consequence of it will need to be agreed by the parties or by us at a resumed hearing in default of any such agreement.

Right to apply for permission to appeal

123. This document contains full findings of fact and reasons for our decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Rules. 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.

JOHN WALTERS QC

JUDGE OF THE FIRST-TIER TRIBUNAL
RELEASE DATE: 1 March 2012