TC02046

Appeal number TC/2009/11689

FIRST-TIER TRIBUNAL
TAX CHAMBER

S.49 VATA and Art 5 VAT (Special Provisions) Order 1995 – creation of a sub-lease – whether there was the transfer of a business or the disposal of a new asset – Appeal Allowed

ROBINSON FAMILY LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE IAN WILLIAM HUDDLESTON

Sitting in public in Belfast on 13 June 2011

Ms. Penny Hamilton BL instructed by C&H Jefferson, for the Appellant

James Puzey, BL instructed by the Solicitors Office of HM Revenue & Customs for the Respondents

DECISION

Appeal

1. The decision which is the subject of this appeal is a review decision of HMRC dated 14 August 2009.

2. The original assessment was raised under Section 73 of the Value Added Tax Act 1994 ("VATA") in the sum of £447,300 plus interest for the accounting periods 07/06 and 07/07 and was notified to the Appellant on 19 March 2009.

3. The assessment was based upon the refusal by HMRC to treat two property disposals made by the Appellant, a property development company, to third parties within the relevant accounting periods as transfers of going concerns or otherwise "non-supplies" for VAT pursuant to Section 49 VATA and Article 5 of the VAT (Special Provisions) Order 1995 (collectively "the TOGC Provisions").

4. When the assessment was originally raised, it was based on an alleged insufficiency of evidence of the existence of a property letting business at the point of transfer but, the review decision, and the case argued before this Tribunal (and as set out in HMRC's statement of case) is somewhat different to that original position. HMRC's current position is that at the point of transfer new leases were created to effect the two disposals in question and that, therefore, there was a new and separate supply of those sub-leases and that consequently the requirements of the TOGC Provisions have not been met and that the transactions are therefore taxable supplies.

5. The Property in question is comprised of a number of developed unites. I should also point out that the dispute on the disposal of Units 1, 2 and 5 is no longer relevant – the VAT on that transaction having now been paid and reclaimed.

6. The appeal, therefore, focuses solely on the VAT treatment of Unit 3. In that regard, it probably makes sense at this point to also deal with one peculiar issue. The assessment in the case of Unit 3 as originally raised represented an apportionment of the tax assessable – on the basis that only one floor out of three was independently let. Following the review and its change of approach, HMRC was of the view that the whole of Unit 3 ought to have been the subject of a vatable supply (because in its entirety it was the subject of a new lease), but HMRC were caught by the 3 year time limit in which HMRC have to make an assessment. As such, therefore, HMRC was not able to raise a separate assessment.

The Facts

7. The Appellant is a limited company which carries on a property development business, the directors of which are members of the Robinson Family. The Appellant is registered for value added tax under number 83 8764 58 and has been so registered since the 21 July 2004.

8. In or about July 2004 the Appellant company bought a site at 21 Old Channel Road, Belfast from Maxol Oil. That site was held under a lease from Belfast Harbour Commissioners ("BHC"), but it was the Appellant's intention to re-negotiate that lease and procure an extension to its original term. This they subsequently did and, at the operative time, held title directly from BHC on foot of a lease ("the Head Lease") with a term of 125 years from 1 January 2006, subject to a reviewable ground rent.

9. The Head Lease was in BHC's standard form for lettings of this type ("the BHC Standard Lease") and by virtue of the restrictions on alienation, assignments of part were prohibited. As a result, disposals of the completed Units could only be effected by way of sub-leases. Mr. Tinman of C&H Jefferson, Solicitors, who gave evidence, advanced the view that if HMRC are to be successful in their argument (as now advanced) the result would be of a material disadvantage to developers of Belfast Harbour Estate, all of whom will hold titles under the BHC Standard Lease.

10. Post acquisition the Appellant undertook demolition works and then commenced the re-development of the site – a process which took approximately two years. The ultimate completed development consisted of 6 commercial units.

11. The evidence before the Tribunal is that Unit 6 is let to a commercial tenant, and at the time of the appeal, was retained by the Appellant as an investment. VAT is charged on the rent and no issues arise as between the parties.

12. Unit 4 was sold to a third party, a Mr. & Mrs. Gunning, for a premium of £1,000,000 (One million pounds). That sale was transacted subject to VAT.

13. Issues, however, did arise between the parties in relation to the remaining units.

14. Units 1, 2 and 5 were the subject of a sale to a company which was associated with the Appellant – Rockport Securities Limited.

15. That sale was conducted by the Appellant for a premium of £1,250,000 (One million two hundred and fifty thousand pounds) but, distinct from the sale of Unit 4, the approach taken by the Appellant was that the sale constituted the transfer of a property letting business to which the TOGC Provisions applied. As a result no VAT was initially charged on the transaction.

16. There was initially disagreement between HMRC and the Appellant as to the evidence of the letting business which existed at the point of transfer to justify the TOGC treatment.

17. The Tribunal was given copy Heads of Terms from CBRE dated 16 June 2006 which purported to disclose the details of a proposed commercial letting between Rockport Securities Limited and Inbis Limited – advanced as evidence of an intention to let.

18. The second piece of evidence which was advanced to establish the existence of a property letting business was a letter dated the 6 July 2006 from Dowling Savage Financial Consultants, who indicated their intention, subject to terms and conditions

being agreed, to take a Lease over Units 1 and 2. The exact terms of that letter are as follows:

"*Subject to the terms and conditions being finalised, we confirm our intention to lease the Units 1 and 2, 21 Old Channel Road, Belfast. We look forward to completing matters in the near future.*"

19. The letter is signed by Ronnie Savage, partner of the Dowling Savage Practice. Mr. Savage at the time also was a director of Rockport Securities Limited.

20. Mr. Workman from HMRC, and who was the original assessing officer in the case, had considered that the two pieces of evidence advanced were either inconsistent or insufficiently cogent to satisfy the requirements of the TOGC Provisions, and it was on that basis that the assessment to the tax arising on the disposal to Rockport Securities (premium £1,500,000 (One million five hundred thousand pounds)) was in part comprised. At the point of completion, the sale of Units 1, 2 and 5 was transacted by a sub-lease for the term of the Head Lease, less the last three days (ie. 125 years from 1/1/2006 less 3 days). HMRC, on review, said that this constituted the creation of a new interest in land, such that the TOGC Provisions did not apply and raised an assessment to VAT. As I have already indicated, VAT has been paid by the Appellant and reclaimed, so the circumstances and the disposal of Units 1, 2 and 5 no longer form part of the dispute between the parties.

21. The second element of the assessment, however, relates to the circumstances around the disposal of Unit 3 – the circumstances of which resemble the sale depicted above. This sale had been the subject of a liability ruling by HMRC at the request of the Appellant's accountant (dated 8 May 2006) and HMRC's reply (24 May 2006) confirming that "on the basis of the information contained in your letter, the conditions for treating the sale as a TOGC for VAT purposes appear to have been met … ". That response was, obviously, caveated as being non-binding, but it does appear to have informed the Appellant's approach. What was not made clear in those exchanges was that the sale or disposal was to be effected by way of sub lease as opposed to outright assignment.

22. In due course Unit 3 was disposed of to C.J. Higgins Ltd, an insurance broker, and again the Tribunal was provided with a copy of the sale agreement dated 21 July 2006. The contract provided for a sale by way of sublease for the entirety of the contractual term of the BHC Head Lease, less the last three days of that term. The purchase price was £1,600,000 (One million six hundred thousand pounds) and again the sale was treated by the Appellant as the transfer of a going concern.

23. The text of that contract provided that both the deposit (per clause 4) and the premium (per clause 5) were exclusive of VAT, although in the definitions section, both the premium and the deposit are described as "*with no VAT payment, exclusive of VAT*".

24. Unlike the contracts for Units 1, 2 and 5, the Contract in this case, however, did include the usual drafting relating to TOGC transfers of a business and, most

relevantly of all, indicated (at clause 16) that any purported transfer of the Appellant's interest under the terms of the contract was subject to a proposed letting to Eastonville Traders Limited (clause 16.1). In that regard the Tribunal had sight of a letter dated the 22 May 2006 from Eastonville Traders Limited in exactly the terms of the letter from Dowling Savage referred to above, namely:

"*Subject to the terms and conditions being finalised we confirm our intention to lease the second floor of Unit 3, 21 Old Channel Road, Belfast.*

We look forward to completing matters in the near future."

25. In point of fact, the letting to Eastonville Traders Ltd never materialised. After the sale was completed, C.J. Higgins Ltd. sub-let a portion of the building to Jelly Communications Limited, but that transaction occurred after the sale to C.J. Higgins Ltd had been completed.

26. Mr. Workman, in reviewing the matters prior to the assessment, established, largely from a site inspection, that ultimately two thirds of Unit 3 was being actively used by C.J. Higgins Limited, and that the balancing one third was being used as a property letting business (ie it was let to that third party).

27. It was on that basis that he firstly assessed that the transaction did not comply with the TOGC Provisions, and secondly apportioned the tax due in respect of Unit 3 on a pro rata basis.

28. On the 4 February 2009, HMRC wrote to the Appellant and indicated that the conditions for TOGC were not satisfied for either of the two transactions described, and that an assessment would be raised in respect of £184,800 for the proportion of Unit 3 that did not constitute a TOGC, and £262,500 in respect of the VAT payable on the disposal of Units 1, 2 and 5 to Rockport Securities Limited.

Title Matters

29. It is perhaps also helpful to set out, at this stage, the evidence which was produced to the Tribunal in terms of the documentation by which the disposals were effected. The easiest way to do this is perhaps to look at the documents in hierarchical order.

30. The first document in sequence was (and is) the Head Lease from Belfast Harbour Commissioners to the Appellant dated 21 July 2006 under which the overall development site was demised to the Appellant for a term of 125 years from January 2006 subject to a ground rent reviewable on a five yearly cycle. A copy of that Head Lease was produced to the Tribunal and was referred to in Mr. Tinman's evidence.

31. Clause 5.9 of that document deals with restrictions on alienation and imposes a prohibition, in effect, against any sub-division of the site other than by way of the creation of sub-leases which then must be created in accordance with the specific terms applicable to sub-leases set out in the Head Lease.

32. Given that restriction, Belfast Harbour Commissioners, as the ultimate landlord, by necessity, therefore, are party to each lease/sub-lease and every subsequent transaction to, in effect, provide their consent to any sub-letting which occurs. The result, after time, is the creation of a pyramid of titles / sub-leases beneath the Head Lease in relation to every development plot. Evidence was provided and was accepted by the Tribunal that this is consistent with the structure of all lettings within Belfast Harbour Estate.

33. In terms of hierarchy, the next documents which are relevant to this appeal are the sub-leases created on the foot of the sales or disposals to, firstly, Rockport Securities Limited (in respect of Units 1, 2 and 5) and, secondly, C.J. Higgins Limited (in respect of Unit 3). We were only furnished with a copy of the sub-lease for Unit 3, but Mr. Tinman confirmed that the same form was adopted in relation to each disposal. Each of those sub-leases was for a term of 125 years from 1 January 2006 (ie. the Head Lease term) less 3 days and was subject to a due proportion (defined as 21%) of the ground rent payable under the Head Lease x 1.1. Presumably this was intended to, firstly, apportion the ground rent between the units and, secondly, leave a small "profit rent" to be held by the Appellant / its assignee.

34. Out of each of those sub-leases the tenant could occupy, sell by way of a sub-lease (for the entire term of the Head Lease (less a nominal reversion)) or sub-let on a commercial rack rent basis.

35. C.J. Higgins Limited, in relation to Unit 3, as I have said sublet part of the floorspace which they had acquired to Jelly Communications Limited and occupied the balance for their own purposes.

36. It is the sub-leases which were created to transact the disposals in favour of Rockport Securities Limited and, separately, C.J. Higgins Limited, which HMRC, on review, determined were "new" leases and ruled that TOGC Provisions did not apply.

The Law

37. The TOGC Provisions have their provenance in Article 5 of the EC Council Directive, 1977 / 388 ("the Sixth Directive") which commences with a definition of the supply of goods. Article 5.1 provides that a supply of goods means:

> "*The transfer of the right to dispose of tangible property as owner.*"

38. Article 5.8 then provides as follows:

> "*In the event of a transfer, whether for consideration or not, or as a contribution to a company, of a totality of assets or parts thereof, Member States may consider that no supply of goods has taken place and, in that event, the recipient shall be treated as the successor to the transferor. Where appropriate, Member States may take the necessary measures to prevent distortion of competition in cases where the recipient is not wholly liable to tax.*"

39. The UK, on the back of those provisions, has implemented Section 49 VATA and the Value Added Tax (Special Provisions) Order 1995 ("the Order").

40. " Section 49 VATA, which deals with the TOGC Provisions, provides as follows:

"Transfers of going concerns.

(1) Where a business carried on by a taxable person is transferred to another person as a going concern, then

(a) for the purpose of determining whether the transferee is liable to be registered under this Act he shall be treated as having carried on the business before as well as after the transfer and supplies by the transferor shall be treated accordingly; ……

41. Article 5 of the VAT (Special Provisions) Order 1995 provides as follows:

"*Treatment of transactions*

5.—(1) Subject to paragraph (2) below, 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 2(2) 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 2(2) of the Manx Act.

42. The emphasis is added but primarily for a TOGC to arise the legislation requires that "assets" are deployed in the "business" which is the subject of the transfer and that the business continues both before and after the transfer.

HMRC's Case

43. It will have been apparent from the history cited above that HMRC commenced this case on the basis that Mr. Workman, as the original investigating and then assessing officer, considered that there was insufficient evidence of intended economic activity to justify the argument that there was a letting business either in place (or indeed proposed) to allow the disposals to firstly Rockport Securities Limited and secondly C.J. Higgins Limited to be treated as transfers of going concerns.

44. There was a good deal of the correspondence briefed to the Tribunal which dealt with this point in terms of letters passing between Mr. Workman and variously the Appellant, its lawyers and accountants. Most of that correspondence is to similar effect – namely attempting to elucidate exactly what evidence of the proposed economic activity, in terms of agreed or documented lettings, existed at the point of transfer of each Unit to justify their treatment as the transfer of a business.

45. Upon the review that is the subject of this Appeal, that approach was not adopted by Ms. Deirdre Doherty as the reviewing officer and did not form the basis of her review decision of 14 August 2009. In that letter, Ms. Doherty does not substantially deal with the question of whether or not there was sufficient evidence of a letting business at the point of transfer, and rather focuses on the question of whether or not the same economic interest was transferred. Specifically, and here I quote from her letter, she states as follows:

"*In the circumstances, I will not spend time here on the question of whether a property rental business existed or prospective tenants have been evidenced as in place, as this is in the circumstances a moot point.*"

46. Rather, the basis of Ms. Doherty's review is that:

(1) the Appellant had a single lease from BHC for 21 Old Channel Road (ie. the Head Lease);

(2) this lease was not "supplied" to either Rockport Securities Limited or C.J. Higgins Ltd. as both were separately granted "new" leases;

(3) that accordingly the Appellant had not sold "its" lease to the purchasers, but rather created two new leases;

(4) that the TOGC Provisions do not allow such newly created assets to be treated as non-supplies and that therefore the TOGC Provisions do not apply.

47. In that regard she quoted in her letter from Public Notice 700/9 "Transfer of a Business as a Going Concern":

"*6.3 Examples where there is not a TOGC:*

If you:

- *own the freehold of a property and grant a lease, even a 999 year lease, you are not transferring a business as a going concern. You are creating a new asset (the lease) and selling it while retaining your original asset (the freehold). This is true regardless of the length of lease. Similarly if you own a head lease and grant a sub-lease,* ***you are not transferring your business as a going concern.***"

48. That, being the basis of HMRC's review was, in substance, the argument adopted by HMRC in its statement of case and its case as presented to the Tribunal. HMRC argue that if the sub-leases were assets and it was those assets that were transferred and that in neither case therefore was there a transfer of a going concern.

The Appellant's case

49. The Appellant, by its appeal notice, indicated that its grounds of appeal were:

"*This was a TOGC and no VAT was chargeable.*"

50. That assertion was, however, more developed in the correspondence passing between the parties although, in point of fact, it is only the correspondence after the review letter of the 14 August 2009 which is relevant (the earlier correspondence dealing rather with the question of evidence of whether a lettings business existed or not).

51. The Appellant's argument was raised in C. & H. Jefferson's letter of the 4 August 2010. Broadly speaking that argument is that the disposals in question were consistent with the legal framework for all land transactions carried out within the Harbour Estate and was driven by the requirements of BHC as the ultimate freeholder and the terms of the BHC Standard Lease. In terms of title it was suggested that no other legal transfer other than the creation of two separate new leases could have been effected – given the terms and stipulations of the Head Lease - but that notwithstanding the title nuances (and here I paraphrase) the economic interest transferred was an outright disposal of the lettings business, even though (in the case of each of the sales) it was effected by way of the creation of a new and separate sub-lease.

52. The Appellant's case is that it has long been accepted that preparatory acts themselves constitute a business for the purposes of VAT (for which they cite the authority *Intercommunale Voor Zeewaterontzilting (Inzo) (in Liquidation) v Belgian State Case 110/94 [1996] STC 569*).

53. They argue that the acquisition and development of Unit 3 with a view to letting or sale was accepted by HMRC as a business carried on by the Appellant and further that HMRC in their letter of the 24 May 2006 had further accepted that the sale of Unit 3 to C.J. Higgins Limited was as something which would constitute the "transfer of a property rental business" fulfilling the conditions of a TOGC.

54. In essence, the Appellant's case is that the sole issue between the parties now is whether that transfer can be treated as a TOGC of part of the Appellant's business because it was made by way of a grant of sub-lease to C.J. Higgins for a term of 3 days less than the term of the Head Lease rather than by an outright assignment of the Appellant's Head Lease.

55. It is the Appellant's case that HMRC are relying on the particular form in which the transfer was made under domestic law, rather than looking at the substance of the transaction itself, which the Appellant, in turn, contends is not a permissible application of Article 5.8 of the Sixth Directive.

56. In support of that proposition, the Appellant cites *Zita Modes Sarl v Administration des L'Enregistrement et des Domaines (C-497/01) [2005] STC 1059* where the ECJ examined the concept of a TOGC under Article 5.8 and set down a number of principles.

57. Those which are most relevant, the Appellant suggests, are that:

(1) the "no supply rule" in Article 5.5 constitutes an independent concept of EU Law; and

(2) there is no definition of a "transfer of a totality of assets or part thereof" in Article 5.8 and so that that term must be given an "autonomous and uniform interpretation throughout the Community" (paragraphs 33 and 34 of the Judgment).

58. As such, they say, that it is clear from the Judgment in *Zita Modes* that an individual member state which adopts the options in Article 5.8 of a "no supply" rule is not then entitled to limit its ambit by reference to its own domestic law.

59. The Appellant cited the case of *Staat Secretaris Van Financien v Shipping and Forwarding Enterprise Safe BV (Case C320/88) [1991 STC 627] ("Safe")* where the ECJ considered the meaning of the word "supply" in Article 5.1 of the Sixth Directive and held (at paragraphs 7 and 8 of the Judgment):

> "It is clear from the wording of this provision that "supply" of goods does not refer to the transfer of ownership in accordance with the procedures prescribed by the application of national law, but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were the owner of the property."

60. On that basis the Appellant submitted that, as a matter of European Law, the transfer of part of its business in relation to Unit 3, albeit by the creation of a new sub-lease does not prevent the transaction from being treated as a "non-supply" under the provisions of Article 5.8. The position which they advance is that the granting of a new lease was merely the mechanism by which the assets of that part of the Appellant's letting business that related to Unit 3 was transferred to C.J. Higgins and that the application of the sub-lease placed the transferee, post completion, in the same economic position as the transferor, pre-completion.

61. Counsel for the Appellant also referred us to a Northern Irish case, that of *Rana v McCann & McCann [2003] NI CH4* where Mr. Justice Givan (as he then was), having considered Section 45(3) of the Interpretation Act (Northern Ireland) 1954 concluded (at paragraph 7):

> "*In any event, I am satisfied that in the context of land transactions in Northern Ireland the disposal of this property by way of a long lease can properly be regarded as a sale of the property. There is no real difference between the term of 900 years and the disposal of a fee simple interest and very frequently in the context of Northern Ireland Land Law disposal of property is effected by way of a long lease in circumstances that are regularly regarded as effectively sales of the property.*"

62. The Appellant also relied on two decisions of the VAT and Duties Tribunal, as the predecessor to this Tribunal:

63. The first was *Melvin Nataniel Fox t/a The Cavendish Hotel v Customs and Excise Commissioners (2003) VAT Decision 18441* in which the Tribunal held that there was a transfer of a going concern, notwithstanding that the transferee occupied the premises in that case as a tenant at will or a licensee, but regardless of that distinction what clearly was an entirely different interest from the formal tenancy under which the original transferor had occupied the premises.

64. The second authority cited was the case of *Morton Hotels Limited v Customs and Excise Commissioners (2007) VAT Decision 20039* in which the Tribunal held that there was a TOGC even though the transferor previously held the freehold of the particular business premises and the transferee (who had entered into a sale and leaseback of the premises) held title as a tenant rather than as an owner of the freehold.

65. It is relevant in that case the Tribunal observed that under Article 5 of the Order "*there was no requirement ..... that the assets are to be used in the same way by the transferee or that* ***any proprietorial interest acquired by him has to be retained in the same form.***"

66. In short, the Tribunal looked to the substance and not the form of the transaction.

67. On the legislative basis, and the authority of those cited cases, the Appellant submitted that as the substance of the transaction involving Unit 3 involved the transfer by a party of its letting business within the meaning of Article 5.8, that the transfer should be treated as a non-supply in accordance with the TOGC Provisions.

Decision

68. The essence of this case is the question of whether or not there was a sale of an asset (namely the creation of a new sub-lease in respect of Unit 3) or whether the Appellant had disposed of part of its letting business as it related to that Unit.

69. In this regard the Tribunal is cogniscent of the fact that the Appellant was constrained by the title which it held from Belfast Harbour Commissioners on foot of the BHC Standard Lease. That form of lease requires all developers within Belfast Harbour Estate to conduct transactions in a particular manner – namely by way of the creation of sub-leases. The question is if adherence to that title structure is sufficient to deny a developer such as the Appellant the availability of the TOGC Provisions.

70. It is settled that in relation to transactions such as this the Tribunal must have regard to the substance rather than the form of a transaction. That has been settled law for some considerable time and the Tribunal was referred to the case of *Kenmir v Frizzell [1968] 1WLR329* where Widgery J considered whether there had been a transfer of a business and held (at page 325):

> "*In deciding whether a transaction amounts to the transfer of a business, regard must, in our view, be had to its substance rather than to its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. In the event the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he could carry on without interruption.*"

71. The question, therefore, which this Tribunal must ask itself, is what actually was transferred. Was it a new asset (viz the sub-lease of Unit 3) or was it part of the Appellant's existing letting business insofar as it related to that Unit?

72. By the time the review was carried out (if not before) HMRC had accepted that sufficient preparatory acts had been undertaken by the Appellant to constitute a letting business, and that on the proposed sale of Unit 3 to CJ Higgins that the conditions for a TOGC would be fulfilled.

73. At that point, HMRC obviously did not appreciate that the proposed method of documenting that sale was by way of the creation of a sub-lease - albeit one which was for the entire term of the Head Lease less a nominal reversion.

74. The evidence which existed was the proposed letting to Eastonville Traders Limited which was referred to in a letter of intent and in the sale contract itself (clause 16). In reality, that letting to Eastonville Traders Limited never materialised and it was only post completion that C.J. Higgins entered into a sub-lease of a portion of the building, and then in favour of a completely different tenant, Jelly Communications Limited. It is not, however, the task of this Tribunal to re-open whether or not a business existed. HMRC accepted that there was sufficient evidence of a letting business.

75. That letting business would have entitled the vendor (in this case the Appellant) the ability to sub-let on rack rental terms and collect rent in relation to the occupancy rights which would then be granted to sub-tenants. The Tribunal finds that that right (ie. the right to operate that letting business) passed at the point of transfer insofar as it is clear that on the disposal of Unit 3 the right to conduct letting activities passed to

the transferee. This is clearly evidenced by the circumstances which occurred post completion – namely the creation of the sub-lease to Jelly Communications Limited.

76. As such, therefore, the Tribunal finds that the lettings business which HMRC accepted existed before the point of transfer also existed subsequent to the point of transfer.

77. To use the language then of Article 5 of the Order, what were the assets which were required for that business? In short they consisted of the unit which was to be sub-let or occupied. In the case of Unit 3, that meant that ownership and possession would need to have transferred to C.J. Higgins Limited as transferee. Again, the Tribunal finds that that transfer was effected – albeit on foot of the sub-lease which was created. That sub-lease did not in any material respect constrain C.J. Higgins from carrying out the business and was (applying *Rana v McCann* supra) an outright disposal. The particular nuances around the resultant pyramid title structure were simply a result of the requirements of Belfast Harbour Commissioners. In substance the assets which constituted the core of the lettings business were transferred with the transferor retaining only a notional interest (ie. the reversionary interest of 3 days) but otherwise disposing of the economic activity which was to be carried on from or in relation to that Unit.

78. As I have mentioned above, the transferor did, in addition, retain a small economic interest (in effect a profit rent). The Tribunal does not find that that in any way alters the substance of what was happening. It is true that the payment of the profit rent would have to be factored in as an expense of the business being carried forward by the transferee, but it does not impact on the substance of what was happening. The letting business was being transferred and the transferee was free to conduct it as it saw fit (subject only to the confines of the sub-lease and ultimately the requirements of BHC as reflected in the Head Lease).

79. While not technically binding on this Tribunal, the Tribunal's decisions in the case of *Fox* and *Morton Hotels* 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 an "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.

83. We find that in this particular case that is exactly what occurred and, therefore, allow the Appeal.

84. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

IAN WILLIAM HUDDLESTON
TRIBUNAL JUDGE

RELEASE DATE: 29 May 2012