VAT – Art 5, VAT (Special Provisions) Order 1995 - sale of freehold property with an agreement for a tenancy – tenant introduced by purchaser – whether transfer of a going concern – whether assessment within the period set by s73(6)(b) VATA 1995 – approach on appeal to record of evidence before the FTT

[2015] UKUT 0038 (TCC)
Appeal No: FTC/83/2013

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ON APPEAL FROM THE FIRST TIER TRIBUNAL
(FINANCE AND TAX CHAMBER)

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THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS — **Appellants**
- and -
(1) ROYAL COLLEGE OF PEDIATRICS AND CHILD HEALTH — **Respondents**
(2) COLERDIGE (THEOBALDS ROAD) LIMITED

TRIBUNAL: MR JUSTICE BIRSS

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James Puzey (instructed by **HMRC**) for the **Appellants**
Michael Conlon QC and **David Scorey** (instructed by **Hogan Lovells**) for the **Respondent**

Hearing dates: 8th December 2014
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DECISION

1. The case relates to the sale by Coleridge (Theobalds Road) Ltd ("Coleridge") of the building at 5-11 Theobalds Road, London WC1X 8SH ("the Property") to the Royal College of Paediatricians and Child Health ("the Royal College"). The sale was agreed on 16th November 2007 and completed on 15th January 2008. The Royal College and Coleridge treated the transfer as a transfer of a going concern ("TOGC"). By a letter dated 4th July 2010 the Commissioners informed Coleridge that the purchase did not amount to a TOGC. On that basis and since Coleridge had previously elected to waive the VAT exemption relating to the building, it followed that the transaction was a standard rated supply. VAT was therefore due. Since the purchase price was £17,445,000, the VAT would be substantial.

2. Coleridge and the Royal College appealed. The appeal came before Judge David Demack in the First Tier Tribunal. In his decision dated 27th March 2013 Judge Demack decided three issues. First he allowed the appeal of Coleridge and the Royal College and held that the transfer was a TOGC. Second he held that in any event the assessment was made out of time under s73(6) of the 1994 VAT Act. Third he decided an issue concerning so called clawback under the Capital Goods Scheme rules and found that in Coleridge's favour too.

3. HMRC appealed and permission to appeal was given by Upper Tribunal Judge Colin Bishopp on 29th July 2013.

4. Before me the appeal relates to the first two points: TOGC and the time bar. HMRC does not now seek to challenge Judge Demack's conclusion on the third point about CGS clawback.

5. The primary facts are set out in paragraphs 7 to 35 of the FTT decision. They are not in dispute. In summary they are as follows.

6. The Royal College is a registered charity whose activities are predominantly non-business or exempt. It was registered for VAT in 1996. Its premises were at 50 Hallam St, London. The Royal College let space in its premises at Hallam St to two further organisations: the British Association of Perinatal Medicine (BAPM) and the British Association for Community Child Health (BACCH). The latter two organisations are registered charities, with aims similar to each other and related to those of the Royal College.

7. Coleridge is a property development company. It was registered for VAT with effect from 9th August 2005 with a business activity of property trading and letting. It purchased the Property on 9th August 2005 and opted to waive the VAT exemption. When purchased the Property had sitting tenants.

8. In November 2006 Coleridge paid the then tenants of the Property to surrender their tenancy and in early 2007 undertook major refurbishment. On completion of the building works Coleridge placed the Property on the market to let. In 2007 the Royal College wished to move to new premises and identified the Property. It was advised that Coleridge might be prepared to sell as opposed to lease it. BAPM and BACCH wished to move with the Royal College and remain its tenants.

9. Purchase terms were agreed and the Royal College then instructed its advisers to achieve the most VAT efficient structure of the purchase. From the point of view of the Royal College, since its activities are predominantly non-business or exempt, it would be advantageous if VAT on the sale price could be saved. The advice was that VAT could be saved if the transfer was a TOGC. If BAPM were to enter into an agreement for a lease with Coleridge before the Royal College agreed to buy the Property then, since Coleridge was carrying on a property business, the transfer would be a TOGC.

10. On 2nd October the Royal College elected to waive exemption for VAT over the Property and on 16th November 2007 Coleridge and BAPM entered into an agreement for a lease for a single room in the Property for a premium of £1,000. The terms include the following. Clause 2.1 makes the agreement conditional on Coleridge exchanging an unconditional contract for sale of the Property with the Royal College by 16th November 2007. Moreover clauses 3.1.1 to 3.1.4 together provide that the premium will be repaid if the condition is not met or if completion of the lease with the Royal College has not happened by 31st March 2008. These terms also provide that completion will take place 21 days after Coleridge serves a notice that it requires completion. That notice must be by 10th March 2008. The rent provided for in clause 3.2 is only payable after completion. The form of the lease to be entered into was a valid lease.

11. Later on the same day (16th November) Coleridge and the Royal College exchanged contracts for the sale of the freehold of the Property with the benefit of the agreement for the lease with BAPM and certain other assets. The sale agreement provides that the parties believe that the sale is a TOGC. It also provides that the Royal College will indemnify Coleridge to the extent that VAT is determined to be due.

12. The sale was completed on 15th January 2008. As it was treated as a TOGC, no VAT was charged on the sale. In March and then May 2008 the Royal College granted 15 year leases to BAPM and BACCH respectively each for a single room in the Property. No further leases have been granted to any other party although that had been the intention of the Royal College when the Property was originally purchased.

13. The parties to the sale treated the works carried out by Coleridge before the sale as creating a Capital Goods Scheme item (CGS). The fact the transfer was treated as a TOGC affected the manner in which the CGS rules applied. On 18th November 2008 the Royal College's advisers wrote to the Commissioners about the use of the Property in order to clarify the treatment. This letter stated, amongst other things, that the transfer was treated as a TOGC. The next critical event was on 5th July 2010 when the Commissioners decided that the transfer was not a TOGC and assessed Coleridge for VAT.

Transfer of a going concern

The Commissioners' decision

14. The Commissioners' decision had two main grounds. First that the agreement for the lease to BAPM was conditional on the Royal College acquiring the property before the lease began and if the Royal College failed to acquire the Property then the agreement was to become void and the premium refunded. Second that no property

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

The FTT decision

15. Judge Demack considered the legal framework at paragraphs 40 – 43. Neither side criticised his statement of the law. He then considered the parties' submissions and found in favour of Coleridge and the Royal College in paragraphs 44 to 58. Key elements in his decision were the following. First he found that Coleridge was actively engaged in marketing the Property following its refurbishment and that the Property and its associated building contracts were assets which Coleridge intended to and did exploit (paragraph 56). He held that the Royal College did intend to grant leases to BAPM and BACCH and attract third party tenants (paragraph 56). As regards the conditional nature of the agreement with BAPM, he held that it was unconditional once the agreement between the Royal College and Coleridge was exchanged and that BAPM could have sought an order for specific performance against Coleridge (paragraph 57). He held that the sale was, in substance, a TOGC of a property business (paragraph 57) and referred to the Commissioners' own guidance (paragraph 57). He also decided a case relied on by the appellant, ***Dartford Borough Council v HMRC*** [2007] Decision No 20423 could not be distinguished from the instant case, contrary to HMRC's submissions (paragraph 58).

This appeal

16. The appellant submits the FTT judge erred in law. Its argument is that on the facts as found, the legal conclusion, that the transfer was a TOGC, does not follow. The respondent submits that this appeal does not raise a point of law at all and that the appellant's argument is outside the scope of what can be argued in the Upper Tribunal applying ***Edwards v Bairstow*** [1956] AC 14.

17. In my judgment it is open to the appellant to make the submission it wishes to. The argument is of the same character as the one permitted in ***Edwards v Bairstow***. The question is whether on the facts as found the legal conclusion follows. Therefore I do not need to resolve on this appeal whether the scope of the Upper Tribunal's appellate jurisdiction is wider than ***Edwards v Bairstow***.

18. For example one of the important findings by the judge was that the case could not be distinguished from ***Dartford Borough Council v HMRC*** and that the HMRC had misunderstood the effect of that case. On appeal the appellant submits that it can be distinguished and that the judge was in error. The question whether or not ***Dartford*** is distinguishable is a legal one.

The law – transfer of a going concern

19. As Judge Demack explained in paragraphs 40 and 41: section 4 of the Value Added Tax Act 1994 provides that VAT shall be charged on any supply of goods or services, paragraph 4 of Schedule 4 to the 1994 Act provides that the assignment of land is a supply of goods, and, although Item 1 of Group 1 of Schedule 9 exempts the grant of any interest in land, where an election to waive exemption under paragraph 2 of Schedule 10 has effect, the grant of an interest in land is taxable.

20. Section 5(3)(c) of the 1994 Act provides a power to make delegated legislation which in turn provides that certain transactions are to be treated as neither a supply of goods or services. The relevant legislation is Article 5 of the Value Added Tax (Special Provisions) Order 1995 (SI 1995/1268). This article is the current version of a provision which has formed part of VAT law for many years. So far as material Article 5 provides as follows:

> (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 the assets of his business-
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> a. their supply to a person to whom he transfers his business as a going concern where-
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> 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. […]
>
> 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. […]

21. This provision exists in UK law in order to implement the relevant EU VAT Directive. The current Directive is the Principal VAT Directive 2006/112/EC and Art 5(8) of that Directive. The language of Article 5(8) does not use the expression "transfer of a going concern" nevertheless it is clear that the UK legislation needs to be interpreted in conformity with the Directive. In ***Zita Modes*** (Case C-497/01) the Court of Justice held that these provisions must be given an autonomous and uniform interpretation throughout the community (judgment paragraph 32-34). As Judge Demack recognised (in paragraph 43) the Court in ***Zita Modes*** held that the purpose of the provision was to facilitate transfers of undertakings by simplifying them and preventing overburdening of the transferee with VAT.

22. The Court in ***Zita Modes*** considered the meaning of the words "the totality of assets or part thereof" which appear in Art 5(8) at paragraphs 33-39. There the court explained (paragraphs 34-35) that where the totality of the assets is concerned, there is little difficulty. The totality will include, for example, corporeal elements like plant and stock as well as incorporeal elements such as goodwill and customer lists. Also referred to are the tenant's interest in a lease and the benefit of existing contracts. The "cement" which the Court said bound such elements together is the fact that they combine to allow the pursuit of a specific economic activity. The Court concluded:

"Separately they are the building blocks of a business; together they amount to a business".

23. Turning to transfer of part of a totality the Court emphasised that this relates not to one or more individual elements but to a sufficient combination thereof to allow the pursuit of an economic activity, even if that economic activity forms only part of a larger business (paragraph 36). This is to be contrasted with a trader closing its business and selling off the stock to another trader, which is not within Art 5(8).

24. Judge Demack also referred to ***Schriever*** (Case C-444/10). In that case the Court of Justice referred back to ***Zita Modes*** and to the parts of that judgment mentioned above and held that for there to be a transfer of a business or of an independent part of an undertaking, all the elements transferred must, together, be sufficient to allow an independent economic activity to be carried on (paragraph 25). The Court in ***Schriever*** also held that the intentions of the purchaser can or in certain cases must be taken into account (paragraph 38). On that point one can also refer to ***CEC v Padglade*** [1995] STC 602 (also cited by Judge Demack at paragraph 53). In summary the Court in ***Schriever*** held that an overall assessment must be made of the factual circumstances of the transaction at issue (paragraph 32).

25. ***Kenmir v Frizzell*** [1968] 1 All ER 414 is relevant for the point that the test must be one of substance rather than form (and Judge Demack cited that at paragraph 52).

26. Mr Puzey referred to the ***Spijkers*** case (Case 24/85) which related to the transfer of an undertaking in a different legal context. Its relevance in this case is simply to emphasise that a transfer of an undertaking does not occur merely because its assets are transferred (paragraph 12).

27. I was also referred to ***Kopalnia*** (C-280/10), which stands for the proposition that relevant economic activity can consist of several consecutive business transactions.

28. It seems to me that a critical point arising from these mainly European authorities (with some UK cases too) is that for a transfer to fall into the relevant class there are two things which have to transferred. First of course an asset must be transferred. However something else has to be transferred as well. That further element is referred to variously as a business, an undertaking, or an economic activity (or part of such a thing). Merely transferring an asset on its own will never be enough to satisfy the test. In order to work out whether the necessary second element has been transferred, one needs to look at all the relevant circumstances. The test is one of substance not form. The circumstances can include the intentions of the parties.

29. Two tribunal decisions cited: the ***Dartford*** case mentioned already and also ***Kwik Save Group v Commissioners*** [1994] VATTR 457. There is no need to address ***Kwik Save*** but it is necessary to consider ***Dartford***.

30. In ***Dartford***, the local council owned some land. In January 2003 they agreed with a developer to develop the site and in November 2004 the Council and the developer entered a conditional agreement with a supermarket (Sainsbury) for distribution warehouses and maintenance and recycling units to be constructed on the site. Completion was to be in 2007. In December 2005, prior to completion and before any building work or the receipt of rents, the council sold the freehold to a third party

(GP). The sale was subject to the agreement with Sainsbury. The sale was treated a transfer of a going concern. HMRC issued a decision that the transfer was not a TOGC. The parties appealed. Before the Tribunal it was common ground that the council was carrying on economic activity in relation to the land. The Tribunal regarded the question it had to decide as whether the council's business included an intention to sell the land before rent was payable on completion of the building and if so, whether that was a different business from GP's business, since GP's business and intention was one based on holding the land and receiving rent from it. The Tribunal found as a fact that the council did not have the intention of disposing of its interest in the land before completion of the buildings and receipt of the rents. Accordingly GP intended to use the land to carry out the same type of business as the council and so there was a transfer of a going concern. The tribunal also held that even if the council had intended to sell its interests before completion of the buildings it would still be a transfer of a going concern. Where there was an agreement for lease, the current receipt of rent was irrelevant to the debate about the type of business.

31. Although it is not binding on me, since both sides took ***Dartford*** as correct, I will do so as well.

Application to the facts

32. Mr Conlon submitted that the FTT's factual findings regarding the respective businesses of Coleridge and the Royal College pre and post disposition of the Property were not challenged by the HMRC and that the FTT's conclusion was one which was open to it on the undisputed factual background. He also submitted that the HMRC's real complaint was that the transfer was in some way a sham or abusive in the sense of ***Halifax v Customs & Excise Comrs*** (Case C-255/02) but that this was not a case which was advanced below by the HMRC and it was too late to raise such a case now.

33. Mr Puzey denied that the appeal was on the ground that the transfer or part of it was a sham or an abuse and confirmed he was not making that submission. He submitted he was not challenging the findings of fact by the judge but was contending that on those facts the transfer was not a transfer of a going concern.

34. In my judgment the judge made an error in categorising this sale as a transfer of a going concern. My reasons are as follows.

35. Although both this case and ***Dartford*** involve a sale of a freehold subject to an agreement to let part of the premises to a tenant, I do not agree with the judge that ***Dartford*** is indistinguishable from the facts of this case. Unlike ***Dartford***, in this case the putative tenant (BAPM) was already a tenant of the purchaser and, given the related aims of the organisations, plainly envisaged remaining one. It is true that BAPM wished to become a tenant of the newly purchased premises but that was obviously because of its pre-existing relationship with the Royal College. As Mr Puzey submitted it was the Royal College who introduced BAPM to the Coleridge. This is a long way from the facts in ***Dartford***. In ***Dartford*** there was no suggestion that the purchaser GP had introduced Sainsbury to the Council.

36. In this case the agreement for the lease and the sale of the freehold were part and parcel of the same arrangement whereas in ***Dartford*** there were two distinct

transactions. Looking at the matter from the point of view of economic activity, in ***Dartford*** the economic activity represented by the Council's agreement with Sainsbury was a pre-existing business which stood separate from the sale of the land to GP. That pre-existing business was transferred, along with the asset (the land), to the purchaser. That is quite different from the present case. In no sense was BAPM transferred as a tenant or putative tenant to the Royal College. As I have said, BAPM already was a tenant of the Royal College in the old premises. Coleridge only entered into the agreement with BAPM because BAPM had been introduced by the Royal College in the first place.

37. However just because the case is distinguishable, it does not follow that the transfer is not a TOGC.

38. In paragraph 57 of the Decision Judge Demack considered the terms of the agreement between Coleridge and BAPM and the agreement about its conditional nature. This paragraph finds that once the agreement had been reached between Coleridge and the Royal College, if then the Royal College had failed to complete, the terms of the agreement with BAPM gave BAPM the power to compel Coleridge to grant a lease to BAPM. Although Mr Puzey submitted this was not correct, Mr Conlon objected to the submission. I will assume the judge's analysis of the terms of the agreement was right. The judge then reasoned that the sale was therefore in substance a TOGC and that "all that was needed was for the transferor to have agreed to grant a lease, which the transferee in fact granted". I believe that this reasoning is not correct in law. The fact that it is true that BAPM could in some circumstances have compelled Coleridge to grant a lease to BAPM does not, in my judgment, make this in substance a TOGC. It ignores the special position of BAPM in these circumstances. If BAPM had been a third party unconnected with the purchaser then the conclusion might follow but BAPM was not in that position. Furthermore the second step in the reasoning refers to the grant of a lease to BAPM by the Royal College after the purchase. Of course it is true that the Royal College did grant a lease to BAPM afterwards but it is unreal to connect that to the agreement between Coleridge and BAPM. The lease granted by the Royal College to BAPM was obviously nothing to do with the agreement between Coleridge and BAPM. Or, putting the matter another way, BAPM's agreement with Coleridge is not what caused BAPM to become a tenant of the Royal College in the Property after transfer.

39. I do not believe the distinction turns on the precise terms of the agreement for lease between Coleridge and BAPM in this case. The critical feature of this case is the relationship between BAPM and the Royal College. The terms of the agreement do not alter the substance of that relationship.

40. The judge also referred to the guidance issued by the HMRC (Notice No 700/9/02) which is as follows:

> "There is a business transferred as a going concern even if the property is only partly tenanted …
>
> … when you transfer the property to a third party (with the benefit of the prospective tenancy but before a lease has been signed) there is sufficient evidence of intended economic

> activity for there to be a property rental business capable of being transferred."

41. Mr Puzey submitted and I agree that this guidance does not purport to cover this case. The guidance is general guidance and I have no doubt is true in the general case. It does not address a transfer of a property which includes the kind of agreement with the kind of prospective tenant as appears in this case.

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

43. In a normal case of the transfer of a freehold, no doubt it is enough for the extra element to be a transfer of a lease to a tenant or even an agreement with a putative tenant to do so. As long as that lease which is transferred (or the agreement) can truly be said to have been part of the seller's business then the requirements of the law will be satisfied. Normally I suppose it will be. However here the agreement for a lease was not part of the seller's business at all. The putative tenants were never part of Coleridge's business, they came from the purchaser. The agreement arose directly from and was simply part of the sale transaction. No part of seller's business was transferred to the buyer. For this reason the transfer was not a transfer of a going concern.

44. I would allow this part of the appeal.

The time bar point

45. As the judge explained in paragraph 60, section 73(1) of the 1994 Act provides that where it appears to the Commissioners that a return is incomplete or incorrect they may assess the amount due to the best of their judgment. There are time limits for this and the relevant time limit is set by s73(6) as follows:

> "(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and must not be made after the later of the following-
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> (a) 2 years after the end of the prescribed accounting period; or

> (b) One year after evidence of facts sufficient in the opinion of [the Commissioners] to justify the making of the assessment, comes to their knowledge …"

46. There is no doubt that the assessment was outside the two year period provided for in s73(6)(a) since the prescribed accounting period ended on 29th February 2008 and the assessment was on 5th July 2010. Before the FTT HMRC relied on the one year period and contended that the relevant evidence was only received on 24th November 2009. This was within the one year period and so within s73(6)(b).

47. The principles to be applied under s73(6)(b) are set out in the judgment of Dyson J in ***Pegasus Birds v CCE*** [1999] STC 95. They were set out by Judge Demack in paragraph 62 of the decision. The correct approach is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the Commissioners, justified making the assessment and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the Commissioners. The one year period runs from the date in (ii). The reference to the Commissioners in (ii) refers to the Commissioners collectively. The burden is on the taxpayer to show that the assessment was out of time.

48. The case of the Royal College and Coleridge before the FTT was that the Commissioners knew all the facts more than a year before 5th July 2010 and so the assessment was out of time. The key dispute before the FTT was about when the important documents, such as the agreement for the lease and the sale agreement, were provided to the Commissioners. The Royal College and Coleridge contended that a file of the documents was given to Mr Lewis of HMRC in May 2009. HMRC contended that the documents were only provided in November 2009. If that had been correct then the assessment was not out of time.

49. The judge heard evidence from the relevant witnesses and the witnesses were cross-examined. He found as a fact that the documents were given to the relevant officer, Mr Lewis, in May 2009. On that basis he found that the Commissioners had all the information they needed to make the assessment on 14th May 2009 and so the assessment was out of time.

50. In making this finding the judge was preferring the evidence of the witnesses for Coleridge and the Royal College over that from the HMRC. Thus on the face of it the prospect of overturning this conclusion on appeal looks hopeless.

51. Before me Mr Puzey did not seek to challenge the finding that the documents were given to the Commissioners in May 2009. He took a different point. Two officers were involved with the assessments, Mr Lewis and Mr Staniforth. Whereas the judge had focussed on Mr Lewis, Mr Puzey before me focussed on Mr Staniforth. He was the officer actually responsible for the 5th July 2010 assessment. Mr Puzey submitted that the judge below had failed to deal with a second point arising from evidence Mr Staniforth had given in cross-examination.

52. The second point was as follows. Mr Staniforth's witness statement had explained that he had not become involved until January 2010 and explained that he made some enquiries with Valad Property Group at that time. Valad is the owner of Coleridge.

One of the points made was that Mr Staniforth asked for copies of the sales agreements. That evidence was relevant to the (rejected) case that the agreements had not been provided in May 2009. However the witness statement also stated that Mr Staniforth had asked about the history of the building and what had happened up the sale. Mr Puzey submitted that the latter question was a reflection of Mr Staniforth's opinion that he needed to know more information about any subsisting letting business in order to determine if the transfer was a TOGC. Following ***Pegasus Birds***, Mr Puzey submitted that Mr Staniforth's opinion, as at January 2010, was that he needed answers to questions about previous leases from Coleridge before he could make the assessment. That information was only provided in February 2010 after Mr Staniforth asked for it. Since this all happened in early 2010, the assessment in July 2010 was not out of time. Mr Puzey submitted that the FTT had failed to deal with this issue at all. On the evidence which was before the FTT, the finding ought to be that the assessment was not out of time.

53. It is correct that the FTT did not address this second point. Nevertheless Mr Conlon objected strenuously to it. He took a number of objections, including that it was not pleaded. It is fair to say that the HMRC's pleading is not clear on this point but there is a vague paragraph which might be said to cover the argument and I will not decide the issue on a pleading point because there is a more fundamental problem with the argument on appeal, as follows. The argument depends critically on a debate about Mr Staniforth's state of mind in January 2010. However the evidence relied on by Mr Puzey for this is not in Mr Staniforth's witness statement, it is said to have been given orally by Mr Staniforth in the course of cross-examination before the FTT. But Mr Conlon, who appeared below as well as Mr Puzey, does not agree that Mr Staniforth said what Mr Puzey says he said.

54. Mr Puzey does not seriously dispute that without the oral evidence from Mr Staniforth this second point cannot succeed. Without that evidence there is no proper basis on which a tribunal could find that Mr Staniforth's had the relevant opinion so as to satisfy s73(6)(b) in January 2010. Without the evidence there is no basis on which to find that the Commissioners ever had an opinion that they needed more than the information which had in fact been provided in May 2009 to make the assessment.

55. The hearing before the FTT was not recorded. The parties have approached Judge Demack and he has provided a copy of his notes, which have been typed up and approved. They do not contain the evidence Mr Puzey wishes to rely on. Nor do the notes of Mr Conlon. The only source of a record of the critical evidence Mr Puzey says was given by Mr Staniforth at the FTT is Mr Puzey's own notes. Judge Demack was invited to make an order directing that his notes of the evidence be amended to include the passages from Mr Puzey's notes. He declined to do so, stating that he was unable to recall the cross-examination of Mr Staniforth.

56. Mr Conlon submitted as follows. First the Upper Tribunal Rules contain no express provisions as to how conflicts of evidence are to be dealt with after findings of fact by the FTT (see rule 15). Mr Puzey did not disagree. Second the approach of the Employment Appeal Tribunal in ***Dexine Rubber Co v Alker*** [1977] ICR 434 should be applied. That approach was described as "well settled" in ***Keskar v Governors of All Saints Church of England School*** [1991] ICR 493 (EAT). Essentially the ***Dexine*** procedure amounts to obtaining the judge's note and putting the criticisms of the note by a party or the parties to the judge for comment. If the judge replies stating

that he or she believes the note is correct, then the conclusion must be accepted. Mr Conlon also referred to the judgment of HHJ McMullen QC in ***Company X v Mrs A, Mr B***, [2003] WL 21917453 (EAT) that in such circumstances "the record of the Chairman is conclusive".

57. Mr Puzey submitted that the Upper Tribunal should not follow the ***Dexine*** approach and that the UT retains the power to accept counsel's submission about what evidence was given below.

58. The ***Dexine*** approach is a sensible and workable one. It can and in my judgment it should be applied in the Upper Tribunal. At one stage Mr Puzey submitted that Judge Demack had not actually stated in terms that he believed his note was correct but that is a bad point. The parties put their rival contentions about the judge's note to the judge, he considered them and refused to change his note. Applying ***Dexine*** to this case would not permit Mr Puzey to advance the argument he does.

59. To attempt to exercise the power which Mr Puzey submits I have shows how unworkable it would be. Mr Puzey did not suggest he should be sworn in and cross-examined on the issue. Even if one simply compares Mr Puzey's note with that of Mr Conlon and the judge, the fact that Mr Puzey wrote what he did in his notebook does not mean that it reflects what the witness was actually saying. As Mr Conlon submitted, given the significance of that sort of evidence in a case of this kind, if such a thing had been said you might expect counsel for the taxpayer to notice and remember it. But he says he did not. Am I to turn both lawyers into witnesses and arrange for the cross-examination of both Mr Puzey and Mr Conlon? As Mr Conlon also pointed out, counsel's notebook often contains notes which are not verbatim records of what a witness said. Notes can also reflect counsel's thoughts about the case and points to take later. Even if I had the power which Mr Puzey submits exists, I would not exercise it in the appellant's favour on this point. I am not satisfied that Mr Staniforth gave the evidence contended for.

60. Without the disputed evidence from Mr Staniforth, there is no substance to the second point on the time bar question. That aspect of the appeal must be dismissed.

Conclusion

61. I will dismiss the appeal. Although I would allow the appeal in relation to the transfer of a going concern issue, I will not allow the appeal on the time bar issue and so the overall appeal fails.

MR JUSTICE BIRSS

RELEASE DATE: 28 JANUARY 2015