



**TC06506**

**Appeal number: TC/2017/02351**

*VAT – one building or two-one supply or two-in both cases one-economic activity-taxable supply-insufficient link between rental income and supply-appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**THE GLASGOW SCHOOL OF ART**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S  
REVENUE & CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE ANNE SCOTT  
MEMBER: PETER SHEPPARD**

**Sitting in public at George House, 126 George Street, Edinburgh on Tuesday  
6 March 2018**

**Philip Simpson, QC, for the Appellant**

**Mrs Elizabeth McIntyre, Officer of HMRC, for the Respondents**

## DECISION

### **The matter in dispute**

1. The decision of the respondents (“HMRC”) dated 13 February 2017, which is the subject matter of this appeal, concerned the period 01/16 VAT Repayment Return which resulted in a net claim of £405,301.07 and a VAT 652 error correction notice which amounted to a claim for £65,778, both of which were rejected by HMRC. HMRC’s final position, as set out in a letter of 23 February 2017, was to raise an assessment under section 73 Value Added Tax Act (“VATA”) 1994 in the sum of £96,525.74.

2. Effectively HMRC refused the appellant’s claim for full deduction of Value Added Tax (“VAT”) on the construction works at the Garnethill campus carried out on the area of the Reid Building known as the Assembly Building. That had been claimed on the basis that the appellant was entitled to credit for input tax it had incurred on refurbishment of the Assembly Building; that was input tax on a supply that the appellant argues was to be wholly used for making taxable supplies.

3. At the heart of this appeal is the issue that at the time of the construction works and for a period thereafter, the site, being the entire construction works, was described by the appellant as the Reid Building and it is only latterly that the appellants argue that there are two buildings. By contrast, as can be seen below, in March 2015, HMRC argued that the Reid Building and the Assembly Building were separate buildings but latterly, and currently, argue that the whole site is one building.

4. For the purposes of this decision we describe the area of the site occupied by The Glasgow School of Art Students Association SCIO and GSASA Limited (together “the Students’ Union”) as the Assembly Building and the area occupied by the appellant as the Reid Building, albeit routinely the whole site has been referred to as the Reid Building by the appellant and others.

5. It was agreed that the decision of the Tribunal would be a decision in principle only.

### **Background and Findings in Fact on the physical aspects**

6. The appellant, which was established in 1845, is a Higher Education Institution Art School specialising in Fine Art, Design and Architecture.

7. The Assembly Building which had an entrance in Renfrew Street was constructed in or around 1936. It is a Category C listed building on the Garnethill campus. The whole campus sits within the Glasgow Central Conservation area and is therefore subject to development control. Since approximately 1980 it had been used by the Students’ Union providing facilities for the student body including a bar, music venue and exhibition space. Adjacent to it there were two other buildings, namely the Foulis and Newbery Buildings which were used for the appellant’s educational purposes. Prior to the construction works, the Assembly Building was in a worse state of repair than the other two buildings which were linked to each other.

8. In 2003, the appellant conducted an Estates Strategy Review which concluded that, with the exception of the original Mackintosh Building, a major redevelopment of the Garnethill campus was required. Phase 1 of the redevelopment was the site opposite the Mackintosh Building comprising the Assembly, Foulis and Newbery Buildings. It was not considered feasible to redevelop just part of that site and it was always planned to have a single delivery strategy.

9. The original internal deliberations had proceeded on the basis that all three buildings would be demolished and there would be a dedicated space within the new build that would allow the Students' Union to function independently. The Brief from the students dated 22 March 2010, and subsequently utilised by the architects, specified that there should be no functional connection to the rest of the Phase 1 building.

10. The quantity surveyor cost consultants working on the project, Turner & Townsend, were requested to review the cost comparison between the refurbishment of the Assembly Building and the possibility of the space requirements of the Students' Union being incorporated in a totally new build option. Refurbishment was found to be the better value for money option.

11. The winning architect design team for the project proposed retaining much of the external structure of the Assembly Building and refurbishing the whole interior and a new building, which was ultimately named the Reid Building, would be cantilevered above what remained of the Assembly Building. Effectively the Reid Building is wrapped around and above the Assembly Building. The Reid Building is independently supported for structural and acoustic reasons although at the west it rests on the Assembly Building.

12. All that was retained of the Assembly Building were the facades on three sides; one facing Renfrew Street, one on Scott Street and one looking on to the back lane. All of the floors and internal structure of the previous building were completely removed. At one point on Scott Street pedestrians can walk next to the facade of the Assembly Building but under and next to the support for the Reid Building which hides a not insignificant portion of that facade; effectively there is an external corridor on the pavement. Part of the facade facing Renfrew Street, including the then main entrance to the building, was demolished as was the fourth facade. The facade on Scott Street was altered to provide the new main entrance.

13. Separate applications for Planning and Listed Building Conservation Area consent were made. The planning application which was made on 13 September 2010 was described as "New, purpose built studio and academic building for the Glasgow School of Art including the refurbishment of the existing student union building and public realm works". The cost of the development was estimated at £27,266,000.

14. Although it was described as refurbishment, in fact the construction process involved the demolition of the Foulis and Newbery Buildings and partial demolition of the Assembly Building and then the shoring up of the exterior of the Assembly

Building on three sides, followed by the excavation of the demolished site to provide a double basement under what was described as “the new building”.

15. Planning permission for “Erection of academic building..., external alterations to listed building and associated public realm works” was granted subject to conditions on  
5 22 March 2011. Planning permission for demolition of the Foulis and Newbury Buildings and “...partial demolition of, external alterations to and internal refurbishment of [the Assembly Building] in association with erection of academic building...” was granted subject to conditions on 27 April 2011.

16. Although technically it might have been possible to have completed the partial  
10 demolition and refurbishment of the Assembly Building first, for many reasons that would have been far too disruptive, expensive and, indeed potentially dangerous. It was never contemplated.

17. The Bill of Quantities, produced on 10 June 2011, identified the two buildings  
15 separately with a total costing of £21,681,486.23 of which £1,423,201.78 was attributable to the Assembly Building. The nature of the works, as designed, led to construction being procured as a single contract and with the approval of the Scottish Funding Council, Sir Robert McAlpine Ltd was appointed as a main contractor in August 2011. The site works proceeded together under the single contract.

18. For programming and progress monitoring purposes, however, and due to the  
20 different nature of the works, the Assembly Building construction works were recognised separately in the Sir Robert McAlpine Ltd Master Programme and Progress Reports. In the later stages of construction there was necessary coordination between the two work streams, as the Reid Building structure was effectively “wrapped around” the Assembly Building shell. Once this element of the works was  
25 completed the finishing trades for both buildings proceeded separately.

19. The Scottish Funding Council, who provided all of the funding for Phase 1, specified, as a standard condition of funding, that the works were required to meet, at a minimum, the British Research Establishment Environmental Assessment Method (“BREEAM”) Excellent Standard. The Reid Building in isolation was considered  
30 unlikely to achieve that. The specialist consultant advised the appellant that “...there needs to be a physical usable link between the Assembly Building and the new building”. The building design was therefore modified to include, on the second floor level, a single door connecting the two buildings.

20. The Assembly Building is an ornate sandstone building on three sides and very  
35 distinctive. The fourth side is a party wall with the Reid Building and it is there that the single link door was placed. The Assembly Building was purpose designed as the student union. The Club/Venue area has a separate fire escape on Scott Street. The Assembly Building provides a bar and a club for students on the ground and first floor. In addition there are toilets in the basement and offices for the Students’ Union  
40 and a small student exhibition area. There is a partial second floor providing further space for the Students’ Union.

21. The Assembly Building is controlled and managed by the Students' Union as a building to provide social functions for students and members of the public, an administrative base for students and Students' Union staff and exhibition/project space.
- 5 22. The Reid Building is a modern glass and steel clad building and is managed by the appellant and serves a number of functions as an art school. It primarily comprises learning, teaching and technical spaces with accommodation for academic support and management. There is a refectory.
- 10 23. The Reid Building has two entrances on Renfrew Street. The primary entrance is immediately adjacent to the Assembly Building. There is another entrance to the "Window on the Mack" which is a visitor centre on the ground floor where visitors who wish to tour the Mackintosh Building assemble. There is access from there into the Reid Building.
- 15 24. The Reid Building comprises two main basement levels and four main upper levels with additional mezzanine floors. The Reid Building has a security system and entry gates separate the public facing area of the Reid Building to the main academic and studio areas. Everyone entering the non-public facing area of the Reid Building must do so through the front door and internal entry gates.
- 20 25. The only common facilities for the two buildings are the sprinkler and air handling systems which are centralised in the Reid Building and the heating which is centralised in the nearby Bourdon Building together with that for other buildings. The two buildings have a reciprocal fire alarm system but with separate fire panels to identify alarm activation sources.
- 25 26. On the third floor of the Reid Building there are doors which give access to the roof of the Assembly Building but those are utilised purely for maintenance purposes and there is no access to the Assembly Building. The drainage outflow from both buildings enters the shared public infrastructure. Drainage from the upper floors on the west side of the Reid Building pass through and/or adjacent to the Assembly Building since those floors are immediately above it.
- 30 27. If students wish to go from the Assembly Building to the Reid Building then they must exit the Assembly Building through its front door and enter the Reid Building through one of its front doors. The buildings operate independently and the Assembly Building is not usually open until late morning whereas the Reid Building is open from early morning. It closes to students from 10pm on week days whereas the  
35 Assembly Building is open until at least 1am. Both buildings have their own emergency exits and evacuation procedures.
28. The two buildings are classified separately for non-domestic rates with the Assembly Building classified as a business and the Reid Building as a charity.
- 40 29. Construction of the whole site was sufficiently completed to enable the Reid Building to be opened to students on 6 January 2014 and the Assembly Building on 15 January 2014. However both buildings were certified for Partial Possession on

3 January 2014 (and in sections thereafter) subject to the completion of snagging works identified thereafter, and Practical Completion on 22 July 2014.

30. The completed Phase 1 was known generically as the Reid Building but comprised both the Assembly Building and the Reid Building. The formal opening of the Reid Building on 9 April 2014 was of both buildings.

### **The appellant and the Students' Union**

31. The appellant awards an annual subvention to the Students' Union which covers the direct cost of employing their sabbatical officers and two support staff. In 2014 that amounted to £66,000 per annum.

32. The Assembly Building was, and is, "leased" to the Students' Union with entry on 1 January 2014, albeit the Agreement dated 7 July 2014 that incorporates the rental provision is not a lease *per se*. It has the basic elements required for a lease in Scotland, namely identification of the parties, the address, the rental and an implied duration. No duration is specified but there is provision for termination on one year's notice. There is no provision for rent review other than that "Any future amendments in the rental..." will be agreed between the Students' Union and the Director of Finance of the appellant.

33. It is really a Service Level Agreement. The appellant is responsible for the buildings insurance. In the first year, in addition, the contents insurance was paid by the appellant but in subsequent years it was to be recharged. The appellant is responsible for maintaining the external condition of the premises other than in the case of vandalism. The appellant provides and supports the phone system. The appellant provides computer equipment and training for some staff. There is a degree of support, if not control, in relation to a number of areas such as Health and Safety, Human Resources, Payroll and Corporate Governance.

34. The rental is £5,000 per annum plus VAT. The first invoice for rent was for the period 1 February 2014 to 31 January 2015 and was issued on 31 October 2014. HMRC have pointed out that the rental worked out at £0.45 per square foot at a time when the market rate for a city centre bar/restaurant was £7.62 per square foot and office space commanded £12-£15.

35. In response, the appellant's agent advised HMRC on 29 July 2016 that the rental was set at a level that was "affordable" to the Students' Union. There are no notes of discussions or meetings regarding the level of rent. No professional advice was taken.

36. The VAT inclusive income of the Students' Union in the year to 31 January 2015 was almost £1.1 million of which £765,185 was liable to VAT. The appellant receives a monthly account of all of the Students' Union's income and expenditure and the agent confirmed to HMRC that there was no significant profit because of high staff costs.

37. The appellant accepted that there is a close and necessary link between it and the Students' Union and that: "... they work together to provide GSA students with access to welfare services and to provide facilities for social and recreational activities."

5 38. There is of course a symbiotic relationship in that the appellant uses the Students' Union as a "selling point" in attracting students and the Students' Union makes exhibition space available in the Union and funds some of the student projects.

10 39. The full business case for Phase 1 made it explicit at 4.3 in the Criteria for the Redeveloped Estate that "Good quality, accessible social and refectory facilities will be provided, together with Students' Union spaces which retain the atmosphere of the famous GSA Club and house social and support activities". Further at 6.3.3 it made it explicit that, in relation to accommodation for the Students' Union, it would have to be "capable of independent access".

### **VAT history**

#### *Previous history*

15 40. As the construction of the two buildings was tendered as a single construction contract, during the period of construction Sir Robert McAlpine Ltd invoiced monthly with the combined cost and charged VAT. Those costs were based on the costings from Turner & Townsend who acted as project managers. In 2011 they had produced a one page summary of the costs of £21,681,486.23 divided as between "New Build"  
20 and "Assembly Building" (see paragraph 17 above).

41. After completion of the buildings, when VAT became an issue, the appellant asked for separate invoices in order to identify the cost of the Assembly Building refurbishment and those were produced with compensating credit notes to cover the previously issued, and paid, invoices.

25 42. When the original single invoices were issued, the appellant treated the VAT on the monthly invoices as being "residual", ie as relating to all of their activities and thus neither fully taxable nor fully blocked from recovery.

30 43. The appellant reclaimed a proportion of the VAT thereon by applying their agreed Business/Non-Business Apportionment Calculation ("BNB") and approved Partial Exemption Special Method ("PESM"). The BNB and PESM had been agreed with HMRC and were operative from 1 August 2009.

35 44. On 23 December 2013, the appellant's agent wrote to HMRC seeking agreement to a method for determining the "use" of a capital item which was described as "the new Reid Building at Glasgow School of Art" and that on the basis that the appellant had become aware that the intended taxable use of the new building would not be accurately represented within the PESM.

45. That was further clarified on 23 January 2014 when the agent confirmed that the request for a change of method had been triggered by the appellant's intention to

waive VAT exemption for the Reid Building, including the Assembly Building, which would contain a number of tenants (ie it would opt to tax).

46. On 20 March 2014, the agent requested a Capital Item Special Method based on floor space allocation and identified those areas that would be treated as wholly attributable to taxable use. At that stage the area to be treated as wholly attributable to taxable use amounted to approximately 16.28% of the building. The whole Phase 1 site, which was by then occupied and operational, was simply referred to as the Reid Building. The letter stated:

“The initial objective is to identify those areas of the Reid Building which will be used solely for taxable business activities and solely for non-table activities. These areas will include:-

- ...Areas which will be let with the option to tax including:-
  - Assembly Area - let to GSA Students Union
  - “Windows on the Mac” restaurant and café - let to GSA Enterprises Limited
- Exhibition & Project Space
- Centre for Advanced Textiles
- Education/Non-Business Research areas”.

47. On 14 August 2014 the agent submitted form VAT 1614A notifying the “Option to Tax” for that entire building.

48. On 31 October 2014, the agent wrote to HMRC with a worked example of how the Capital Goods Adjustment (“CGA”) as required by Regulation 116 of SI 1995/2518 would be calculated. Spreadsheet 1 identified the areas of the Reid Building that would be used for taxable and exempt/non-business purposes. It was intimated that the appellant had elected to waive VAT exemption in respect of the Reid Building and had granted leases/licenses

“...to the following entities who wished to use the Reid Building:-

- Glasgow School of Art Students Association – ‘Assembly Building’
- Glasgow School of Art Enterprises Ltd – retail shop
- Where the Monkey Sleeps – catering (agent for GSA)”.

49. That worked example also attributed an element of mixed use areas to taxable, resulting in an overall taxable percentage of 29.98%.

50. The floor plans that accompanied that letter were headed the Reid Building and included the Assembly Building but it was not identified as a separate building.

51. Correspondence ensued.



52. On 16 February 2015 HMRC acknowledged the Option to Tax on a belated notification for the Reid Building at 164 Renfrew Street.

53. On 11 March 2015, HMRC rejected the Capital Item Special Method request on the basis that the outputs generated over the period from the leases (£102,500) did not fairly represent the sole economic use of the building costs and the estimated input tax (£2,174,796) that would have resulted from the operation of the method.

54. At that juncture HMRC stated:

“Upon further investigation, we find that the Assembly Building is not actually part of the new construction.”

55. HMRC went on to say that they accepted that the Assembly Building had been refurbished but, in their view, it did not form part of the main construction costs of the new Reid Building.

56. On 7 May 2015, the agent requested reconsideration and argued that the Assembly Building was part of the Reid Building but conceded that:

“However, there is evidence that suggests that, for VAT purposes at least, the Assembly Building may be regarded as a separate building”.

57. On 30 June 2015, HMRC responded pointing out that the appellant had incurred costs on a single construction contract and upheld that refusal. That decision was not appealed and forms no part of this appeal. However, that history is of relevance.

*History of this appeal.*

58. On 20 August 2015, the agent wrote to HMRC advising that the request to use a special CGS calculation had been withdrawn and intimated that the appellant would utilise the BNB and PESM methods.

59. At that point, for the first time, the agent stated definitively that the Assembly Building was neither an extension nor an annexation to the Reid Building. It was a building in its own right as defined within Schedule 10 to the Value Added Tax Act 1994 (“VATA”). No detail was offered on that point.

60. The letter went on to confirm that the appellant had elected to waive the VAT exemption in respect of the Assembly Building and that although the election notification correspondence had referred to the Reid Building, because the lease to the Students’ Union related only to the Assembly Building, the clear intent had been to opt to tax the Assembly Building. VAT had been charged and all output tax on rental income had been accounted for by the appellant. The Assembly Building had been used for wholly taxable purposes.

61. On 10 September 2015, the agent wrote to HMRC stating twice, and erroneously, that there was no internal link between the two buildings. In fact the plan produced with that letter shows the link.

61. On 14 October 2015, Officers Kerr and Cumberland visited the appellant and toured the Reid Building and the Assembly Building. At that juncture HMRC established that there was an internal link, being the door on the second floor. It was locked but the keys were readily available and HMRC were told that it was a fire exit.
- 5 62. Correspondence ensued and the agent explained that the only physical connection between the two buildings was a “fire exit door” that permits staff in the Assembly Building to exit into a fire escape exit within the adjacent Reid Building”. In fact, the second floor of the Reid Building has a stairwell which allows access to the whole building, including but not limited to, the ground floor fire exit. The link door is not required as a fire exit  
10 under either building’s fire strategy.
63. On 6 November 2015, HMRC wrote to the appellant confirming their view that the single development constituted one building because of the existence of the internal link.
- 15 64. On 24 November 2015, the agent responded confirming that the door that had been observed by the officers had been incorrectly installed since it was simply a “fire door” and not a fire exit escape door. The contractor had now modified it, the door lock mechanism was disabled and both keyholes blanked off. A single glass “panic bolt” mechanism was installed on the Assembly Building side only. It was argued that there had never been any intention to allow any access from the Reid Building to the  
20 Assembly Building or *vice a versa*.
65. On 27 November 2015, HMRC wrote to the appellant’s agent advising that at the time of construction, and when the input VAT had been incurred, there was a single project of the Reid Building and a single building.
- 25 66. On 25 February 2016, the agent wrote to submit the claim (VAT 652) in the sum of £65,778 for VAT in periods 01/12 to 07/15 relating to VAT incurred on the design and construction of the Assembly Building and that on the basis that the original VAT had been incorrectly allocated to “residual or non-attributed tax”. It should have been fully recoverable as the building was used by the appellant for fully taxable purposes.
- 30 67. On 10 March 2016, HMRC responded intimating that the VAT return for period 01/16 had been selected for checking.
68. On 23 March 2016, the agent responded providing the relevant information comprising details of the calculation and a copy invoice from Sir Robert McAlpine Ltd dated 31 January 2016, in the sum of £2,963,778.05 with VAT of £493,963.01. The VAT return calculation revealed that the input VAT credit claimed of  
35 £483,913.01 was lower than the value on the invoice and that was because of the inclusion on that return of 2014/15 Partial Exemption Longer Period Adjustment being £61,947.99 due to HMRC. The net amount reclaimed by the appellant was therefore £405,301.07. On the same date further information was also provided for the calculation of the VAT 652.
- 40 69. On 30 March 2016, HMRC sought further details and correspondence ensued.

## HMRC's detailed arguments

70. Ultimately on 13 February 2017, HMRC wrote to the appellant referring to the £7,800,000 of VAT incurred in respect of The Reid Building project. That letter rehearsed the history and confirmed HMRC's view that:

- 5 (a) There was a single supply which had not been altered by the issue of the credit notes and invoices outwith the accounting system.
- (b) VAT had been charged at the time of the supply and deducted using the PESM and BNB then in place.
- 10 (c) The supply was properly attributable to all of the appellant's activities so the Vat on the construction services was residual and it is not possible years later to re-attribute part of that supply to fully taxable.
- (d) The cost component on the supply of construction of the Assembly Building relates to all of the appellant's activities not just the lease so the deduction should not be limited to the Assembly Building alone.
- 15 (e) The cost component test relates to whether there is a "direct and immediate link" between the input and the output tax.
- (f) Whilst it is accepted that a business does not require to be profitable to deduct its input tax, and that deduction is not being denied by HMRC, the attribution solely to the lease does not reflect the economic reality.
- 20 (g) One should look objectively at purpose and funding when considering the economic use of costs and the grant of a lease at an almost notional cost was not the sole or even principal purpose of the refurbishment funded by the Scottish Funding Council.

## Discussion

### 25 *Overview of the arguments*

#### *The appellant*

71. The appellant argues that there are two primary issues, namely:

- 30 (a) Whether the refurbishment of the Assembly Building was a supply by Sir Robert McAlpine Ltd that was separate from the construction of the Reid Building. One of the factors to be taken into account in answering this question is whether the Assembly Building and the Reid Building are separate buildings for the purposes of VAT law. It is submitted that they are separate buildings and that the supplies in question were separate supplies.
- 35 (b) The entitlement to deduct depends on the utilisation of the supply and because the Assembly Building is leased on a taxable basis to the Students' Union the

appellant is entitled to credit for input tax incurred on the refurbishment of the building.

### *HMRC*

5 72. In response, HMRC argue that here was a single supply of construction services for the entire site and as a result of the internal access via the level 2 door there is only one building for VAT purposes. At the time of completion of the building there was access between the two buildings.

10 73. As far as the entitlement to deduct is concerned, HMRC argue that it is not unconditional and there must be a sufficient link between the rental payable by the Students' Union and the expenditure and the rental activity cannot be treated as an economic activity. They do not deny the deduction but rather the attribution.

15 74. Attribution is the process of determining how much of the input tax incurred relates to taxable supplies made or to be made. The VAT incurred on the Reid Building incorporating the area known as the Assembly Building is attributable to the whole of the appellant's activities and therefore falls to be treated as residual input tax.

75. The attribution originally utilised by the appellant to residual input tax was correct and fixed the position at the time the original attribution was made.

20 76. HMRC also addressed the timing of the supply or supplies arguing that the time of supply for the construction services was when the works were carried out and not when the invoice in the sum of £493,963.01 was subsequently issued after the appellant had opted to tax the whole of the Reid Building including the Assembly Building.

### *Separate buildings?*

25 77. Mr Simpson correctly states that there is no statutory provision which is directly applicable in considering whether the buildings are separate buildings. He argued that the factors that should be considered include:

- (i) Whether the Assembly Building is intended to and is capable of being used as a stand-alone building.
- 30 (ii) The means of access to it, for example, whether there is internal access between it and the Reid Building and, if so, whether that internal access is the main means of access to the part in question.

78. We find that the Assembly Building is capable of being used as a separate building.

79. We are not convinced that the appellant's intention was or is relevant. As Lightman J said at paragraph 4 in *Cantrell v HMRC* ("Cantrell")<sup>1</sup>: "The terms of planning permissions, the motives behind undertaking the Works and the intended and subsequent actual use are irrelevant...". We cite *Cantrell* since Mr Simpson referred to it, arguing that the question as to whether there is a separate building must be asked as at the date of the supply and by reference to the objective characteristics of the structures in question which include "similarities and differences in appearance, the layout and how the building or buildings are equipped to function".

80. We observe that *Cantrell* relates to zero rating and Lightman J's observations were in the context of explaining the applicable law for Group 5 of Schedule 8 VATA. Mr Simpson urged us to look at Notes 2, 5, 16 and 17 of Group 5 when considering the question of access via the internal door. Those provisions relate to whether the construction of residential dwelling houses or buildings for relevant charitable purposes and similar matters is construction of an annexe, extension or enlargement and those are not the issues in this appeal. In any event Note 2 specifies that there should be no direct internal access. In this instance there is such access. Notes 16 and 17 relate to where there are main accesses in both an existing building and an annexe. The provisions are specific to that and there is no question of either building being an annexe in this instance.

81. The other case cited by the appellant in that context was *Kahal Imrei Chaim Limited v HMRC*<sup>2</sup> which relied on *Cantrell*. To the limited extent that these cases are of any relevance, we, and HMRC, agree that the question of whether it was one or two buildings should be considered as at the date of the supply.

82. Looking to the facts, the appellant argues that the buildings are clearly separate and that is exhibited by their construction, history, function, occupation, operation and appearance. The shared aspects are minimal.

83. Certainly the external appearance of each building is very different, but because the Reid Building is wrapped around and over the Assembly Building, in many ways it could be said that the Assembly Building has been subsumed into the very much larger Reid Building. The shared aspects are indeed minimal.

84. We have set out at length our findings on the physical aspects of the two buildings. The first and very obvious point is that of course there is, and always has been a physical link between the two.

85. We do not accept that the link door was built as a fire exit. There was no requirement for that. It was built because it was a basic requirement of funding that the buildings had a physical link. We entirely accept HMRC's arguments that that was a commercial driver for there to be one building and that the "panic bolt" mechanism was only installed due to HMRC's enquiry. We accept that it has been locked at all times since construction, but it exists.

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<sup>1</sup> 1999 STC 100

<sup>2</sup> 2006 UK VAT 19625

5 86. We do not accept the appellant's argument that the construction of both buildings was completed at the same time for convenience and efficiency rather than necessity. It was always planned thus. Procurement was on the basis that it was a single construction project and the successful tender was on that basis; hence the single invoices.

10 87. After the demolition phase was completed, the reality was that three old walls were shored up on two corners of a very big site which amounted to a huge hole in the ground. Although the word "refurbishment" has been extensively used, even from the pre-design stage, the whole construction was undoubtedly envisaged as a single combined construction.

88. In our view it is not significant that for progress monitoring etc (see paragraph 18 above) the work on the Assembly Building was reported separately or that finishing trades proceeded separately. That is not uncommon and can happen for many reasons not least because fitting out a Bar is different to fitting out an exhibition space.

15 89. No-one has addressed the attribution of costs to the party wall between the two buildings and we do not intend to speculate on the position.

90. It was no isolated accident that the whole site was repeatedly described as the Reid Building and that it was the Reid Building that was formally "opened" or that for quite some time the appellant strenuously argued that there was only one building.

20 91. However, undoubtedly the two buildings can be, and are, capable of almost entirely independent operation and for very good reasons. The Assembly Building is open to the public and at times of day when the Reid Building is closed. Obviously it would be highly undesirable if the public could access the Reid Building from the Assembly Building at any time of day or night.

25 92. There is no requirement for the Students' Union to operate in a separate building and indeed the six other architects who entered bids for the contract suggested one building but with a self-contained space for the Students' Union. For that reason, we do not accept that the history of the Students' Union is a relevant consideration as the appellant argues.

30 93. On the other hand, it is significant that the Assessor for Glasgow has entered the two buildings on the Valuation Roll as separate subjects. The law for rating, when considering whether property comprises a *unum quid* or "one thing", takes account of functionality, and of course both parties have addressed that. An interesting exposition of that law can be found at *Woolway v Mazars*<sup>3</sup>.

35 94. Obviously, the appellant argues that the function of the Assembly Building is quite distinct from that of the Reid Building. It is, as we set out at length above, but that is far from the end of the matter. Firstly, if the facades had not been retained, the Students' Union would have functioned in exactly the same fashion within a new

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<sup>3</sup> 2015 UKSC 53

build, as originally envisaged and as recommended by the losing architects. Therefore functionality is merely one of the factors to be considered.

5 95. We looked very carefully at the general function of the Students' Union as can be seen at paragraphs 31-39 above. The "lease" with the Students' Union was not negotiated in a commercial sense, if indeed it was even negotiated. In our view, it is a nominal rent particularly if one looks at the other provisions of the agreement such as the appellant's responsibility for the insurance of the building (and indeed payment for the contents insurance in the first year) and provision of telephones and support for numerous other functions. The Students' Union's finances are monitored by the appellant on a monthly basis.

15 96. Like other Colleges and Universities, in order to attract students, and thus income, the appellant requires to have, and to support, a student union. It is an important part of the "student experience" provided by the appellant. No doubt it is for that reason that the business case for Phase 1 (see paragraph 39 above) made provision for the Students' Union in the context of refectory and other space. Incidentally, the refectory is in the Reid Building.

97. In summary, we find that the Students' Union, and what it does, is an integral part of the appellant's business.

20 98. A "building" is quite simply an edifice that has been constructed. What the appellant wishes us to find is that there are two separate buildings. Although we accept that possibly, the Assembly Building could have been constructed separately (see paragraph 16 above) we heard no evidence to the effect that the Reid Building could have been constructed without the Assembly Building. In our view, that seems extremely unlikely given that, as constructed, in large part, the Reid Building effectively envelopes the Assembly Building.

25 99. Obviously, we have given all aspects a great deal of thought but we find, on the balance of probability and looking to the totality of the evidence that what we have here is more akin to a semi-detached building which has an internal link. It is one building constructed as such.

30 *Separate supplies*

100. We are not persuaded that it ultimately matters whether there is one building or two. As the parties have demonstrated it is possible to argue both sides of the coin. What does matter is whether there was one supply or two.

35 101. We, HMRC and the appellant agree that in considering the approach to separate supplies the proper approach is to look at what, from an economic point of view, is being supplied and the *Card Protection Plan Limited v Customs & Excise*

*Commissioners*<sup>4</sup> (“CPP”) and *Levob Verzekering v Staatssecretaris Van Financiën*<sup>5</sup> (“Levob”). That is uncontroversial.

102. In this case a single price was charged. At paragraph 31 in *CPP* the Court stated: “...the fact that a single price is charged is not decisive...if circumstances ...indicated that the customer intended to purchase two distinct services...then it would be necessary to identify...”.

the separate prices. At paragraph 25 in *Levob*, the Court of Justice commenting on that paragraph said that even if separate prices had been contractually stipulated, and they were not in this case, that “...cannot affect the objective close link...nor the fact that they form part of a single economic transaction.”

103. In this case we find that as Mr Miller said very clearly “...the Phase 1 project...was always planned to have a single delivery strategy” and for that reason “...a single procurement strategy, encompassing both buildings, concurrently, under the same contract, was considered the optimum delivery approach...”.

104. Mr Simpson referred to *HMRC v Newey*<sup>6</sup> in his Skeleton Argument but in oral submission stated that it was not of particular relevance. We disagree. At paragraph 43, the Court stated:

“Given that the contractual position normally reflects the economic and commercial reality of the transactions...the relevant contractual terms constitute a factor to be taken into consideration..”.

105. The reality is that 100% of the funding came from The Scottish Funding Council and a condition of that funding was that the BREEAM rating was achieved. The appellant knew that that meant that the buildings would have to be physically linked. The appellant accepted that and contractually agreed the funding. It was the appellant’s choice to adopt the single delivery strategy and to contract with Sir Robert McAlpine Ltd on that basis.

106. The fact that prior to construction separate costs had been identified is not material as all bidders were requested to, and did, tender on the basis of a single contract and delivery. The buildings were handed over on the same dates (see paragraph 29 above). The various planning permission applications were for both buildings.

107. At no stage, until VAT became an issue long after the construction had finished and the buildings were occupied, did the appellant or anyone other than HMRC consider that there was anything other than a single supply by Sir Robert McAlpine Ltd.

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<sup>4</sup> 1992 2 AC 601; Case C-349/96

<sup>5</sup> 2004 ECR - I 9433; Case C-41/04

<sup>6</sup> 2013 STC 2432 Case C – 653/11



108. In that context, we accept that HMRC came to the view that there were two buildings at a stage where they were unaware that the entire interior of the Assembly Building had been removed or that there was an internal link.

5 109. Mr Simpson argued that the Tribunal should look at the economic and commercial reality of the transaction, having regard to the circumstances in which the transaction took place. He relied on Lord Hoffman at paragraph 31 in *Dr Beynon & Partners v HMRC*<sup>7</sup> for the proposition that should be looked at at the level of generality which corresponds to the social and economic reality of the transaction. That did not assist very much since, in that case, Lord Hoffman cautioned against splitting a transaction  
10 into smaller units since that amounted to “artificial dissection of the transaction”.

110. In this case, the reality, from every aspect, is that at all material times the appellant intended to, and did, develop the site as a whole. Only three walls were retained from the Assembly Building and one of those is obscured in part by the Reid Building.

15 111. In this case it was only when the appellant had been unsuccessful in its attempts to reclaim VAT that it decided to request new invoices and credit notes. That cannot change the nature of the supply.

112. We find at paragraph 99 above that there is one building, but even if there are two buildings, we find that there was one supply by Sir Robert McAlpine Ltd and the  
20 VAT treatment at the time of the supply was correct.

113. Even if we are wrong and there are two buildings and/or two supplies what then would be the position?

114. HMRC rely on *Tolsma*<sup>8</sup>, *Lebara*<sup>9</sup>, and *Commission v Finland*<sup>10</sup>. In particular in regard to *Finland*, HMRC rely on paragraph 29 which reads:

25 “The pursuit of those activities is therefore not accompanied by the economic risk characteristic of normal commercial activity. Furthermore the contributions do not cover, even in part, the costs associated with such services. It is impossible to isolate – as a specific economic activity an individual area of those offices’ activity. Such distinction cannot be justified either by the  
30 minimal contribution which must be paid by certain recipients of legal aid services depending on their financial situation or by the services themselves ...”.

115. Mr Simpson is entirely correct in saying that that was simply the Finnish Government’s argument, although of course that Government was successful. He relied rather on paragraph 36 stating that there had to be an economic activity carried out by the taxable person and that the appellant did so in imposing a rental for the  
35 Assembly Building.

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<sup>7</sup> 2004 UKHL 53

<sup>8</sup> Case C16/93,

<sup>9</sup> Case 520/10

<sup>10</sup> Case 246/08

116. We note at paragraph 38 that the Court goes on to say:

“However, it follows from the case-law that the receipt of a payment does not, per se, mean that a given activity is economic in nature.”

5 It went on to find at paragraphs 48 and 49 that where the payment is linked to the payer’s ability to pay there is a weaker link with the purported supply. As can be seen the rental in this instance can be described as “nominal” at best and is entirely linked to the Students’ Unions’ ability to pay.

117. HMRC rely on *African Consolidated Resources plc v HMRC*<sup>11</sup> (“ACR”) at paragraph 64 where it states:

10 “... the Tribunal has concluded that the provision of management services for what was essentially a fixed fee based on what the subsidiary could afford cannot be treated as a taxable supply. The lack of any relationship between the level of the fees and the value of the services provided....”.

15 Mr Simpson argues that that case was decided on its own facts and, of course, it was but the Tribunal in *ACR* went on to say in the next paragraph:

20 “As made clear in the *Finland* and *Tolsma* decisions, in order for a supply of services to be treated as a taxable supply, there has to be some legal and economic link between the consideration paid and the services provided: ‘A supply of services is effected for consideration.... only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied’. (*Tolsma v Inspecteur der Omzetbelasting Leuwarden* Case C-16/93) In this instance, there is insufficient evidence of an economic link between the value of what is being provided and the price which is being charged; in fact the evidence suggests that there is intentionally no such link.”

25 118. In this appeal, the value of what is being provided by the appellant in terms of the lease of the Assembly Building vastly exceeds the rental which is not pitched at even a remotely commercial level, even without taking into account the other costs borne by the appellant in the “lease”. If the appellant were to lease the Assembly Building at arm’s length, then, as we point out at paragraph 34 above, the rental would be

30 massively higher than the £5,000 charged to the Students’ Union. Any such lease would also be expected to contain appropriate rent review provisions to say nothing of including a specified duration.

35 119. On the basis of *Norseman Gold plc v HMRC*<sup>12</sup> Mrs McIntyre argued that mere receipt of a payment did not, of itself, mean that a given activity was economic in nature (and that is confirmed in *Finland* as we point out at paragraph 116 above) and if there was no economic activity there was no entitlement to recover the input tax. At paragraph 124 of *Norseman* Warren J, as he was then, said:

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<sup>11</sup> 2014 UKFTT 580 (TC)

<sup>12</sup> 2016 UKUT 69 (TCC)

“What needs to be established is a direct and immediate link between the services supplied and the charges levied...”.

120. Undoubtedly, there is a direct and immediate link between the appellant and the Students’ Union but that is not the question. There is a correlation between the rental and the lease but the issue comes down to whether or not the provision of the building by the appellant is an economic activity.

121. We were not referred to the case, but we are bound by Lord Drummond Young in *HMRC v Findmypast Ltd*<sup>13</sup> where having reviewed *CPP, Levob, Lebara*, and a number of other cases, at paragraph 24 he states:

10           “...the nature of a supply for VAT purposes must be determined in the light of a range of factors, including both the parties’ contract and the overall economic context in which that contract operates”.

122. Looking at the totality of the evidence, objectively considered, we find that the appellant was not engaged in an economic activity of letting when leasing the Assembly Building to the Students’ Union. Whilst we accept that a low level of rent is not an automatic bar to deduction, this lease is not an economic activity. It would take the appellant more than 500 years to recoup its capital outlay and that is not allowing for the fact that it bears the insurance and some other costs. We find as fact that it provides the lease and the facilities as part of its necessary support of the Students’ Union.

## CONCLUSION

123. The appellant as a whole is a business but some of its activities are not a business for VAT purposes.

124. For completeness, since it was included in HMRC’s Skeleton Argument but was not addressed by the appellant in the hearing, we confirm that as we indicate at paragraph 76 above, HMRC argued that the time of supply for the construction services was when the works were carried out and not when the invoice in the sum of £493,963.01 was subsequently issued. We agree.

125. There was a single supply of construction services under a single contract, against a single tender. That supply was of one building in which there is a link from the area leased to the Students’ Union to the rest of the building, and deliberately so, internally.

126. Although it would be possible to sell or lease the Assembly Building separately, provided the purchaser or lessee was prepared to either accept the link door or the appellant was able, and prepared, to remove it, that does not affect the supply made by Sir Robert McAlpine Ltd at that time.

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<sup>13</sup> 2017 CSIH59

127.The subsequent issue of new invoices and credit notes does not change the economic reality of that supply.

5 128.The lease of the Assembly Building is not a taxable supply as it is not an economic activity. There is not a sufficient direct and immediate link given the terms of the contractual arrangements and the overall economic context.

129.For all these reasons this appeal is dismissed.

10 130.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.

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**ANNE SCOTT  
TRIBUNAL JUDGE**

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**RELEASE DATE: 23 MAY 2018**

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