72TACD2021

BETWEEN/

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

Appeal

[**1**] This appeal relates to a refusal of the Revenue Commissioners on claims for a refund of value-added tax in respect of the following:

Taxable Period	Amount of Claim	Date of Claim	Date of Refusal	Date of Notice of Appeal
January/February 2014	€17,250	7 December 2016	22 June 2017	14 July 2017
March/April 2014	€34,500	7 December 2016	22 June 2017	14 July 2017
September/October 2014	€40,808	27 September 2018	5 October 2018	16 October 2018
November/December 2014	€139,518	12 December 2018	15 February 2019	20 February 2019
January/February 2015	€52,674	26 February 2019	19 March 2019	20 March 2019
March/April 2015	€32,645	26 April 2019	27 May 2019	7 June 2019
July/August 2015	€29,977	23 August 2019	27 August 2019	28 August 2019
September/October 2015	€120,546	25 October 2019	30 October 2019	11 November 2019

[**2**] The issue in the appeal is whether the Appellant has a right to deduct value-added tax charged on costs incurred by the Appellant in connection with the acquisition of the reversionary interest in properties. The properties were subject to leases of ten years or greater. The leases were granted before 1 July 2008. The value-added tax charged to the Appellant was:

Taxable Period	**VAT Charged**	**Invoice**
January/February 2014	€17,250	[redacted] [€17,250]
March/April 2014	€34,500	[redacted] [€34,500]
September/October 2014	€40,808	[redacted] [€40,325] [redacted] [€483]
November/December 2014	€139,518	[redacted] [€1,725] [redacted] [€11,293] [redacted] [€126,500]
January/February 2015	€52,673	[redacted] [€11,308] [redacted] [€41,365]
March/April 2015	€32,645	[redacted] [€32,645]
July/August 2015	€29,977	[redacted] [€29,977]
September/October 2015	€120,545	[redacted] [€12,716] [redacted] [€92,580] [redacted] [€13,800] [redacted] [€1,449]

[**3**] The structure of this determination is:

(A) Facts
(B) Representative Transaction
(C) Legislation
(D) Case-Law
(E) Submissions on behalf of the Appellant
(F) Submissions on behalf of the Revenue Commissioners
(G) Analysis and Findings
(H) Determination

[**4**] For ease, the following abbreviations will apply hereinafter – Value-Added Tax (*VAT*); Value-Added Tax Act, 1972 (*VATA 1972*); Value Added Tax Consolidation Act, 2010 (*VATCA 2010*); Sixth Council Directive 77/388/EEC (*Sixth Directive*); and Council Directive 2006/112/EC (*VAT Directive*).

(A) Facts

[**5**] The following facts were agreed by the parties:

Background to Appellant

5.1 [redacted]

[redacted].

5.2 [redacted].

5.3 Since [redacted], the Appellant has granted leases and has also acquired properties subject to leases. In the case of leases granted by the Appellant, almost invariably the Appellant has exercised the option for the leases to be subject to VAT where such an option was available under VATCA 2010. [redacted].

Background to Appeal

5.4 On various occasions the Appellant acquired the reversionary interest in commercial property i.e. it has purchased the freehold or long leasehold interest in properties which were subject to existing leases granted in favour of tenants who were in occupation. The properties in question were purchased with the benefit of leases of ten years or greater granted by the Appellant's predecessor in title prior to 1 July 2008 and taxed as a supply of goods at that time (hereinafter "legacy leases").

5.5 Claims in respect of the recovery of VAT incurred on expenditure related to the purchase of such properties were submitted by the Appellant and refused by the Revenue Commissioners for the taxable periods January/February 2014, March/April 2014, September/October 2014, November/December 2014, January/February 2015, March/April 2015, July/August 2015 and September/October 2015.

5.6 It is agreed by the parties that identical legal issues arise in respect of each of these claims and that the legal issues can be determined for all periods by reference to the facts of a single representative transaction as follows:

- On , the Appellant purchased a property portfolio from . The portfolio included a number of properties purchased with the benefit of legacy leases. is one such property.
- This property was purchased subject to a 25 year lease with an annual rent of €134,739 granted by to the on 9 March 2007. VAT of €341,058 was accounted for on the grant of the lease, being the VAT due at 13.5% on a capitalised value of €2,526,356. The capitalised value was determined in accordance with Regulation 19(1)(c)(i) of the Value-Added Tax Regulations 1979: namely, three-quarters of €134,739 (¾ annual rent) x 25 (number of complete years) = €2,526,356.
- On the purchase of the property the Appellant acquired the landlord's interest in the lease and became the landlord. Accordingly, on purchasing the property, the Appellant became entitled to receive the rents reserved by the lease and became responsible for the burden of all the landlord's covenants. No further VAT was payable by the to the Appellant or its predecessor in title on the rent payments made by the as the lease was subject to VAT on the grant of the lease on the capitalised value of the lease.
- In relation to the purchase of this property portfolio, the Appellant incurred VAT of €51,140 in respect of legal services provided by . On a property value-based apportionment, €40,325 of this VAT relates to the acquisition of the portion of this

property portfolio with the benefit of legacy leases and €604.80 of the €40,325 relates to the acquisition of [redacted].

- The €40,325 claimed as input tax in respect of the issue in the appeal formed part of a claim for a refund of VAT of €40,808 submitted on 27 September 2018 in respect of the taxable period September/October 2014. The Revenue Commissioners refused the claim on 5 October 2018 and an appeal was lodged with the Tax Appeals Commission on 16 October 2018.

Appeal

5.7 All the claims for a refund of VAT submitted were refused by the Revenue Commissioners on the basis that section 93(3)(b) VATCA 2010 precluded the recovery of VAT charged in connection with the acquisition of a reversionary interest.

5.8 The Appellant submitted Notices of Appeal on 14 July 2017, 16 October 2018, 20 February 2019, 19 March 2019, 7 June 2019, 28 August 2019 and 11 November 2019 in which it is submitted that all the VAT incurred in relation to the acquisition of the reversionary interest in the properties is deductible in full.

(B) Representative Transaction

[**6**] The lease between [redacted] and the [redacted] dated 9 March 2007 for [redacted] for a term of 25 years includes the following:

"***2. DEMISE***

In consideration of the rent hereby reserved and of the covenants on the part of the Tenant hereinafter contained the Landlord hereby demises and confirms unto the Tenant ***ALL THAT*** *the Demised Premises together with the easements rights and privileges but*

excepting and reserving unto the Landlord the exceptions and reservations ***TO HOLD*** *the Demised Premises unto the Tenant for the Term* ***YIELDING AND PAYING*** *therefor during the Term:*

FIRST *with effect from the Term Commencement Date the initial yearly rent of €134,739 (One hundred and thirty four thousand seven hundred and thirty nine Euro) (subject to review in accordance with Clause 3 hereof) to be paid by four equal quarterly payments in advance on the Gale Days the first payment to be made on the execution hereof*
SECONDLY *the Tenant's Proportion of the Park Service Charge payable on demand*
THIRDLY *by way of additional rent the Insurance Rent from time to time payable on demand*
AND FOURTHLY *the Tenant's Proportion of the Landscaping Costs payable on demand*

in each case to be paid by direct debit or at the option of the Landlord exercisable on any number of occasions either by standing order, credit transfer or cheque."

[**7**] The lease includes the following relating to VAT:

"***Pay Value Added Tax***

4.1.2 To pay and keep the Landlord indemnified against all Value Added Tax (or any tax of a similar nature that may be substituted for it or levied in addition to it) which may from time to time be charged on the rents and/or any other monies payable under this Lease including without prejudice to the generality of the foregoing all Value Added Tax chargeable on the grant of this Lease."

"***6.8 Option to Surrender***

The Tenant shall have the option to surrender the Lease upon the expiration of the eleventh year of the Term (the "termination date") upon giving to the Landlord not less than twelve months prior written notice ("termination notice") of its intention to do so and strictly subject to the following further conditions:-

...

6.8.2 the Tenant shall execute a Deed of Surrender and deliver same together with the original Lease and any other appropriate documents to the Landlord and shall pay to the Landlord the stamp duty and value added tax (to the extent that same is irrecoverable by the Landlord and subject to receipt of a valid VAT invoice) arising on the Surrender.

..."

[**8**] A letter from [redacted] to the [redacted] dated 9 March 2007 describes:

"*In respect of a 25 year lease of the following property: -*

[redacted]

Capitalised Value	*€2,526,356*
VAT @ 13.5%	*€341,058*
Total	*€2,867,414*

[redacted] *VAT Number:* [redacted]"

[**9**] The Contract for Sale between [redacted] and the Appellant dated [redacted] with a total contract value of [redacted] for a portfolio of properties includes the following relating to VAT:

"**SPECIAL CONDITIONS – PART A: GENERAL**

…

3. Value Added Tax

Definitions

*"**VAT**" means Value Added Tax;*
*"**VAT Act**" means Value-Added Tax Consolidation Act 2010, as amended, and related regulations;*
*"**Accountable Person**" has the meaning attributed to that term under Section 2 VAT Act; and*
*"**Taxable Person**" has the meaning attributed to that term under Section 2 VAT Act*

3.1. The Vendor and Purchaser agree that the Sale is by way of a transfer of a business and the provisions of Section 20(2)(c) and Section 26 VAT Act apply to the Sale and accordingly VAT is not chargeable. The Purchaser warrants to the Vendor that the Purchaser is an Accountable Person and the Purchaser has taken or will take all steps necessary to be taken on the Purchaser's part so that the sale of the ownership interest, or subject property, will qualify for relief from VAT under Section 20(2)(c) and Section 26 VAT Act, and that the Sale shall not be a supply for the purposes of the VAT Act. The Purchaser shall indemnify and keep the Vendor indemnified against any loss, cost or liability which arises as a result of such warranty being or becoming untrue or incorrect in any respect due to the act, neglect or default of the Purchaser.

3.2. If the Sale is not by way of a transfer of a business, then the Vendor and Purchaser agree and acknowledge that a joint option for taxation within the meaning of Section 94 VAT Act would apply in respect of the properties listed in 3.2.1. The Purchaser is a Taxable Person which status the Purchaser warrants to the Vendor. The Purchaser shall indemnify and keep the Vendor indemnified against any loss, cost or liability which arises as a result of such warranty being or becoming untrue

or incorrect in any respect due to the act, neglect or default of the Purchaser. The joint option to tax the Sale under Section 94 VAT Act is hereby exercised by the Vendor and the Purchaser. The Purchaser shall account to Revenue for any VAT arising on the Sale upon a reverse charge basis in accordance with Section 94 VAT Act.

3.2.1 Clause 3.2 applies to the following properties:

a) [redacted]

b) [redacted]

c) [redacted]

d) [redacted]

e) [redacted]

f) [redacted]

3.3. The Vendor warrants that to the best of its knowledge all such documentation and information in its possession, under its control or within its procurement, with regard to the VAT history and VAT status of the Subject Property has been provided to the Purchaser. The Vendor hereby covenants with the Purchaser to assist and cooperate with the Purchaser and to do all things reasonably required by the Purchaser in relation to any VAT queries raised by the Revenue Commissioners which concern the period of ownership of the Vendor's interest in the Subject Property.

3.4. The Purchaser confirms for the purpose of the Sale that the Purchaser is satisfied with the information, copy records and any other documentation in relation to the Sale provided by the Vendor and, subject to 3.3, the Purchaser shall have no recourse to the Vendor for any additional information, copy records and any other documentation following completion of the Sale."

(C) Legislation

Interpretation

[**10**] Insofar as is relevant, section 1 VATA 1972 (as at Finance Act, 1996) provides:

"***1. Interpretation***

...

*"**business**" includes farming, the promotion of dances and any trade, commerce, manufacture, or any venture or concern in the nature of trade, commerce or manufacture, and any profession or vocation, whether for profit or otherwise;*

...

*"**exempted activity**" means –*

(a) a supply of immovable goods in respect of which pursuant to section 4(6) tax is not chargeable, and

(b) a supply of any goods or services of a kind specified in the First Schedule or declared by the Minister by order for the time being in force under section 6 to be an exempted activity;"

[**11**] Insofar as is relevant, section 1 VATA 1972 (as at Finance Act, 1998) provides:

"***1. Interpretation***

...

*"**business**" includes farming, the promotion of dances and any trade, commerce, manufacture, or any venture or concern in the nature of trade, commerce or manufacture, and any profession or vocation, whether for profit or otherwise;*

...

*"**exempted activity**" means –*

(a) a supply of immovable goods in respect of which pursuant to section 4(6) tax is not chargeable, and

(b) a supply of any goods or services of a kind specified in the First Schedule or declared by the Minister by order for the time being in force under section 6 to be an exempted activity;"

[**12**] Insofar as is relevant, section 2 VATCA 2010 (as at Finance Act, 2014) provides:

"***2. Interpretation – general***

...

*"**business**" means an economic activity, whatever the purpose or results of that activity, and includes any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, and the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis;"*

...

*"**exempted activity**" means –*

(a) a supply of immovable goods in respect of which, pursuant to sections 94(2) and 95(3) and (7)(b), tax is not chargeable, and

(b) a supply of any goods or services of a kind specified in Schedule 1;"

Supply of immovable goods

[**13**] Insofar as is relevant, section 4 VATA 1972 (as at Finance Act, 1996) provides:

"***4. Special provisions in relation to the supply of immovable goods***

(1) (a) This section applies to immovable goods –

(i) which have been developed by or on behalf of the person supplying them, or

(ii) in respect of which the person supplying them was, or would, but for the operation of section 3(5)(b)(iii), have been at any time entitled to claim a deduction under section 12 for any tax borne or paid in relation to a supply or development of them.

(b) In this section "interest", in relation to immovable goods, means an estate or interest therein which, when it was created, was for a period of at least ten years but does not include a mortgage, and a reference to the disposal of an interest includes a reference to the creation of an interest.

(2) Subject to paragraphs (c), (d), (e) and (f) of section 3(1), section 19(2) and subsections (3), (4) and (5), a supply of immovable goods shall be deemed, for the purposes of this Act, to take place if, but only if, a person having an interest in immovable goods to which this section applies disposes, as regards the whole or any part of those goods, of that interest or of an interest which derives therefrom.

...

(4) Where a person having an interest in immovable goods to which this section applies disposes, as regards the whole or any part of those goods, of an interest which derives from that interest in such circumstances that he retains the reversion on the interest disposed of, he shall, in relation to the reversion so retained, be deemed, for the purposes of section 3(1)(f), to have made an appropriation of the goods or of the part thereof, as the case may be, for a purpose other than the purpose of his business.

(5) Where a person disposes of an interest in immovable goods to another person and in connection with that disposal a taxable person enters into an agreement with that other person or person connected with that other person to carry out a development in relation to those immovable goods, then –

(a) the person who disposes of the interest in the said immovable goods shall, in relation to that disposal, be deemed to be a taxable person,

(b) the disposal of the interest in the said immovable goods shall be deemed to be a supply of those goods made in the course or furtherance of business, and

(c) the disposal of the interest in the said immovable goods shall, notwithstanding subsection (1), be deemed to be a disposal of an interest in immovable goods to which this section applies.

(6) Notwithstanding anything in this section or in section 2 tax shall not be charged on the supply of immovable goods –

(a) in relation to which a right in favour of the person making the supply to a deduction under section 12 in respect of any tax borne or paid on the supply or development of the goods did not arise and would not, apart from section 3(5)(b)(iii), have arisen, or

(b) which had been occupied before the specified day and had not been developed between that date and the date of the supply other than a supply of immovable goods to which the provisions of subsection (5) apply.

…"

[**14**] Insofar as is relevant, section 4 VATA 1972 (as at Finance Act, 1998) provides:

"***4. Special provisions in relation to the supply of immovable goods***

(1) (a) This section applies to immovable goods-

(i) which have been developed by or on behalf of the person supplying them, or

(ii) in respect of which the person supplying them was, or would, but for the operation of section 3(5)(b)(iii), have been at any time entitled to claim a deduction under section 12 for any tax borne or paid in relation to a supply or development of them.

(b) In this section "interest", in relation to immovable goods, means an estate or interest therein which, when it was created was for a period of at least ten years or, if it was for a period of less than ten years, its terms contained an option for the person in whose favour the interest was created to extend it to a period of at least ten years, but does not include a mortgage, and a reference to the disposal of an interest includes a reference to the creation

of an interest, and an interval of the type referred to in subsection (2A) shall be deemed to be an interest for the purposes of this section.

(c) Where an interest is created and, at the date of its creation, its terms contain one or more options for the person in whose favour the interest was so created to extend that interest, then that interest shall be deemed to be for the period from the date of creation of that interest to the date that that interest would expire if those options were so exercised.

(2) Subject to paragraphs (c), (d), (e) and (f) of section 3(1), section 19(2) and subsections (3), (4) and (5), a supply of immovable goods shall be deemed, for the purposes of this Act, to take place if, but only if, a person having an interest in immovable goods to which this section applies disposes (including by way of surrender or by way of assignment), as regards the whole or any part of those goods, of that interest or of an interest which derives therefrom.

...

(4) Where a person having an interest in immovable goods to which this section applies disposes, as regards the whole or any part of those goods, of an interest which derives from that interest in such circumstances that he retains the reversion on the interest disposed of, he shall, in relation to the reversion so retained, be deemed, for the purposes of section 3(1)(f), to have made an appropriation of the goods or of the part thereof, as the case may be, for a purpose other than the purpose of his business.

(5) Where a person disposes of an interest in immovable goods to another person and in connection with that disposal a taxable person enters into an agreement with that other person or person connected with that other person to carry out a development in relation to those immovable goods, then –

(a) the person who disposes of the interest in the said immovable goods shall, in relation to that disposal, be deemed to be a taxable person,

(b) the disposal of the interest in the said immovable goods shall be deemed to be a supply of those goods made in the course or furtherance of business, and

(c) the disposal of the interest in the said immovable goods shall, notwithstanding subsection (1), be deemed to be a disposal of an interest in immovable goods to which this section applies.

(6) Notwithstanding anything in this section or in section 2 tax shall not be charged on the supply of immovable goods –

(a) in relation to which a right in favour of the person making the supply to a deduction under section 12 in respect of any tax borne or paid on the supply or development of the goods did not arise and would not, apart from section 3(5)(b)(iii), have arisen, or

(b) which had been occupied before the specified day and had not been developed between that date and the date of the supply other than a supply of immovable goods to which the provisions of subsection (5) apply.

...

(9) Where a disposal of an interest in immovable goods is chargeable to tax and where those goods have not been developed since the date of the disposal of that interest (hereafter referred to in this subsection as "the taxable interest") any disposal of an interest in those goods after that date by a person other than the person who acquired the taxable interest shall, for the purposes of this Act, be deemed to be a supply of immovable goods to which subsection (6) applies.

(10) (a) Where a disposal of an interest in immovable goods is chargeable to tax and the person who acquires that interest is obliged to pay rent to another person (hereafter referred to in this subsection as "the landlord") under the terms and conditions laid down in respect of that interest, the landlord –

(i) shall, notwithstanding the provisions of section 8, be deemed not to be a taxable person in respect of transactions in relation to those immovable goods other than –

(I) supplies of those immovable goods on which tax is chargeable in accordance with the provisions of this section, or

(II) supplies of other goods or services effected for consideration by the landlord, or

(III) post-letting expenses in respect of that interest,

(ii) shall not be entitled to deduct tax in respect of transactions in relation to those immovable goods other than –

(I) supplies of those immovable goods on which tax is chargeable in accordance with the provisions of this section other than subsection (4), or

(II) supplies of other goods or services effected for consideration by the landlord, or

(III) post-letting expenses in respect of that interest,

(iii) shall be deemed, where that landlord is not the person who made the disposal of the interest, to be a taxable person in respect of post-letting expenses in relation to that interest and shall in relation to those post-letting expenses be entitled to deduct tax, in accordance with section 12, as if those post-letting expenses were for the purposes of the landlord's taxable supplies.

(b) For the purposes of this subsection post-letting expenses in relation to an interest in immovable goods are expenses which the landlord incurs–

(i) in carrying out services which the landlord is obliged to carry out under the terms and conditions of the written contract entered into on the disposal of the interest which was chargeable to tax but does not include transactions the obligation to perform which is not reflected in the consideration on which tax was charged on the disposal of that interest, or

(ii) which directly relate to the collection of rent arising under the contract referred to in subparagraph (i), or

(iii) which directly relate to a review of rent where the terms and conditions of the contract referred to in subparagraph (i) provide for such a review, or

(iv) which directly relate to the exercise of an option to extend the interest or to exercise a break-clause in relation to that interest where the terms and conditions of the contract referred to in subparagraph (i) provide for such an option or such a break-clause, but do not include any expenses relating to goods or services of the type specified in section 12(3)."

[**15**] Insofar as is relevant, section 93 VATCA 2010 (as at Finance Act, 2014) provides:

"***93 Supply of immovable goods (old rules)***

(1) (a) In this section –

*(i) "**interest**", in relation to immovable goods –*

(I) subject to clause (II), means an estate or interest in those goods which, when it was created, was for a period of at least 10 years or, if it was for a period of less than 10 years, its terms contained an option for the person in whose favour the interest was created to extend it to a period of at least 10 years,

(II) does not include a mortgage,

(ii) a reference to the disposal of an interest includes a reference to the creation of an interest, and

(iii) an interval of the type referred to in section 4(2A) of the repealed enactment shall be deemed to be an interest for the purposes of this section.

(b) Where an interest is created and, at the date of its creation, its terms contain one or more options for the person in whose favour the interest was so created to extend the interest, then that interest shall be deemed to be for the period from the date of creation of that interest to the date that that interest would expire if those options were so exercised.

(c) This section applies to immovable goods –

(i) *which have been developed by or on behalf of the person supplying them, or*

(ii) *in respect of which the person supplying them was, or would, but for the operation of section 20(2)(c), have been at any time entitled to claim a deduction under Chapter 1 of Part 8 for any tax borne or paid in relation to a supply or development of them.*

(2) (a) (i) Subject to subparagraph (ii), where an interest in immovable goods was created prior to 1 July 2008 in such circumstances that a reversion on that interest (in this subsection referred to as a "reversionary interest") was created and retained, then any sub-sequent disposal to another person of the reversionary interest or of an interest derived entirely from that reversionary interest shall be deemed to be a supply of immovable goods to which tax is not charged if, since the date the first-mentioned interest was created, those goods have not been developed by, on behalf of, or to the benefit of, the person making such subsequent disposal.

(ii) This subsection shall not be construed as applying to a disposal of an interest which includes an interval.

(b) For the purposes of this subsection, the Revenue Commissioners may make regulations specifying the circumstances or conditions under which development work on immovable goods is not treated as being on behalf of, or to the benefit of, a person.

(3) (a) For the purposes of this subsection –

*"**landlord**" has the meaning assigned to it by paragraph (b);*

*"**post-letting expenses**", in relation to an interest in immovable goods–*

(i) subject to subparagraph (ii), means expenses which the landlord incurs –

(I) in carrying out services which the landlord is obliged to carry out under the terms and conditions of the written contract entered into on the disposal of the interest which

was chargeable to tax (other than transactions in relation to which the obligation to perform is not reflected in the consideration on which tax was charged on the disposal of that interest),

(II) which directly relate to the collection of rent arising under the contract referred to in clause (I),

(III) which directly relate to a review of rent where the terms and conditions of the contract referred to in clause (I)provide for such a review, or

(IV) which directly relate to the exercise of an option to extend the interest or to exercise a break-clause in relation to that interest where the terms and conditions of the contract referred to in clause (I) provide for such an option or such a break-clause,

(ii) do not include any expenses relating to goods or services of the type specified in section 60(2).

(b) Where –

(i) an interest in immovable goods was disposed of prior to 1 July 2008,

(ii) that disposal was chargeable to tax, and

(iii) the person who acquired that interest is obliged to pay rent to another person (in this subsection referred to as the "landlord") under the terms and conditions laid down in respect of that interest,

then the landlord –

(I) shall, notwithstanding Part 2, be deemed not to be an accountable person in respect of transactions in relation to those immovable goods other than –

(A) supplies of those immovable goods on which tax was chargeable in accordance with section 4 of the repealed enactment,

(B) supplies of other goods or services effected for consideration by the landlord, or

(C) post-letting expenses in respect of that interest,

(II) shall not be entitled to deduct tax in respect of transactions in relation to those immovable goods other than –

(A) supplies of those immovable goods on which tax was chargeable in accordance with section 4 (other than subsection (4) of that section) of the repealed enactment,

(B) supplies of other goods or services effected for consideration by the landlord, or

(C) post-letting expenses in respect of that interest,

(III) shall be deemed, where the landlord is not the person who made the disposal of the interest, to be an accountable person in respect of post-letting expenses in relation to that interest, and

(IV) shall, in relation to those post-letting expenses, be entitled to deduct tax, in accordance with Chapter 1 of Part 8, as if those post-letting expenses were for the purposes of the landlord's taxable supplies."

VAT Directive

[**16**] Insofar as is relevant, the VAT Directive provides:

Article 1

"*1. This Directive establishes the common system of value added tax (VAT).*

2. The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.

On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.

The common system of VAT shall be applied up to and including the retail trade stage."

Article 9(1)

"*1. 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.*

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

Article 14(1)

"*1. 'Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner*."

Article 15(2)

"*2. Member States may regard the following as tangible property:*

(a) certain interests in immovable property;

..."

Article 24(1)

"*1. 'Supply of services' shall mean any transaction which does not constitute a supply of goods*."

Article 135(1)

"*1. Member States shall exempt the following transactions:*

(j) the supply of a building or parts thereof, and of the land on which it stands, other than the supply referred to in point (a) of Article 12(1);

...

(l) the leasing or letting of immovable property."

Article 167

"*A right of deduction shall arise at the time the deductible tax becomes chargeable*."

Article 168

"*In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:*

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

..."

(D) Case-Law

[**17**] The parties referred to the following case-law.

[**18**] In ***BP Supergas -v- Greek State*** [Case C-62/93] the nature of one of the questions submitted by the national court (Administrative Court of First Instance) was whether Article 11A(1) and B(1) and (2), and Article 17(1) and (2) of the Sixth Directive confer rights on individuals on which they may rely before national courts. In this appeal, the following paragraphs were referred to:

"*33 In order to reply to that question, reference should be made to the settled case-law of the Court regarding the right of individuals to rely upon the Sixth Directive (see the judgments in inter alia Case 8/81 Becker [1982] ECR 53 and Case C-10/92 Balocchi [1993] ECR I-5105). I - 1917 JUDGMENT OF 6. 7. 1995 - CASE C-62/93*

34 It follows from that case-law that, despite the relatively wide discretion enjoyed by the Member States in implementing certain provisions of the Sixth Directive, individuals may effectively plead before national courts the provisions of the directive which are sufficiently clear, precise and unconditional (Balocchi, paragraph 34).

35 The provisions of Article 11A(1) and B(1) and (2) specify the rules for determining the taxable amount whilst Article 17(1) and (2) specify the conditions giving rise to the right to deduct and the extent of that right. They do not leave the Member States any discretion as regards their implementation. Accordingly, they satisfy the abovementioned criteria and therefore confer rights on individuals which they may invoke before a national court in order to challenge national rules which are incompatible with those provisions.

36 Consequently, it should be stated in reply to the first part of Question 2 that the provisions of Article 11A(1) and B(1) and (2) and of Article 17(1) and (2) of the Sixth Directive confer rights on individuals on which they may rely before a national court."

[**19**] In ***Rompelman -v- Minister van Financiën*** [Case C-268/83] the nature of the question submitted by the national court (Supreme Court of the Netherlands) was whether the acquisition of a right to the future transfer of ownership of part of a building yet to be constructed with a view to letting such premises in due course may be regarded as an

economic activity within the meaning of Article 4(1) of the Sixth Directive. In this appeal, the following paragraphs were referred to:

"*17. Article 4(1) of the Directive must be considered against that general background. That provision defines a taxable person as 'any person who independently carries out in any place any economic activity specified in paragraph (2), whatever the purpose or results of that activity'. Article 4(2) provides that 'the economic activities referred to in paragraph (1) shall comprise all activities of producers, traders and persons supplying services ...'. In particular, the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis' is considered to be an economic activity.*

18 Article 17(1) of the Sixth Directive provides that 'the right to deduct shall arise at the time when the deductible tax becomes chargeable'. Article 17(2) provides that, in so far as the goods and services are used for the purposes of his taxable transactions, the taxable person is to be entitled 'to deduct from the tax which he is liable to pay the value-added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person'.

19 From the provisions set forth above it may be concluded that the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of value-added tax therefore ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way.

…

25 The answer to the question submitted to the Court must therefore be that the acquisition of a right to the future transfer of property rights in part of a building yet to be constructed, with a view to letting such premises in due course, may be regarded as an economic activity within the meaning of Article 4(1) of the Sixth

Directive. However, that provision does not preclude the revenue authorities from requiring the declared intention to be supported by objective evidence such as proof that the premises which it is proposed to construct are specifically suited to commercial exploitation."

[**20**] In this appeal the following paragraph was referred to from ***Finanzamt Freistadt Rohrbach Urfahr -v- Unabhängiger Finanzsenat Außenstelle Linz*** [Case C-219/12]:

"*36 It should also be borne in mind that, according to the structure of the system introduced by the Sixth Directive, input taxes on goods or services used by a taxable person for his taxable transactions may be deducted. The deduction of input taxes is linked to the collection of output taxes. Where goods or services are used for the purposes of transactions that are taxable as outputs, deduction of the input tax on them is required in order to avoid double taxation (see Case C-184/04 Uudenkaupungin kaupunki [2006] ECR I-3039, paragraph 24, and Case C-72/05 Wollny [2006] ECR I-8297, paragraph 20).*"

[**21**] In this appeal the following paragraph was referred to from ***Imofloresmira – Investimentos Imobiliários SA -v- Autoridade Tributária e Aduaneira*** [Case C-672/16]:

"*35 Under Article 167 of the VAT Directive, a right of deduction arises at the time the deductible tax becomes chargeable. Consequently, only the capacity in which a person is acting at that time can determine the existence of the right to deduct (see, to that effect, judgments of 11 July 1991, Lennartz, C-97/90, EU:C:1991:315, paragraph 8, and of 30 March 2006, Uudenkaupungin kaupunki, C-184/04, EU:C:2006:214, paragraph 38).*"

[**22**] In this appeal the following paragraph was referred to from ***MEO – Serviços de Comunicações e Multimédia SA -v- Autoridade Tributária e Aduaneira*** [Case C-295/17]:

"*43 As regards the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case-law of the Court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, judgment of 20 June 2013, Newey, C-653/11, EU:C:2013:409, paragraph 42 and the case-law cited).*

...

61 On the other hand, as has been held in paragraph 43 above, it is essential to take into account the economic reality of the transaction at issue, which constitutes a fundamental criterion for the application of the common system of VAT (see, to that effect, the judgment of 20 June 2013, Newey, C-653/11, EU:C:2013:409, paragraphs 42, 48 and 49 and the case-law cited)..."

[**23**] In ***Abbey National Plc -v- Commissioners of Customs and Excise*** [Case C-408/98] the nature of the question submitted by the national court (High Court of Justice of England and Wales) was whether, in circumstances where a Member State had exercised the option in Article 5(8) of the Sixth Directive so that the transfer of assets was regarded as not being a supply of goods, the transferor may deduct the VAT on the costs of the services acquired in order to effect the transfer. In this appeal, the following paragraphs were referred to:

"*24 It should be noted, to begin with, that the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see, to that effect, Case 268/83 Rompelman v Minister van Financiën [1985] ECR 655 ...).*

25 Article 17(5) of the Sixth Directive, in the light of which paragraph 2 of that article must be interpreted, lays down the rules applicable to the right to deduct VAT where

the VAT relates to input transactions used by the taxable person 'both for transactions covered by paragraphs 2 and 3, in respect of which value added tax is deductible, and for transactions in respect of which value added tax is not deductible'. The use in that provision of the words 'for transactions' shows that to give rise to the right to deduct under paragraph 2 the goods or services acquired must have a direct and immediate link with the output transactions which give rise to the right to deduct, and that the ultimate aim pursued by the taxable person is irrelevant in this respect (see Case C-4/94 BLP Group v Customs and Excise [1995] ECR I-983, paragraphs 18 and 19, and Midland Bank, paragraph 20).

26 *As the Court held in paragraph 24 of Midland Bank, Article 2 of the First Directive and Article 17(2), (3) and (5) of the Sixth Directive must be interpreted as meaning that, in principle, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to the right to deduct is necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement.*

27 *It should also be borne in mind that, according to the fundamental principle which underlies the VAT system, and which follows from Article 2 of the First Directive and Article 2 of the Sixth Directive, VAT applies to each transaction by way of production or distribution after deduction of the VAT directly borne by the various cost components (Midland Bank, paragraph 29).*

28 *It follows from that principle, as well as from the rule that, in order to give rise to the right to deduct, the goods or services acquired must have a direct and immediate link with the taxable transactions, that the right to deduct the VAT borne by those goods or services presupposes that the expenditure incurred in acquiring them was part of the cost components of the taxable transactions. That expenditure must therefore form part of the costs of the output transactions which use the goods and services acquired. Consequently, those cost components must generally have*

arisen before the taxable person carried out the taxable transactions to which they relate (see Midland Bank, paragraph 30).

29 *The Court must therefore examine whether there is a direct and immediate link between the various services acquired by the transferor in order to effect the transfer of a totality of assets or part thereof and one or more taxable output transactions.*

30 *Article 5(8) of the Sixth Directive provides that Member States may, on a transfer of a totality of assets or part thereof, consider that no supply of goods has taken place and that the recipient is the successor to the transferor. It follows that if a Member State has made use of that option the transfer of a totality of assets or part thereof is not regarded as a supply of goods for the purposes of the Sixth Directive. Under Article 2 of the directive, such a transfer is thus not subject to VAT, and consequently cannot constitute a taxable transaction within the meaning of Article 17(2).*

31 *Abbey National, however, submits that since under Article 5(8) of the Sixth Directive the transferee is the successor of the transferor, the transferor may take into account the taxable supplies of the transferee so as to be able to deduct all the VAT on the expenditure incurred for the services acquired in order to effect the transfer.*

32 *That argument cannot be accepted. First, it is clear from Article 17(2) of the Sixth Directive that a taxable person may deduct only the VAT on the goods and services used for the purposes of his own taxable transactions. Second, in any event, the amount of VAT paid by the transferor on the costs incurred for the services acquired in order to carry out a transfer of a totality of assets or part thereof does not directly burden the various cost components of the transferee's taxable transactions, as*

required by Article 2 of the First Directive. Those costs do not form part of the costs of the output transactions which use the goods and services acquired.

33 *Abbey National's argument that, if the transaction had been an ordinary transfer of business assets and hence a taxable transaction, Scottish Mutual would have been able to deduct the VAT on the costs of the various services acquired in order to carry out that transaction under Article 17(2) of the Sixth Directive must also be rejected. The fact that the transfer of a totality of assets or part thereof does not constitute a taxable transaction for the purposes of that article is simply the inevitable consequence of the fact that the Member State concerned has opted to apply Article 5(8) and that the transfer is not therefore regarded as a supply of services. Consequently, it is immaterial whether the transfer of business assets would have constituted a taxable transaction giving rise to the right to deduct that expenditure if the Member State had not exercised the option provided for in that article.*

34 *It follows that the various services acquired by the transferor in order to effect the transfer of a totality of assets or part thereof do not have a direct and immediate link with one or more output transactions giving rise to the right to deduct.*

35 *However, the costs of those services form part of the taxable person's overheads, and as such are cost components of the products of a business. Even in the case of a transfer of a totality of assets, where the taxable person no longer effects transactions after using those services, their costs must be regarded as part of the economic activity of the business as a whole before the transfer. Any other interpretation of Article 17 of the Sixth Directive would be contrary to the principle that the VAT system must be completely neutral as regards the tax burden on all the economic activities of a business provided that they are themselves subject to VAT, and would make the economic operator liable to pay VAT in the context of his economic activity without giving him the possibility of deducting it (see, to that*

effect, Gabalfrisa, paragraph 45). An arbitrary distinction would thus be drawn between expenditure incurred for the purposes of a business before it is actually operated and that incurred during its operation, on the one hand, and, on the other hand, the expenditure incurred in order to terminate its operation.

36 Thus in principle the various services used by the transferor for the purposes of the transfer of a totality of assets or part thereof have a direct and immediate link with the whole economic activity of that taxable person.

37 It follows from Article 17(5) of the Sixth Directive that a taxable person who effects both transactions in respect of which VAT is deductible and transactions in respect of which it is not may deduct only that proportion of the VAT which is attributable to the former transactions.

38 However, as the Court held in paragraph 26 of the Midland Bank judgment, a taxable person who effects transactions in respect of which VAT is deductible and transactions in respect of which it is not may nevertheless deduct the VAT charged on the goods or services acquired by him, where those goods or services have a direct and immediate link with the output transactions in respect of which VAT is deductible, without it being necessary to differentiate according to whether Article 17(2), (3) or (5) of the Sixth Directive applies.

39 That rule must apply also to the costs of the goods and services which form part of the overheads relating to a part of a taxable person's economic activities which is clearly defined and in which all the transactions are subject to VAT, since those goods and services thus have a direct and immediate link with that part of his economic activities.

40 So if the various services acquired by the transferor in order to effect the transfer of a totality of assets or part thereof have a direct and immediate link with a clearly

defined part of his economic activities, so that the costs of those services form part of the overheads of that part of the business, and all the transactions relating to that part are subject to VAT, he may deduct all the VAT charged on his costs of acquiring those services.

41 *It is for the national court to determine whether those criteria are satisfied in the case in point in the main proceedings.*"

[**24**] In ***Finanzamt Offenbach am Main-Land -v- Faxworld*** [Case C-137/02] the nature of the question submitted by the national court (Federal Finance Court) was whether, in circumstances where a Member State had exercised the option in Articles 5(8) and 6(5) of the Sixth Directive so that the transfer of assets was regarded as not being a supply of goods, a civil-law partnership (Faxworld GbR), whose object was to prepare the means necessary for the activities of a limited company (Faxworld AG) to be formed, was entitled to deduct VAT where its sole output in performance of its object was to transfer the totality of its assets to that limited company once it had been formed. In this appeal, the following paragraphs from the Opinion of Advocate General Jacobs were referred to:

"*36.* *Next, I should state that the result favoured by the German authorities appears to me to be inconsistent with the principle of the neutrality of VAT, in so far as it denies any right to deduct the input tax in issue, whether for Faxworld GbR or for Faxworld AG.*

37. *From an economic point of view, it seems clear, a single business has been set up, going through various preparatory stages before becoming operational. The continuity of the business from preparatory to operational stages - the continuity of its identity as a business - does not appear to be in any doubt. The normal operation of the VAT system requires that input tax on supplies acquired by a business at both preparatory and operational stages be deductible from its output tax.*

38. *Any deviation from that normal operation, and therefore from the principle of neutrality, can in my view be accepted only where there is clear authorisation in the legislation, as interpreted where appropriate by the Court*.

39. *In the present case, from a legal point of view the preparatory and operational stages were carried out by two separate entities, a partnership and a limited company. It is on that separation that the German authorities base their arguments.*

...

43. *None the less, although the partnership and the limited company in the present case are two separate legal persons, there is not only a perceptible economic continuity between them but also a degree of legal continuity.*

...

56. *It might be questioned whether the view I have reached is wholly compatible with the Court's judgment in Abbey National. At paragraphs 32 to 35 of that judgment, it will be recalled, the Court stated that a taxable person may deduct only the VAT on the goods and services used for the purposes of his own taxable transactions, and that the amount of VAT paid by the transferor on the costs incurred for the services acquired in order to carry out a transfer of a totality of assets or part thereof does not directly burden the various cost components of the transferee's taxable transactions. None the less, such costs form part of the overheads of the transferor's business and as such are cost components of the products of that business; the transferor thus enjoys a right to deduct on that basis.*

57. *I view that reasoning however as specific to the circumstances of Abbey National. The tax in issue in that case was payable on services acquired for the purposes of effecting the transfer, and not on the assets actually transferred. Those latter assets, in issue in the present case, clearly do form cost components of the transferee's transactions, and the continuity of personality as between the transferor and his successor, the transferee, justifies treating input VAT on their acquisition as giving rise to a right to deduct on that basis.*

58. In order to respect the principle of the neutrality of VAT and to avoid any distortion of competition, that right should vest in the person, whether transferor or transferee, who actually bears the economic burden of the tax, in circumstances where Article 5(8) of the Sixth Directive applies. It would only be in wholly exceptional - and difficult to imagine - circumstances that those aims could still be achieved by allowing the other party to the transfer the right to deduct."

[**25**] In this appeal the following paragraphs from the judgment in ***Finanzamt Offenbach am Main-Land -v- Faxworld*** [Case C-137/02] were referred to:

"*20 However, observing that, according to the judgment in Abbey National, a taxable person may deduct only the VAT on input supplies used for the purposes of its own taxable transactions and that, therefore, account cannot be taken of the transactions of the recipient of the transfer, the Bundesfinanzhof points out that, in the case at issue in the main proceedings, the legal distinction between Faxworld GbR and Faxworld AG is merely the result of the particular features of German civil law relating to the establishment of companies. Moreover, the national court points out that the principle of fiscal neutrality underlying the system of VAT precludes economic operators carrying on the same activities from being treated differently as far as taxation is concerned, and takes the view that the particularities of German civil law relating to the establishment of companies cannot result in the loss of a right to deduct tax in the preparatory phase (Case C-216/97 Gregg [1999] ECR I-4947, paragraph 20).*

...

31 As stated in paragraph 24 of this judgment, Article 17(2) of the Sixth Directive provides that a taxable person may deduct the VAT incurred on goods or services used 'for the purposes of his taxable transactions'. With respect to establishing whether a taxable person has effected taxable transactions, point 1 of Article 2 of

the Sixth Directive provides, as a general rule, that the supply of goods or services effected for consideration by a taxable person acting as such are subject to VAT.

...

33 *Since its only output transaction was the transfer of the totality of its assets and given that the Federal Republic of Germany has exercised the options provided for in Articles 5(8) and 6(5) of the Sixth Directive, Faxworld GbR itself effected no taxable transactions within the meaning of Article 17(2) of the Sixth Directive.*

...

36 *Although it does not dispute that Faxworld GbR is to be treated as a taxable person, the Commission shares the view taken by the German Government as regards that partnership's right to deduct. Relying on the judgment in Abbey National, paragraph 28, which states that the right to deduct presupposes that the expenditure incurred in acquiring the output services was part of the cost components of the taxable transactions, the Commission argues that the deduction of input tax requires that taxable transactions be effected; Faxworld GbR, however, never intended to effect such transactions.*

37 *It should be noted, first of all, that the deduction scheme is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see Rompelman, paragraph 19; Case C-37/95 Ghent Coal Terminal [1998] ECR I-1, paragraph 15; Gabalfrisa, cited above, paragraph 44; Case C-98/98 Midland Bank [2000] ECR I-4177, paragraph 19; and Abbey National, paragraph 24). Given the general nature of that right, derogations are permitted only in the cases expressly provided for in the Directive (see, to that effect, Ghent Coal Terminal, cited above, paragraph 16).*

38 *In the case giving rise to the judgment in Abbey National, the taxable person in question had transferred a business and wished to deduct the VAT which it had paid*

on the services received by it for the purpose of that transfer in circumstances in which the transfer did not constitute a taxable transaction because the Member State concerned had exercised its option under Article 5(8) of the Sixth Directive.

39 *Recognising that the taxable person was, in principle, entitled to deduct the VAT, the Court found that the costs of the services in question formed part of the taxable person's overheads and that, even in the case of a transfer of a totality of assets, where the taxable person no longer effects transactions after using those services, their costs must be regarded as part of the economic activity of the business as a whole before the transfer. Otherwise, an arbitrary distinction would be drawn between, on the one hand, expenditure incurred for the purposes of a business before it is actually operated and that incurred during its operation and, on the other hand, the expenditure incurred in order to terminate its operation (see Abbey National, paragraph 35).*

40 *That interpretation made it possible to relieve the taxable person in question of the burden of the VAT paid in the course of its economic activity. Accordingly, the taxable person's additional argument that it had to be able to rely on the recipient's taxable operations in order to be entitled to deduct all the VAT incurred on those services was rejected (Abbey National, paragraphs 31 and 32).*

41 *However, in contrast to the facts of the case giving rise to the judgment in Abbey National, the taxable person in the case before the national court, namely Faxworld GbR, as a Vorgründungsgesellschaft, did not even intend to effect itself taxable operations, its sole object being to prepare the activities of the Aktiengesellschaft (limited company). None the less, the VAT which Faxworld GbR wishes to deduct relates to supplies acquired for the purpose of effecting taxable transactions, even though those transactions were only the planned transactions of Faxworld AG*."

[**26**] In ***Kopalnia Odkrywkowa Polski Trawertyn P. Granatowicz, M. Wąsiewicz spółka jawna -v- Dyrekton Izby Skarbowej w Poznaniu*** [Case C-280/10] the nature of one of the questions submitted by the national court (Supreme Administrative Court) was whether Articles 9, 168 and 169 of the VAT Directive must be interpreted as precluding national legislation which permits neither partners (Granatowicz and Wąsiewicz) nor their partnership (Polski Trawertyn) to exercise the right to deduct input tax on the investment costs incurred by those partners before registration and identification of the partnership for the purposes of and with the view to its economic activity. In this appeal, the following paragraphs were referred to:

"*26* *At the outset, it should be noted that, as was apparent from the arguments presented to the Court at the hearing, it is established that the partners cannot, by applying the national legislation applicable in the main proceedings, rely on a right to deduct VAT on investment expenditure which they effected before the registration and identification of Polski Trawertyn for the purposes of VAT, for and with the view to its economic activity, because the contribution of the capital goods at issue is an exempt transaction. It must therefore be held that, in a situation such as that at issue in the main proceedings, not only does that national legislation not permit that partnership to exercise the right to deduct VAT incurred on the capital goods at issue, but also prevents the partners who effected the investment expenditure from exercising that right.*

...

30 *The Court concluded therefrom that anyone who carries out such investment transactions which are closely connected with and necessary for the future exploitation of immovable property must be regarded as a taxable person within the meaning of the Sixth Directive (see Rompelman, paragraph 23).*

31 *Accordingly, in a situation such as that at issue in the main proceedings, in which the partners of a partnership incurred, before registration and identification of the partnership for the purposes of VAT, investments necessary for the future*

exploitation of immovable property by the partnership, those partners may be considered to be taxable persons for the purposes of VAT and are therefore, in principle, entitled to exercise the right to deduct input tax.

32 *Therefore, the fact that the contribution of an immovable property to a partnership by its partners is a transaction exempted from VAT and the fact that those partners do not pay VAT upon that transaction cannot have the consequence of burdening them with the cost of the VAT in the context of their economic activity without any possibility of their deducting it or of obtaining a refund (see, to that effect, Rompelman, paragraph 23).*

33 *Second, it should be noted that the Court has held that, in applying the principle of neutrality of VAT, a taxable person whose sole object is to prepare the economic activity of another taxable person and who has not effected any taxable transaction may exercise a right to deduct in relation to taxable transactions carried out by the other taxable person (see, to that effect, Case C-137/02 Faxworld [2004] ECR I-5547, paragraphs 41 and 42). That interpretation of the Sixth Directive concerned a situation where the VAT which the first taxable person wished to deduct related to supplies acquired by it for the purpose of carrying out taxable transactions planned by the second taxable person.*

34 *It is true, as the Advocate General observed at points 46 to 49 of his Opinion, that the factual and legislative context of the dispute which led to the reference for a preliminary ruling giving rise to the judgment in Faxworld was different to that forming the basis for the present reference for a preliminary ruling. However, the grounds underlying the Court's interpretation in that judgment remain valid in circumstances such as those which characterise the main proceedings.*

35 *It must therefore be held that, in so far as, under national legislation, the partners, even though they may be considered taxable persons for the purposes of VAT, are*

unable to rely on the taxable transactions effected by Polski Trawertyn in order to relieve the cost of the VAT on investment transactions effected for the purposes of and with the view to the activity of that partnership, the latter must, in order to ensure the neutrality of taxation, be entitled to take account of those investment transactions when deducting VAT (see, to that effect, Faxworld, paragraph 42).

...

38 In the light of those considerations, the answer to the first question is that Articles 9, 168 and 169 of Directive 2006/112 must be interpreted as precluding national legislation which permits neither partners nor their partnership to exercise the right to deduct input VAT on the investment costs incurred by those partners, before the creation and registration of the partnership, for the purposes of and with the view to its economic activity."

[**27**] In ***Sveda UAB -v- Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos*** [Case C-126/14] the nature of the question submitted by the national court (Supreme Administrative Court) was whether Article 168 of the VAT Directive must be interpreted as granting a taxable person the right to deduct the input tax for the acquisition or production of capital goods, for the purposes of a planned economic activity related to rural and recreational tourism, which are (i) directly intended for use by the public free of charge, and may (ii) be a means of carrying out taxed transactions. In this appeal, the following paragraphs were referred to:

"*27 According to settled case-law, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to entitlement to deduct is, in principle, necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement. The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct (see, inter alia, judgment in SKF, C-29/08, EU:C:2009:665, paragraph 57).*

28 *Nevertheless, as the Advocate General observed in points 33 and 34 of her Opinion, the Court has held that a taxable person also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the expenditure incurred is part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such expenditure does have a direct and immediate link with the taxable person's economic activity as a whole (see, to that effect, judgments in Investrand, C-435/05, EU:C:2007:87, paragraph 24, and SKF, C-29/08, EU:C:2009:665, paragraph 58).*

29 *It is apparent from the case-law of the Court that, in the context of the direct-link test that is to be applied by the tax authorities and national courts, they should consider all the circumstances surrounding the transactions concerned and take account only of the transactions which are objectively linked to the taxable person's taxable activity. The existence of such a link must thus be assessed in the light of the objective content of the transaction in question (see, to that effect, judgment in Becker, C-104/12, EU:C:2013:99, paragraphs 22, 23 and 33 and the case-law cited).*

30 *The findings of the referring court establish that, in the case in the main proceedings, the expenditure incurred by Sveda as part of the construction work on the recreational path should come partly within the price of the goods or services provided in the context of its planned economic activity.*

31 *The referring court nevertheless harbours doubts as to whether there is a direct and immediate link between the input transactions and Sveda's planned economic activity as a whole, owing to the fact that the capital goods concerned are directly intended for use by the public free of charge.*

32 *In that regard, the case-law of the Court makes it clear that, where goods or services acquired by a taxable person are used for purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected or input tax deducted (judgment in Eon Aset Menidjmunt, C-118/11, EU:C:2012:97, paragraph 44 and the case-law cited). In both cases, the direct and immediate link between the input expenditure incurred and the economic activities subsequently carried out by the taxable person is severed.*

33 *First, in no way does it follow from the order for reference that the making available of the recreational path to the public is covered by any exemption under the VAT Directive. Second, given that the expenditure incurred by Sveda in creating that path can be linked, as is apparent from paragraph 23 of this judgment, to the economic activity planned by the taxable person, that expenditure does not relate to activities that are outside the scope of VAT.*

34 *Therefore, immediate use of capital goods free of charge does not, in circumstances such as those in the main proceedings, affect the existence of the direct and immediate link between input and output transactions or with the taxable person's economic activities as a whole and, consequently, that use has no effect on whether a right to deduct VAT exists.*

35 *Thus, there does appear to be a direct and immediate link between the expenditure incurred by Sveda and its planned economic activity as a whole, which is, however, a matter for the referring court to determine*."

[**28**] In ***Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika -v- Iberdrola Inmobiliaria Real Estate Investments*** [Case C-132/16] the nature of the question submitted by the national court (Administrative Supreme Court) was whether Article 168(a) of the VAT Directive must be interpreted as meaning that a taxable person has the right to deduct input tax in respect of a supply of services consisting of the

construction or improvement of a property owned by a third party when that third party enjoys the results of those services free of charge and when those services are used both by the taxable person and by the third party in the context of their economic activity. In this appeal, the following paragraphs were referred to:

"*25 With regard to whether the right to deduct laid down by Article 168(a) of Directive 2006/112 precludes a provision such as Article 70 of the ZDDS, it should be recalled that that right is an integral part of the VAT scheme and in principle may not be limited. It is exercisable immediately in respect of all the taxes charged on input transactions (see to that effect, in particular, judgments of 29 October 2009, SKF, C-29/08, EU:C:2009:665, paragraph 55, and of 18 July 2013, AES-3C Maritza East 1, C-124/12, EU:C:2013:488, paragraph 25).*

26 The deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see, in particular, judgments of 29 October 2009, SKF, C-29/08, EU:C:2009:665, paragraph 56, and of 18 July 2013, AES-3C Maritza East 1, C-124/12, EU:C:2013:488, paragraph 26).

27 It follows from Article 168 of Directive 2006/112 that, in so far as the taxable person, acting as such at the time when he acquires goods or receives services, uses those goods or services for the purposes of his taxed transactions, he is entitled to deduct the VAT paid or payable in respect of those goods or services (see, to that effect, judgment of 22 October 2015, Sveda, C-126/14, EU:C:2015:712, paragraph 18).

28 In accordance with settled case-law, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or

transactions giving rise to the right to deduct is necessary, in principle, before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement. The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct (judgments of 29 October 2009, SKF, C-29/08, EU:C:2009:665, paragraph 57, and of 18 July 2013, AES-3C Maritza East 1, C-124/12, EU:C:2013:488, paragraph 27).

29 *A taxable person also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole (see, in particular, judgments of 29 October 2009, SKF, C-29/08, EU:C:2009:665, paragraph 58, and of 18 July 2013, AES-3C Maritza East 1, C-124/12, EU:C:2013:488, paragraph 28).*

30 *On the other hand, where goods or services acquired by a taxable person are used for purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected or input tax deducted (see, to that effect, judgment of 29 October 2009, SKF, C-29/08, EU:C:2009:665, paragraph59).*

31 *It is apparent from the case-law of the Court that, in the context of the direct-link test that is to be applied by the tax authorities and national courts, they should consider all the circumstances surrounding the transactions concerned and take account only of the transactions which are objectively linked to the taxable person's taxable activity. The existence of such a link must thus be assessed in the light of*

the objective content of the transaction in question (see, to that effect, judgment of 22 October 2015, Sveda, C-126/14, EU:C:2015:712, paragraph 29)."

[**29**] ***Erin Executor and Trustee Company Limited (as trustee of Irish Pension Fund Property Unit Trust) -v- The Revenue Commissioners*** [1998] 2 IR 287 was a case stated from the Appeal Commissioners which arose out of an appeal against a refusal by the Revenue Commissioners on claims for a refund of VAT. Erin Executor and Trustee Company Limited had claimed a refund of VAT on the basis of right to deduct under section 12 VATA 1972 on expenditure incurred by the company relating to certain properties held by the company under leases of more than ten years duration. Geoghegan J.in the High Court stated:

"*The expenditure was broken down by reference to three categories of properties in respect of which it had been incurred:-*

Category A:-

Properties which had been developed by the unit trust giving rise to new long term taxable lettings. The value added tax claimed here related to costs incurred subsequent to the creation of the long term lettings.

Category B:-

Properties which were acquired by the unit trust with sitting tenants and which had subsequently been partly developed. Where the development of particular units gave rise to immediate long term taxable lettings, these were excluded from the category as input tax had already been recovered in such circumstances. The value added tax reclaimed in this category related to general development which it was envisaged would give rise to further taxable disposals for the future.

Category C:-

Properties which had been acquired by the unit trust with sitting tenants where no subsequent development had been carried out. As assignee of the obligations of the

previous owner in respect of repairs, rent reviews etc., it was claimed that value added tax incurred relating to such properties was recoverable by the unit trust.

It is then explained in the case stated that whereas the Revenue Commissioners' Inspector had always accepted that the unit trust was entitled to deduct against the charge of value added tax arising upon the granting of a lease of ten years or more such value added tax as had been charged to it in respect of expenditure incurred in the development of the property, the Inspector would not allow credits in respect of expenditure incurred in relation to the maintenance, further development and administration of that property after the granting of the lease and during the term of years creating by it. The Revenue Commissioners via the Inspector took the view that the property was taken out of the tax net upon the making of the disposal and that any further expenditure incurred in respect of the property was deemed attributable to the reversion and not to the property as such. …The Appeals Commissioners upheld the view of the Revenue Commissioners and affirmed the refusal of the Revenue Commissioners to allow the repayment claim."

…

The two principal legal issues involved in this case would seem to me to be as follows:-

1. *If a lease is granted by way of a taxable disposal under the Value Added Tax Acts is the property comprised in the lease effectively taken out of the tax net for the duration of the lease so that no credits can be obtained in respect of tax paid by the lessor or his successor in title on items of expenditure necessarily flowing from his position as lessor?*
2. *If expenditure is incurred in relation to the property by the lessor during the currency of such a lease for the purposes of making a new taxable disposal by way of lease or sale after the expiration of the lease is there a legitimate credit in relation to value added tax paid in connection with such expenditure?*"

[**30**] On the first issue, Geoghegan J. stated:

"*In my opinion the scheme of the Acts is that tax is paid upfront on the granting of a lease which is a taxable disposal, and once the lease has been granted the property is taken out of the tax net until such time as a new lease is made of it, or a sale after the expiration of the lease, which in turn is a taxable disposal. On the first of the two issues which I have identified therefore I would agree with the view put forward by the Revenue Commissioners.*

Counsel for the appellant of course went on to argue that if his interpretation of the Act of 1972 was incorrect the Act contravened the Sixth Council Directive of the 17th May, 1977, 77/388/EEC. I have carefully read and considered the Directive and indeed I accept that the Act itself must be interpreted in the light of the Directive. But having read and considered the provisions of the Directive, I am satisfied that in relation to this matter the Act conforms with it. Counsel for the appellant's argument in relation to the Directive is neatly summarised in para. 4.10 of the case stated because of course he had made the same arguments before the Commissioners. Paragraph 4.10 reads as follows:-

"Article 5(6) of the Directive is the basis for s. 3(1)(f) of the Act but the art. is directed at transactions involving actual appropriations of goods from a business to a non-business purpose. It does not constitute any basis or authority for deeming an appropriation to take place artificially when none in fact occurs. By so doing, s. 4(4) of the Act distorts the application of Community law and exceeds what is authorised and required by Directive. No provision of the Directive authorises or warrants the provision for a deemed appropriation contained in s. 4(4) of the Act and the sub-section is ultra vires for that reason."

I cannot agree with this argument. Article 5(6) of the Directive provides that:-

"the application by a taxable person of goods forming part of his business assets for his private use or that of his staff, or the disposal thereof free of charge or more

generally their application for purposes other than those of his business, where the value added tax on the goods in question or the component parts thereof was wholly or partly deductible, shall be treated as supplies made for consideration."

Presumably the purpose of this provision is to prevent a dealer in say, washing machines, getting a tax benefit in circumstances where he was appropriating one of the washing machines in his sales room to his own domestic use. If that happened it would mean that tax was being deducted in relation to expenditure which was not leading to a taxable disposal. It would seem to me to be entirely in keeping with that principle that the same tax treatment should be applied to the retention of a reversion. A developer who improves his property for the purposes of granting leases is enhancing the value of his reversionary interest as well as enhancing the value of the leasehold interest. If the retention of the reversion was not itself treated as a taxable disposal the lessor would be getting a tax benefit in relation to a proportion of the expenditure even though that proportion was not leading to a taxable disposal, and the entire of the tax was being deducted under section 12. There is therefore in my view nothing artificial or illogical or contrary to the intention of the Directive in the manner in which the reversion is treated for tax purposes by the national legislation. I do agree that it may not necessarily follow that the particular way in which the reversion is treated necessarily of itself leads to the conclusion that tax on post-lease expenditure is non-deductible. But as I have already indicated the combination of factors involved in the tax treatment of immovable goods which are leased inevitably leads in my view to that conclusion and I cannot see that it is in any way inconsistent with anything in the Directive."

[**31**] On the second issue, Geoghegan J. stated:

"*I move now to the second issue. I have already made clear that in expressing the views which I have done in relation to deductibility of tax on post-lease expenditure I was not referring to expenditure carried out for the purposes of a new taxable disposal after the expiration of the lease. This is the question which I am now going to address. On this aspect*

of the case I find myself in complete agreement with the submissions put forward by counsel for the appellant. The decision of the Court of Justice of the European Community in case 268/83 Rompelman v. Minister van Financien [1985] E.C.R. 655, would appear to govern this issue. That case provides clear support for the view that tax on expenditure for the purposes of a future taxable disposal is deductible. But in some cases of course there may be an evidential problem. The Revenue Commissioners are entitled under Rompelman to require appropriate corroborative evidence of the purpose of the expenditure."

[**32**] In the Supreme Court, Barron J. stated:

"*The appellant is engaged in acquiring, developing, leasing and managing a portfolio of properties in the course of business. It claims to be entitled to input credit by way of deduction under the provisions of s. 12 of the Value Added Tax Act, 1972, in respect of tax paid on expenses incurred whether as general overheads or administrative costs of the business or in the maintenance or further development and management of specific properties let under leases for terms in excess of ten years. The respondents contest this claim in respect of any expenditure incurred after the creation of the relevant leases, whether such leases were made by the appellant or by its predecessors in title and even where it related to further development. In all cases there had been development prior to the granting of the leases by the party granting the same as a result of which value added tax became payable by virtue of the provisions of s. 4 of the Act of 1972.*

The matter came for hearing before the Appeal Commissioners. The issue revolved around the proper construction to be placed upon s. 4(4) of the Value Added Tax Act, 1972 and s. 3(1)(f) of the same Act.

...

It was submitted on behalf of the appellant that the sole purpose of s. 4(4) was to make reversions on leases for more than ten years taxable on the grant of such leases where such leases were themselves taxable. It was further submitted that, if this was not the proper construction of the provision, then it was incompatible with the provisions of Council

Directive 77/388/EEC (known as the Sixth Directive). The respondents on the other hand submitted that the proper construction was to take the property outside the value added tax net and that this was not incompatible with the Sixth Directive.

…

The case stated was heard in the High Court by Geoghegan J. who treated the first three questions as being in reality one question. He answered it as follows:-

"Yes, except in relation to expenses proved to have been incurred exclusively for the purposes of future taxable disposals and not pursuant to any covenant, clause or term in the existing lease."

He answered the remaining question, 'Yes'. The appellant has appealed against this decision.

While the questions relate to input credits, this case does not depend on the construction of relevant statutory provisions relating thereto. The real issue is whether a reversionary interest in relation to a lease for more than ten years remains in the tax net. If it does, the input credits claimed should be allowed; if it does not, then, subject to the proviso contained in the answer given by the learned High Court Judge they should not be.

I agree with Geoghegan J. that the first three questions may be taken together. In later amending Acts the word 'delivery' has been changed to the word 'supply'. The provisions of s. 3(1)(f) are designed to make a trader who uses part of his stock-in-trade for his own purpose to be liable for value added tax on the goods so used. It is the appropriation which is defined as supply. This is known as self-supply. The effect is to charge to value added tax a transaction which is not in the course of trade and in the ordinary way would not have been so subject.

The case being made by the appellant is that the purpose of s. 4(4) is to ensure that the value of the reversion which was not being supplied and which would not in the ordinary way have been subject to value added tax should be made subject thereto. The reversion

should be taxable for this limited purpose only. Reliance is placed upon the words 'for the purpose of s. 3(1)(f)', which defines as a taxable supply a transaction which would not otherwise be such.

The respondents accept that the purpose of s. 4(4) is to tax the reversion, but that this is on the basis of a supply and so the reversion ceases to be within the revenue net.

The reversion is deemed to have been supplied. This makes it taxable but it is not being supplied in fact. It still remains part of the business assets of the taxpayer. When something is deemed by a statutory provision to be so it becomes a matter of construction of that provision to determine to what extent it is deemed to be so. Is it deemed to be so for all purposes or only for some purposes? In the present case s. 4(4) clearly says that it is to be so deemed for the purposes of section 3(1)(f). In other words it is deemed to have been supplied so that tax becomes payable in respect of it. It is not deemed to have been supplied for any other purpose. This is in accord with the principle of the strict construction of taxing statutes. If the legislature had intended the result contended for by the respondents, it would have said so in clear terms.

It seems to me that the reality is that the purpose of s. 4(4) is to ensure that on the grant of a lease for more than ten years value added tax when chargeable shall be charged on the whole value of the property both that leased and that retained. There is nothing in the provision which suggests that once the tax has been paid on the reversion that the reversion should no longer be regarded as being in the ownership of the taxpayer.

I would answer the questions raised as follows:-

1. *No.*
2. *No.*
3. *No.*
4. *Does not apply*."

(E) Submissions on behalf of the Appellant

[**33**] The Appellant submits that the Appellant is a taxable person engaged in an economic activity, namely, the exploitation of tangible property for the purposes of obtaining an income therefrom on a continuing basis.

[**34**] On 9 March 2007, [redacted] granted a 25 year lease to the [redacted] for [redacted]. The grant of the lease by [redacted] to the [redacted] was deemed to be a supply of immovable goods under section 4(2) VATA 1972. The reversion retained by [redacted] was deemed to have been appropriated for a non-business purpose under section 4(4) VATA 1972. The taxable amount was the open market price of the lease. The open market price of the lease was computed as a capitalised value of €2,526,356. The computation of the capitalised value incorporates the rent payments to be received over the term of the 25 year lease. The computation is (¾ annual rent) x (number of complete years). This meant that the rent payments received by [redacted] from the [redacted] of €134,739 per annum were not subject to VAT because the value of the rent payments had been subject to VAT on the grant of the lease. The lease between [redacted] and the [redacted] was subject to VAT of €341,058. The Appellant submits that, in this appeal, the taxable supply is the grant of the lease to the [redacted]. As the lease has been subject to VAT on the grant of the lease, there is a right to deduct VAT on costs which have a direct and immediate link to that taxable supply over the term of the 25 year lease. This is the VAT position regardless of the person who may be the landlord.

[**35**] On [redacted], the Appellant purchased a property portfolio from [redacted] The portfolio included the property known as [redacted], which title consisted of [redacted] together with a Head Lease for a term of 999 years from [redacted]. The property was purchased subject to leases with tenants in occupation. [redacted] was subject to the lease

granted by [redacted] to the [redacted]. The Appellant acquired the reversionary interest in the lease with the [redacted]. The Appellant submits that the transaction between [redacted] and the Appellant gives rise to a disposal of a reversionary interest to which section 93(2) VATCA 2010 applies. The disposal of the reversionary interest is deemed to be a supply of immovable goods by [redacted] to which VAT is not charged. The Appellant did not make any supply to which section 93(2) applies. Therefore, the Appellant submits, simply because the supply by [redacted] is deemed not to be within the charge to VAT, does not have a bearing on whether the Appellant has a right to deduct VAT.

[**36**] The Appellant submits that the key facts in this appeal are that the Appellant steps into the shoes of [redacted] as landlord under the lease thereby becoming responsible for the burden of all the covenants under the lease and that all the rent payments received by the Appellant in consideration for making the property available and performing those obligations have already been subject to VAT. The Appellant submits that while [redacted] and the Appellant are different persons, the VAT position centres on the taxable economic activity of the exploitation of tangible property in return for payment in circumstances where payments to be received by the landlord over the term of the 25 year lease, whether those rent payments are received by [redacted] or the Appellant, have been subject to VAT in advance of receiving the rent payments.

[**37**] As a result of the disposal of the reversionary interest, the Appellant steps into the shoes of [redacted] and becomes the landlord under the lease with the [redacted]. The economic and commercial reality remains the same following the transaction between [redacted] and the Appellant other than the Appellant becomes the landlord under the lease. The Appellant becomes responsible for the burden of all the covenants under the lease previously borne by [redacted]. Following the disposal, the Appellant, rather than [redacted], is making the property available to the [redacted] and performing the obligations under the lease in return for rent payments from the [redacted]. The rent payments of €134,739 per annum

by the [redacted] to the Appellant are not subject to VAT because the payments have been subject to VAT on the grant of the lease. In effect, the acquirer of the reversionary interest (the Appellant) steps into the shoes of the predecessor in title ([redacted]) and the taxable supply made by the predecessor in title ([redacted]) continues to govern the acquirer's (the Appellant) VAT position when the Appellant receives the rent payments from the [redacted]. Section 25 VATCA 2010 provides that the supply of services "*means the performance or omission of any act or the toleration of any situation other than (a) the supply of goods, and (b) a transaction specified in section 20 or 22(2).*" The Appellant submits that the ongoing rent payments from the [redacted] would come within the meaning of 'the performance or omission of any act or the toleration of any situation' to be considered a supply of services. However, the ongoing rent payments received by the Appellant from the [redacted] are not subject to VAT as a supply of services because the payments were previously subject to VAT as a supply of goods.

[**38**] Following the transaction between [redacted] and the Appellant, the Appellant had a right to deduct VAT on post-letting expenses under section 93(3) VATCA 2010 in a similar way that [redacted] had a right to deduct VAT on post-letting expenses. The reason that [redacted], and then the Appellant, had a right to deduct input tax on post-letting expenses was because the post-letting expenses had a direct and immediate link to a taxable economic activity, namely making the property available to the [redacted] in return for payment, on which the output tax had been accounted for on the grant of the lease. This further demonstrates the link between the grant of the lease and the VAT position of the Appellant. The output tax has been charged on the grant of the lease and, therefore, the Appellant has a right to deduct input tax on the costs incurred in connection with the acquisition of the reversionary interest to ensure it is taxed in a wholly neutral way.

[**39**] The Appellant submits that there are two separate and distinct concepts in EU law both of which are referred to by the term 'fiscal neutrality'. In ***Finanzamt Steglitz -v- Ines Zimmermann*** [Case C-174/11] the court expressed the matter as follows:

"*46 In relation to those points, it should be borne in mind that, in the field of VAT, the concept of neutrality is used in different senses.*

47 On the one hand, recalling that the deduction mechanism provided for under the Sixth Directive is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities, the Court has held that the common system of VAT seeks to ensure neutrality of taxation of all economic activities, provided that those activities are themselves subject in principle to VAT…

48 On the other hand, according to settled case-law, the principle of fiscal neutrality means that supplies of goods or services which are similar, and which are accordingly in competition with each other, may not be treated differently for VAT purposes…"

In summary, fiscal neutrality means first, that VAT should not be a cost to those who are engaged in a taxable economic activity and second, that similar supplies should be treated similarly. In ***Rompelman*** it was stated that the exploitation of tangible property for the purposes of obtaining income therefrom on a continuing basis is considered an economic activity. Therefore, as regards the first concept of neutrality, the Appellant is engaged in an economic activity (the exploitation of tangible property in return for payment) and must be relieved entirely of the burden of the VAT paid in the course of that economic activity. As regards the second concept of neutrality, the Appellant submits that the distinctions in national law on transactions involving the acquisition of properties with tenants in occupation arise by reference to the length of the lease and the date on which the lease is granted. There is no economic or commercial difference between the transactions,

however, by reason of the length of the lease and the date on which the lease is granted, there is a right to deduct VAT in respect of the costs of acquiring some of the properties and not in respect of others. This means that similar supplies are treated differently for VAT purposes which does not accord with fiscal neutrality.

[**40**] The Appellant submits that the general principle relied on by the Revenue Commissioners from ***Abbey National Plc*** is that one taxable person cannot have a right to deduct VAT based on a taxable supply of another taxable person. The Appellant submits that ***Faxworld*** was an exception to the general principle laid down in ***Abbey National Plc***. The Appellant submits that ***Faxworld*** involved different factual circumstances than the present appeal, however, the Appellant relies on the judgment to the extent of the principles enunciated on fiscal neutrality. The requirements of neutrality compelled the CJEU to treat undeniably separate entities (Faxworld GbR [civil-law partnership] and Faxworld AG [limited company]) in a manner which gave the civil-law partnership a right to deduct VAT on supplies acquired for the purpose of effecting taxable transactions, even though those taxable transactions were the planned transactions of the limited company and not the civil-law partnership. As regards the Opinion of the Advocate General in ***Faxworld***, the Appellant submits that the continuity pertaining to the lease following the transaction between [redacted] and the Appellant is significant, in that the transaction simply substituted the Appellant for [redacted] as the landlord under the lease through a transaction which was not within the charge to VAT. As regards the judgment in ***Faxworld***, the Appellant submits that in specific circumstances the activity can be so tightly bound together that it would breach the principle of fiscal neutrality to deny a right to deduct. The output tax has been charged on the grant of the lease and, therefore, there must be a right to deduct input tax to ensure it is taxed in a wholly neutral way. That the activity in this appeal is inseparable is disclosed in a number of ways:

- The ongoing rent payments received by [redacted] from the [redacted] were not subject to VAT because the lease had been charged to VAT on the grant of the lease. The taxable amount on which VAT was charged was the open market

price of the lease. The open market price of the lease was computed as a capitalised value of €2,526,356. The computation of the capitalised value incorporates the value of the rent payments to be received over the term of the 25 year lease. Therefore, the rent payments received by the Appellant have already been subject to VAT.

- The disposal of the reversionary interest by [redacted] to the Appellant is deemed to be a supply of immovable goods by [redacted] to which VAT is not charged. There is no event on which VAT is charged. The Appellant simply steps into the shoes of [redacted] as landlord under the lease with the [redacted]. The Appellant becomes responsible for the burden of all the covenants under the lease and receives rent payments from the [redacted] as payment for performing those obligations. The rent payments received by the Appellant have already been subject to VAT.
- [redacted] was a taxable person engaged in an economic activity, namely the exploitation of tangible property in return for payment. The ongoing rent payments received by [redacted] from the [redacted] under the terms of the lease would come within the meaning of 'the performance or omission of any act or the toleration of any situation' to be considered a supply of services. However, the ongoing rent payments were not a supply of services because the payments were previously subject to VAT as a supply of goods. It is the same provision which applies to the Appellant meaning that the rent payments received by the Appellant from the [redacted] are not a supply of services and are not subject to VAT as the payments were previously subject to VAT as a supply of goods. For VAT purposes, the Appellant is not making a supply of services because [redacted] made a supply of goods. This demonstrates the symbiosis between the lease, the performance of the obligations under the lease and the payments under the lease.

[**41**] The Appellant submits that the CJEU has insisted that fiscal neutrality be met and take all necessary steps to ensure the neutrality of taxation. Those lengths include ascribing taxable transactions to a person who did not engage in such transactions. The fundamental principle is that the deduction system is intended to relieve the trader entirely of the burden

of VAT paid in the course of its economic activity. The Appellant submits that the circumstances surrounding the transaction between [redacted] and the Appellant must be construed as demonstrating that there is a link between the costs incurred by the Appellant and the ongoing exploitation of property to the [redacted] in return for payment. The Appellant must be relieved entirely of the burden of the VAT charged on the costs incurred by the Appellant in connection with the acquisition of the reversionary interest in the property. Furthermore, the Appellant has a right to deduct VAT on post-letting expenses on the basis of being engaged in the economic activity of the ongoing exploitation of property to the [redacted] in return for payment. The costs incurred by the Appellant in connection with the acquisition of the reversionary interest have a direct and immediate link to the same economic activity. Therefore, given that both have a direct and immediate link to the same activity, it is not correct for the Appellant to have a right to deduct in respect of one and not the other.

[**42**] The Appellant submits that the reliance of the Revenue Commissioners on ***Abbey National Plc***, which concerns transfer of business, is misplaced. Firstly, the judgment relates to the right to deduct of a transferor and not a transferee. Secondly, the judgment concludes that the costs which the transferor (Abbey National Plc) incurred in connection with a transaction which was not within the charge to VAT (the transfer of business is regarded neither as a supply of goods nor a supply of services) had a direct and immediate link to its (Abbey National Plc) economic activity as a whole such that the transferor has a right to deduct VAT. This conclusion was grounded in fiscal neutrality. The Appellant submits that if the costs incurred by the Appellant in acquiring the reversionary interest relate to the whole economic activity of the Appellant, the Appellant had a right to deduct VAT. The costs incurred by the Appellant in connection with the acquisition of a reversionary interest in a property have a direct and immediate link to the economic activity of the exploitation of tangible property in return for payment when the Appellant became the landlord under the lease to the [redacted]. Therefore, even if the position of the Revenue Commissioners prevails that because the taxable supply was by [redacted] and not the Appellant there is no right to deduct VAT, the Appellant is a taxable

person engaged in a taxable economic activity and the costs incurred by the Appellant in connection with the acquisition of the reversionary interest have a direct and immediate link to that economic activity as a whole, therefore, the Appellant has a right to deduct.

[**43**] The intention of the Appellant at the time the VAT was charged was to acquire the reversionary interest of a lease with a tenant in occupation, become the landlord under the lease, to continue the economic exploitation of the lease and to hold as a long term investment. For the purposes of considering whether the Appellant has a right to deduct VAT charged on the costs incurred in connection with the acquisition of a reversionary interest, what may or may not happen in the future with the property is not relevant. The fact that a future transaction may give rise to a non-taxable use is not relevant. It is the facts and circumstances at the time the Appellant incurs the VAT that are relevant. As stated in ***Imofloresmira***, the right to deduct arises at the time the deductible tax becomes chargeable and, consequently, only the capacity in which a person is acting at that time can determine the existence of the right to deduct.

[**44**] The Appellant submits that it has a right to deduct VAT charged on the costs incurred by the Appellant in connection with the acquisition of the reversionary interest as a matter of EU law. The refusal by the Revenue Commissioners on the claims for refunds of VAT on the grounds that section 93(3)(b) VATCA 2010 precluded the right to deduct VAT charged on the costs incurred in connection with the acquisition of a reversionary interest was a limitation contrary to EU law. The rules on the right to deduct VAT are rules of an EU origin which are set down in the VAT Directive. The right to deduct under the VAT Directive has direct effect. In ***BP Supergas*** it was stated that the Sixth Directive (now the VAT Directive) confers rights on persons on which they may rely before a national court. It is a matter of national law to establish the nature of the activity and once it is established that a person is engaging in a taxable economic activity, it is a matter of EU law as to whether the person has a right to deduct. If there is a right to deduct VAT as a matter of EU law, then national law has no discretion to place limits on the right to deduct.

[**45**] The Appellant submits that this appeal cannot be resolved within the confines of the obligation of conforming interpretation. The obligation of conforming interpretation is an obligation to interpret national law, so far as possible, in the light of the VAT Directive. In ***Crawford -v- Centime Limited*** [2005] IEHC 328 it was stated "*In accordance with the jurisprudence of the courts in this jurisdiction it is necessary, where possible, to construe domestic implementing legislation in a manner designed to ensure that that legislation is consistent with obligations in European Law*." The Appellant submits that section 93(3) VATCA 2010 provides for a right to deduct VAT on post-letting expenses. The Revenue Commissioners submit that the costs incurred by the Appellant in connection with the acquisition of a reversionary interest in a property are not post-letting expenses within section 93(3) VATCA 2010, therefore, the Appellant does not have a right to deduct. If the Revenue Commissioners are correct on the interpretation of the national law, the national law must be disapplied because the VAT Directive provides for a right to deduct, which has direct effect, and the Appellant is entitled to rely on the directly effective right to deduct under EU law.

[**46**] As regards ***Erin Executor***, the Appellant submits that the judgment in ***Erin Executor*** means that if an asset remains part of the business assets, there is a right to deduct; if an asset does not remain part of the business assets, there is no right to deduct. The Appellant submits that the Supreme Court in ***Erin Executor*** were not saying that the scope of the right to deduct was not relevant – since the case was concerned entirely with the extent of the right to deduct – but rather that the solution did not lie in any uncertainty as to the scope of the right to deduct but rather ambiguity as to whether the property remained in the tax net. The Appellant submits that 'remains in the tax net' means that the asset remains part of the business assets. The legislation being considered by the Supreme Court deemed the reversionary interest not to be part of the business assets for a specific purpose only. Therefore, the reversionary interest remained part of the business assets.

[**47**] The Appellant submits that the Supreme Court could only have reached the conclusion that a successor in title landlord had a right to deduct VAT on post-lease costs

(being the costs of acquiring a property and post-letting expenses) on the basis that the VAT on the post-lease costs were a cost component of the ongoing exploitation of the property which was a taxable activity, even though the predecessor in title landlord accounted for the VAT. Therefore, the costs of acquiring the property must relate to the ongoing exploitation of the property continued through a successor in title landlord. In ***Erin Executor***, the Revenue Commissioners submitted that Erin Executor did not have a right to deduct input tax under section 12 VATA 1972 because Erin Executor was not a taxable person in respect of the property as the reversion retained had been appropriated to a non-business purpose. The Supreme Court held that Erin Executor did have a right to deduct input tax under section 12 VATA 1972 meaning Erin Executor was a taxable person using the goods for the purposes of taxable supplies. The fact that section 4(10) VATA 1972 deems the successor in title landlord to be a taxable person does not affect the position because the Supreme Court had already held that the successor in title was a taxable person without the deeming provision.

[**48**] At the hearing, the Appellant and the Revenue Commissioners disagreed on the type of expenditure included under Category C in ***Erin Executor***. The Appellant submits that the expenditure under Category C must have included the costs of acquiring the properties with tenants in occupation and not simply costs associated with rent reviews, repairs and maintenance. The Appellant produced an information leaflet published by the Revenue Commissioners on 3 May 1998 (the Supreme Court having delivered judgment in ***Erin Executor*** on 16 December 1997) to demonstrate that the expenditure under Category C must have included the costs of acquiring the properties. The information leaflet is headed '*VAT on property claims for repayment of VAT arising out of the Supreme Court judgement in the case of Erin Executor and Trustee Company Limited, for periods prior to 27 March, 1998*.' Section 4(9) and section 4(10) VATA 1972 were introduced by Finance Act, 1998 with effect from 27 March 1998. Paragraph 2 of the information leaflet states:

"*2. This information leaflet sets out how claims for repayment of VAT on post-letting expenses arising out of the judgement for periods prior to 27 March, 1998 should be dealt with. It should be noted that this right to deductibility has been qualified in the Finance Act, 1998 and the separate information leaflet VAT on Property – Post-letting expenses, VAT Information Leaflet No. 4 1998, should be consulted in respect of periods from 27 March, 1998 onwards*."

The Appellant referred to paragraph 6 and paragraph 7 of the information leaflet:

"*6. A landlord who acquired a property with sitting tenants is also affected by the judgement. Although this type of landlord has not made a taxable supply of the property, the Court has held that he or she is entitled to deduct VAT on post-letting expenses, where the creation of the lease was chargeable to VAT. Again, input tax will be allowed on expenses the landlord incurred in relation to the lease to the original tenants. General overheads will also be deductible, but see paragraph 8 below. If any of the sitting tenants was not a party to the original taxable supply, input tax will not be deductible in relation to expenses relating to the letting to those tenants. This could have arisen if the original tenant surrendered his or her interest in the property, and the landlord created a new interest in the property under the VAT rules applicable prior to 26 March 1997.*

7. VAT on expenses relating to the acquisition of a property with sitting tenants will be allowed to the extent that the creation of the tenants' interest was subject to VAT. Therefore, in a situation where part of the property is occupied by tenants who acquired their interest as a result of a taxable supply and part of the property is not, then apportionment of the input credit will be required."

The Appellant submits that the position described by the Revenue Commissioners in the information leaflet would mean that the Appellant, who acquired a property with a tenant in occupation ( ), would have a right to deduct VAT on the costs incurred in

connection with the acquisition of the reversionary interest in the property because the grant of the lease to the [redacted] was subject to VAT. This position would prevail for the Appellant regardless of whether the disposal of the reversionary interest by [redacted] to the Appellant was within the charge or outside the charge to VAT.

[**49**] Subsequent to the hearing, the Appellant provided the Case Stated in ***Erin Executor*** with the attached annexes. Annex 5 was the letter to the Revenue Commissioners dated 22 March 1991 which described Category C as:

"*This category includes properties which IPFPUT has acquired with sitting tenants and where no subsequent development has been carried out. These properties have been developed by a previous owner since 1972 and would have given rise to a previous VAT charge*."

Annex 6 included a schedule for each category (Category A, Category B and Category C) which was described as 'directly attributable VAT'. These schedules provided a breakdown by reference to: (i) sales/purchase (expenses incurred in respect of the sale and purchase of properties); (ii) improvements/repairs; (iii) maintenance; (iv) rent reviews; (v) re-letting; (vi) legal; (vii) miscellaneous. For Category C, the amounts given as 'directly attributable VAT' were:

Sales/Purchase	IR£39,311.39
Improvements/Repairs	IR£350.00
Maintenance	IR£504.00
Rent Reviews	IR£2,717.30
Re-letting	IR£1,274.75
Legal	IR£32.88
Miscellaneous	IR£216.75
GRAND TOTAL	**IR£44,407.07**

The Appellant submits that it is clear that the costs of acquiring the properties with tenants in occupation were included in the claims the subject matter of the appeal in ***Erin Executor***. The Supreme Court concluded that the Appeal Commissioners were not correct in law in holding that Erin Executor were not entitled to input credit by way of deduction under section 12 VATA 1972 in respect of VAT paid on expenses incurred by Erin Executor on properties which had been acquired with tenants in occupation and in respect of which no subsequent development had been carried out. This conclusion related to the claim in Category C of IR£18,491.95 (VAT on general expenses) and IR£44,707.07 (directly attributable VAT which included IR£39,311.39 (approximately 88%) for expenses incurred in respect of the sale and purchase of properties).

[**50**] The Appellant submits that the Revenue Commissioners did not simply amend section 4(4) VATA 1972 following the Supreme Court judgment by inserting new wording in section 4(4) to the effect that the reversion retained was deemed, for all purposes (rather than the specific purpose), to have been appropriated for a non-business purpose. Instead the Revenue Commissioners introduced section 4(9) and section 4(10) VATA 1972 in response to the judgment. The Appellant submits that the statutory position under section 4(9) and section 4(10) was carried across to section 93(2) and section 93(3) VATCA 2010. Section 4(9) deems the disposal of a reversionary interest to be a supply of immovable goods to which VAT is not charged. Section 4(10) provides a right to deduct VAT on post-letting expenses to the acquirer of the reversionary interest but did not specifically include a right to deduct VAT charged on the costs incurred in connection with the acquisition of the reversionary interest. For the Appellant to have a right to deduct VAT on post-letting expenses under section 93(3) it must be that the Appellant is engaged in an economic activity of making the property available to the [redacted] in return for payment. If that position pertains, then it must follow that the Appellant has a right to deduct VAT on the costs incurred in connection with the acquisition of the reversionary interest.

[**51**] The Appellant submits that three questions are considered to establish if there is a right to deduct VAT:

(i) *What are the costs*? In this appeal, the costs are the costs incurred in connection with the acquisition of a reversionary interest of a legacy lease.

(ii) *What supply or activity do the costs relate to*? In this appeal, either (a) the costs have a direct and immediate link to the exploitation of property by the Appellant, that is, continuing to make the property available to the tenant and performing the obligations under the lease in return for payment which was deemed a taxable supply of immovable goods on the grant of the lease and for which output tax has been charged and accounted for on the grant of the lease; or (b) the costs have a direct and immediate link to the economic activity of the Appellant as a whole.

(iii) *Are those supplies or activities of a nature to give rise to a right to deduct*? In this appeal, either (a) there is a right to deduct in full if there is a direct and immediate link to the taxable economic activity of the exploitation of property; or (b) there is a right to deduct in full if there is a direct and immediate link to the taxable economic activity of the Appellant as a whole.

[**52**] The Appellant has a right to deduct under section 59 VATCA 2010 as the Appellant, as an accountable person, has used the goods for the purposes of taxable supplies, similar to the position established in ***Erin Executor***. Section 93(3) VATCA 2010 simply declares that a certain right to deduct exists, however, this does not limit the right to deduct under section 59.

Transfer of Business

[**53**] The Contract for Sale between [redacted] and the Appellant dated [redacted] includes the following – '*The Vendor and Purchaser agree that the Sale is by way of a transfer of a business and the provisions of Section 20(2)(c) and Section 26 VAT Act apply to the Sale and accordingly VAT is not chargeable.'* Section 20(2)(c) VATCA 2010 provides that the transfer of ownership of goods, being the transfer to an accountable

person of a totality of assets, or part thereof, of a business (even if that business or part thereof had ceased trading) where those transferred assets constitute an undertaking or part of an undertaking capable of being operated on an independent basis, shall be deemed not to be a supply of the goods. Section 26(2) VATCA 2010 provides that the transfer of goodwill or other intangible assets of a business, in connection with the transfer of the business or part thereof (even if that business or that part thereof had ceased trading), or in connection with a transfer of ownership of goods in accordance with section 20(2)(c), by (a) an accountable person to a taxable person who carries on a business in the State, or (b) a person who is not an accountable person to another person, shall be deemed not to be a supply of services.

[**54**] The Appellant submits that if section 20(2)(c) VATCA 2010 applies, then section 93(2) VATCA 2010 would not apply. Section 93(2) means that the disposal by [redacted] of the reversionary interest is deemed to be a supply of immovable goods to which tax is not charged and section 20(2)(c) means the transfer of ownership of goods by [redacted] is deemed not to be a supply of goods. However, whether the supply by [redacted] is a supply to which section 93(2) applies or section 20(2)(c) applies, this does not have a bearing on the Appellant as the Appellant is the recipient of the supply. Furthermore, the effect of section 20(2)(c) is a deeming not to be a supply of goods, meaning the transaction is not within the charge to VAT, and the effect of section 93(2) is a deeming to be a supply of goods to which tax is not charged, meaning the transaction is not within the charge to VAT. Therefore, for the purposes of this appeal, whether section 93(2) or section 20(2)(c) applies to the supply by [redacted], this does not impact on the submission that the Appellant has a right to deduct VAT charged on the costs incurred by the Appellant in connection with the acquisition of the reversionary interest.

(F) Submissions on behalf of the Revenue Commissioners

[**55**] The Revenue Commissioners submit that the Appellant must establish that the costs incurred by the Appellant in connection with the acquisition of a reversionary interest in a property (the acquisition costs) have a direct and immediate link to a taxable supply. The only taxable supply subject to VAT in this appeal was the disposal of the interest in immovable goods on the grant of the lease by [redacted] to the [redacted]. The grant of the lease in [redacted] was a supply of immovable goods, which, as regards that property, is the only taxable supply that has taken place. The grant of the lease resulted in the creation of a reversionary interest and this reversionary interest was taxed as a deemed self-supply of a good. Effectively, there were two supplies in the transaction – the deemed supply of immovable goods under section 4(2) VATA 1972 and the deemed supply of the reversion retained under section 4(4) VATA 1972. This ensured that the full value of the property was taxed on the grant of the lease and consequent creation of the reversionary interest. Section 4(6) VATA 1972 was a relieving provision that was designed to ensure that tax was only applied to a supply of immovable goods where the supplier of the immovable goods had a right to deduct under section 12 VATA 1972. It ensured that VAT was charged only on the first supply of the immovable goods in question save where there had been further development following that first supply. Section 4(6) VATA 1972 provided that if a person was not entitled to input tax on an otherwise taxable supply of immovable goods then the person would not be subject to VAT on that supply.

[**56**] It is clear from section 59(2) VATCA 2010 that a right to deduct can only arise insofar as goods and services are used by a taxable person for the purposes of his or her taxable supplies. This requires a direct and immediate link between a particular input transaction and a particular output transaction, as is clear from the relevant CJEU case-law interpreting the underlying provision of what is now Article 168 of the VAT Directive. The Revenue Commissioners submit that as the only taxable supply taking place was the supply of immovable goods by [redacted] to the [redacted] on the grant of

the lease, there can only be a right to deduct in respect of costs used for the purposes of that supply.

[**57**] The Revenue Commissioners submit that it follows from ***Iberdrola*** that where goods or services acquired by a taxable person are used for the purposes of transactions that are exempt or outside the scope of VAT, no output tax can be collected or input tax deducted. This is the position that prevails in this appeal. The disposal of the reversionary interest in the lease of [redacted] by [redacted] to the Appellant is an exempted activity in respect of which no output tax was collected and no input tax may be deducted. This was assured by section 93(2) VATCA 2010 under which the disposal of the reversionary interest was deemed to be a supply of immovable goods to which tax was not charged in the absence of further development. The principles developed by the CJEU in its case-law regarding deductibility focus on showing a link between the costs in acquiring an asset and a taxable supply. The fact that an asset, which is acquired by a person, is exempt from VAT or outside the scope of VAT does not necessarily mean that there is no right to deduct. What must be examined is whether the cost of acquiring that asset can be linked to a taxable supply in the sense that costs have a direct and immediate link to a taxable supply or are linked to that supply by being incorporated into the consideration chargeable for that supply. Costs incurred in acquiring a reversionary interest could not have the necessary link to the taxable supply of an immovable good (the lease) by an original landlord ([redacted]) to give rise to a right to deduct VAT in respect of costs incurred by a successor in title landlord (Appellant) in acquiring the reversionary interest in the property. The acquisition costs could not be a cost component in any taxable supply made by the Appellant. The acquisition costs have no link to the taxable supply of an immovable good.

[**58**] The acquisition costs may relate to the transaction between the Appellant and [redacted], being the disposal of the reversionary interest, however this transaction is not a taxable supply. This transaction is governed by section 93(2) VATCA 2010. This is an exempted activity and required to be an exempt transaction under EU law. This means

no output tax can be collected or input tax deducted. The Revenue Commissioners submit that, to the extent the Appellant seeks to attribute the acquisitions costs to a supply of services to the [redacted] in performing the obligations under the lease, this does not give rise to a right to deduct as the only taxable supply is a supply of goods, which means that it cannot simultaneously be a supply of services.

[**59**] Section 4(9) and section 4(10) VATA 1972 were introduced following ***Erin Executor***. In ***Erin Executor***, the Supreme Court concluded that the reversionary interest remained a business asset, thereby potentially creating the possibility of a taxable supply of the reversionary interest. Section 4(9) provides that any subsequent disposal of the reversionary interest is deemed to be a supply of immovable goods to which VAT is not charged. This subsequent disposal comes within the definition of 'exempted activity'. Section 4(10) provides that a successor in title landlord, such as the Appellant, is deemed to be a taxable person in respect of post-letting expenses relating to the lease as otherwise the Appellant would not have a right to deduct VAT on those expenses. Section 4(10) must deem the Appellant to have a right to deduct on post-letting expenses because a successor in title landlord would not be a taxable person in respect of those expenses in the absence of the deeming provision. The Revenue Commissioners understood the judgment in ***Erin Executor*** to relate to post-letting expenses being expenses which relate to obligations under the lease required to be performed by the successor in title landlord, for example, rent review, repairs and maintenance. The description of post-letting expenses in section 4(10) demonstrates that the Oireachtas were making clear that it was expenses relating to the lease that were deductible. This did not include acquisition costs. This equally applies to section 93(3) VATCA 2010 which defines post-letting expenses as expenses relating to the lease. There is a right to deduct VAT on post-letting expenses because the post-letting expenses relate to the taxable supply of the grant of the lease and the requirement to perform the obligations under the lease throughout the term of the lease as part of the bargain between the landlord and tenant. The basis of the reasoning by the Supreme Court in ***Erin Executor*** may not be particularly clear, however, section 4(10) was introduced to deal with the circumstances arising in that case. The Revenue Commissioners would

continue to entertain certain doubts as to whether the Supreme Court judgment in ***Erin Executor*** is correct as a matter of EU law. The premise of the Supreme Court judgment in ***Erin Executor***, that a right to deduct on the acquisition of a reversionary interest was dependant on whether the reversionary interest remained in the 'tax net', is questionable as a matter of EU law (which the Supreme Court did not address).

[**60**] The Revenue Commissioners submit that the CJEU judgment in ***Cussens, Jennings and Kingston -v- Brosnan*** [Case C-251/16] makes clear that although Member States are permitted to treat the occasional supply by a taxable person of buildings or parts thereof, and the land on which they stand, as taxable supplies, the Sixth Directive (and now the VAT Directive) requires Member States to exempt the supply of buildings or parts thereof, and the land on which they stand, which have already been the subject of 'first occupation'. The CJEU stated (at paragraph 72):

"*Thus, the exemption laid down in Article 13B(g) of the Sixth Directive relates to supplies of immovable property occurring after the property has actually been used by its owner or its tenant. By contrast, the first supply of a new property to the final consumer is not exempt*."

Therefore, Ireland was entitled, under EU law, to treat the grant of the lease by [redacted] to the [redacted] as a taxable supply of immovable goods. By contrast, Ireland was (and remains) obliged to exempt all further supplies of the property in question, absent further development thereof, such that a new taxable supply of the property may be said to arise.

[**61**] The definition of 'exempted activity' under section 1 VATA 1972 (as at Finance Act, 1996) and section 1 VATA 1972 (as at Finance Act, 1998) includes '*a supply of immovable goods in respect of which pursuant to section 4(6) tax is not chargeable*'. The definition of 'exempted activity' under section 2 VATCA 2010 (as at Finance Act, 2014) includes '*a supply of immovable goods in respect of which, pursuant to sections 94(2) and*

95(3) and (7)(b), tax is not chargeable'. There is no reference to section 93(2) VATCA 2010 in the definition of exempted activity. The definition of 'exempted activity' was amended by Finance Act, 2019 (with effect from 22 December 2019) to include '*a supply of immovable goods in respect of which, pursuant to sections 93(2)(a)(i), 94(2) and 95(3) and (7)(b), tax is not chargeable*'. The Revenue Commissioners submit that there is no consequence to the omission of section 93(2) from the definition of 'exempted activity' in VATCA 2010 because, by reason of the obligation of conforming legislation, under the Sixth Directive a Member State must exempt a transaction of '*the supply of buildings or part thereof, and of the land on which they stand, other than as described in Article 4(3)(a)*' (Article 13B(g)) and under the VAT Directive a Member State must exempt a transaction of '*the supply of a building or parts thereof, and of the land on which it stands, other than the supply referred to in point (a) of Article 12(1)*' (Article 135(1)(j)) and '*the leasing and letting of immovable property*' (Article 135(1)(l)).

[**62**] The Revenue Commissioners submit that the plain effect of section 4(9) VATA 1972, read in combination with section 4(4) VATA 1972, confirms the clear position of the Oireachtas as articulated through the Finance Act, 1998 that the tax treatment of the supply of the leasehold interest on the grant of the lease encompasses the supply of the reversion retained. The subsequent disposal of that reversionary interest to a successor in title landlord, like the Appellant here, is manifestly a discrete supply that is exempt under section 4(9) in combination with section 4(6) thereof, as required by the Sixth Directive (Article 13B(g)). Accordingly, as is clear from ***Abbey National Plc***, it can give rise to no right to deduct. Indeed, the CJEU has consistently held that "*the right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct*" (***Portugal Telecom SGPS SA -v- Fazenda Público*** [Case C-496/11]). The link in this appeal, such as it is, is with the past taxable supply by [redacted] to the [redacted]. That transaction, which encompassed the supply of the reversion retained, and gave rise at the material time (March 2007) to a right to deduct for [redacted] of all its linked costs in respect thereof, cannot give rise

to a right to deduct in favour of the Appellant with regard to its costs of subsequently acquiring the reversionary interest in [redacted], through what is an exempt transaction.

[**63**] The Revenue Commissioners submit that for VAT purposes it is not sufficient simply to be a taxable person with an economic activity; the taxable person must be engaging in taxable output transactions in considering whether the taxable person has a right to deduct VAT. Advocate General Jacobs in ***Abbey National Plc*** stated (at paragraph 31): "*In order to be deductible, VAT must be borne by supplies (inputs) which are used for the purposes of the taxpayer's taxable transactions (outputs). This is clear from the wording of Article 17(2), particularly when viewed in the context of the provision which it replaced — Article 11(1) of the Second Directive, which referred to supplies 'used for the purposes of his undertaking' — and of the proposal for a Sixth Directive, which spoke of supplies 'used for the purposes of his taxable business'. It thus appears that the legislature deliberately chose wording intended to limit the scope of the right to deduct to the situation where inputs are used for the purposes of identifiable taxable transactions. The principle that deductibility is dependent upon attributability is also inherent in the apportionment rules governed by Articles 17(5) and 19.*"

[**64**] The Revenue Commissioners submit that, although ***Abbey National Plc*** related to transfer of business provisions, the principles enunciated by the CJEU are applicable *mutatis mutandis* to a supply comprising a taxable supply of immovable goods in accordance with section 4(2) VATA 1972. This means that where a supply of immovable goods is a taxable supply of goods for VAT purposes, it is immaterial that the landlord continues to receive rent payments under the lease after the supply is made. The receipt of rent payments is not consideration for any continuing supply of services, notwithstanding that the rent payments may have been used to compute the taxable amount in respect of the supply of immovable goods. This position is simply a consequence of Ireland availing of the option contained in EU law to treat the grant of the lease as a supply of goods, which treatment, in the Irish context, extends, by virtue of the derogation, to the reversionary interest.

[**65**] The Revenue Commissioners submit that it is not sufficient for the Appellant to have an economic activity to have a right to deduct VAT charged on the costs incurred by the Appellant in connection with the acquisition of a reversionary interest in a property. The Appellant must establish that the costs (input transaction) are linked to a taxable supply (output transaction). The costs incurred by the Appellant are not linked to the taxable supply of the disposal of the interest in immovable goods on the grant of the lease between [redacted] and the [redacted] because the costs incurred are simply to enable the Appellant to step into the shoes of [redacted]. The Appellant has incurred costs to become landlord and be responsible for performing the obligations under the lease. However, it is only when the Appellant is the landlord that the legislation deems the Appellant to be an accountable person in respect of post-letting expenses. The mere fact that the Appellant steps into the shoes of [redacted] as the landlord under the lease with the [redacted] does not make the acquisition costs linked to that taxable supply. The Appellant is continuing to perform the obligations as part of the bargain in making the property available to the [redacted]. However, this does not create a link between the acquisition costs and the taxable supply. The taxable amount of the taxable supply is the open market price of the lease. The open market price is calculated by the formula (¾ annual rent) x (number of complete years). The taxable amount is calculated by a formula which includes the rent payments for the purposes of valuing the interest in immovable goods. It could not be said that VAT has been accounted for on the rent payments at the time of the grant of the lease. The Appellant has not demonstrated a direct and immediate link to a taxable supply to have a right to deduct VAT charged on the costs incurred by the Appellant in connection with the acquisition of a reversionary interest in a property. The acquisition costs are not a cost component of the taxable supply.

[**66**] As regards ***Erin Executor***, the Revenue Commissioners submit that the words used by the High Court and the Supreme Court in ***Erin Executor*** to describe the matter under consideration shows that the court were considering the position of Erin Executor as landlord, and not the position of how Erin Executor became the successor in title landlord.

The court was considering post-letting expenses of the nature which were subsequently defined in section 4(10) VATA 1972. In the High Court, Geoghegan J. concluded that the answer to question 1, question 2 and question 3 in the case stated was that the Appeal Commissioners were correct in law in determining that Erin Executor did not have a right to deduct under section 12 VATA 1972 (except in relation to expenses proved to have been incurred exclusively for the purposes of future taxable disposals and not pursuant to any covenant, clause or term in the existing lease). Geoghegan J. concluded that the answer to question 4 in the case stated was that the Appeal Commissioners were correct in law in holding that section 4(4) VATA 1972, as construed and applied by the Revenue Commissioners, was not incompatible with the Sixth Directive. Geoghegan J. agreed with the position of the Revenue Commissioners that the grant of the lease was the taxable supply and costs incurred subsequent to the grant of the lease could not be linked to that taxable supply. There was no other taxable supply to which the costs could be linked.

[**67**] The Supreme Court in ***Erin Executor*** followed the approach of Geoghegan J. in the High Court in considering the first three questions stated by the Appeal Commissioners as, in effect, one question. The Revenue Commissioners submit that it is clear from the judgment of Barron J. that the conclusions arrived at by the Supreme Court, in differing from those of the High Court, arose by virtue of its construction of section 4(4) VATA 1972 and the interaction between section 4(4) and section 3(1)(f) VATA 1972. The Supreme Court did not address the issue of EU law raised by the fourth question of the case stated, or at all. The Revenue Commissioners are not seeking to bypass the judgment in ***Erin Executor*** in this appeal, however, the Supreme Court in ***Erin Executor*** did not base its judgment as to the right to deduct VAT on post-letting expenses on EU law but on a construction of section 4(4) VATA 1972. This appeal turns on EU law and there is no provision of EU law that permits Ireland to allow the claimed right to deduct, as it cannot be linked to any taxable supply.

[**68**] The Revenue Commissioners submit that 'remains in the tax net' means being engaged in an economic activity which would, in principle, be within the charge to VAT.

The concept of 'tax net' in ***Erin Executor*** is not helpful. It is not a concept in national law or EU law. The import of the statement by the Supreme Court that the reversionary interest 'remains part of the business assets' and how that relates to VAT is not clear. The reversionary interest remains in the ownership of the landlord until such time as the landlord chooses to dispose of the interest and, to that extent, the reversionary interest remains part of the business assets of the landlord. It is unclear how the reversionary interest remaining part of the business assets of the landlord gives rise to a right to deduct VAT.

[**69**] The Supreme Court judgment in ***Erin Executo***r gave rise to two information leaflets published by the Revenue Commissioners – Information Leaflet No. 3/98 (dated May 1998) and Information Leaflet No. 4/98 (dated August 1998). Information Leaflet No. 3/98 was published to address the VAT consequences of the judgment in ***Erin Executor*** for periods prior to 27 March 1998 particularly having regard to the potential implication from the judgment that the supply of a reversionary interest was a taxable supply with a right to deduct costs linked to that onward supply. At the hearing, the Revenue Commissioners confirmed that if the invoice from [redacted] presented in this appeal had been presented to the Revenue Commissioners prior to 27 March 1998, the Appellant would have a right to deduct VAT charged on the acquisition costs on the basis that the supply of the reversionary interest was a taxable supply. However, this position would not align with EU law, as this transaction (the supply of the reversionary interest in the absence of further development) should be exempt as required under Article 13B(g) of the Sixth Directive (now Article 135(1) of the VAT Directive).

[**70**] As regard the Case Stated in ***Erin Executor***, a copy of which was submitted by the Appellant subsequent to the hearing, the Revenue Commissioners do not consider that the fact it appears from Annex 6 thereto that an amount of IR£39,311.00 by way of VAT incurred on acquisition costs was included in the claim is decisive. Firstly, it is altogether unclear from the very limited reasoning of the Supreme Court judgment that it addressed the issue of acquisition costs at all and/or that consideration of same formed part of the

ratio decidendi of the decision. Secondly, and more importantly, even if it were assumed that the Supreme Court implicitly considered the issue, regard would have to be given to the amendments subsequently introduced by the Oireachtas and which are now reflected in section 93(3) VATCA 2010. The Revenue Commissioners submit that the Oireachtas has, expressly through those amendments, excluded acquisition costs as being costs that either an original landlord or a successor in title landlord could claim as deductible input tax insofar as the costs contain a VAT component. The Revenue Commissioners submit that, insofar as the supply of immovable goods on the grant of the lease to the [redacted] involved ongoing obligations for the landlord, such as rent reviews, repairs and maintenance, it is clear that a right to deduct relating to those costs is provided for under section 93(3) VATCA 2010. To extend that provision to include costs arising from potentially unlimited numbers of disposals of the original landlord's reversionary interest, would not be compatible with the requirements of the VAT Directive.

[**71**] The Revenue Commissioners submit that the Supreme Court judgment in ***Cussens, Jennings and Kingston -v- Brosnan*** [2019] IESC 77 confirms that there was no incompatibility between section 4(9) VATA 1972 and EU law in light of the following statement by the Chief Justice, Mr. Justice Clarke (at paragraph 8.5):

"*However, it is abundantly clear that the CJEU has determined that the abuse doctrine does apply to transactions which predate the decision of the CJEU in Halifax. In addition, it is clear that, as a matter of EU law, the application of that doctrine in practical terms does not require specific national measures (or, indeed, EU legislation), given that it derives from a fundamental principle of European Union law. In those circumstances, it does not seem to me that any question of compatibility of Irish VAT legislation and EU law now properly arises*."

Transfer of Business

[**72**] The Revenue Commissioners submit that as the potential application of the transfer of business provisions both of the VATCA 2010 and the underlying provisions of the VAT Directive regarding same were not a matter that was argued during the appeal, it would not be appropriate to decide the appeal by reference to those provisions. The Appellant submits that it does not necessarily matter whether the disposal by [redacted] to the Appellant falls within section 20(2)(c) VATCA 2010 or section 93(2) VATCA 2010. The Revenue Commissioners consider that, in principle, it may not make a difference for VAT purposes as to which particular provision applied, since viewed from the perspective of the Appellant, in either case it is obliged, in order to claim the input tax connected with its acquisition costs, to demonstrate that those costs are linked with a specific taxable supply made by the Appellant. Nonetheless, the Revenue Commissioners do not consider that this would be an appropriate appeal for any determination to be made regarding the potential application of section 20(2)(c).

[**73**] The Revenue Commissioners submit that the issue for determination in this appeal is whether the Appellant has demonstrated the necessary link between the acquisition costs and taxable supplies made by the Appellant, whether directly or indirectly, and, if not, whether, alternatively, the Appellant has established that the acquisition costs form part of its general costs in making such taxable supplies. The only taxable supply in this appeal is the supply of immovable goods on the grant of the lease by [redacted] to the [redacted] on 9 March 2007. Insofar as that lease creates ongoing obligations for the landlord, section 93(3) VATCA 2010 provides that post-letting expenses relating to the lease may give rise to a right to deduct and that under section 93(3)(b)(III), a landlord who is not the person who made the disposal of the interest in the first place (such as the Appellant) is deemed to be an '*accountable person in respect of post letting expenses in relation to that interest*'. The mere fact that the Appellant has now been substituted for [redacted] by acquiring the reversionary interest in the lease (and, indeed, any other further landlord who may subsequently purchase the interest from the Appellant), is

irrelevant with regard to the one taxable supply at issue. It is for this reason that the Revenue Commissioners submit that no right to deduct arises under the VAT Directive, and that, accordingly, the claim made by the Appellant, based on EU law, cannot succeed. It is also for this reason that the Revenue Commissioners submit that there is no incompatibility between the refusal of the claims for a refund of VAT and the VAT Directive.

(G) Analysis and Findings

[**74**] The issue in this appeal is whether the Appellant has a right to deduct VAT charged on costs incurred by the Appellant in connection with the acquisition of the reversionary interest in properties. The properties were subject to leases of ten years or greater. The leases were granted before 1 July 2008.

[**75**] The legislative framework governing 'Deductions' in national law is Part 8 of the VATCA 2010 (section 59 to section 64). Section 59(2) VATCA 2010 provides:

"*(2) Subject to subsection (3), in computing the amount of tax payable by an accountable person in respect of a taxable period, that person may, in so far as the goods or services are used by him or her for the purposes of his or her taxable supplies or of any of the qualifying activities, deduct –*

(a) the tax charged to him or her during the period by other accountable persons by means of invoices, prepared in the manner prescribed by regulations, in respect of supplies of goods or services to him or her,

…

(5) Where, in relation to any taxable period, the total amount deductible under this Chapter exceeds the amount which, but for this Chapter, would be payable in respect of such period, the excess shall be refunded to the accountable person in accordance with section 99(1), but subject to section 100."

[**76**] The legislative framework governing 'Deductions' in EU law is Title X of the VAT Directive (Chapter 1 to Chapter 5 – Article 167 to Article 192). Article 167 of the VAT Directive provides "*A right of deduction shall arise at the time the deductible tax becomes chargeable*." Article 168 of the VAT Directive provides:

"*In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:*

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

..."

[**77**] In this appeal, as regards the representative transaction, the Appellant was provided with an invoice from [redacted] dated 5 September 2014 for the supply of legal services. The invoice included VAT. The Appellant delivered a VAT3 return for the taxable period 1 September 2014 to 31 October 2014. The return included the following:

VAT ON SALES [T1]	0.00
VAT ON PURCHASES [T2]	40,808.00

Therefore, in computing the amount of VAT payable by the Appellant for the taxable period 1 September 2014 to 31 October 2014, the Appellant claimed that the tax charged to the Appellant by other accountable persons (which included [redacted]) in respect of the supply of goods or services used by the Appellant for the purposes of taxable supplies was €40,808. As the output tax was NIL and the input tax was €40,808, the Appellant was seeking a refund of VAT.

[**78**] Section 59 VATCA 2010 refers to a person being an 'accountable person'. Section 5 VATCA 2010 provides that "*a taxable person who engages in the supply, within the State, of taxable goods or services shall be (i) an accountable person, and (ii) accountable for and liable to pay the tax charged in respect of such supply*". Section 2 VATCA 2010 defines 'taxable person' as "*a person who independently carries on a business in the Community or elsewhere*". Section 2 defines 'business' as "*an economic activity... including… the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis*". Section 2 defines 'taxable goods' as "*goods the supply of which is not an exempted activity*" and 'taxable services' as "*services the supply of which is not an exempted activity*".

[**79**] Article 168 of the VAT Directive refers to a person being a 'taxable person'. Article 9 of the VAT Directive defines 'taxable person' as "*any person who, independently, carries out in any place any economic activity…*" and states that "*the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity*."

[**80**] There is a multiplicity of different terminology used to describe similar concepts in national law and EU law. For the purposes of this determination, I will refer to taxable person, economic activity, taxable supply (≈taxable transaction), taxable economic activity (≈taxable business activity), exempt economic activity (≈exempt business activity) and non-economic activity (≈non-business activity).

[**81**] For a person to have a right to deduct, first, the person must be a taxable person and, second, the goods or services must be used by the taxable person for the purposes of his or her taxable supplies. In this appeal, the facts agreed by the parties are that [redacted]. No submission was made by the Revenue Commissioners seeking to contest the status of the Appellant as a taxable person. In the

circumstances, I find, at the material time, the Appellant was a taxable person engaged in the economic activity of the exploitation of tangible property for the purposes of obtaining income therefrom on a continuing basis. The next question is whether the legal services supplied by [redacted] were used by the Appellant for the purposes of the taxable supplies of the Appellant.

[**82**] In essence, the Appellant submits that in considering the VAT position in this appeal, it centres on the economic activity created on the grant of the lease. The economic activity is the ongoing exploitation of tangible property for the purposes of obtaining income therefrom on a continuing basis, meaning making [redacted] available to the [redacted] and performing the obligations under the lease in return for payment over the term of the 25 year lease. This is a taxable economic activity on which VAT was charged on the grant of the lease. Consequently, the costs incurred in connection with the acquisition of the reversionary interest have a direct and immediate link to a taxable supply giving rise to a right to deduct. This means that the legal services supplied by [redacted] were used by the Appellant for the purposes of taxable supplies and the Appellant has a right to deduct VAT charged in connection with the supply of the legal services. Alternatively, the costs incurred in connection with the acquisition of the reversionary interest have a direct and immediate link to the economic activity of the Appellant as a whole giving rise to a right to deduct VAT. The Revenue Commissioners submit that the acquisition costs do not have a direct and immediate link to a taxable supply. The only taxable supply was a supply of immovable goods by [redacted] on the grant of the lease to the [redacted]. The acquisition costs incurred by the Appellant are not linked to that taxable supply as the costs incurred were simply to enable the Appellant to step into the shoes of [redacted]. The Appellant has incurred costs to become landlord and be responsible for performing the obligations under the lease.

[**83**] Given the lengthy submissions of the parties on the judgment in ***Erin Executor***, I will now turn to consider that judgment. The legislative references which follow in the

consideration of ***Erin Executor*** are those provisions in force prior to 1998. The relevant provision was section 4 VATA 1972 which comprised subsection (1) to subsection (6). Under section 4(2) a supply of immovable goods was deemed to take place on the disposal of an interest in immovable goods. Under section 4(4) an appropriation for a non-business purpose was deemed to take place in relation to the reversion retained on the disposal of the interest in immovable goods. The reversion retained was deemed, for the purposes of section 3(1)(f) VATA 1972, to have been appropriated for a non-business purpose. Section 3(1)(f) provided that 'supply' in relation to goods means "*the appropriation by a taxable person for any purpose other than the purpose of his business*". As regards section 3(1)(f), the Supreme Court in ***Erin Executor*** stated:

"*The provisions of s. 3(1)(f) are designed to make a trader who uses part of his stock-in-trade for his own purpose to be liable for value added tax on the goods so used. It is the appropriation which is defined as supply. This is known as self-supply. The effect is to charge to value added tax a transaction which is not in the course of trade and in the ordinary way would not have been so subject.*"

[**84**] Section 2 VATA 1972 provides that VAT shall be charged, levied and paid "*on the supply of goods and services effected within the State for consideration by a taxable person in the course or furtherance of any business carried on by him...*". Having ascertained a supply under section 4(2) and section 4(4) VATA 1972, the next step is to ascertain the amount on which VAT is chargeable. Section 10 VATA 1972 is headed 'amount on which tax is chargeable'. Section 10(9) provides:

> *"(9) (a) On the supply of immovable goods and on the supply of services consisting of the development of immovable goods, the value of any interest in the goods disposed of in connection with the supply shall be included in the consideration.*

(b) The value of any interest in immovable goods shall be the open market price of such interest.

Section 10(10) defines 'the open market price' as "*the price, excluding tax, which the goods might reasonably be expected to fetch or which might reasonably be expected to be charged for the services if sold in the open market at the time of the event in question*." Regulation 19 of the Value-Added Tax Regulations, 1979 is headed 'valuation of interests in immovable goods' and provides:

"(1) Where –

(a) it is necessary to value an interest in immovable goods for the purposes of section 10(9) of the Act,

(b) the disposal of such interest consists of or includes the creation of an interest,

(c) a rent is payable in respect of the interest so created, and

(d) the terms under which the interest is created do not provide for an increase in the rent to take effect earlier than the end of the fifth year after which the interest was created,

the value of such rent to be included in the consideration for the purpose of ascertaining the open market price of the interest disposed of shall, in the absence of other evidence of the amount of that price, be –

(i) three-quarters of the annual amount of the rent multiplied by the number of complete years for which the rent has been created, or

(ii) …"

(2) Where a person having an interest in immovable goods (in this paragraph referred to as "the disponor") disposes as regards the whole or any part of those goods of an interest which derives from that interest in such circumstances that he retains the reversion on the interest disposed of (in this

paragraph referred to as the reversionary interest), the following provisions shall apply:

(a) the value of the reversionary interest shall be ascertained by deducting the value of the interest disposed of from the value of the full interest which the disponor had in the goods or the part thereof disposed of at the time the disposition was made, and

(b) if, under the terms of the disposition, the reversionary interest could not, except through the default of the person in whose favour the disposition was made or a person deriving his title through him, revert to the disponor within a period of 20 years from the date of the disposition—

(i) the disponor shall be deemed to have disposed of his full interest in the goods or the part thereof disposed of, and

(ii) the value of the reversionary interest shall be disregarded.

Regulation 19 provides a methodology to value an interest in immovable goods and to value a reversionary interest. The value of the reversionary interest is brought into the computation of the taxable amount on the grant of a lease of greater than ten years. The value of the reversionary interest is disregarded if the reversionary interest could not revert to the landlord within a period of twenty years. Thus, as the Supreme Court in ***Erin Executor*** concluded, section 4(4) was to ensure that when VAT was charged it would be charged on '*the whole value of the property both that leased and that retained*'.

[**85**] In considering the Supreme Court judgment in ***Erin Executor***, and extrapolating principles from the judgment, it is important to understand the nature of the submission made by the Revenue Commissioners in that appeal. The Revenue Commissioners submitted that any expenditure incurred after the disposal of an interest in immovable goods (after the grant of the lease) was attributable to the reversion retained because the taxable supply created on the disposal of the interest in immovable goods ended on the grant of the lease in the absence of further development. The Revenue Commissioners

submitted that the proper construction of section 4(4) VATA 1972 was to take the property out of the tax net. Consequently, as the reversion retained was deemed to have been appropriated for a non-business purpose, there was no taxable supply and no right to deduct. The Supreme Court analysis of section 4(4) was framed in response to the submission made by the Revenue Commissioners. Against that background, it can be seen that the Supreme Court considered the real issue to be "*whether a reversionary interest in relation to a lease for more than ten years remains in the tax net. If it does, the input credits claimed should be allowed; if it does not, then, subject to the proviso contained in the answer given by the learned High Court Judge they should not be.*" The Supreme Court concluded that "*There is nothing in the provision which suggests that once the tax has been paid on the reversion that the reversion should no longer be regarded as being in the ownership of the taxpayer*."

[**86**] The Supreme Court in ***Erin Executor*** held that simply because the reversion retained was deemed to have been appropriated for a non-business purpose under section 4(4) VATA 1972 did not mean the property was no longer part of the business assets. The Supreme Court held that the reversion retained was deemed to have been supplied so that VAT became payable in respect of the reversion retained on the grant of the lease. The reversion retained was not supplied for any other purpose. The Supreme Court held that the Appeal Commissioners were not correct in law in determining that Erin Executor did not have a right to deduct under section 12 VATA 1972 in respect of the three categories of expenditure. Category C referred to properties which had been acquired by Erin Executor with sitting tenants where no subsequent development had been carried out. In Category C, Erin Executor was acquiring the property as a successor in title landlord. Therefore, in computing the amount of VAT payable by Erin Executor in respect of the relevant taxable period, Erin Executor had a right to deduct IR£44,407.07 as tax charged to Erin Executor during the taxable period by other taxable persons in accordance with section 12 VATA 1972. Based on the information provided by the Appellant subsequent to the hearing, the sum of IR£39,311.39 (being part of the sum of IR£44,407.07) represented 'expenses incurred in respect of the sale and purchase of properties'. The

consequence of the Supreme Court judgment in ***Erin Executor*** was that Erin Executor had a right to deduct VAT charged on costs incurred in connection with the acquisition of properties with sitting tenants where no subsequent development had been carried out. The Appellant submits that the right to deduct in ***Erin Executor*** related to the costs incurred in connection with the acquisition of a reversionary interest in a property. The Appellant submits that it must follow, in this appeal, that the Appellant has a right to deduct VAT charged on the costs incurred in connection with the acquisition of a reversionary interest in a property. The Appellant submits that the amendments introduced in section 4(9) and section 4(10) VATA 1972 (carried through to section 93(2) and section 93(3) VATCA 2010) do not alter this position. The Revenue Commissioners submit that the Supreme Court judgment in ***Erin Executor*** must be considered having regard to the legislative provisions operative at the relevant time. The Revenue Commissioners submit that this appeal must be considered having regard to the amendments introduced in section 4(9) and section 4(10) (carried through to section 93(2) and section 93(3)).

[**87**] Having a right to deduct under section 12 VATA 1972 meant that the goods were used by Erin Executor for the purposes of the taxable supplies of Erin Executor. In this appeal, the Revenue Commissioners submit that the Appellant must establish that the acquisition costs are linked to a taxable supply. Applying this submission to ***Erin Executor***, the question arising is what taxable supply could be said to be linked to the three categories of expenditure to give rise to a right to deduct? There was no specific analysis in the Supreme Court on the nature of the taxable supplies of Erin Executor giving rise to the right to deduct under section 12 – where the costs linked to the supply of immovable goods on the grant of the lease; or where the costs linked to the supply of the reversionary interest; or where the costs linked to the whole taxable supplies of Erin Executor. The Revenue Commissioners submit that the import of the statement by the Supreme Court in ***Erin Executor*** that the reversionary interest 'remains part of the business assets' and how that relates to VAT is unclear. The Revenue Commissioners submit that it is unclear how the reversionary interest remaining part of the business assets of the landlord gives rise to a right to deduct. Also, the Revenue Commissioners continue to entertain doubts as to

whether the Supreme Court in ***Erin Executor*** was correct as a matter of EU law. Presumably those doubts arise from the understanding of the Revenue Commissioners that the conclusion of the Supreme Court in ***Erin Executor*** was that Erin Executor had a right to deduct because the costs were linked to the supply of the reversionary interest (the taxable supply), and that, although national law was entitled to treat the grant of the lease as a taxable supply of immovable goods, national law was obliged to exempt all further supplies of the property in question absent further development. Therefore, in light of the foregoing, could it be said that the principle enunciated by the Supreme Court was simply that because the reversion retained was deemed to have been appropriated for a non-business purpose under section 4(4) VATA 1972 this did not mean the property was no longer part of the business assets. Consequently, and having regard to the views expressed by the Revenue Commissioners on the Supreme Court judgment and particularly the views on the correctness of the judgment as a matter of EU law, could the proper conclusion be that the Supreme Court could only have held that Erin Executor had a right to deduct under section 12 if the costs were linked to a taxable supply other than the supply of the reversionary interest? It is noteworthy that the Supreme Court in ***Erin Executor*** were dealing with various broad categories of expenditure and not simply properties which had been acquired by Erin Executor with sitting tenants where no subsequent development had been carried out.

[**88**] Section 4(9) and section 4(10) VATA 1972 were introduced by Finance Act, 1998 and operated with effect from 27 March 1998. Section 4(2) and section 4(4) VATA 1972, which were the provisions considered by the Supreme Court in ***Erin Executor***, remained largely unchanged. What bearing does section 4(9) and section 4(10) have on the principle enunciated in ***Erin Executor***? How does section 4(9) and section 4(10) interact with section 4(2) and section 4(4) and the interpretation of section 4(4) given by the Supreme Court in ***Erin Executor***? Section 4(9) provides that the subsequent disposal of a reversionary interest is deemed to be a supply of immovable goods to which VAT is not charged. According to the submission of the Revenue Commissioners in this appeal, this provision ensured that the requirement under EU law that national law exempt all further supplies of

immovable goods occurring after the property has actually been used was met. Section 4(10) defines 'post-letting expenses' and deems a successor in title landlord to be a taxable person in respect of post-letting expenses and entitled to deduct input tax under section 12 VATA 1972 as if those post-letting expenses were for the purposes of the landlord's taxable supplies. If the reading of the Supreme Court judgment in ***Erin Executor*** is that the Supreme Court could only have held that Erin Executor had a right to deduct under section 12 because the costs were linked to a taxable supply other than the supply of the reversionary interest (to align with EU law), then section 4(9) and section 4(10) may not necessarily impact on the conclusions therein.

[**89**] It is interesting to consider the information leaflets published by the Revenue Commissioners following the judgment in ***Erin Executor***. Information Leaflet No. 3/98 (dated May 1998) states that it was *implied* from the judgment that "*a subsequent supply of a property was chargeable to tax*". The leaflet further states that "*new legislation effective from 27 March, 1998 provides that such subsequent supplies are generally exempt.*" This must be a reference to the insertion of section 4(9) VATA 1972 by Finance Act, 1998. The leaflet states "*A landlord who acquired a property with sitting tenants is also affected by the judgement. Although this type of landlord has not made a taxable supply of the property, the Court has held that he or she is entitled to deduct VAT on post-letting expenses, where the creation of the lease was chargeable to VAT. Again, input tax will be allowed on expenses the landlord incurred in relation to the lease to the original tenants.*" Interestingly, the leaflet provides for a separate paragraph relating to "*VAT on expenses relating to the acquisition of a property with sitting tenants will be allowed to the extent that the creation of the tenants' interest was subject to VAT.*" In light of the Case Stated provided by the Appellant subsequent to the hearing, it is not surprising that Information Leaflet No. 3/98 referred to VAT on expenses relating to the acquisition of a property with sitting tenants given that the Category C expenditure of IR£44,407.07 included the sum of IR£39,311.39 (approximately 88%) as expenses incurred in respect of the sale and purchase of properties.

[**90**] Information Leaflet No. 4/98 (dated August 1998) refers to the VAT treatment of post-letting expenses from 27 March 1998. In relation to section 4(10) and the category of landlord who grants the lease, the leaflet states that "*this subsection, therefore, limits the circumstances in which VAT is deductible in relation to a property which was the subject of a taxable supply. It confirms the basic principles of VAT law which provide that a taxable person is entitled to claim only input tax which directly relates to a taxable supply. Therefore, VAT on expenses such as legal fees in relation to, say, the sale of a freehold by D to L1 in example 1, is not deductible as these expenses directly relate to an exempt supply.*" In relation to the category of landlord who acquires a property with sitting tenants, the leaflet states that as "*the landlord (L) has not made any taxable supply and would not normally be entitled to claim back VAT on expenses incurred. However, as VAT has been accounted for on the value of the lease on its creation, this subsection deems the landlord to be a taxable person and entitled to deduct VAT in respect of post-letting expenses as defined*." In relation to general overheads, the leaflet states "*the concession does not extend to expenses a landlord incurs in relation to an exempt supply of property. Where a landlord acquires a property with sitting tenants, where the lease to these tenants was taxable, expenses relating to the acquisition of the property are not treated as general overheads for the purpose of this concession. Therefore, VAT on expenses, such as legal fees, relating to such acquisition are not deductible*."

[**91**] Based on the information leaflets and the submissions in this appeal, the Revenue Commissioners addressed the Supreme Court judgment in ***Erin Executor*** on the understanding that the taxable supply giving rise to the right to deduct was the supply of the reversionary interest. Therefore, by inserting section 4(9) VATA 1972 and deeming the subsequent disposal of the reversionary interest a supply of immovable goods to which VAT is not charged, this would mean there would be no taxable supply and no right to deduct. That being so, section 4(10) VATA 1972 was required to deem the successor in title landlord a taxable person to give the successor in title landlord a right to deduct VAT on post-letting expenses. However, if the reading of the Supreme Court judgment in ***Erin Executor*** is that the Supreme Court could only have held that Erin Executor had a right to

deduct under section 12 VATA 1972 because the costs were linked to a taxable supply other than the supply of the reversionary interest (to align with EU law), then neither section 4(9) nor section 4(10) may necessarily have a bearing on the conclusion that there is a right to deduct VAT charged on the costs incurred in connection with the acquisition of a reversionary interest in a property under section 12 (now section 59 VATCA 2010). The impact of the insertion of section 4(9) and section 4(10) may have to be considered from the starting point of the correctness or otherwise of the understanding of the Revenue Commissioners of the Supreme Court judgment. It is interesting to note that in ***Cussens, Jennings and Kingston -v- Brosnan*** [2016] IESC 79 the Supreme Court, in referring to the submissions made by the Revenue Commissioners as regards the existence of section 4(9), stated that the Revenue Commissioners submitted "*that it was introduced in 1998 to clarify the law already in place under s. 4(4)…*".

[**92**] There is a reading of the Supreme Court judgment in ***Erin Executor*** which potentially overcomes the reservation of the Revenue Commissioners as to the correctness of the judgment as a matter of EU law. If the understanding of the Supreme Court judgment was that Erin Executor had a right to deduct because the costs were linked to the taxable supply of the reversionary interest, then, according to the Revenue Commissioners, this would be at variance with EU law which obliges Member States to exempt further supplies of immovable property occurring after the property has actually been used. However, this does not arise if the extent of the Supreme Court judgment was that simply because the reversion retained was deemed to have been appropriated for a non-business purpose did not mean the property was no longer part of the business assets which had the consequence that, as regards the appeal and the three categories of expenditure, Erin Executor had a right to deduct VAT because the costs were linked to a taxable supply which must have been a supply other than the supply of the reversionary interest.

[**93**] The principles enunciated by the CJEU in the context of the right to deduct may be summarised as:

93.1 The right to deduct constitutes a fundamental principle of the common system of VAT established by EU law, so that the right to deduct is an integral part of the VAT scheme and in principle may not be limited. The right to deduct is exercisable immediately in respect of all the taxes charged on input transactions. Any limitation on the right to deduct affects the level of the tax burden and must be applied in a similar manner in all Member States.

93.2 The deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of his/her economic activities. The common system of VAT ensures neutrality of taxation of all economic activities provided that the economic activities are themselves subject to VAT.

93.3 A taxable person, acting as a taxable person at the time of acquiring goods or services, who uses those goods or services for the purposes of his/her taxable supplies, has a right to deduct input tax in respect of those goods or services.

93.4 A taxable person has a right to deduct input tax if there is a direct and immediate link between a particular input transaction and a particular output transaction. The right to deduct VAT charged on the acquisition of input goods or services presupposes that the costs incurred in acquiring them are a component of the costs of the output transaction that gave rise to the right to deduct. The link is assessed in light of the objective content of the transaction having regard to all the circumstances surrounding the transaction.

93.5 A taxable person has a right to deduct input tax even where there is no direct and immediate link between a particular input transaction and a particular output transaction, if the costs have a direct and immediate link with the taxable person's economic activity as a whole. The costs are part of the taxable person's general costs and are, as such, components of the price of the goods or services supplied by the taxable person.

93.6 A taxable person does not have a right to deduct input tax if the goods or services are used for the purposes of transactions which are exempt or do not fall within the scope of VAT. No output tax can be collected or input tax deducted. The direct and immediate link between the costs and the economic activity of the taxable person is severed. If the costs are attributable to a taxable economic activity and an exempt economic activity or non-economic activity, the right to deduct input tax is allowed only for the part of the input tax which is proportionate to the amount attributable to the taxable economic activity.

[**94**] I will now consider the VAT position of the transaction between [redacted] and the [redacted] and the transaction between [redacted] and the Appellant. On 9 March 2007, [redacted] granted a 25 year lease to the [redacted] for [redacted]. The lease granted by [redacted] to the [redacted] was deemed to be a supply of immovable goods under section 4(2) VATA 1972. The reversion retained by [redacted] was deemed to have been appropriated for a non-business purpose under section 4(4) VATA 1972. The amount on which tax was chargeable under section 10(9) VATA 1972 was the open market price. Regulation 19(1) of the Value-Added Tax Regulations, 1979 provides that where it is necessary to value an interest in immovable goods, the value of the rent to be included in the consideration for the purpose of ascertaining the open market price of the interest disposed of should be calculated by the formula (¾ annual rent) x (number of complete years). Given that the term of the lease was 25 years, then the value of the reversionary interest may have been disregarded in accordance with Regulation 19(2). The open market price of the 25 year lease was calculated as €2,526,356. The VAT charged on the grant of the lease was €341,058, which was VAT at 13.5% on the open market price of €2,526,356. The Revenue Commissioners submit that simply because the formula for calculating the open market price includes the rent payments does not mean that it can be said that VAT has been accounted for on the rent payments at the time of the grant of the lease. However, it is interesting to note that Regulation 19(1) refers to "*the value of such rent to be included in the consideration*". [emphasis added]

[**95**] On [redacted], a Contract for Sale was signed by [redacted] and the Appellant. The total contract price was [redacted] for a portfolio of properties. One property was [redacted], which was a property with a tenant in occupation ([redacted]) under the lease granted by [redacted] on 9 March 2007. If section 93(2) VATCA 2010 applies to this transaction, this means the disposal of the reversionary interest was deemed to be a supply of immovable goods to which tax is not charged. Consequently, no output tax would be charged. As a result of the transaction, the Appellant became the successor in title landlord in the lease with the [redacted]. Section 93(3) VATCA 2010 deems the Appellant to be an accountable person in respect of post-letting expenses with a right to deduct tax as if those post-letting expenses were for the purposes of the Appellant's taxable supplies. The Revenue Commissioners submit that, in essence, section 93(2) and section 93(3) represent the extent of the VAT consequences following the transaction between [redacted] and the Appellant. The Appellant submits that the taxable economic activity created on the grant of the lease continues following the transaction between [redacted] and the Appellant and, consequently, the Appellant has a right to deduct VAT charged on the costs incurred in connection with the acquisition of the reversionary interest. The Appellant submits that there is a right to deduct under section 59 VATCA 2010. The fact that the transaction between [redacted] and the Appellant may come within section 93(2) does not mean that the VAT consequences of the transaction are confined to section 93 only. Simply because section 93(3) does not provide for a right to deduct VAT on the costs incurred in connection with the acquisition of the reversionary interest does not mean that the Appellant does not have a right to deduct.

[**96**] Based on the CJEU principles, the Appellant has a right to deduct input tax if there is a direct and immediate link between a particular input transaction and a particular output transaction or if there is a direct and immediate link with a taxable economic activity as a whole. Based on the submissions in this appeal, the Appellant has a right to deduct input tax if there is a direct and immediate link between the costs incurred in connection with the

acquisition of the reversionary interest and the taxable supply on the grant of the lease. Alternatively, the Appellant has a right to deduct input tax if the costs have a direct and immediate link with the economic activity of the Appellant as a whole. The Appellant has not sought to establish that the costs have a direct and immediate link to the disposal of the reversionary interest by [redacted] to the Appellant.

[**97**] Based on the CJEU principles, a direct and immediate link is assessed in light of the objective content of the transaction having regard to all the circumstances surrounding the transaction. For the Appellant to have a right to deduct the input tax on the legal services supplied by [redacted], the Appellant must establish the necessary link. The Appellant submits that a direct and immediate link has been established because the taxable supply on the grant of the lease continues to govern the VAT position of the Appellant, in that, the rent payments received by the Appellant as successor in title landlord are not subject to VAT as a supply of services because the payments were previously subject to VAT as a supply of goods. The taxable economic activity created on the grant of the lease to the [redacted], the exploitation of tangible property in return for payment, continues unchanged following the transaction between [redacted] and the Appellant. The economic activity is so tightly bound together that it would breach the principle of fiscal neutrality to deny a right to deduct. The Appellant has a right to deduct VAT on post-letting expenses on the basis of being engaged in the economic activity of the exploitation of property to the [redacted] in return for payment. As the costs incurred by the Appellant in connection with the acquisition of the reversionary interest in the property have a direct and immediate link to the same economic activity, the Appellant must have a right to deduct in relation to those costs. The Revenue Commissioners submit that the costs incurred in acquiring the reversionary interest do not have a direct and immediate link to a taxable supply. The only taxable supply was a supply of immovable goods by [redacted] on the grant of the lease to the [redacted]. The acquisition costs incurred by the Appellant are not linked to that taxable supply as the costs incurred were simply to enable the Appellant to step into the shoes of [redacted].

The Appellant has incurred costs to become landlord and be responsible for performing the covenants under the lease. The taxable supply was not a taxable supply by the Appellant.

[**98**] In short, the question arising is whether the legal services supplied by [redacted] to the Appellant (input transaction) in order to effect the acquisition of the reversionary interest have a direct and immediate link with a taxable supply (output transaction) or a taxable economic activity as a whole giving rise to a right to deduct?

[**99**] In ***Abbey National Plc*** (22 February 2001), the national law regarded the transfer of business as not a supply of goods (similar to section 20(2)(c) VATCA 2010) and consequently could not constitute a taxable supply. Abbey National submitted that Abbey National may take into account the taxable supplies of the transferee so as to be able to deduct the VAT on the costs incurred for the services supplied in order to effect the transfer of business. The CJEU did not accept this submission on the basis that a taxable person may deduct only the VAT on the goods and services used for the purposes of his own taxable supplies and that the VAT paid by Abbey National did not directly burden the various costs components of the transferee's taxable supplies. The CJEU held that the various services acquired by Abbey National in order to effect the transfer of business did not have a direct and immediate link with one or more taxable supply giving rise to a right to deduct. However, the CJEU held that the costs of the various services did form part of the taxable person's overheads. The CJEU held that the various services supplied to Abbey National in order to effect the transfer of business did have a direct and immediate link with the whole economic activity of Abbey National. The CJEU held that if the various services supplied to Abbey National in order to effect the transfer of business "*have a direct and immediate link with a clearly defined part of his economic activities, so that the costs of those services form part of the overheads of that part of the business, and all the transactions relating to that part are subject to VAT, he may deduct all the VAT charged on his costs of acquiring those services*." In the Opinion of Advocate General Jacobs it was stated "*…the conclusion to be drawn from the BLP judgment is that the question to be asked is not what is the transaction with which the cost component has the most direct and*

immediate link but whether there is a sufficiently direct and immediate link with a taxable economic activity." The Advocate General stated "*According to a broader approach, where a taxable person pursues an economic activity in which he makes wholly taxable supplies, all the goods and services supplied to him for the purposes of that activity are cost components of his outputs and all the VAT borne by them should be deductible. The fact that, from a strict bookkeeping point of view, inputs are not attributed to or even apportioned among particular outputs is of no import here. Clearly not all goods and services consumed by a taxable person will be incorporated directly into an identifiable output. Some will be of the nature of general overheads and, to the extent that those overheads are cost components of taxable supplies, VAT levied on them may be deducted*."

[**100**] In ***Faxworld*** (29 April 2004), the national court explained that under national law the formation of a company may be preceded by a civil-law partnership. The civil-law partnership was based on a preliminary agreement between the founders of the company to cooperate with a view to establishing the company. The CJEU stated that based on the wording in Article 17(2) of the Sixth Directive that in order for a person to have a right to deduct, the person must be a 'taxable person' and the goods or services must have been used for the purposes of his taxable supplies. The CJEU held that the civil-law partnership was a taxable person. The CJEU stated that the civil-law partnership did not effect any taxable supplies. In contrast to the facts in ***Abbey National Plc***, the civil-law partnership did not intend to effect taxable supplies as its sole object was to prepare the activities of the company. The taxable supplies on which the civil-law partnership sought to rely to give rise to a right to deduct were the planned taxable supplies of the company. The CJEU held "*in these precise circumstances, and in order to ensure the neutrality of taxation, it must be held that, where the Member State has exercised the options provided for in Articles 5(8) and 6(5) of the Sixth Directive, as a result of the fact that, according to those provisions, 'the recipient shall be treated as the successor to the transferor', a* [civil-law partnership], *as the transferor, must be entitled to take account of the taxable transaction of the recipient, namely the* [company], *so as to be entitled to deduct the VAT paid on input services which have been procured for the purposes of the recipient's taxable operations*."

In the Opinion of Advocate General Jacobs, the procedural requirements under German company law of a civil-law partnership preceding the formation of a company, were such that "*From an economic point of view, it seems clear, a single business has been set up, going through various preparatory stages before becoming operational. The continuity of the business from preparatory to operational stages – the continuity of its identity as a business – does not appear to be in any doubt. The normal operation of the VAT system requires that input tax on supplies acquired by a business at both preparatory and operational stages be deductible from its output tax.*" The Advocate General recognised that "*from a legal point of view the preparatory and operational stages were carried out by two separate entities, a partnership and a limited company*." The Advocate General stated "*None the less, although the partnership and the limited company in the present case are two separate legal persons, there is not only a perceptible economic continuity between them but also a degree of legal continuity*." It is interesting that in reaching the conclusion that the civil-law partnership had a right to deduct the Advocate General stated "*There is, moreover a direct and immediate link between the input supplies and the taxable output transactions which give rise to the right to deduct since, by operation of Article 5(8), no intervening transaction is deemed to have taken place between the acquisition of those supplies and their use for the purposes of the output transactions*." In distinguishing ***Abbey National Plc***, the Advocate General observed that in ***Faxworld*** "*the continuity of personality as between the transferor and his successor, the transferee, justifies treating input VAT on their acquisition as giving rise to a right to deduct on that basis*."

[**101**] In ***I/S Fini H -v- Skatteministeriet*** [Case C-32/03] (3 March 2005), the CJEU held that "*in respect of the rent and charges on the premises previously used for carrying on the restaurant business which were paid during the period for which the restaurant was not operated, that is to say, from October 1993 to September 1998, the taxable person must be entitled to deduct the VAT in the same way as during the period from the commencement of his restaurant business to the date on which it came to an end because, for the entire term of the lease, the premises were directly and immediately linked to his economic activity*."

[**102**] In ***NCC Construction Danmark A/S -v- Skatteministeriet*** [Case C-174/08] (29 October 2009), the CJEU stated "*Where the taxable person effects both taxable transactions, in respect of which VAT is deductible, and exempt transactions, in respect of which VAT is not deductible, Article 17(5) of the Sixth Directive provides that only such proportion of the VAT is deductible as is attributable to the taxable transactions. That proportion is to be calculated according to the detailed rules set out in Article 19 of that directive*." It further stated that "*it should be noted that the principle of fiscal neutrality resulting from the provisions of Article 17(2) of the Sixth Directive implies that a taxable person may deduct all the VAT levied on goods and services acquired for the exercise of his taxable activities*." The CJEU concluded that "*The principle of fiscal neutrality cannot preclude a building business, which is required to pay value added tax on supplies relating to construction effected on its own account (self-supply), from being unable fully to deduct the value added tax relating to the general costs incurred thereby, since the turnover from the sale of buildings thus constructed is exempt from value added tax*."

[**103**] In ***Kopalnia*** (1 March 2012), the CJEU held that "*in so far as, under national legislation, the partners, even though they may be considered taxable persons for the purposes of VAT, are unable to rely on the taxable transactions effected by Polski Trawertyn* [general partnership] *in order to relieve the cost of the VAT on investment transactions effected for the purposes of and with the view to the activity of that partnership, the latter must, in order to ensure the neutrality of taxation, be entitled to take account of those investment transactions when deducting VAT*." The CJEU ruling was that "*Articles 9, 168 and 169 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding national legislation which permits neither partners nor their partnership to exercise the right to deduct input VAT on investment costs incurred by those partners, before the creation and registration of the partnership, for the purposes of and with the view to its economic activity*."

[**104**] In ***Portugal Telecom SGPS SA -v- Fazenda Pública*** [Case C-496/11] (6 September 2012), the CJEU ruling was "*Article 17(2) and (5) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment must be interpreted as meaning that a holding company such as that at issue in the main proceedings which, in addition to its main activity of managing shares in companies in which it holds all or part of the share capital, acquires goods and services which it subsequently invoices to those companies is authorised to deduct the amount of input VAT provided that the input services acquired have a direct and immediate link with the output economic transactions giving rise to a right to deduct. Where those goods and services are used by the holding company in order to perform both economic transactions giving rise to a right to deduct and economic transactions which do not, the deduction is allowed only in respect of the part of the VAT which is proportional to the amount relating to the former transactions and the national tax authorities are authorised to provide for one of the methods for determining the right to deduct in Article 17(5). Where those goods and services are used both for economic and non-economic activities, Article 17(5) of the Sixth Directive is not applicable and the methods of deduction and apportionment are to be defined by the Member States which, in exercising that power, must take account of the purpose and general scheme of the Sixth Directive and, on that basis, lay down a method of calculation which objectively reflects the input expenditure actually attributed to each of those two activities*."

[**105**] In ***Sveda*** (22 October 2015), the CJEU held that "*there does appear to be a direct and immediate link between the expenditure incurred by Sveda and its planned economic activity as a whole, which is, however, a matter for the referring court to determine*." The CJEU ruling was "*Article 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as granting, in circumstances such as those in the main proceedings, a taxable person the right to deduct the input value added tax paid for the acquisition or production of capital goods, for the purposes of a planned economic activity related to rural and recreational tourism, which are (i) directly*

intended for use by the public free of charge, and may (ii) enable taxed transactions to be carried out, provided that a direct and immediate link is established between the expenses associated with the input transactions and an output transaction or transactions giving rise to the right to deduct or with the taxable person's economic activity as a whole, which is a matter for the referring court to determine on the basis of objective evidence." In the Opinion of Advocate General Kokott it was stated "*... if an input transaction objectively serves the purpose of the performance of certain or all output transactions of a taxable person, there is a direct and immediate link between the two as understood in case-law. This is because in such a case the input transaction constitutes, from an economic perspective, a cost component in the provision of the respective output transaction.*"

[**106**] In ***Iberdrola*** (14 September 2017), the CJEU stated "*In the appraisal of the question as to whether, in circumstances such as those at issue in the main proceedings, Iberdrola has the right to deduct input VAT for the reconstruction of the waste-water pump station, it is therefore necessary to determine whether there is a direct and immediate link between, on the one hand, that reconstruction service and, on the other hand, a taxed output transaction by Iberdrola or that undertaking's economic activity. It is clear from the order for reference that, without the reconstruction of that pump station, it would have been impossible to connect the buildings which Iberdrola planned to build to that pump station, with the result that that reconstruction was essential for completing that project and that, consequently, in the absence of such reconstruction, Iberdrola would not have been able to carry out its economic activity. Those circumstances are likely to demonstrate the existence of a direct and immediate link between the reconstruction service in respect of the pump station belonging to the municipality of Tsarevo and a taxed output transaction by Iberdrola, since it appears that the service was supplied in order to allow the latter to carry out the construction project at issue in the main proceedings*."

[**107**] In ***Imofloresmira*** (28 February 2018), the CJEU stated "*It should be noted that a restriction of a taxable person's right to deduct VAT constitutes an exception to a*

fundamental principle of the common system of VAT, the legality of which, according to settled case-law, is acknowledged only in exceptional circumstances."

[**108**] In ***Ryanair Limited -v- The Revenue Commissioners*** [Case C-249/17] (17 October 2018), the CJEU stated "*The principle that VAT should be neutral as regards the tax burden on a business requires that the first investment expenditure incurred for the purposes of, and with the view to, commencing a business must be regarded as an economic activity; it would be contrary to that principle if such an activity commences only when taxable income arises. Any other interpretation would burden the trader with the cost of VAT in the course of his economic activity without allowing him to deduct it and would create an arbitrary distinction between investment expenditure incurred for the needs of a business before actual exploitation of the business or expenditure incurred during exploitation*." The CJEU ruling was "*Articles 4 and 17 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment must be interpreted as conferring on a company, such as that at issue in the main proceedings, which intends to acquire all the shares of another company in order to pursue an economic activity consisting in the provision of management services subject to value added tax (VAT) to that other company, the right to deduct, in full, input VAT paid on expenditure relating to consultancy services provided in the context of a takeover bid, even if ultimately that economic activity was not carried out, provided that the exclusive reason for that expenditure is to be found in the intended economic activity*."

[**109**] For a person to have a right to deduct, first, the person must be a taxable person and, second, the goods or services must be used by the taxable person for the purposes of his or her taxable supplies. According to the settled case-law of the CJEU, the fundamental principle underpinning the VAT system is that VAT should be neutral as regards the tax burden on a business. To what extent, and how far, should this fundamental principle be applied? In ***Faxworld***, when discussing ***Abbey National Plc***, the CJEU stated "*That interpretation made it possible to relieve the taxable person in question of the burden of*

the VAT paid in the course of its economic activity. Accordingly, the taxable person's additional argument that it had to be able to rely on the recipient's taxable operations in order to be entitled to deduct all the VAT incurred on those services was rejected". [emphasis added] Therefore, based on the case-law of the CJEU, it could be said that if there is an interpretation which makes it possible to relieve a taxable person of the burden of the VAT paid in the course of the economic activity of the taxable person, that interpretation should be favoured.

[**110**] Based on the CJEU rulings in ***Faxworld*** and ***Kopalnia***, relying on the taxable supplies of other persons does not necessarily sever the direct and immediate link to have a right to deduct. However, the extent to which a taxable person could rely on the taxable supplies of another taxable person to have a right to deduct must be considered in the precise circumstances in those cases. In ***Faxworld***, a civil-law partnership claimed a right to deduct VAT charged on costs incurred by the partnership (input transaction), however, the taxable supplies were effected by a company (output transaction). The relationship between the civil-law partnership and the company was that the civil law partnership preceded the formation of the company. The civil-law partnership was based on an agreement between the founders of the company to cooperate with a view to establishing the company. The Advocate General described the circumstances as 'a single business' being set up 'going through various preparatory stages before becoming operational' and there being a 'continuity of personality'. The CJEU held that the civil-law partnership was entitled to take account of the taxable supplies of the company so as to have a right to deduct input tax on costs incurred by the partnership for the purposes of the taxable supplies of the company. In ***Kopalnia***, a partnership claimed a right to deduct VAT charged on costs incurred by the partners (input transaction), however, the taxable supplies were effected by the partnership (output transaction). The relationship between the partners and the partnership was that the partners founded the partnership. The costs incurred by the partners were described as the 'investments necessary for the future exploitation of immovable property by the partnership'. Based on the foregoing it could be said that there is a continuity in the relationship between the different taxable persons. The general thrust of

the case-law of the CJEU may be summarised as - a taxable person who incurs costs during the preparatory stage or investment stage of an economic activity which has not yet commenced and which will be carried out subsequently by that person has a right to deduct input tax; a taxable person who incurs costs during the preparatory stage or investment stage of an economic activity in circumstances where the economic activity continues, or formally commences, through another taxable person has a right to deduct input tax. The economic activity is viewed as progressing through stages by taxable persons considered to have a continuity of personality – preparatory stage or investment stage through to operational stage. In my view, in this appeal, the disposal of an interest in immovable goods on the grant of the lease and the subsequent transaction involving a successor in title landlord could not be viewed as an economic activity progressing from preparatory stage or investment stage through to operational stage by taxable persons considered to have a continuity of personality.

[**111**] In this appeal, the facts agreed by the parties are that the Appellant is a core income fund focussed on owning the best income generating properties for the long term and has the principle objective of providing institutional investors with a consistent yield from commercial real estate. At paragraph 81 above, I made a finding that, at the material time, the Appellant was a taxable person engaged in the economic activity of the exploitation of tangible property for the purposes of obtaining income therefrom on a continuing basis. According to settled case-law, if a person is a taxable person for VAT purposes and acting as a taxable person at the time, the person is, in principle, entitled to exercise the right to deduct input tax. Acquiring the reversionary interest in properties was connected with, and necessary for, the economic activity of the Appellant. The Appellant invariably exercises the option to tax in the course of its economic activity. Consequently, I am satisfied, having assessed all the facts and circumstances including the objective content of the services supplied to the Appellant and having considered the circumstances in which the transaction occurred, that there is an objective link between the costs incurred by the Appellant in connection with the acquisition of the reversionary interest in [redacted] and the economic activity of the Appellant as a whole

of the exploitation of tangible property for the purposes of obtaining income therefrom on a continuing basis to establish a direct and immediate link to give rise to a right to deduct in full. This interpretation makes it possible to relieve the Appellant of the burden of the VAT paid in the course of its economic activity. Accordingly, the Appellant has a right to deduct under section 59 VATCA 2010.

(H) Determination

[**112**] Based on a review of the facts and a consideration of the evidence, materials and submissions of the parties, I determine that the refusal of the Revenue Commissioners on the claims for a refund of value-added tax shall not stand. This appeal is hereby determined in accordance with section 949AL of the Taxes Consolidation Act, 1997.

FIONA McLAFFERTY
APPEAL COMMISSIONER

23 FEBRUARY 2021

The Appeal Commissioners have been requested to state and sign a case for the opinion of the High Court under Chapter 6, Part 40A of the Taxes Consolidation Act, 1997.