# TC03770

**TC/2012/04223**

***VATA 1994 Sch 10 – lease and sale by pension trustee – retrospective acceptance of option to tax land – whether sale grant made by person exercising option – whether prior permission needed – revised texts of Sch 10 – appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**DARREN HILLS & LYNN HILLS** **Appellants**

**- and -**

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

**TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY**
**MR JOHN COLES**

**Sitting in public at 45 Bedford Square, London, on 19 & 20 May 2014**

**Ms Rebecca Murray, instructed by The VAT Consultancy, for the taxpayers**

**Ms Hui Ling McCarthy, instructed by the Solicitor and General Counsel to HMRC, for the Crown**

## DECISION

*Introduction*

1 Darren and Lynn Hills are the buyers of a freehold property ('the Property')called Unit 4, Cardiff Gate Business Park, Cardiff, and the question raised in the appeal is whether VAT was chargeable on the sale to them by NM Pensions Trustees Limited of that property on 22 or 23 December 2011[1].

2 Mr and Mrs Hills appeal as third parties against HMRC's decision of 16 February 2012 that VAT is chargeable at the standard rate on the sale. If VAT is chargeable on the supply, the obligation to account for and pay the tax falls on the seller, not on the Hills (who have deposited the tax in escrow). Their interest in the VAT treatment arises because the sale price of £650,000 was expressed to be "plus VAT (if applicable)", which is a further £130,000.

*Facts*

3 A self-invested personal pension plan ('the SIPP') was established by a trust deed dated 3 January 2002 between GE Pensions Limited and GE Pensions Trustees Limited; this deed was supplemented by a deed dated 6 April 2006 between the same parties replacing the provisions of the earlier deed. Two further supplemental deeds of 18 May 2007 and 16 July 2008 were made. The first recorded a change of name of the two companies to NM Pensions Limited and NM Pensions Trustees Limited respectively; the second put in place a new 'provider' of the pension scheme, Windsor Life Assurance Company Limited. We refer to NM Pensions Trustees Limited as 'the Trustee'.[2] The SIPP was a registered pension scheme within part 4 of the Finance Act 2004.

4 Clare Patel and her husband Viren Patel completed a Property Application form to use the SIPP for the acquisition of the Property on 11 June 2003, in which they showed the proportion of their interests as 60% to Dr Patel and 40% to Mrs Patel. They both became members of the trust scheme on 30 July and 5 August 2003 respectively. Unit 4, Cardiff Gate Business Park ('the Property') was purchased by the Trustee on 30 March 2004 using the funds in the SIPP, but also with a business mortgage which the Trustee contracted, as its principal asset; one day later on 31 March, a 15 year lease of it was granted to Dr and Mrs Patel for use as a dental practice, a mainly VAT exempt undertaking.

5 On 8 September 2010, Dr Patel died, and a sale of the property was then contemplated. There appears to have been concern that the process was taking too long, because on 7 November 2011 the solicitors acting in the sale wrote to the purchaser's solicitors in these terms:

> We understand that there is a time limit imposed by pensions legislation which requires distribution of benefits following the death of a holder of a pension. Following Mr Patel's death is a time limit within which benefits can be distributed to his widow and family. We do not feel it is appropriate

[1] Both dates are given in the papers.

[2] It became a subsidiary of Liverpool Victoria Friendly Society on 31.12.07.

> to provide you with the full information at this stage as no doubt you can obtain your own advice in this regard. However our client is suffering the risk of extreme prejudice if the sale of the property is not completed promptly.

6 On 22 December 2011 the sale by the Trustee to the appellants was agreed, and completed the same day, or the next day.

7 On 12 July 2010, the Trustee had written to the Revenue to make a "belated notification of option to tax", or an election under Schedule 10 of the Value Added Tax Act 1994 "to waive exemption" in regard to the property, adding that the Property "should have been elected from 14 April 2004".; the election stated that there had been no previous exempt supplies in respect of the property in the ten years up to 14 April 2004. A copy of the first rent demand was enclosed showing VAT payable. The copy of the rent demand supplied to the tribunal does show VAT, but does not show the name or address of the sender; it is addressed to Dr and Mrs Patel and it is stated to be for 'rent monthly in advance for the period 30/03/2004 to 23/06/2004', due on 30/03/2004; it is dated 14/04/2004.

8 It was followed by a VAT invoice dated 11/08/2004 addressed likewise for 'rent monthly in advance for the period 30/03/2004 to 23/06/2004, due on 30/03/2004', and was issued by the Trustee; the tax point is shown as 16/07/2004. (The print of the invoice in evidence seems to have been produced at a more recent date, because it bears the logo of Liverpool Victoria Friendly Society Limited which did not take over the Trustee company until 2007; a footnote shows NM Trustees Limited as part of the Liverpool Victoria group. It was not suggested that this invoice was a fake, and we accept that it was the original invoice printed out again later.)

9 A copy of the counterpart lease was also in evidence dated 31 March 2004, giving the rent commencement date as 31 March 2004 and the start of the term as "the date hereof".

10 The notification of 12 July 2010 contained the statement:

> The decision to elect to waive exemption was made by Miss Michaela Bergman, Property Technician, NM Pensions Trustees Limited.

It was followed by a formal notification on 6 August 2010, repeating the request for the effective date of the option to be 14 April 2010

11 In an email sent to Mr Hills by Dr Patel on 29 July 2010, when the sale of the Property was apparently in contemplation, the election was explained thus:-

> Regarding the VAT – the accountants dealt with this but if memory serves me – the only way we could reclaim back the VAT (via the SIPP) was to elect to have the rental paid with VAT. Effectively, you still end up paying the VAT in the long term but there's a big VAT refund at the start and then VAT is paid on rent over 20 to 25 years which helps cash flow etc.

12 On 2 August 2010, HMRC replied to the Trustee pointing out that there were two stages in making a legally valid option to tax: the first was to make the decision to do so, and the second to notify HMRC of that decision within 30 days of making it. HMRC could however, under paragraph 20(2)(b) of Schedule 10 exercise a discretion to accept notification at a later date. On 11 October the Trustee wrote to HMRC referring to a conversation that had taken place between them, saying:

> Please accept this letter as confirmation of our intention to opt to tax [the

Property] with an effective date of 30 March 2004, and not 14 April 2004 as stated in our original application.

13 HMRC replied by email on 11 October 2010 referring to what appears to have been a further conversation with an official of the Trustee saying:

> Many thanks for the information provided.
>
> I have now had an opportunity to review the documents supplied and have some further queries that I hope you will be able to answer.
>
> - The date from which you wish the option to take effect is 14/04/04; if a belated notification is approved from this date this will result in exempt supplies of the property having been made during the period 30/03/04 to 23/06/04 and therefore the VAT charged on your invoice dated 11/08/04 is incorrect.
> - Following on from this, if exempt supplies of the property have been made then prior permission to opt would have been required, unfortunately this cannot be granted retrospectively and can only be granted from a current date.
> - The lease document that you provided in support of your application outlines your intention to make taxable supplies of the property from an earlier date, this is further evidenced by the tax demand and invoice raised in respect of rent to your tenant.
>
> I would be grateful if you could review your application and advise me of the correct date from which the option should take effect bearing in mind that your first taxable supply of the property was made on 30/03/04.
>
> Please don't hesitate to contact me should you wish to discuss.

14 The next correspondence we have is a letter from HMRC dated 16 November 2010 to the Trustee referring to correspondence from the company that day. The letter from HMRC is a formal acceptance of the belated notification in these terms:

> I acknowledge receipt of your letter notifying your option under paragraph 2, Schedule 10 of the VAT Act 1994, to opt to tax the land/property listed therein and as shown below with the effective option date.
>
> [the address of the property is then given and the effective date is specified as 30 March 2004]
>
> This belated notification is acknowledged on the basis that all relevant facts have been disclosed and output tax has been charged and accounted for from the effective date of the option to tax.

*Preliminary applications*

15 On 14 May, urgent *ex parte* applications were made on behalf of the appellants as follows:

- An application to amend the grounds of appeal to add the contention that there was no evidence that the Trustee had actually decided to opt to tax the property sold (such a decision being a precursor to the making of an election).
- An application for a direction from the tribunal that HMRC should not be permitted to rely on a new argument without first applying to amend their statement of case. This related to a letter issued by HMRC as late as 29 April 2014 stating that if prior permission to opt to tax had under the legislation in fact been required then HMRC were exercising their discretion to treat the option as valid and to dispense with the requirement to seek permission.

- An application to adjourn the hearing on the ground that there were new arguments raising complex technical issues which each side needed time to consider, and on the further ground that the appellants were seeking to apply for judicial review of the purported exercise of discretion by HMRC on 29 April 2014.
- An application that the case be allocated to the complex track.

16 On 15 May, HMRC responded objecting to these applications and sought to amend their statement of case to include the issue raised by their letter of 29 April 2014. At the hearing, the appellants' adjournment application was withdrawn and, after hearing argument, we refused the applications to amend, acceded to the reallocation application, and proceeded to address the substantive issues already identified.

17 We adjourned to consider these applications and refered to the guidance given by the Court of Appeal in *Swain-Mason & Ors. v Mills & Reeve* [2011] EWCA Civ 14, in particular the views expressed by Lloyd LJ at [69], [72] and [73].

18 In relation to the appellants' first application, the reasons for our refusal were that:

(i) Even though the issue had been addressed in the appellants' skeleton argument dated 25 April 2014, the application was made at an unacceptably late point in an appeal which originated as far back as 16 March 2012.

(ii) It raised an issue of fact in relation to which further research would have been desirable, and could not be undertaken without an adjournment,

(iii) The appeal was a third party appeal, which made the investigation of factual evidence more difficult than would otherwise have been the case, so that significant delay was likely if the matter were to be investigated further.

(iv) HMRC would be prejudiced by not having an opportunity to make their own enquiries to verify the matter if the hearing were to proceed on this ground.

19 In regard to HMRC's application to admit the new issue raised by their letter of 29 April 2014 (purporting to exercise their discretion to dispense with the need for prior permission to exercise the option to tax, if on the facts such permission had been required), our refusal was likewise based on the lateness of the introduction of this new factor so late in the day and which the appellants had had insufficient opportunity to respond to.

20 Moreover, we considered that this issue was likely to raise questions outside the tribunal's jurisdiction, both by reason of its being an exercise of the commissioners' discretion and because of the possible argument that it was, in the circumstances, an abuse of a statutory power in altering retrospectively the tax treatment of a transaction which had already occurred; it appeared therefore more suitable to be dealt with on an application for judicial review – as the appellants had indeed argued in their now withdrawn application for adjournment – rather than as a matter of normal statutory interpretation by the tribunal. Having regard to the possibility of the Upper Tribunal being in a position to exercise both a statutory interpretation and a judicial review jurisdiction, we explored briefly the option of transferring the appeal entirely to the Upper Tribunal under Rule 28, but HMRC made it clear that they would not consent to that course.

21 Lastly, in regard to the reallocation of the case to the complex track, although we are aware that such a course is very unusual as late as the commencement of the hearing, and is inevitably then too late to benefit from much of the procedural advantage associated with it, it was nevertheless clear to us that this was a case in which, had the application been made earlier, it would have been granted. The complexity of the legal issues and the likelihood that the questions of law inherent in this case will lead to it proceeding beyond the first instance – including now the possibility of there being parallel proceedings in the High Court – justify that conclusion under Rule 23(4)(b). Ms McCarthy indicated that she did not resist the application strongly, and Ms Murray indicated that the appellants did not intend to opt out of liability for costs under Rule 10(1)(c). We therefore decided on balance to accede to the appellants' application.

*Legislation*

22 The paragraphs cited to us of Schedule 10 to the Value Added Tax Act 1994, as now enacted, provide:-

> *Overview of the option to tax*
> 1(1) This Part of the Schedule makes provision for a person to opt to tax any land.
> (2) The effect of the option to tax is dealt with in paragraph 2 (exempt supplies become taxable), as read with paragraph 3.
> (3) Grants are excluded from the effect of paragraph 2 by—
> (*a*) paragraph 5 (dwellings designed or adapted, and intended for use, as dwelling etc.),
> (*b*) paragraph 6 (conversion of buildings for use as dwelling etc.),
> (*c*) paragraph 7 (charities),
> (*d*) paragraph 8 (residential caravans),
> (*e*) paragraph 9 (residential houseboats),
> (*f*) paragraph 10 (relevant housing associations), and
> (*g*) paragraph 11 (grant to individual for construction of dwelling).
> (4) Paragraphs 12 to 17 (anti-avoidance: developers of land etc.) provide for certain supplies to which any grant gives rise to be excluded from the effect of paragraph 2.
> (5) Paragraphs 18 to 30 deal with—
> (*a*) the scope of the option to tax,
> (*b*) the day from which the option to tax has effect,
> (*c*) notification requirements,
> (*d*) elections to opt to tax land subsequently acquired,
> (*e*) the revocation of the option,
> (*f*) the effect of the option to tax in relation to new buildings, and
> (*g*) requirements for prior permission in the case of exempt grants made before the exercise of an option to tax.
> (6) Paragraphs 31 to 34 deal with definitions which apply for the purposes of this Part, as well as other supplemental matters.
>
> *Effect of the option to tax: exempt supplies become taxable*
> 2(1) This paragraph applies if—
> (*a*) a person exercises the option to tax any land under this Part of this Schedule, and
> (*b*) a grant is made in relation to the land at any time when the option to tax it has effect.
> (2) If the grant is made—
> (*a*) by the person exercising that option, or
> (*b*) by a relevant associate (if that person is a body corporate),
> the grant does not fall within Group 1 of Schedule 9 (exemptions for land).
> (3) For the meaning of "relevant associate", see paragraph 3.

*Meaning of "relevant associate"*

3(1) This paragraph explains for the purposes of this Part of this Schedule what is meant by a "relevant associate" in a case where a body corporate ("the opter") exercises an option to tax in relation to any building or land.

(2) A body corporate is a relevant associate of the opter if under sections 43A to 43D (groups of companies) the body corporate—

(*a*) was treated as a member of the same group as the opter at the time when the option first had effect,

(*b*) has been so treated at any later time when the opter had a relevant interest in the building or land, or

(*c*) has been treated as a member of the same group as a body corporate within paragraph (*a*) or (*b*) or this paragraph at a time when that body had a relevant interest in the building or land.

(3) But a body corporate ceases to be a relevant associate of the opter in relation to the building or land in the following circumstances.

(4) The body corporate ceases to be a relevant associate of the opter in relation to the building or land at the time when all of the following conditions are first met—

(*a*) the body corporate has no relevant interest in the building or land [,

(*aa*) where the body corporate has disposed of such an interest, it is not the case that a supply for the purposes of the charge to VAT in respect of the disposal—

(i) is yet to take place, or

(ii) would be yet to take place if one or more conditions (such as the happening of an event or the doing of an act) were to be met,][2]

(*b*) the body corporate or the opter is not treated under sections 43A to 43D as a member of the group mentioned above, and

(*c*) the body corporate is not connected with any person who has a relevant interest in the building or land where that person is the opter or another relevant associate of the opter.

(5) The body corporate also ceases to be a relevant associate of the opter in relation to the building or land if the body corporate—

(*a*) meets conditions specified in a public notice (see paragraph 4), or

(*b*) gets the prior permission of the Commissioners (also, see that paragraph).

The time when the body corporate ceases to be a relevant associate of the opter is determined in accordance with that paragraph.

(6) In this paragraph "relevant interest in the building or land" means an interest in, right over or licence to occupy the building or land (or any part of it).

*Permission for a body corporate to cease to be a relevant associate of the opter*

4(1) This paragraph applies for the purposes of paragraph 3(5) in relation to a body corporate which has been a relevant associate of the opter.

(2) If the conditions specified in the public notice under paragraph 3(5)(*a*) are met in relation to the body corporate, it ceases to be a relevant associate of the opter only if notification of those conditions being met is given to the Commissioners.

(3) The notification must—

(*a*) be made in a form specified in a public notice,

(*b*) state the day from which the body corporate is to cease to be a relevant associate of the opter (which may not be before the day on which the notification is given),

(*c*) contain a statement by the body corporate certifying that, on that day, the conditions specified in the public notice under paragraph 3(5)(*a*) are met in relation to it, and

(*d*) contain other information specified in a public notice.

(4) An application for the prior permission of the Commissioners must—

(*a*) be made in a form specified in a public notice,
(*b*) contain a statement by the body corporate certifying which (if any) of the conditions specified in the public notice under paragraph 3(5)(*a*) are met in relation to it, and
(*c*) contain other information specified in a public notice.
(5) If the body corporate gets the prior permission of the Commissioners, it ceases to be a relevant associate of the opter from—
(*a*) the day on which the Commissioners give their permission, or
(*b*) such earlier or later day as they specify in their permission.
(6) The Commissioners may specify an earlier day only if—
(*a*) the body corporate has purported to give a notification of its ceasing to be a relevant associate of the opter,
(*b*) the conditions specified in the public notice are not, in the event, met in relation to the body corporate, and
(*c*) the Commissioners consider that the grounds on which those conditions are not so met are insignificant.
(7) The day specified may be the day from which the body corporate would have ceased to be a relevant associate of the opter if those conditions had been so met.
(8) The Commissioners may specify conditions subject to which their permission is given and, if any of those conditions are broken, they may treat the application as if it had not been made.

*Developers of exempt land*

12(1) A supply is not, as a result of an option to tax, a taxable supply if—
(*a*) the grant giving rise to the supply was made by a person ("the grantor") who was a developer of the land, and
(*b*) the exempt land test is met.
(2) The exempt land test is met if, at the time when the grant was made (or treated for the purposes of this paragraph as made), the relevant person intended or expected that the land—
(*a*) would become exempt land (whether immediately or eventually and whether or not as a result of the grant), or
(*b*) would continue, for a period at least, to be exempt land.
(3) "The relevant person" means—
(*a*) the grantor, or
(*b*) a development financier.
(4) For the meaning of a development financier, see paragraph 14.
(5) For the meaning of "exempt land", see paragraphs 15 and 16.
(6) If a supply is made by a person other than the person who made the grant giving rise to it—
(*a*) the person making the supply is treated for the purposes of this paragraph as the person who made the grant giving rise to it, and
(*b*) the grant is treated for the purposes of this paragraph as made at the time when that person made the first supply arising from the grant.
(7) For a special rule in the case of a grant made on or after 19th March 1997 and before 10th March 1999, see paragraph 17.
(8) Nothing in this paragraph applies in relation to a supply arising from—
(*a*) a grant made before 26th November 1996, or
(*b*) a grant made on or after that date but before 30th November 1999, in pursuance of a written agreement entered into before 26th November 1996, on terms which (as terms for which provision was made by that agreement) were fixed before 26th November 1996.

*Meaning of grants made by a developer*

13(1) This paragraph applies for the purposes of paragraph 12.
(2) A grant made by any person ("the grantor") in relation to any land is made by a developer of the land if—

(*a*) the land is, or was intended or expected to be, a relevant capital item (see sub-paragraphs (3) to (5)), and

(*b*) the grant is made at an eligible time as respects that capital item (see sub-paragraph (6)).

(3) The land is a relevant capital item if—

(*a*) the land, or

(*b*) the building or part of a building on the land,

is a capital item in relation to the grantor.

(4) The land was intended or expected to be a relevant capital item if the grantor, or a development financier, intended or expected that—

(*a*) the land, or

(*b*) a building or part of a building on, or to be constructed on, the land,

would become a capital item in relation to the grantor or any relevant transferee.

(5) A person is a relevant transferee if the person is someone to whom the land, building or part of a building was to be transferred—

(*a*) in the course of a supply, or

(*b*) in the course of a transfer of a business or part of a business as a going concern.

(6) A grant is made at an eligible time as respects a capital item if it is made before the end of the period provided in the relevant regulations for the making of adjustments relating to the deduction of input tax as respects the capital item.

(7) But if—

(*a*) a person other than the grantor is treated by paragraph 12(6) as making the grant of the land, and

(*b*) the grant is consequently treated as made at what would otherwise be an ineligible time,

the grant is treated instead as if were not made at an ineligible time.

(8) In this paragraph a "capital item", in relation to any person, means an asset falling, in relation to the person, to be treated as a capital item for the purposes of the relevant regulations.

(9) In this paragraph "the relevant regulations", as respects any item, means regulations under section 26(3) and (4) providing for adjustments relating to the deduction of input tax to be made as respects that item.

*Meaning of "development financier"*

14(1) This paragraph explains for the purposes of paragraphs 12 to 17 what is meant, in relation to the grantor of any land, by a development financier.

(2) A "development financier" means a person who—

(*a*) has provided finance for the grantor's development of the land, or

(*b*) has entered into any arrangement to provide finance for the grantor's development of the land,

with the intention or in the expectation that the land will become exempt land or continue (for a period at least) to be exempt land.

(3) For the purposes of this paragraph references to finance being provided for the grantor's development of the land are to doing (directly or indirectly) any one or more of the following—

(*a*) providing funds for meeting the whole or any part of the cost of the grantor's development of the land,

(*b*) procuring the provision of such funds by another,

(*c*) providing funds for discharging (in whole or in part) any liability that has been or may be incurred by any person for or in connection with the raising of funds to meet the cost of the grantor's development of the land, and

(*d*) procuring that any such liability is or will be discharged (in whole or in part) by another.

(4) For the purposes of this paragraph references to providing funds for a particular purpose are to—

(*a*) the making of a loan of funds that are or are to be used for that purpose,

(*b*) the provision of any guarantee or other security in relation to such a loan,
(*c*) the provision of any of the consideration for the issue of any shares or other securities issued wholly or partly for raising those funds,
(*d*) the provision of any consideration for the acquisition by any person of any shares or other securities issued wholly or partly for raising those funds, or
(*e*) any other transfer of assets or value as a consequence of which any of those funds are made available for that purpose.
(5) For the purposes of this paragraph references to the grantor's development of the land are to the acquisition by the grantor of the asset which—
(*a*) consists in the land or a building or part of a building on the land, and
(*b*) is, or (as the case may be) was intended or expected to be, a relevant capital item in relation to the grantor (within the meaning of paragraph 13).
(6) For this purpose the reference to the acquisition of the asset includes—
(*a*) its construction or reconstruction, and
(*b*) the carrying out in relation to it of any other works by reference to which it is, or was intended or expected to be, a relevant capital item (within the meaning of paragraph 13).
(7) In this paragraph "arrangement" means any agreement, arrangement or understanding (whether or not legally enforceable).

*Meaning of "exempt land": basic definition*
15(1) This paragraph explains for the purposes of paragraphs 12 to 17 what is meant by exempt land.
(2) Land is exempt land if, at any time before the end of the relevant adjustment period as respects that land—
(*a*) a relevant person is in occupation of the land, and
(*b*) that occupation is not wholly, or substantially wholly, for eligible purposes.
(3) Each of the following is a relevant person—
(*a*) the grantor,
(*b*) a person connected with the grantor,
(*c*) a development financier, and
(*d*) a person connected with a development financier.
(3A) Where a person ("P") is in occupation of the land at any time before the end of the relevant adjustment period as respects that land, P is treated for the purposes of sub-paragraph (2) as not in occupation of the land at that time if—
(*a*) the building occupation conditions are met at that time, or
(*b*) P's occupation of the land arises solely by reference to any automatic teller machine of P.
(4) The relevant adjustment period as respects any land is the period provided in the relevant regulations (within the meaning of paragraph 13) for the making of adjustments relating to the deduction of input tax as respects the land.
(5) For the purposes of this paragraph any question whether a person's occupation of any land is "wholly, or substantially wholly," for eligible purposes is to be decided by reference to criteria specified in a public notice.

*Meaning of "exempt land": the building occupation conditions*
15A(1) For the purposes of paragraph 15(3A), the building occupation conditions are met at any time ("the time in question") if—
(*a*) the grant consists of or includes the grant of a relevant interest in a building, and
(*b*) P does not, at the time in question, occupy—
(i) any part of the land that is not a building, or
(ii) more than [the maximum allowable percentage of any relevant building.

(2) For the purposes of sub-paragraph (1)(*b*)(i) and (ii) occupation by a person connected with P is treated as occupation by P [if that occupation is not wholly, or substantially wholly, for eligible purposes.

(3) For the purposes of sub-paragraph (1)(*b*)(i) occupation by a person of—

(*a*) land used for the parking of cars or other vehicles, or

(*b*) land that is within the curtilage of a building,

is disregarded if the occupation is ancillary to the occupation by that person of a building.

(4) In sub-paragraph (1)(*b*)(ii)—

"the maximum allowable percentage" means—

(*a*) 2% where P is the grantor or a person connected with the grantor, and

(*b*) 10% where P is a development financier or a person connected with a development financier (but not also the grantor or a person connected with the grantor), and

"relevant building"—

(*a*) means a building any relevant interest in which is included in the grant, other than any part of such a building in which, immediately before the grant, neither the grantor nor any person connected with the grantor held a relevant interest, but

(*b*) does not include any building P's occupation of which arises solely by reference to any automatic teller machine of P.

(5) The way in which occupation by a person of a building is measured for the purposes of sub-paragraph (1)(*b*)(ii) is to be determined in accordance with conditions specified in a public notice.

(6) In this paragraph "relevant interest", in relation to a building or part of a building, means any interest in, right over or licence to occupy the building or part.

(6A) Subparagraph (5) of paragraph 15 (determination of whether occupation "wholly, or substantially wholly" for eligible purposes to be by reference to criteria in public notice) applies for the purposes of this paragraph.][2]

(7) Subparagraphs (4) to (7) of paragraph 18 (meaning of "building") apply for the purposes of this paragraph.

*Meaning of "exempt land": eligible purposes*

16(1) This paragraph explains what is meant for the purposes of paragraph 15 by a person occupying land for eligible purposes.

(2) A person cannot occupy land at any time for eligible purposes unless the person is a taxable person at that time (but this rule is qualified by sub-paragraphs (5) and (6)).

(3) A taxable person occupies land for eligible purposes so far as the occupation is for the purpose of making creditable supplies (but this rule is qualified by sub-paragraphs (5) to (7)).

(4) "Creditable supplies" means supplies which—

(*a*) are or are to be made in the course or furtherance of a business carried on by the person, and

(*b*) are supplies of such a description that the person would be entitled to a credit for any input tax wholly attributable to those supplies.

(5) Any occupation of land by a body to which section 33 applies (local authorities etc) is occupation of the land for eligible purposes so far as the occupation is for purposes other than those of a business carried on by the body.

(6) Any occupation of land by a Government department (within the meaning of section 41) is occupation of the land for eligible purposes.

(7) . . .

(8) If a person occupying land—

(*a*) holds the land in order to put it to use for particular purposes, and

(*b*) does not occupy it for any other purpose,

the person is treated for the purposes of this paragraph, for so long as the conditions in paragraphs (a) and (b) continue to be met, as occupying the land for the purposes for which the person proposes to use it.

(9) If land is in the occupation of a person ("A") who—

(*a*) is not a taxable person, but

(*b*) is a person whose supplies are treated for the purposes of this Act as made by another person ("B") who is a taxable person,

the land is treated for the purposes of this paragraph as if A and B were a single taxable person.

(10) For the purposes of this paragraph a person occupies land—

(*a*) whether the person occupies it alone or together with one or more other persons, and

(*b*) whether the person occupies all of the land or only part of it.

*Scope of the option*

18(1) An option to tax has effect in relation to the particular land specified in the option.

(2) If an option to tax is exercised in relation to—

(*a*) a building, or

(*b*) part of a building,

the option has effect in relation to the whole of the building and all the land within its curtilage.

(3) If an option to tax—

(*a*) is exercised in relation to any land, but

(*b*) is not exercised by reference to a building or part of a building,

the option is nonetheless taken to have effect in relation to any building which is (or is to be) constructed on the land (as well as in relation to land on which no building is constructed).

(4) For the purposes of this paragraph—

(*a*) buildings linked internally or by a covered walkway, and

(*b*) complexes consisting of a number of units grouped around a fully enclosed concourse,

are treated as a single building.

(5) But for those purposes—

(*a*) buildings which are linked internally are not treated as a single building if the internal link is created after the buildings are completed, and

(*b*) buildings which are linked by a covered walkway are not treated as a single building if the walkway starts to be constructed after the buildings are completed.

(6) In this paragraph a "building" includes—

(*a*) an enlarged or extended building,

(*b*) an annexe to a building, and

(*c*) a planned building.

(7) In this paragraph "covered walkway" does not include a covered walkway to which the general public has reasonable access.][1]

*The day from which the option has effect*

19(1) An option to tax has effect from—

(*a*) the start of the day on which it is exercised, or

(*b*) the start of any later day specified in the option.

(2) But if, when an option to tax is exercised, the person exercising the option intends to revoke it in accordance with paragraph 23 (revocation of option: the "cooling off" period), the option is treated for the purposes of this Act as if it had never been exercised.

(3) An option to tax may be revoked in accordance with paragraph 22(2) or (3) and any of paragraphs 23 to 25, but not otherwise.

(4) This paragraph needs to be read with—

(*a*) paragraph 20 (requirement to notify the option), and

(*b*) paragraph 29(3) (application for prior permission in the case of an exempt grant before the exercise of an option to tax).

*Requirement to notify the option*

20(1) An option to tax has effect only if—

(*a*) notification of the option is given to the Commissioners within the allowed time, and

(*b*) that notification is given together with such information as the Commissioners may require.

(2) Notification of an option is given within the allowed time if (and only if) it is given—

(*a*) before the end of the period of 30 days beginning with the day on which the option was exercised, or

(*b*) before the end of such longer period beginning with that day as the Commissioners may in any particular case allow.

(3) The Commissioners may publish a notice for the purposes of this paragraph specifying—

(*a*) the form in which a notification under this paragraph must be made, and

(*b*) the information which a notification under this paragraph must contain.

(4) Notification of an option to tax does not need to be given under this paragraph if the option is treated as exercised in accordance with paragraph 29(3).

*Pre-option exempt grants: requirement for prior permission before exercise of option to tax*

28(1) This paragraph applies if—

(*a*) a person wants to exercise an option to tax any land with effect from a particular day,

(*b*) at any time ("the relevant time") before that day the person has made, makes or intends to make an exempt supply to which any grant in relation to the land gives rise, and

(*c*) the relevant time is within the period of 10 years ending with that day.

(2) The person may exercise the option to tax the land only if—

(*a*) the conditions specified in a public notice are met in relation to the land, or

(*b*) the person gets the prior permission of the Commissioners (but see also paragraph 30).

(3) The Commissioners must refuse their permission if they are not satisfied that there would be a fair and reasonable attribution of relevant input tax to relevant supplies.

(4) For this purpose—

"relevant input tax" means input tax incurred, or likely to be incurred, in relation to the land, and

"relevant supplies" means supplies to which any grant in relation to the land gives rise which would be taxable (if the option has effect).

(5) In deciding whether there would be a fair and reasonable attribution of relevant input tax to relevant supplies, the Commissioners must have regard to all the circumstances of the case.

(6) But they must have regard in particular to—

(*a*) the total value of any exempt supply to which any grant in relation to the land gives rise and which is made or to be made before the day from which the person wants the option to have effect,

(*b*) the expected total value of any supply to which any grant in relation to the land gives rise that would be taxable (if the option has effect), and

(*c*) the total amount of input tax incurred, or likely to be incurred, in relation to the land.

*Paragraph 28: application for prior permission*

29(1) An application for the prior permission of the Commissioners under paragraph 28 must—

(*a*) be made in a form specified in a public notice,

(*b*) contain a statement by the applicant certifying which (if any) of the conditions specified in the public notice under paragraph 28(2)(*a*) are met in relation to the land, and

(*c*) contain other information specified in a public notice.

(2) The Commissioners may specify conditions subject to which their permission is given and, if any of those conditions are broken, they may treat the application as if it had not been made.

(3) If the applicant (*a*) gets the prior permission of the Commissioners, A is, as a result of this sub-paragraph, treated for the purposes of this Part of this Schedule as if A had exercised the option to tax the land with effect from—

(*a*) the start of the day on which the application was made, or

(*b*) the start of any later day specified in the application.

*Paragraph 28: purported exercise where prior permission not obtained*

30(1) This paragraph applies if—

(*a*) an option to tax was purportedly exercised in a case where, before the option could be exercised, the prior permission of the Commissioners was required under paragraph 28, and

(*b*) notification of the purported option was purportedly given to the Commissioners in accordance with paragraph 20.

(2) The Commissioners may, in the case of any such option, subsequently dispense with the requirement for their prior permission to be given under paragraph 28.

(3) If the Commissioners dispense with that requirement, a purported option—

(*a*) is treated for the purposes of this Part of this Schedule as if it had instead been validly exercised, and

(*b*) has effect in accordance with paragraph 19.

*Timing of grant and supplies*

31(1) This paragraph applies if—

(*a*) an option to tax is exercised in relation to any land,

(*b*) a grant in relation to the land would otherwise be taken to have been made (whether in whole or in part) before the time when the option has effect, and

(*c*) the grant gives rise to supplies which are treated for the purposes of this Act as taking place after that time.

(2) For the purposes of this Part of this Schedule, the option to tax has effect, in relation to those supplies, as if the grant had been made after that time.

*Benefit of consideration for grant accruing to a person other the grantor*

40(1) This paragraph applies if the benefit of the consideration for the grant of an interest in, right over or licence to occupy land accrues to a person ("the beneficiary") other than the person making the grant.

(2) The beneficiary is to be treated for the purposes of this Act as the person making the grant.

(3) So far as any input tax of the person actually making the grant is attributable to the grant, it is to be treated for the purposes of this Act as input tax of the beneficiary.

23 Reference was made to the paragraphs of Schedule 10 in force up to 1 June 2008 as follows:

*Election to waive exemption*

2(1) Subject to sub-paragraphs (2), (3) and (3A) and paragraph 3 below, where

an election under this paragraph has effect in relation to any land, if and to the extent that any grant made in relation to it at a time when the election has effect by the person who made the election, or where that person is a body corporate by that person or a relevant associate, would (apart from this sub-paragraph) fall within Group 1 of Schedule 9, the grant shall not fall within that Group.

(2) Sub-paragraph (1) above shall not apply in relation to a grant if the grant is made in relation to—

(a) a building or part of a building intended for use as a dwelling or number of dwellings or solely for a relevant residential purpose; or

(b) a building or part of a building intended for use solely for a relevant charitable purpose, other than as an office;

[(c) a pitch for a residential caravan;

(d) facilities for the mooring of a residential houseboat.

(2A) Subject to the following provisions of this paragraph, where—

(a) an election has been made for the purposes of this paragraph in relation to any land, and

(b) a supply is made that would fall, but for sub-paragraph (2)(a) above, to be treated as excluded by virtue of that election from Group 1 of Schedule 9,

then, notwithstanding sub-paragraph (2)(a) above, that supply shall be treated as so excluded if the conditions in sub-paragraph (2B) below are satisfied.

(2B) The conditions mentioned in sub-paragraph (2A) above are—

(a) that an agreement in writing made, at or before the time of the grant, between—

(i) the person making the grant, and

(ii) the person to whom it is made,

declares that the election is to apply in relation to the grant; and

(b) that the person to whom the supply is made intends, at the time when it is made, to use the land for the purpose only of making a supply which is zero-rated by virtue of paragraph (b) of item 1 of Group 5 of Schedule 8.]

(3) Sub-paragraph (1) above shall not apply in relation to a grant if—

(a) the grant is made to a [relevant housing association] and the association has given to the grantor a certificate stating that the land is to be used (after any necessary demolition work) for the construction of a building or buildings intended for use as a dwelling or number of dwellings or solely for a relevant residential purpose; or

(b) the grant is made to an individual and the land is to be used for the construction, otherwise than in the course or furtherance of a business carried on by him, of a building intended for use by him as a dwelling.

(3AA) Where an election has been made under this paragraph in relation to any land, a supply shall not be taken by virtue of that election to be a taxable supply if—

(a) the grant giving rise to the supply was made by a person ("the grantor") who was a developer of the land; and

(b) at the time of the grant, [or at the time it was treated as made by virtue of [sub-paragraphs (3AAA) or (3B)] below,] it was the intention or expectation of—

(i) the grantor, or

(ii) a person responsible for financing the grantor's development of the land for exempt use,

that the land would become exempt land (whether immediately or eventually and whether or not by virtue of the grant) or, as the case may be, would continue, for a period at least, to be such land.

(3AAA) For the purposes of sub-paragraph (3AA) above a grant (the original grant) in relation to land made on or after 19th March 1997 and before 10th March 1999 shall be treated as being made on 10th March 1999 if at the time of the original grant—

(a) the grantor or a person responsible for financing the grantor's development of the land for exempt use, intended or expected that the

land or a building or part of a building on, or to be constructed on, that land would become an asset falling in relation to—

(i) the grantor, or

(ii) any person to whom that land, building or part of a building was to be transferred either in the course of a supply or in the course of a transfer of a business or part of a business as a going concern,

to be treated as a capital item for the purposes of any regulations made under section 26(3) and (4) providing for adjustments relating to the deduction of input tax to be made as respects that item, and

(b) the land or a building or part of a building on, or to be constructed on, that land had not become such an asset.]

[(3A) . . .]

(3B) Where a supply is made by a person other than the person who made the grant giving rise to it, then for the purposes of sub-paragraph (3AA) above—

(a) the person making the supply shall be treated as the person who made the grant that gave rise to that supply; and

(b) the grant shall be treated as made at the time when that person made his first supply arising from the grant.

(4) Subject to the following provisions of this paragraph, no input tax on any supply or importation which, apart from this sub-paragraph, would be allowable by virtue of the operation of this paragraph shall be allowed if the supply or importation took place before the first day for which the election in question has effect.

(5) Subject to sub-paragraph (6) below, sub-paragraph (4) above shall not apply where the person by whom the election was made—

(a) has not, before the first day for which the election has effect, made in relation to the land in relation to which the election has effect any grant falling within Group 1 of Schedule 9; or

(b) has before that day made in relation to that land a grant or grants so falling but the grant, or all the grants—

(i) were made in the period beginning with 1st April 1989 and ending with 31st July 1989; and

(ii) would have been taxable supplies but for the amendments made by Schedule 3 to the Finance Act 1989.

(6) Sub-paragraph (5) above does not make allowable any input tax on supplies or importations taking place before 1st August 1989 unless—

(a) it is attributable by or under regulations to grants made by the person on or after 1st April 1989 which would have been taxable supplies but for the amendments made by Schedule 3 to the Finance Act 1989, and

(b) the election has effect from 1st August 1989.

(7) Sub-paragraph (4) above shall not apply in relation to input tax on grants or other supplies which are made in the period beginning with 1st April 1989 and ending with 31st July 1989 [if]—

(a) they would have been zero-rated by virtue of item 1 or 2 of Group 5 of Schedule 8 or exempt by virtue of item 1 of Group 1 of Schedule 9 but for the amendments made by Schedule 3 to the Finance Act 1989; and

(b) the election has effect from 1st August 1989.

(8) Sub-paragraph (4) above shall not apply in relation to any election having effect from any day on or after 1st January 1992, except in respect of the input tax on a supply or importation which took place before 1st August 1989.

(9) Where a person has made an exempt grant in relation to any land and has made an election in relation to that land which has effect from any day before 1st January 1992, he may apply to the Commissioners for sub-paragraph (4) above to be disapplied in respect of any input tax on a supply or importation which took place on or after 1st August 1989, but the Commissioners shall only permit the disapplication of that sub-paragraph if they are satisfied, having regard to all the circumstances of the case, and in particular to—

(a) the total value of—

(i) exempt grants made;

(ii) taxable grants made or expected to be made, in relation to the land; and

(b) the total amount of input tax in relation to the land which had been incurred before the day from which the election had effect,

that a fair and reasonable attribution of the input tax mentioned in paragraph (b) above will be secured.

3(1) An election under paragraph 2 above shall have effect—

(a) subject to the following provisions of this paragraph, from the beginning of the day on which the election is made or of any later day specified in the election; or

(b) where the election was made before 1st November 1989, from the beginning of 1st August 1989 or of any later day so specified.

(2) An election under paragraph 2 above shall have effect in relation to any land specified, or of a description specified, in the election.

(3) Where such an election is made in relation to, or to part of, a building (or planned building), it shall have effect in relation to the whole of the building and all the land within its curtilage and for the purposes of this sub-paragraph buildings linked internally or by a covered walkway, and [complexes consisting of a number of units grouped around a fully enclosed concourse], shall be taken to be a single building (if they otherwise would not be).

(4) Subject to sub-paragraph (5) below, an election under paragraph 2 above shall be irrevocable.

(5) Where—

(a) the time that has elapsed since the day on which an election had effect is—

(i) less than 3 months; or

(ii) more than 20 years;

(b) in a case to which paragraph (a)(i) above applies—

(i) no tax has become chargeable and no credit for input tax has been claimed by virtue of the election; and

(ii) no grant in relation to the land which is the subject of the election has been made which, by virtue of being a supply of the assets of a business to a person to whom the business (or part of it) is being transferred as a going concern, has been treated as neither a supply of goods nor a supply of services; and

(c) the person making the election obtains the written consent of the Commissioners;

the election shall be revoked, in a case to which paragraph (a)(i) above applies, from the date on which it was made, and in a case to which paragraph (a)(ii) above applies, from the date on which the written consent of the Commissioners is given or such later date as they may specify in their written consent.

(5A) Where—

(a) an election under paragraph 2 above is made in relation to any land, and

(b) apart from this sub-paragraph, a grant in relation to that land would be taken to have been made (whether in whole or in part) before the time when the election takes effect,

that paragraph shall have effect, in relation to any supplies to which the grant gives

rise which are treated for the purposes of this Act as taking place after that time, as if the grant had been made after that time.

(5B) Accordingly, the references in paragraph 2(9) above and sub-paragraph (9) below to grants being exempt or taxable shall be construed as references to supplies to which a grant gives rise being exempt or, as the case may be, taxable.]

(6) An election under paragraph 2 above shall have effect after 1st March 1995 only if—

(a) in the case of an election made before that date—

(i) it also had effect before that date; or

(ii) written notification of the election is given to the Commissioners not later than the end of the period of 30 days beginning with the day on which the election was made, or not later than the end of such longer period beginning with that day as the Commissioners may in any particular case allow, together with such information as the Commissioners may require;

(b) in the case of an election made on or after that date—

(i) written notification of the election is given to the Commissioners not later than the end of the period of 30 days beginning with the day on which the election is made, or not later than the end of such longer period beginning with that day as the Commissioners may in any particular case allow, together with such information as the Commissioners may require; and

(ii) in a case in which sub-paragraph (9) below requires the prior written permission of the Commissioners to be obtained, that permission has been given.

(7) In paragraph 2 above and this paragraph "relevant associate", in relation to a body corporate by which an election under paragraph 2 above has been made in relation to any building or land, means a body corporate which under section 43—

(a) was treated as a member of the same group as the body corporate by which the election was made at the time when the election first had effect;

(b) has been so treated at any later time when the body corporate by which the election was made had an interest in, right over or licence to occupy the building or land (or any part of it); or

(c) has been treated as a member of the same group as a body corporate within paragraph (a) or (b) above or this paragraph at a time when that body corporate had an interest in, right over or licence to occupy the building or land (or any part of it).

(7A) In paragraph 2 above—

(a) "houseboat" means a houseboat within the meaning of Group 9 of Schedule 8; and

(b) a houseboat is not a residential houseboat if residence in it throughout the year is prevented by the terms of a covenant, statutory planning consent or similar permission.

(8) In paragraph 2 above "relevant housing association" means—

(a) a registered social landlord within the meaning of Part I of the Housing Act 1996,

(b) a registered housing association within the meaning of the Housing Associations Act 1985 (Scottish registered housing associations), or

(c) a registered housing association within the meaning of Part II of the Housing (Northern Ireland) Order 1992 (Northern Irish registered housing associations).

(8A) . . .]

(9) Where a person who wishes to make an election in relation to any land (the relevant land) to have effect on or after 1st January 1992, has made, makes or intends to make, an exempt grant in relation to the relevant land at any time between 1st August 1989 and before the beginning of the day from which he wishes an election in relation to the relevant land to have effect, he shall not make an election in relation to the relevant land unless [the conditions for automatic permission specified in a notice published by the Commissioners are met or] he obtains the prior written permission of the Commissioners, who shall only give such permission if they are satisfied having regard to all the circumstances of the case and in particular to—

(a) the total value of exempt grants in relation to the relevant land made or to be made before the day from which the person wishes his election to have effect;

(b) the expected total value of grants relating to the relevant land that would be taxable if the election were to have effect; and

(c) the total amount of input tax which has been incurred on or after 1st August 1989 or is likely to be incurred in relation to the relevant land,

that there would be secured a fair and reasonable attribution of the input tax mentioned in paragraph (c) above to grants in relation to the relevant land which, if the election were to have effect, would be taxable.

3A**(**1) This paragraph shall have effect for the construction of paragraph 2(3AA), (3AAA) and (3B) above.

(2) For the purposes of paragraph 2(3AA), (3AAA) and (3B) above, a grant made by any person in relation to any land is a grant made by a developer of that land if—

(a) the land or building or part of a building on that land is an asset falling in relation to that person to be treated as a capital item for the purposes of any regulations under section 26(3) and (4) providing for adjustments relating to the deduction of input tax; or

(b) that person or a person financing his development of the land for exempt use intended or expected that the land or a building or part of a building on, or to be constructed on, that land would become an asset falling in relation to—

(i) the grantor, or

(ii) any person to whom it was to be transferred either in the course of a supply or in the course of a transfer of a business or part of a business as a going concern,

to be treated as a capital item for the purposes of the regulations referred to in sub-paragraph (a) above,

unless the grant was made at a time falling after the expiry of the period over which such regulations require or allow adjustments relating to the deduction of input tax to be made as respects that item.

(2A) For the purposes of paragraph 2(3AA) where—

(a) by virtue of paragraph 2(3B), a person is treated as making the grant of the land giving rise to a supply made by him; and

(b) the grant is not a grant made by a developer of that land within sub-paragraph (2) above only because it is treated as made at a time falling after the expiry of the period for adjustments of input tax by virtue of regulations made under section 26(3) and (4),

the grant shall be treated as having been made by a developer of the land to which the grant relates.

(3) In paragraph 2(3AA), (3AAA) and (3B) above and this paragraph the references to a person's being responsible for financing the grantor's development of the land for exempt use are references to his being a person who, with the intention or in the expectation that the land will become, or continue (for a period at least) to be, exempt land—

(a) has provided finance for the grantor's development of the land; or

(b) has entered into any agreement, arrangement or understanding (whether or not legally enforceable) to provide finance for the grantor's development of the land.

(4) In sub-paragraph (3)(a) and (b) above the references to providing finance for the grantor's development of the land are references to doing any one or more of the following, that is to say—

(a) directly or indirectly providing funds for meeting the whole or any part of the cost of the grantor's development of the land;

(b) directly or indirectly procuring the provision of such funds by another;

(c) directly or indirectly providing funds for discharging, in whole or in part, any liability that has been or may be incurred by any person for or in connection with the raising of funds to meet the cost of the grantor's development of the land;

(d) directly or indirectly procuring that any such liability is or will be discharged, in whole or in part, by another.

(5) The references in sub-paragraph (4) above to the provision of funds for a purpose referred to in that sub-paragraph include references to—

(a) the making of a loan of funds that are or are to be used for that purpose;

(b) the provision of any guarantee or other security in relation to such a loan;

(c) the provision of any of the consideration for the issue of any shares or other securities issued wholly or partly for raising those funds; . . .

(cc) the provision of any consideration for the acquisition by any person of any shares or other securities described in paragraph (c) above; or

(d) any other transfer of assets or value as a consequence of which any of those funds are made available for that purpose.

(6) In sub-paragraph (4) above the references to the grantor's development of the land are references to the acquisition by the grantor of the asset which—

(a) consists in the land or a building or part of a building on the land, and

(b) in relation to the grantor falls or, as the case may be, is intended or expected to fall to be treated for the purposes mentioned in sub-paragraph (2)(a) or (b) above as a capital item;

and for the purposes of this sub-paragraph the acquisition of an asset shall be taken to include its construction or reconstruction and the carrying out in relation to that asset of any other works by reference to which it falls or, as the case may be, is intended or expected to fall, to be treated for the purposes mentioned in sub-paragraph (2)(a) or (b) above as a capital item.

(7) For the purposes of paragraph 2(3AA), (3AAA) and (3B) above and this paragraph land is exempt land if, [at a time falling before the expiry of the period provided in regulations made under section 26(3) and (4) for the making of adjustments relating to the deduction of input tax as respects that land—

(a) the grantor,

(b) a person responsible for financing the grantor's development of the land for exempt use, or

(c) a person connected with the grantor or with a person responsible for financing the grantor's development of the land for exempt use,

is in occupation of the land without being in occupation of it wholly or mainly for eligible purposes.

(8) For the purposes of this paragraph, but subject to sub-paragraphs (10) and (12) below, a person's occupation at any time of any land is not capable of being occupation for eligible purposes unless he is a taxable person at that time.

(9) Subject to sub-paragraphs (10) to (12) below, a taxable person in occupation of any land shall be taken for the purposes of this paragraph to be in occupation of that land for eligible purposes to the extent only that his occupation of that land is for the purpose of making supplies which—

(a) are or are to be made in the course or furtherance of a business carried on by him; and

(b) are supplies of such a description that any input tax of his which was wholly attributable to those supplies would be input tax for which he would be entitled to a credit.

(10) For the purposes of this paragraph—

(a) occupation of land by a body to which section 33 applies is occupation of the land for eligible purposes to the extent that the body occupies the land for purposes other than those of a business carried on by that body; and

(b) any occupation of land by a Government department (within the meaning of section 41) is occupation of the land for eligible purposes.

(11) For the purposes of this paragraph, where land of which any person is in occupation—

(a) is being held by that person in order to be put to use by him for particular purposes, and

(b) is not land of which he is in occupation for any other purpose,

that person shall be deemed, for so long as the conditions in paragraphs (a) and (b) above are satisfied, to be in occupation of that land for the purposes for which he proposes to use it.

(12) Sub-paragraphs (8) to (11) above shall have effect where land is in the occupation of a person who—

(a) is not a taxable person, but

(b) is a person whose supplies are treated for the purposes of this Act as supplies made by another person who is a taxable person,

as if the person in occupation of the land and that other person were a single taxable person.

(13) For the purposes of this paragraph a person shall be taken to be in occupation of any land whether he occupies it alone or together with one or more other persons and whether he occupies all of that land or only part of it.

(14) Any question for the purposes of this paragraph whether one person is connected with another shall be determined in accordance with section 839 of the Taxes Act.

**4**

. . .

*Developers of certain non-residential buildings etc.*

5(1) Paragraph 6 below shall apply—

(a) on the first occasion during the period beginning with the day when the construction of a building or work within sub-paragraph (2) below is first planned and ending 10 years after the completion of the building or work on which a person who is a developer in relation to the building or work—

(i) grants an interest in, right over or licence to occupy the building or work (or any part of it) which is an exempt supply; or

(ii) is in occupation of the building, or uses the work (or any part of it) when not a fully taxable person (or, if a person treated under section 43 as a member of a group when the representative member is not a fully taxable person); or

(b) if construction commenced before 1st March 1995 and the period referred to in paragraph (a) above has not then expired, on 1st March 1997;

whichever is the earlier.

(2) Subject to sub-paragraph (3) [and (3A)] below, the buildings and works within this sub-paragraph are—

(a) any building neither designed as a dwelling or number of dwellings nor intended for use solely for a relevant residential purpose or a relevant charitable purpose; and

(b) any civil engineering work, other than a work necessary for the

development of a permanent park for residential caravans.

(3) A building or work is not within sub-paragraph (2) above if—

(a) construction of it was commenced before 1st August 1989 [or after 28th February 1995]; or

(b) a grant of the fee simple in it which falls within paragraph (a)(ii) or (iv) of item 1 of Group 1 of Schedule 9 has been made before the occasion concerned.

(3A) A building or work which would, apart from this sub-paragraph, fall within sub-paragraph (2) above is not within that sub-paragraph if—

(a) construction of it was commenced before 1st March 1995 but had not been completed by that date; and

(b) the developer—

(i) makes no claim after that date to credit for input tax, entitlement to which is dependent upon his being treated in due course as having made a supply by virtue of paragraph 6 below; and

(ii) has made no such claim prior to that date; or

(iii) accounts to the Commissioners for a sum equal to any such credit that has previously been claimed.

(4) For the purposes of this paragraph a taxable person is, in relation to any building or work, a fully taxable person throughout a prescribed accounting period if—

(a) at the end of that period he is entitled to credit for input tax on all supplies to, and [acquisitions and] importations by, him in the period (apart from any on which input tax is excluded from credit by virtue of section 25(7); or

(b) the building or work is not used by him at any time during the period in, or in connection with, making any exempt supplies of goods or services.

(5) Subject to sub-paragraph (6) below, in this paragraph and paragraph 6 below "developer", in relation to a building or work, means any person who—

(a) constructs it;

(b) orders it to be constructed; or

(c) finances its construction,

with a view to granting an interest in, right over or licence to occupy it (or any part of it) or to occupying or using it (or any part of it) for his own purposes.

(6) Where—

(a) a body corporate treated under section 43 as a member of a group is a developer in relation to a building or work, and

(b) it grants an interest in, right over or licence to occupy the building or work (or any part of it) to another body corporate which is treated under that section as a member of the group,

then, for the purposes of this paragraph and paragraph 6 below, as from the time of the grant any body corporate such as is mentioned in sub-paragraph (7) below shall be treated as also being a developer in relation to the building or work.

(7) The bodies corporate referred to in sub-paragraph (6) above are any which under section 43—

(a) was treated as a member of the same group as the body corporate making the grant at the time of the grant; or

(b) has been so treated at any later time when the body corporate by which the grant was made had an interest in, right over or licence to occupy the building or work (or any part of it); or

(c) has been treated as a member of the same group as a body corporate within paragraph (a) or (b) above or this paragraph at a time when that body corporate had an interest in, right over or licence to occupy the building or work (or any part of it).

(8) Subject to sub-paragraph (10) below, subparagraphs (1), (2) and (3A) to (7) above shall apply in relation to any of the following reconstructions, enlargements or extensions—

(a) a reconstruction, enlargement or extension of an existing building which is commenced on or after 1st January 1992 [and before 1st March 1995] and—

(i) which is carried out wholly or partly on land (hereafter referred to as new building land) adjoining the curtilage of the existing building, or

(ii) as a result of which the gross external floor area of the reconstructed, enlarged or extended building (excluding any floor area on new building land) exceeds the gross external floor area of the existing building by not less than 20 per cent of the gross external floor area of the existing building;

(b) a reconstruction of an existing building which is commenced on or after 1st January 1992 [and before 1st March 1995] and in the course of which at least 80 per cent of the area of the floor structures of the existing building are removed;

(c) a reconstruction, enlargement or extension of a civil engineering work which is commenced on or after 1st January 1992 [and before 1st March 1995] and which is carried out wholly or partly on land (hereafter referred to as new land) adjoining the land on or in which the existing work is situated,

as if references to the building or work were references to the reconstructed, enlarged or extended building or work and as if references to construction were references to reconstruction, enlargement or extension.

(9) For the purposes of subparagraph (8)(a) above, extensions to an existing building shall include the provision of any annex having internal access to the existing building.

(10) Subparagraphs (1) and (2) and subparagraphs (3A) to (7) above shall not apply to a reconstruction, enlargement or extension—

(a) falling within sub-paragraph (8)(a)(i) or (ii) or (c) above where the developer has held an interest in at least 75 per cent of all of the land on which the reconstructed, enlarged or extended building or work stands, or is constructed, throughout the period of 10 years ending with the last day of the prescribed accounting period during which the reconstructed, enlarged or extended building or work becomes substantially ready for occupation or use; or

(b) to the extent that it falls within sub-paragraph (8)(a)(ii) above or falling within sub-paragraph (8)(b) above, where the interest in, right over or licence to occupy the building concerned (or any part of it) has already been treated as supplied to and by the developer under paragraph 6(1) below.

6(1) Where this paragraph applies the interest in, right over or licence to occupy the buildings or work (or any part of it) held by the developer shall be treated for the purposes of this Act as supplied to the developer for the purpose of a business carried on by him and supplied by him in the course or furtherance of the business on the last day of the prescribed accounting period during which it applies, or, if later, of the prescribed accounting period during which the building or work becomes substantially ready for occupation or use.

(2) The supply treated as made by sub-paragraph (1) above shall be taken to be a taxable supply and the value of the supply shall be the aggregate of—

(a) the value of grants relating to the land on which the building or work is constructed made or to be made to the developer, but excluding, in a case where construction of the building or work in question commenced before 1st January 1992, the value of any grants to be made for consideration in the form of rent the amount of which cannot be ascertained by the developer when the supply is treated as made, and in any other case excluding the value of any—

(i) grants made before the relevant day to the extent that consideration for such grants was in the form of rent, and

to the extent that such rent was properly attributable to a building which has been demolished,

(ii) grants made before the relevant day in respect of a building which has been reconstructed, enlarged or extended so that the reconstruction, enlargement or extension falls within paragraph 5(8)(a)(ii) above, and does not fall also within paragraph 5(8)(b) above, to the extent that consideration for such grants was in the form of rent, and to the extent that such rent was properly attributable to the building as it existed before the commencement of the reconstruction, enlargement or extension,

(iii) grants made before the relevant day in respect of a building which has been so reconstructed that the reconstruction falls within paragraph 5(8)(b) above, to the extent that consideration for such grants was in the form of rent, and to the extent that such rent was properly attributable to the building before the reconstruction commenced,

(iv) grants falling within paragraph (b) of item 1 of Group 1 of Schedule 9, and

(b) the value of all the taxable supplies of goods and services, other than any that are zero-rated, made or to be made for or in connection with the construction of the building or work.

(3) Where the rate of VAT (the lower rate) chargeable on a supply (the construction supply) falling within sub-paragraph (2)(b) above, the value of which is included in the value of a supply (the self-supply) treated as made by sub-paragraph (1) above, is lower than the rate of VAT (the current rate) chargeable on that self-supply, then VAT on the self-supply shall be charged—

(a) on so much of its value as is comprised of the relevant part of the value of the construction supply, at the lower rate; and

(b) on the remainder of its value at the current rate.

(4) For the purposes of sub-paragraph (3)(a) above, the relevant part of the value of the construction supply means—

(a) where the construction supply is a supply of goods, the value of such of those goods as have actually been delivered by the supplier;

(b) where the construction supply is a supply of services, the value of such of those services as have actually been performed by the supplier,

on or before the last day upon which the lower rate is in force.

(5) Where the value of a supply which, apart from this sub-paragraph, would be treated as made by sub-paragraph (1) above would be less than £100,000, no supply shall be treated as made by that sub-paragraph.

(6) For the purposes of sub-paragraph (2)(a)(i) above, the relevant day is the day on which the demolition of the building in question commenced and, for the purposes of sub-paragraph (2)(a)(ii) and (iii) above, the relevant day is the day on which the reconstruction, enlargement or extension in question commenced.

(7) In the application of sub-paragraphs (1) to (6) above to a reconstruction, enlargement or extension to which sub-paragraphs (1) and (2) and [sub-paragraphs (3A) to (7)] of paragraph 5 above apply by virtue of paragraph 5(8) above—

(a) references to the building or work shall be construed as references to the reconstructed enlarged or extended building or work, and references to construction shall be construed as references to reconstruction, enlargement or extension;

(b) the reference in paragraph (a) of sub-paragraph (2) to the value of grants relating to the land on which the building or work is constructed shall be construed as a reference—

(i) in relation to a reconstruction, enlargement or extension of an existing building to the extent that it falls within paragraph 5(8)(a)(i) above and does not fall also within

paragraph 5(8)(b) above, to the value of grants relating to the new building land;

(ii) in relation to a reconstruction, enlargement or extension of an existing building, to the extent that it falls within paragraph 5(8)(a)(ii) above and does not fall also within paragraph 5(8)(b) above, to the value of grants relating to the land on which the existing building stands multiplied by the appropriate fraction;

(iii) in relation to a reconstruction, enlargement or extension to a work falling within paragraph 5(8)(c) above, to the value of grants relating to the new land.

(8) For the purposes of sub-paragraph (7)(b)(ii) above the appropriate fraction shall be calculated by dividing the additional gross external floor area resulting from the reconstruction, enlargement or extension (excluding any floor area on new building land) by the gross external floor area of the reconstructed, enlarged or extended building (excluding any floor area on new building land).

(9) Where this paragraph applies by virtue of paragraph 5(1)(b) above it shall have effect as if—

(a) in sub-paragraph (1)—

(i) the words "(or any part of it)" were omitted; and

(ii) for the words "the last day" to "ready for occupation or use" there were substituted "1st March 1997";

(b) in sub-paragraph (2)(a) the words "or to be made" and the words "to be made" were omitted;

(c) in sub-paragraph (2)(b) the words "or to be made" were omitted; and

(d) sub-paragraph (5) were omitted.]

7(1) Where a developer is a tenant, lessee or licensee and becomes liable to a charge to VAT under paragraph 6(1) above [(except where that paragraph applies by virtue of paragraph 5(1)(b))] in respect of his tenancy, lease or licence he shall notify forthwith in writing his landlord, lessor or licensor (as the case maybe)—

(a) of the date from which the tenancy, lease or licence becomes a developmental tenancy, developmental lease or developmental licence for the purposes of paragraph (b) of item 1 of Group 1 of Schedule 9;

(b) in a case falling within paragraph 5(8)(a)(ii) above, of the appropriate fraction determined in accordance with paragraph 6(8) above.

(2) Where the appropriate fraction has been notified in accordance with sub-paragraph (1)(b) above, any supply made pursuant to the tenancy, lease or licence in question shall be treated as made pursuant to a developmental tenancy, developmental lease or developmental licence (a developmental supply) as if, and only to the extent that, the consideration for the developmental supply is for an amount equal to the whole of the consideration for the supply made pursuant to the tenancy, lease or licence, multiplied by the appropriate fraction.

*General*

8(1) Where the benefit of the consideration for the grant of an interest in, right over or licence to occupy land accrues to a person but that person is not the person making the grant—

(a) the person to whom the benefit accrues shall for the purposes of this Act be treated as the person making the grant; and

(b) to the extent that any input tax of the person actually making the grant is attributable to the grant it shall be treated as input tax of the person to whom the benefit accrues.

(2) Where the consideration for the grant of an interest in, right over or licence to occupy land is such that its provision is enforceable primarily—

(a) by the person who, as owner of an interest or right in or over that land, actually made the grant, or

(b) by another person in his capacity as the owner for the time being of that interest or right or of any other interest or right in or over that land,

that person, and not any person (other than that person) to whom a benefit accrues by virtue of his being a beneficiary under a trust relating to the land, or the proceeds of sale of any land, shall be taken for the purposes of this paragraph to be the person to whom the benefit of the consideration accrues.

(3) Sub-paragraph (2) above shall not apply to the extent that the Commissioners, on an application made in the prescribed manner jointly by—

(a) the person who (apart from this sub-paragraph) would be taken under that sub-paragraph to be the person to whom the benefit of the consideration accrues, and

(b) all the persons for the time being in existence who, as beneficiaries under such a trust as is mentioned in that sub-paragraph, are persons who have or may become entitled to or to a share of the consideration, or for whose benefit any of it is to be or may be applied,

may direct that the benefit of the consideration is to be treated for the purposes of this paragraph as a benefit accruing to the persons falling within paragraph (b) above, and not (unless he also falls within paragraph (b) above) to the person falling within paragraph (a) above.

9 Notes (1) to (6), (10), (12) and (19)] to Group 5 of Schedule 8 and Notes (1), (1A), (2) and (15) to Group 1 of Schedule 9 apply in relation to this Schedule as they apply in relation to their respective Groups but subject to any appropriate modifications.

24 The Value Added Tax (Buildings and Land) Order 2008 introduced the present text of Schedule 10 as follows:

*Citation, commencement and effect*

1(1) This Order may be cited as the Value Added Tax (Buildings and Land) Order 2008 and comes into force on 1st June 2008.

(2) This Order, apart from article 4, has effect in relation to supplies made on or after 1st June 2008.

(3) Article 4 has effect in relation to supplies made on or after 1st June 2020.

(4) Paragraphs (2) and (3) are subject to Schedule 2 (transitional provisions and savings).

*SCHEDULE 2 Transitional Provisions and Savings*

*Part 1 – General provisions*

1 The re-enactment by article 2 of this Order of any provision of Schedule 10 to VATA 1994 in a rewritten form does not affect the continuity of the law.

2 Paragraph 1 does not apply to any change in the law relating to that provision effected by that article.

3 Any thing which—

(a) has been done, or has effect as if done, under or for the purposes of a provision (a "superseded provision") of Schedule 10 to VATA 1994 as it stood before being rewritten, and

(b) is in force or effective immediately before the commencement of the corresponding rewritten provision,

has effect after that commencement as if done under or for the purposes of the rewritten provision.

4 Any reference (express or implied) in any enactment, instrument or document to—

(a) a rewritten provision, or

(b) things done or falling to be done under or for the purposes of a rewritten provision,

is to be read as including, in relation to times, circumstances or purposes in relation to which any corresponding superseded provision had effect, a reference to the superseded provision or (as the case may be) things done or falling to be done under or for the purposes of the superseded provision.

5 Any reference (express or implied) in any enactment, instrument or document to—
(a) a superseded provision, or
(b) things done or falling to be done under or for the purposes of a superseded provision,
is to be read as including, in relation to times, circumstances or purposes in relation to which any corresponding rewritten provision has effect, a reference to the rewritten provision or (as the case may be) things done or falling to be done under or for the purposes of the rewritten provision.
6 Paragraphs 1 to 5 have effect instead of section 17(2) of the Interpretation Act 1978 (but do not affect the operation of any other provision of that Act).
7 Paragraphs 4 and 5 have effect only in so far as the context permits.

25 The Trust Deed of 2006 contained the following provisions:-

Clause 2.1 provides that the Trustee holds the assets invested under irrevocable trust, that a Member shall not be a co-trustee and that the assets of the trust shall be held under the legal control of the Trustee;

Clause 2.3 provides that the SIPP is established to be a registered pension scheme in accordance with the provisions of Part 4 of the Finance Act 2004, with effect from 6 April 2006.

Clauses 3.6, 5.3, 7 and 8 provide for remuneration of the Trustee, the Scheme Administrator and professional advisers.

Clause 9 provides for tax liabilities to be paid out of trust funds.

Clause 13.1 gives the Trustee the "same full and unrestricted powers of investing and changing investments as if they were the beneficial owners of the assets in each Member's Personal Account".

Clause13.7 provides that the Trustee "shall have… all other powers relating to any properties, assets, rights, options, contracts or interests forming part of the Member's Personal Accounts which apply as if the Trustee was absolutely and beneficially entitled to them."

Clause 14 provides for powers to borrow and insure.

Scheduled to the Trust Deed are the Rules of the Scheme. In summary, they define –

"Dependants" to mean the spouse of a Member at the time of death or at the time when the Member's benefits come into payment, any person dependent on the Member financially or because of disability, and any children of the Member under 23 or disabled dependent children at the time of the Member's death;

"Relatives" to mean the Member's spouse, former spouse, parents, grandparents, parents' widows, widowers and spouses' descendants.

Each Member is an individual for whom there is to be "one or more Arrangements to provide benefits in respect of that individual under the Scheme" which consist of "one or more Member's Personal Accounts".

The Rules provide for certain payments to be made by the Trustee to or in respect of a Member, including the purchase of a lifetime annuity and the payment of a pension, lump sum or other specific benefits. The Rules further provide for benefits to be paid by the Trustee to Dependents or

*Submissions – the taxpayer*

26 For Mr and Mrs Hills, Ms Murray submitted that the sale was not a taxable supply, but was instead an exempt supply.

27 The first ground for this submission rested on the proposition that at the time of the sale the Trustee held the Property as trustee of a personal pension upon trust for a sole beneficiary, namely Mrs Patel, and accordingly by virtue of paragraph 40 of schedule 10 the sale of the Property was a grant made not by the Trustee but instead by Mrs Patel as the beneficiary; she, however, had not exercised an option to tax the Property. Ms Murray contended that Mrs Patel was the sole beneficiary as Mr Patel's widow and that there was no question of other beneficiaries coming into existence, such as a Relative or Dependant of Mr Patel (as defined in the plan rules). Thus, in Ms Murray's submission, Mrs Patel was the sole beneficiary – although it was later accepted that the class of potential beneficiaries was not closed. This was referred to as the 'grantor issue'.

28 In *Nell Gwynn House Maintenance Fund Trustees v CEC* [1999] STC 79 at 93, Lord Slynn stated that paragraph 40 (then paragraph 7 of schedule 6A to the VAT Act 1983) was aimed at the situation where the legal title is in one person but the beneficial interest is in another person; it is directed to the case where trustees grant an interest in land on behalf of the beneficiary and the benefit of the consideration for the grant accrues to the beneficiary.

29 Ms Murray said that it was trite law that the sole and only possible beneficiary under a trust is indeed beneficially entitled to that property: see *Saunders v Vautier* (1841) [1835-42] All E.R. 58, cited in *Thorpe v HMRC* [2010] EWCA Civ 339; see in particular paragraph 15 which confirms that the rule in *Saunders v Vautier* can apply to a pension trust. The actual decision in *Thorpe,* Ms Murray said, was distinguishable because Mr Thorpe was not in that case the only possible beneficiary.

30 It was submitted therefore that the benefit of the consideration paid by the appellants to the Trustee for the sale of the Property accrued to Mrs Patel alone, because she was the only possible beneficiary of the pension scheme and therefore the absolute beneficial interest was vested in her. Thus, Mrs Patel, and not the Trustee, was the person making the grant to Mr and Mrs Hills. The option exercised by the Trustee had no effect because that person did not make the grant as required by paragraph 2 of schedule 10 and the sale of the Property was accordingly an exempt supply.

31 The second ground for the conclusion for which Ms Murray contended was that HMRC's prior permission was required before the option to tax could be exercised and that, given that such permission was neither sought not given before the sale, the option could not validly have been exercised and the sale was thus an exempt supply.

32 Paragraph 28 of schedule 10 provides that the prior permission of HMRC is required before an option to tax can be exercised in the following circumstances: (a) where a person wants to exercise an option to tax with effect from a particular day; and (b) at any time in the 10 years before that day, the person has made, makes or intends to make an exempt supply to which any grant in relation to the land gives rise.

33 Paragraphs 12 to 17 of schedule 10 contain anti-avoidance provisions whereby, in summary, an option to tax is disapplied if, inter alia, (i) a grant is made by a

"developer" and (ii) the "exempt land test" is met. This test is met if at the time of the grant the grantor, or a "development financier", intended or expected that the land would become "exempt land".

34 Land becomes "exempt land" if it is occupied by a "relevant person" and the occupation is not wholly, or not substantially wholly, for "eligible purposes". A "relevant person" within the exempt land definition is the grantor, any person connected with the grantor, any development financier, or any person connected with the development financier. And land is occupied for "eligible purposes" if it is occupied for the purposes of making taxable supplies.

35 Following this argument, the Trustee had made exempt supplies in that it exercised an option to tax with effect from 31 March 2004 – see the notification of 10 July 2010 and its sequel on 8 August. In those circumstances, as HMRC correctly advised in their email of 11 October 2010, the Trustee had already made exempt supplies before the option took effect, in that rent was payable as from 30th March 2004 in advance, and it is to be presumed that the rent was duly paid on time.

36 Further or alternatively, even if the Trustee decided to exercise an option to tax with effect from 14th April 2004, it nevertheless intended to make exempt supplies, because when that decision was taken it was about to grant a lease of the Property to Mr and Mrs Patel, and that grant would be caught by the anti-avoidance provisions mentioned above, with the result that an option to tax would be disapplied.

37 The reason why the anti-avoidance provisions would apply (and did apply) to the grant of the lease to Mr and Mrs Patel is because (i) the Property was a capital item in relation to the Trustee; (ii) it was intended and expected by both the Trustee and Mr and Mrs Patel that the Property would be occupied by Mr and Mrs Patel for the purposes of their dental practice, which was not use for "eligible purposes" because it would involve the making of exempt supplies; (iii) Mr and Mrs Patel provided finance for the acquisition of the Property and so they were "development financiers"; (iv) in addition, as settlors of the personal pension plan, Mr and Mrs Patel were connected with the Trustee as the grantor.

38 In this connection, it is not necessary to show in addition that NMPTL knew, or intended, that its supplies to Mr and Mrs Patel would be exempt supplies. This is because for the purposes of paragraph 28 of schedule 10 a person "intends" to make exempt supplies if he intends to make supplies which, objectively, will be exempt.

39 It follows that there was an intention to make exempt supplies which was formed before the lease was entered into on 30th March 2004 and before any date on which NMPTL could have wanted an option to tax to take effect. For either or both of these reasons, HMRC's prior permission was required before an option to tax could be exercised. But permission was neither sought nor given. In particular, in the light of HMRC's advice in the email of 11 October 2011 (which advice was apparently given in ignorance of the fact that the Property had been used for exempt purposes), NMPTL purported to alter the day from which the option to tax was to take effect, rather than to ask for HMRC's prior permission. For this reason also, the sale of the Property was an exempt supply.

*Submissions – HMRC*

40 Ms McCarthy summarised HMRC's submissions as follows:- on the Grantor issue*:* Paragraph 40 of Sch.10 does not apply to the sale of the Property to the Hills and, that being the case, the supplier is the Trustee (not the SIPP beneficiary); on the Prior Permission issue the Trustee was not required to seek prior permission from HMRC

before the option could be exercised.

41 *Prima facie*, the sale of the Property by the Trustee to the Hills is a taxable supply, the Trustee having exercised the option to tax with effect from 30 March 2004 and thereafter selling the Property to the Hills during the currency of the option. The taxpayers, however, seek to rely on paragraph 40 of Schedule 10 and argue that, because Mrs. Patel was the sole surviving beneficiary of the SIPP, the "benefit of the consideration" from the sale of the Property to the Hills "accrued" to Mrs. Patel within the meaning of paragraph 40(1) on the basis of the rule in *Saunders v Vautier*.

42 Pursuant to paragraph 40(2), the Hills argue that Mrs. Patel is therefore to be treated as the person granting the freehold interest in the Property to the Hills; accordingly, this deemed supply would be exempt because it is common ground that Mrs. Patel did not herself opt to tax the Property at any point. This argument is wrong when one considers the rules of the SIPP as against the purpose of para.40.

43 In *Nell Gwynn* Lord Slynn expressed the purpose of the provision thus (at 93):

> Paragraph 7 of the Schedule [now paragraph 40] is general, but it seems to me that it is really aimed at the situation where the legal title is in one person, so he can make a grant of an interest in the land, but the beneficial interest is in another person, so he received any rent or other payment for the grant of the lease.

44 The general scheme of VAT requires the supplier of a service to account for VAT. A trustee, as legal owner of an asset, is ostensibly the only entity that can make a supply in relation to it. However, the extent of the beneficiary's control over the trust arrangements may mean that the economic reality is that the supply is in effect made by the beneficiary, despite the provision relating to legal title. The situation envisaged by Lord Slynn was one where the beneficiary was entitled to receive the consideration for the grant of the interest in land. In other words, the purpose of the deeming provision is to replicate the VAT treatment of an ordinary supply in cases where the economic reality is that a paragraph 40 "beneficiary" in effect stands in the shoes of the supplier entitled to receive the consideration for the supply, and is thus obliged to account for VAT.

45 This interpretation produces a sensible and rational result in a straightforward case where land owned concurrently by more than one person is held on trust for the benefit of the co-owners. On a sale of the land, the beneficial co-owners will be entitled to the sale proceeds (not, if different, the owner of the legal title). Paragraph 40 therefore applies so that liability to VAT (assuming the option has been exercised) also falls on the beneficial co-owners, and not, if different, the owner of the legal title. It does not, however, follow that paragraph 40 will apply whenever any trustee sells an interest in land. Whether or not the "benefit of the consideration" for the sale "accrues" to the beneficiary of a trust in the relevant sense will depend on all the circumstances – including, in particular, the terms of the trust.

46 Broadly, for a pension scheme such as the SIPP to qualify as a "registered pension scheme" under Part 4 of the Finance Act 2004, the scheme rules must not directly or indirectly give a member or any other person an entitlement to any benefits or payments which are not authorised in the pensions tax legislation (see ss.153 and 160 when read together with the rest of the provisions of Chapter 3 of Part4 of the Finance Act 2004). In particular, s.153(3) of the 2004 Act requires a scheme administrator to make certain declarations to HMRC on applying to register a pension scheme, including "a

declaration that the instruments or agreements by which it is constituted do not entitle any person to unauthorised payments" (where cash advances to a member other than the tax free lump sum and pension payable on retirement will typically fall to be unauthorised payments).

47 The appellants rely on *Saunders v Vautier* and *Thorpe v HMRC* to argue that because Mrs. Patel was the sole surviving member of the SIPP, she was absolutely, beneficially entitled to the property in the SIPP with the result that the benefit of the sale proceeds accrued to her within the meaning of para.40(1). Even if it is right that the rule in *Sanders v Vautier* can apply to the SIPP (which HMRC dispute), the obvious point has been overlooked: a trust does not automatically end and beneficiaries do not become "owners" of trust property simply because they are in a position to exercise their *Saunders v Vautier* rights but, as here, have not actually done so.

48 At the time of the sale, Mrs. Patel was, and was perfectly entitled to be, content to allow the trust to run its course without terminating it. That being the case, she was not entitled to receive the consideration at the time the Property was sold to the appellants, not least because the SIPP (and with it, its rules) remained extant. See, by analogy, *CPT Custodian Pty Ltd v CSR* [2005] HCA 53 at [52], where the High Court of Australia observed that:

> It is one thing to say… that a court of equity will not enforce a trust for accumulations in which no person has an interest but the legatee, and another to determine for a statutory purpose that there is a presently subsisting interest in all of the trust assets at a particular date… because of what could thereafter be done in exercise of a power of termination of the trust in question but at that date had not been done. Equity often regards as done that which ought to be done, but not necessarily that which merely could be done. In any event, what is at stake here is the operation of statutory criteria upon general law concepts of equitable ownership.

49 For so long as the SIPP remains extant, the Trust Deed and Rules of the SIPP, when read alongside Part 4 of the Finance Act 2004, provide that in order for the SIPP to qualify as a registered pension scheme, its rules must specifically not entitle its members to unauthorised payments (which a straightforward advance of the sale proceeds by the Trustee in this case would be).

50 As held in *Nell Gwynn*, paragraph 40 envisages a case where the beneficiary in question is entitled to receive the consideration from the sale of the land. Here, the rules of the Scheme make it clear that Mrs. Patel has no entitlement to receive that money – rather, her entitlement is to certain benefits paid out under the rules of the SIPP in certain circumstances (e.g. tax-free lump sum pension payments, the purchase of an annuity etc.) – see by analogy *Thorpe* at [26].

51 Whilst the appellants seek to rely on the rule in *Saunders v Vautier*, it is notable that they have not sought to formulate by reference to the rules of the SIPP precisely how it is that Mrs. Patel would have been entitled to call for all the funds (comprising the sale consideration) to be paid over to her on the date of the sale. Testing the point another way, were Mrs. Patel to be declared bankrupt shortly after the SIPP had sold the Property, her trustee in bankruptcy would have no entitlement over the consideration received from the sale, precisely because the benefit of the sale consideration had not accrued to Mrs. Patel. Indeed, were the appellants' interpretation of paragraph 40(1)

correct, this would lead to the invidious result that a beneficiary of a SIPP (or other investment vehicle) might be left with the liability to pay VAT without having access to the money required to pay it.

52 In any event, the appellants have not established that the rule in *Saunders v Vautier* does in fact apply to the SIPP and have not sought to explain why they say that Mrs. Patel was the only possible beneficiary of the funds under the SIPP. If Mrs. Patel were to remarry, for example, a new spouse could receive benefits from the fund in due course, hence the class of possible beneficiaries is not closed.

53 Whilst it is true that Lloyd LJ observed in *Thorpe* at [25] that "The *Saunders v Vautier* principle… can in theory apply to a pension trust", it is equally clear that just because there is a sole surviving member of a SIPP, it does not automatically follow that that member will be the only possible beneficiary absolutely entitled to the property in the SIPP.

54 On any view, Mrs. Patel's rights as a Member would have been subject to the rights of the Trustee to be fully remunerated for, or protected against, such matters as Trustee fees, taxes, costs and other outgoings (see, e.g., clauses 5.3, 8.1, 8.2, 9.1, 13.1, 14.2 etc. of the 2006 Deed). So even taking the appellants' case at its highest, they have not demonstrated that Mrs. Patel would have been entitled to the benefit of the consideration in the manner intended by paragraph 40. For these reasons, it is clear that the benefit of the sale proceeds did not accrue to Mrs. Patel in the relevant sense, hence she is not deemed to have granted the Property to the appellants under paragraph 40(2).

55 Turning to the prior permission issue, Ms MCarthy submitted that the legislation that applied to determine whether prior permission was required in March 2004 is paragraph 3(9) of Schedule 10 as it was prior to 1 June 2008 – and not paragraph 28 of Schedule 10 as rewritten. It is clear from the wording of paragraph 3(9) that in order for prior permission to be required, the intended exempt grant must be an exempt grant intended to be made before the option takes effect. The appellants' submission on this issue is that if the Trustee decided to exercise the option to tax the Property in 2004, HMRC's prior permission was required before the option could be exercised because "[The Trustee] had made, and/or it intended to make, exempt supplies in relation to the Property".

56 This submission appears to be based on some confusion with the relevant dates. In the appellants' skeleton argument, it is asserted that the option to tax was exercised with effect from 31 March 2004, yet the rent was payable under the lease granted by the SIPP to Mr and Mrs Patel from 30 March 2004. The reverse is in fact true: it is clear from the correspondence that the option to tax was notified as being effective from 30 March 2004 – the day before the rent became payable under the lease. That being the case, the Trustee neither made nor intended to make an exempt supply in relation to the land, prior to the option to tax being exercised.

57 In particular, it is not enough for there to have been an intention (formed before the option to tax had been exercised) to make exempt supplies (after the option had been exercised) for prior permission to be required. Rather, prior permission is required in the event that either (i) an exempt supply was made before the option was exercised – here, no supply in relation to the Property had been made before the option was exercised on 30 March 2004, or (ii) there was an intention (before the option was exercised) to make an exempt supply (again, before the option was exercised) – here, the Trustee had no evident intention to make any exempt supplies relating to the Property in the short time between its purchase of the Property (on 30 March 2004) and the grant of the lease to

Mr and Mrs Patel (on 31 March 2004).

*Conclusions*

58 We deal first with what was described as "the grantor issue", that is the question whether paragraph 40 of Schedule 10 as now enacted has the effect of preventing the sale from being a taxable supply by reason of the person effecting the sale not being the same as the person exercising the option to tax.

59 The person opting to tax was the Trustee, whereas the person corresponding to the beneficiary referred to in paragraph 40 was – on the face of it – Mrs Patel, who had not herself exercised the option to tax. There are two questions inherent in this issue: the first is whether the paragraph is wide enough in its application to cover the situation of a person in the position of Mrs Patel under a pension trust, and the second is whether it can be said that the consideration for the sale accrued to "a person . . . other than the person making the grant".

60 In regard to the first of these two points, the essential question is whether the paragraph envisages a situation in which there is in effect a bare trust, or something very close to it, where the legal title to an asset is, for one reason or another, held for a person or group of persons absolutely entitled to the asset; or whether a more complex situation is also envisaged in which the consideration for the grant of an interest finally accrues in whole or in part, and with or without intermediate steps being interposed, to a person or persons entitled in equity to the asset or its worth.

61 The former seems to us the better view, having regard to the evidently procedural or administrative nature of the provision. If the alternative reading of the paragraph were to be assumed, it is difficult to see how subparagraph (3), treating input tax attributable to the grant as that of the beneficiary, would operate. Certainly, in this case, as Ms McCarthy has pointed out, the deeming of the input tax to Mrs Patel (assuming that she is the only relevant beneficiary) would be pointless, and at variance with the scheme of the tax generally which matches inputs and outputs in the business of the same taxable person. It is more attractive therefore to see the paragraph as having an application which is workable rather than one which produces a result which leads to anomalies.

62 Ms Murray is right, however, in principle to argue that the rule in *Saunders v Vautier* can apply to any situation in which the legal and equitable interests are distinct and, as she has pointed out, there is judicial authority to that effect in the judgment of Sir Edward Evans-Lombe in *Thorpe* approving, at [15], the reasoning of the special commissioner below in a matter concerning a pension scheme. It is relevant to note, however, that the scope of the rule in *Saunders v Vautier* is very limited. Since the special commissioner's citation of it was approved by the High Court in *Thorpe*, we reproduce as he did the definition given in *Snell's Equity* (31st edition):

> Although beneficiaries cannot, in general, control the trustees while the trust remains in being, or commit them to a particular dealing with the trust property, they can, if *sui juris* and together entitled to the whole beneficial interest, put an end to the trust and direct the trustees to hand over the trust property as they direct; and this is so even if the trust deed contains express provisions for the determination of the trust.

63 This leads on to the second aspect of the interpretation of paragraph 40 to which we refer, namely whether in the situation in which Mrs Patel found herself on the death of her husband there was a *Saunders v Vautier* entitlement on her part to the whole of the consideration given for the grant of the interest effected by the sale. Here, it is for the

taxpayers to prove their case and, although there were last minute efforts during the hearing to establish what had happened following the completion of the sale in December 2011, there is no firm evidence of what in fact transpired, that is to say what happened next. There is an assertion in the papers that the trust was "stripped", but there is no sufficient evidence to establish that, or when and where and how it occurred – if indeed it did.

64 It is evident from the Trustees' solicitors' letter of 7 November 2011 that Mrs Patel had relatives or dependents (within the definition of the Trust Deed) who had, potentially at least, a beneficial interest in the SIPP. Even if that were not the case, it is clear from the various clauses of the deed cited that there were a number of calls upon the sale money before Mrs Patel could become entitled to some of it, not least the discharge of the debt incurred in the acquisition of the Property.

65 Speculation apart, the presumption must be that the trust remained subsisting following the sale at least for some period, in which case it is not possible to speak of the consideration for the sale accruing to Mrs Patel: the term "accrues" in paragraph 40 is in the present tense, not in the future, and it implies that Mrs Patel was there and then entitled to receive the sale price. Whether, in the events that occurred subsequently, part of the consideration did accrue to Mrs Patel is not the question; it has not on the balance of probabilities been proved that the consideration on the grant accrued to her within the meaning of paragraph 40. Our conclusion therefore is that the benefit of the consideration accrued to the Trustee.

66 Notwithstanding our refusal to permit an amendment of the grounds of appeal to plead that no decision to opt to tax was ever taken, Ms Murray at the hearing requested the tribunal to make a finding of fact that the decision to opt to tax was made on 14 April 2004, the date from which originally the Trustee sought to make the option effective. This departed from Ms Murray's formal submission and presents a curious dilemma. On 12 July 2010, when the belated notification was first made, it was stated that the decision to elect to waive exemption was made by Miss Michaela Bergman, Property Technician, NM Pensions Trustees Limited. This had been the name the Trustee since 18 May 2007, but it was not the name of the Trustee in 2004.

67 Moreover, as we have seen, the first attempt at belated notification was evidently ill-considered and produced a result which HMRC gently pointed out was not going to achieve what the Trustee evidently wanted, namely the taxation of a supply of an interest in the Property. Further thought was then given to the matter, further discussions with HMRC took place, and the notification was finally re-submitted over four months later on 16 November, this time in terms apt to achieve the desired result. The conclusion we reach from this is that the original belated notification of 12 July 2010 is, without further explanation, an unsafe source of evidence as to the date on which a decision to opt was made.

68 Regrettably, no-one from the Trustee company was in court to give evidence about what really happened over the exercise of the option, the history of which obviously requires some explanation. Without evidence from those who dealt with matters at the outset we are left with the task of assessing, on the balance of probabilities, what was likely to have been the course which events took.

69 Our conclusion is that the decision to opt to tax was made at the time the Property was acquired on 30 March 2004, the day before the lease to the Patels was granted; the

rent demand was issued a fortnight later, showing VAT added to the rent, suggesting strongly that that it had always been the intention to make the grant of the lease a taxable supply. It is unlikely that in the process of setting up and implementing the SIPP – which is by definition a tax-efficient investment vehicle – no-one would have addressed the option to tax issue; on the contrary, it is much more likely that the tax implications of the matter would have been addressed comprehensively, and that the VAT choices would have been dealt with at the same time, but that the need for notification to HMRC of the decision was overlooked. The belated issue of the formal VAT invoice for the first rent period as late as 11 August only reinforces the impression of poor administration in the aftermath of the initial decisions.

70 The second major issue concerns the claim that the exercise of the option to tax in this case required the commissioners' prior permission under paragraph 28 of Schedule 10 –3(9) – and that none was obtained, meaning that the option was not effectively exercised and that the default position remained that supplies of an interest in the property were exempt. This argument is based on the claim that the anti-avoidance provisions of paragraphs 12-17 of Schedule 10 had somehow disapplied the option to tax and that therefore both the lease to Mr and Mrs Patel – and thus the sale the subject of this appeal – were exempt transactions. Although it was common ground that the property was a capital item and that Mrs Patel was connected with the Trustee for the purposes of Schedule 10, it is clear from the facts that the anti-avoidance provisions of paragraphs 12-17 were not applicable.

71 It has not been established on the balance of probabilities that the conditions at paragraph 12(1)(b) and (2), as subsequently defined, were satisfied. Thus, the appellants have not shown that when the property was acquired it was acquired in circumstances in which Mrs Patel was a "development financier" for the purposes of paragraph 14, or that the Trustee at the time the grant of the lease was made intended or expected that the Property would become exempt or would continue for a period to be exempt. Given that 30 March was the date from which the election to tax is deemed to have been effective, and that a lease was granted the following day in what was intended to be a taxable transaction, the conditions for the application of these provisions did not exist.

72 Paragraph 28, or its predecessor, therefore cannot be in point. We must ask (using the previous wording) whether the Trustee, when it wished to make an election, was a person "who has made, makes or intends to make, an exempt grant in relation to the relevant land . . . before the beginning of the day from which he wishes an election in relation to the relevant land to have effect"? If so, prior permission would have been needed for the election. While both the invoice issued on 14 April 2004 and the VAT invoice issued on 11 August 2004 give 30 March 2004 as the start date for the rent, the lease itself gave the rent commencement date as 31 March, so it is clear the grant was actually made on 31 March; and the effective date of the option to tax was 30 March.

73 Thus an exempt grant was not made "before the beginning of the day from which [the Trustee wished] an election in relation to the relevant land to take effect" – the grant was made the day after and was a taxable transaction. The matter can be tested by reference to the wording of Schedule 10 as revised, which leads to the same conclusion: paragraph 28(1) provides that if at any time before the day from which a person wishes an option to tax to take effect the person in question "has made, makes or intends to make an exempt supply to which any grant in relation to the land gives rise" he needs prior permission to elect. The analysis is the same: the option takes effect on 30 March, the grant is on 31 March.

74 This conclusion of course takes no account of the purported grant of permission retrospectively by HMRC on 29 April 2014 (contrary, we note, to the view they expressed to the Trustee in their email of 11 October 2010). The effect of that action is for examination, if need be, elsewhere.

75 We accordingly find that the decision of 16 February 2012 the subject of this appeal was correct and that the sale of 22 December 2011 was a chargeable supply at the standard rate. The appeal must therefore be dismissed with costs on the standard basis, to be assessed in accordance with the further order of the tribunal if not agreed within 56 days of the release of this decision, and there is liberty to apply accordingly.

*Further appeal rights*

76 This document contains the full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply in writing for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by the tribunal no later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**MALACHY CORNWELL-KELLY**
**TRIBUNAL JUDGE**

**RELEASE DATE: 2 July 2014**

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 23 July 2014.