AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

209TACD2025

Between

[redacted]

Appellant

and

The Revenue Commissioners

Respondent

Determination

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Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 ("the TCA 1997") brought on behalf of [redacted] ("the Appellant") in relation to a decision ("the decision") of the Revenue Commissioners ("the Respondent") dated 27 July 2023, to refuse a Value Added Tax ("VAT") input credit claimed by the Appellant in relation to its VAT return for the period March - April 2022 ("the relevant period"), in the amount of €459,000. At the hearing of the appeal, it was confirmed by counsel for the Appellant that the amount at issue was in the revised amount of €441,414.

2. Specifically, the issue to be determined is whether the input VAT cost of €459,000 incurred by the Appellant in acquiring the surrender of an Option agreement, was incurred by the Appellant acting for the purposes of its taxable supplies. The Respondent has refused the Appellant's claim for an input VAT credit on the basis that it did not satisfy the "direct and immediate" test and it was the Appellant's actual use, namely the letting of residential property, which took precedence over any intended use, and that determined the deductibility of VAT.

3. On 24 August 2023, the Appellant duly appealed to the Commission by submitting its Notice of Appeal. In accordance with section 949Q TCA 1997, on 6 October 2023, the Appellant filed its Statement of Case and on 16 October 2023, the Respondent filed its Statement of Case. Furthermore, in accordance with section 949S TCA 1997, on 17 May 2024, the Appellant filed its Outline of Arguments and on 9 April 2024, the Respondent filed its Outline of Arguments in relation to the appeal. The Commissioner has considered all the documentation submitted by the parties in this appeal.

4. On 13 March 2025, the hearing of the appeal commenced for one day. However, as the hearing of the Appellant's appeal did not conclude on that date, on 6 April 2025, the hearing of the appeal recommenced for one further day. The Appellant was represented by junior counsel and Respondent was represented by senior counsel. [redacted] Director of the Appellant ("the Director of the Appellant") and [redacted] ("the Appellant's Financial Controller") were called as witnesses to give evidence on behalf of the Appellant. The Respondent did not call witnesses to give evidence in the appeal.

Background

5. The Appellant is a limited liability company and part of the [redacted] ("the group"). The group includes the Appellant and [redacted] ("the developer"). The

members of the [redacted] (collectively "the MFP") are the beneficial owners of the Appellant and the developer.

6. In 2006/2007, the apartments at [redacted] ("the apartments") were developed by the developer. The apartments are capital goods for VAT purposes and the developer, as developer of the apartments, was a capital goods owner.

7. On 23 December 2014, the developer entered into an agreement with the Appellant for the sale of the apartments and the commercial units to the Appellant. As the developer had reclaimed VAT in the amount of €1,311,314 on the development costs associated with the apartments that were sold to the Appellant, the Appellant took over the Capital Goods Scheme ("CGS") obligations of the developer in accordance with section 64(9) VATCA 2010.

8. On 22 December 2014, the Appellant entered into an Option agreement with the MFP, which granted the MFP the right to purchase the apartments (not the commercial units) from the Appellant for their market value at the date the Option agreement was granted. This amounted to the sum of €6,200,000 plus 1% interest per annum calculated on a cumulative basis from 22 December 2014 to the date of exercise of the Option agreement. The Option agreement was for a period of 10 years from the date of 22 December 2014 and the Option agreement had an expiration date of 22 December 2024. The Appellant charged the MFP €100 for the grant of the option and no VAT was applied to this charge.

9. On 22 December 2014, the date the Appellant entered into the Option agreement with the MFP, the Appellant held no interest in the apartments. That was so, as it did not enter into the agreement for sale with the developer until the following day, 23 December 2014.

10. In April 2022, two years prior to the expiry of the Option agreement on 22 December 2024, the MFP released the Appellant of its obligations under the Option agreement for a fee of €3,400,000 together with VAT in the amount of €459,000 payable by the Appellant to the MFP.

11. The Appellant claimed a VAT input credit in the amount of €459,000 which gave rise to a repayment claim by the Appellant in the amount of €441,414 in its VAT return for the period March/April 2022. The Appellant claims that it was entitled to the VAT incurred on the surrender of the Option agreement, as it was directly attributable to the future taxable sale of the apartments, regardless of when that occurred. It was the Appellant's position that the surrender of the Option agreement enabled the Appellant to benefit from the future taxable sale of the apartments.

12. The Respondent refused the Appellant's claim on the basis that there was no "direct and immediate link" between the Appellant's input transaction, being the charge arising on the surrender of the Option agreement, and a taxable output transaction, to permit the Appellant to deduct VAT incurred on the surrender of the Option agreement. The "direct and immediate link" was to the supply of VAT exempt letting of the apartments, which cannot be taxed due to the provisions of section 97(4) VATCA 2010.

Legislation and Guidelines

13. The legislation relevant to this appeal is as follows:-

14. Section 2 VATCA 2010, Interpretation, provides *inter alia* that:

> *"capital goods" means developed immovable goods and includes refurbishment within the meaning of section 63 (1), and a reference to a capital good includes a reference to any part thereof and the term "capital good" shall be construed accordingly;*
>
> *……...*
>
> *"immovable goods" has the same meaning as "immovable property" has in Article 13b (inserted by Council Implementing Regulation 1042/2013 of 7 October 2013) of Council Implementing Regulation 282/2011/EU of 15 March 2011*;

15. Section 19 VATCA 2010, Meaning of supply of goods, provides *inter alia* that:

> …….
>
> *(2) For the purposes of this Act "supply", in relation to immovable goods, shall be regarded as including the transfer in substance of –*
>
> *(a) the right to dispose of the immovable goods as owner, or*
>
> *(b) the right to dispose of the immovable goods.*

16. Section 20 VATCA 2010, Transfers etc. deemed not to be supplies, provides *inter alia* that:

> ……..
>
> *(2) The transfer of ownership of goods –*
>
> *……...*
>
> *(c) being the transfer to an accountable person of a totality of assets, or part thereof, of a business (even if that business or part thereof had ceased trading) where those transferred assets constitute an undertaking or part of an undertaking capable of being operated on an independent basis,*

shall be deemed, for the purposes of this Act, not to be a supply of the goods.

17. Section 59 VATCA 2010, Deduction for tax borne or paid, provides *inter alia* that:

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

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

…….

18. Section 64 VATCA 2010, Capital Goods Scheme, provides *inter alia* that:

(2)(a) Where the initial interval proportion of deductible use in relation to a capital good differs from the proportion of the total tax incurred in relation to that capital good which was deductible by that owner in accordance with Chapter 1, then that owner shall, at the end of the initial interval, calculate an amount in accordance with the formula –

A - B

where -

A is the amount of the total tax incurred in relation to that capital good which was deductible by that owner in accordance with Chapter 1, and

B is the total reviewed deductible amount in relation to that capital good.

(b) Where in accordance with paragraph (a) -

(i) A is greater than B, then the amount calculated in accordance with the formula set out in paragraph (a) shall be payable by that owner as if it were tax due in accordance with Chapter 3 of Part 9 for the taxable period immediately following the end of the initial interval, or

(ii) B is greater than A, then that owner is entitled to increase the amount of tax deductible for the purposes of Chapter 1 by the amount calculated in accordance with paragraph (a) for the taxable period immediately following the end of the initial interval.

(c) Where a capital good is not used during the initial interval, then the initial interval proportion of deductible use is the proportion of the total tax incurred that is deductible by the capital goods owner in accordance with Chapter 1.

……..

(4)(a) Where in respect of a capital good for an interval (other than the initial interval) the proportion of deductible use expressed as a percentage differs by more than 50 percentage points from the initial interval proportion of deductible use expressed as a percentage, then the capital goods owner shall at the end of that interval calculate an amount in accordance with the formula -

$$(C - D) \times N$$

where -

C is the reference deduction amount in relation to that capital good,

D is the interval deductible amount in relation to that capital good, and

N is the number of full intervals remaining in the adjustment period at the end of that interval plus one.

(b) Where in accordance with paragraph (a) -

(i) C is greater than D, then the amount calculated in accordance with the formula set out in paragraph (a) shall be payable by that owner as if it were tax due in accordance with Chapter 3 of Part 9 for the taxable period immediately following the end of that interval, or

(ii) D is greater than C, then that owner is entitled to increase the amount of tax deductible for the purposes of Chapter 1 by the amount calculated in accordance with the formula set out in paragraph (a) for the taxable period immediately following the end of that interval.

(c) Paragraph (a) shall not apply to a capital good or part thereof that has been subject to subsection (5)(a) or (b) during the interval to which paragraph (a) applies.

(d) Where a capital goods owner is obliged to carry out a calculation referred to in paragraph (a) in respect of a capital good, then, for the purposes of the remaining intervals in the adjustment period, the proportion of deductible use in relation to that capital good for the interval in respect of which the calculation is required to be made shall be treated as if it were the initial interval proportion of deductible use in relation to that capital good and, until a further calculation is required under paragraph (a), all other definition amounts shall be calculated accordingly.

(e) Where the other provisions of this subsection apply to an interval, then subsection (3) does not apply to the interval.

(5)(a) Where a capital goods owner who is a landlord in respect of all or part of a capital good terminates his or her landlord's option to tax in accordance with section 97(1) in respect of any letting of that capital good, then -

(i) that owner is deemed, for the purposes of this Chapter, to have supplied and simultaneously acquired the capital good to which that letting relates,

(ii) that supply shall be deemed to be a supply on which tax is not chargeable and no option to tax that supply in accordance with section 94(5) shall be permitted on that supply, and

(iii) the capital good acquired shall be treated as a capital good for the purposes of this Chapter and the amount calculated in accordance with subsection (6)(b) on that supply shall be treated as the total tax incurred in relation to that capital good.

(b) Where in respect of a letting of a capital good that is not subject to a landlord's option to tax in accordance with section 97(1), a landlord subsequently exercises a landlord's option to tax in respect of a letting of that capital good, then -

(i) that landlord is deemed, for the purposes of this Chapter, to have supplied and simultaneously acquired that capital good to which that letting relates,

(ii) that supply shall be deemed to be a supply on which tax is chargeable, and

(iii) the capital good acquired shall be treated as a capital good for the purposes of this Chapter, and -

(I) the amount calculated in accordance with subsection (6)(a) shall be treated as the total tax incurred in relation to that capital good,

(II) the total tax incurred shall be deemed to have been deducted in accordance with Chapter 1 at the time of that supply.

……...

(8)(c) The capital goods owner shall calculate an amount, which shall be payable by that owner as if it were tax due in accordance with Chapter 3 of Part 9 for the taxable period in which the supply or transfer occurs, in accordance with the formula -

$$I - J$$

where -

I is the adjustment amount, and

J is the amount of tax chargeable on the supply of that capital good, or the amount of tax that would have been chargeable on the transfer of that capital good but for the application of section 20(2)(c), or the amount of tax that would have been chargeable on the supply but for the application of section 56.

……..

19. Section 94 VATCA 2010, Supplies of immovable goods (new rules), provides *inter alia* that:

…….

(8) (a) In this subsection and in subsection (9) -

"recipient" has the meaning assigned to it by section 16(1)(a).

"relevant supply" has the meaning assigned to it by section 16(1)(a).

(b) Where a taxable person supplies immovable goods to another person in circumstances where that supply would otherwise be exempt in accordance with subsection (2), tax shall, notwithstanding that subsection, be chargeable on that supply where -

(i) the immovable goods are buildings designed as or capable of being used as a dwelling,

(ii) the person who makes that supply is a person who developed the immovable goods in the course of a business of developing immovable goods or a person connected with that person within the meaning of section 97(3), and

(iii) the person who developed those immovable goods was entitled to a deduction under Chapter 1 of Part 8 for tax chargeable to that person in respect of that person's acquisition or development of those immovable goods.

(c) In the case of a building to which this subsection would apply if the building were supplied by the taxable person at any time during the capital goods scheme adjustment period for that building -

(i) section 64(4) and (5) shall not apply, and

(ii) notwithstanding section 64(2), the proportion of total tax incurred that is deductible by that person shall be treated as the initial interval proportion of deductible use.

(d) Where a relevant supply is a supply of immovable goods to which this subsection would apply, the recipient shall be treated thereafter, for the purposes of this subsection in respect of those immovable goods, as if that recipient were a person connected (within the meaning of section 97(3)) to the person who developed those immovable goods.

20. Section 95 VATCA 2010, Transitional measures for supplies of immovable goods, provides *inter alia* that:

……

(2) Where an interest to which subsection (1)(b) applies is surrendered, then, for the purposes of the application of Chapter 2 of Part 8 in respect of the immovable goods concerned -

(a) the total tax incurred shall include the amount of tax chargeable on the surrender in accordance with subsection (8) and shall not include tax incurred prior to the creation of the surrendered interest, and

(b) the adjustment period shall consist of the number of intervals specified in subsection (12)(c)(iv) and the initial interval shall begin on the date of that surrender.

21. Section 97 VATCA 2010, Option to tax letting of immovable goods, provides inter alia that:-

(3) (a) In this subsection -

"control", *in the case of a body corporate or in the case of a partnership, has the meaning assigned to it by section 4(2)*;

"relative" means a brother, sister, ancestor or lineal descendant.

(b) For the purposes of this section, any question of whether a person is connected with another person shall be determined in accordance with the following:

(i) a person is connected with an individual if that person is the individual's spouse or civil partner, or is a relative, or the spouse or

civil partner of a relative, of the individual or of the individual's spouse or civil partner;

(ii) a person is connected with any person with whom he or she is in partnership, and with the spouse or civil partner or a relative of any individual with whom he or she is in partnership;

(iii) subject to clauses (IV) and (V) of subparagraph (v), a person is connected with another person if he or she has control over that other person, or if the other person has control over the first-mentioned person, or if both persons are controlled by another person or persons;

(iv) a body of persons is connected with another person if that person, or persons connected with him or her, have control of that body of persons, or the person and persons connected with him or her together have control of it;

(v) a body of persons is connected with another body of persons -

(I) if the same person has control of both or a person has control of one and persons connected with that person or that person and persons connected with that person have control of the other,

(II) if a group of 2 or more persons has control of each body of persons and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person with whom he or she is connected,

(III) if both bodies of persons act in pursuit of a common purpose,

(IV) if any person or any group of persons or groups of persons having a reasonable commonality of identity have or had the means or power, either directly or indirectly, to determine the activities carried on or to be carried on by both bodies of persons, or

(V) if both bodies of persons are under the control of any person or group of persons or groups of persons having a reasonable commonality of identity;

(VI) a person in the capacity as trustee of a settlement is connected with -

(I) any person who in relation to the settlement is a settlor, or

(II) any person who is a beneficiary under the settlement.

(4) A landlord's option to tax may not be exercised in respect of all or part of a house or apartment or other similar establishment to the extent that those immovable goods are used or to be used for residential purposes, including any such letting -

(a) governed by the Residential Tenancies Act 2004,

(b) governed by the Housing (Rent Books) Regulations 1993 (S.I. No. 146 of 1993),

(c) governed by section 10 of the Housing Act 1988,

(d) of a dwelling to which Part II of the Housing (Private Rented Dwellings) Act 1982 applies, or

(e) of accommodation which is provided as a temporary dwelling for emergency residential purposes.

22. Article 15(2) of the Directive 2006/112/EC - Value Added Tax Directive (VAT) ("the Principal VAT Directive") provides *inter alia* that:

Member States may regard the following as tangible property:

(a) certain interests in immovable property;

23. Article 135 of the Principal VAT Directive provides *inter alia* that:-

1. Member States shall exempt the following transactions:

……

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

……

(l) the leasing or letting of immovable property.

24. Article 167 of the Principal VAT Directive provides that:

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

25. Article 168 of the Principal VAT Directive provides *inter alia* that:

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

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

Evidence and Submissions

Appellant's evidence

26. The Director of the Appellant gave evidence on behalf of the Appellant. The Commissioner sets out hereunder a summary of the evidence given by the Director of the Appellant:

26.1. The witness testified that she is a director of the Appellant and one of a number of directors of the group. The witness gave evidence that the Appellant is a family business, and the group is a second-generation business. The witness relayed that the group's core business was [redacted] The witness said that the group's investments are kept in different companies, but under the umbrella of the group.

26.2. The witness testified that during early 2003/2004, the developer engaged in building developments. The apartments originally consisted of a number of linked houses attached to certain trading properties of the group and which were purchased with the intention of building commercial units on the ground floor with apartments above. Furthermore, the witness said that it was the intention of the developer that the property be developed and sold, but that a recession occurred in Ireland in 2008. The witness confirmed that there were approximately 70 apartments in total, with seven or eight commercial units on the ground floor, in addition to a double basement car park, which was very important to the business of the commercial units. The witness said that initially 11 of the apartments in total

were sold to third parties, which left in or around 60 to 62 apartments that are currently leased by the Appellant.

26.3. The witness gave evidence that the Appellant is not a landlord and that it was never her intention that the Appellant be a landlord. She stated that there were a number of reasons why the apartments had not been sold to date, but that it was the intention of the Appellant to sell the apartments. The witness testified that being a landlord was not the core business of the group, but that its core business was development.

26.4. The witness testified that the group's assets [redacted] for a number of years, and that it had to obtain refinancing with a UK provider and then in turn refinance with their own financial institution in the State. The witness clarified that in 2014, to protect the apartments as an asset, and based on advice that the group had received, the Appellant was established, and the developer sold the apartments to the Appellant. In doing so, the witness testified that the CGS obligations of the developer were also transferred to the Appellant.

26.5. In relation to the Option agreement, the witness testified that it was proposed by the advisors to the group, that in order to protect the group's assets and the family in general, restructuring was required, and the Option agreement was the solution proffered at that time. Then, the witness testified that between the dates of 22 and 23 December 2014, the Option agreement was entered into, and the Appellant acquired the apartments. The witness relayed that the decision that was made saved the family business, as at the time it had considerable repayments to make to various financial institutions, and it was a very stressful time. The witness testified that the Option agreement was a means to protect their family and the business, and to give them the possibility of having something to reinvest, should everything go wrong.

26.6. The witness gave evidence that from 2014 onwards, investment was made on capital expenditure ("Capex"), such as renovations and refurbishments of existing assets. The witness testified that every business needs an injection of life for it to be attractive, sellable, and usable for the customer and that also goes for retail. In order to keep up with trends, the witness stated that over €1,700,000 was spent on updating the [redacted] and a further €1,700,000 went into its [redacted]. In addition, the witness stated that the group

undertook renovations to the ground floors and bedrooms [redacted] The witness gave evidence that the group also acquired property during that time.

26.7. The witness stated that “it was a case of one thing after another”. The witness testified that when refinancing occurred with its financial provider in 2017, the Covid-19 pandemic then occurred and there arose difficult family circumstances in the years subsequent to that. The witness relayed that after the Covid-19 pandemic had occurred, the group focussed its time on trading and considering what other trading assets it could add to its portfolio. The witness stated that in order for the group to acquire the funds to develop further into its normal trading area of business, it had to sell the apartments. The witness confirmed that the Appellant was in receipt of rent from a [redacted] it leases and recently sold a business that the Appellant had ownership of.

26.8. In terms of decision making in the business, the witness testified that it is a family business, and business was discussed all the time; for example, at family dinners decisions can be made over a meal. The witness gave evidence that whilst there are directors’ meetings, Capex meetings and investment meetings, it depended on what was going on in the lives of the directors at that time. The witness confirmed that the meeting notes included in the documentation in the appeal came from a directors’ meeting that took place in the head office where meetings can be a mix of operational discussions, family plans and development plans. The witness confirmed that she and the Appellant’s Financial Controller are responsible for taking meeting notes and she confirmed that she took the notes submitted in support of the appeal.

26.9. The witness testified that the meeting notes refer to “alternative options for an extra floor in the apartments”. The witness stated that she walked the apartments with an Architect to make sure that the car park and the landing areas that service the supermarket, the car park and the commercial units were all looked after in some way. The witness gave evidence that it was the Architect that suggested adding an additional floor to the apartments, as he was aware that the Appellant was considering how to achieve the best value in a sale of the apartments and an additional floor would increase the value of the property before the Appellant sold it. The witness confirmed that it was a live discussion that the Appellant was going to redevelop the apartments, and the witness stated that she was in receipt of sketches in relation to an additional floor to the apartments.

26.10. The witness confirmed that the Option agreement was surrendered in 2022, on the basis that the Appellant always had the intention to sell the apartments to create the funds that it needed to match the lending from its financial institution, and it was as simple as that, the witness said. The witness testified that the apartments are the biggest asset that it has, and the apartments can be sold to create funds to buy businesses. The witness said that the next generation was coming into the business, and it needs to maintain growth in the form of acquiring other stores to keep going. The witness stated that the apartments have not been sold to date, due to a family bereavement and the witness taking a serious role as Chairperson with the [redacted] The witness confirmed that the Appellant did not want to keep the apartments as the Appellant was not a landlord and it was not its core business. The witness testified that "we are not landlords, we are developers, we are [redacted]. That is the day-to-day core business. We like to buy and develop, but we are certainly not landlords."

26.11. The witness was cross examined on her evidence by counsel for the Respondent. The witness confirmed the structure of the group and that she is a shareholder of the group along with her siblings and her father. The witness confirmed that there were about ten to twelve separate companies that sit under the group and that each of the entities do separate things. The witness was asked why the developer sold the apartments to the Appellant if it was all within one group. The witness stated that it was in order to protect the apartments, when the developer was in a commercial dispute with another company, and that commercial dispute was the subject of arbitration at the time.

26.12. The witness testified that a company called [redacted] ("the UK financial provider") was engaged which at the time, assisted the group with removing its assets from [redacted]. It was put to the witness that the Option agreement was of benefit to the witness. The witness gave evidence that the Option agreement was for the benefit of the family, in the event the family lost everything due to its financial circumstances. It was put to the witness that this came at the cost of €6,200,000, because the Option agreement required the payment of that amount and the witness agreed. The witness was asked what the advantage to the Appellant was and the witness reiterated that it remained in the family and that was the benefit. The witness stated that the Appellant followed the advice from its advisors at the time.

26.13. It was put to the witness that the Appellant was the holder of the apartments and was letting the apartments. Therefore, the only relevant entity in respect of this appeal was the Appellant, in terms of the group. It was further put to the witness that her evidence was in relation to the group and not the Appellant specifically. The witness confirmed that the Appellant was letting the apartments and that whilst she had discussed the group, she could be more specific as to the Appellant.

26.14. It was put it to the witness by counsel for the Respondent that when the Option agreement was surrendered it permitted the Appellant to continue to let the apartments without interference and the witness agreed. Furthermore, it was put to the witness that the Option agreement meant that as soon as the family decided to exercise the Option agreement, the Appellant would have had to sell the apartments. The witness testified that it was in the best interests of the Appellant to seek the surrender of the Option agreement, as the Option agreement needed to be released so that the Appellant could sell the apartments to create options in respect of other investments.

26.15. It was put to the witness by counsel for the Respondent that it was that evidence that was lacking, namely why it was that the Appellant wanted to sell the apartments. The witness stated that "we are not landlords", and it was put to her that the Appellant was a landlord and whilst the witness agreed, she stated that the Appellant was not just a landlord but had also developed and sold a number of other properties, such as [redacted] Counsel for the Respondent again put it to the witness that the Appellant was in the business of being a landlord, as it had 62 apartments, in addition to other commercial lettings. The witness stated that being a landlord was part of its business. It was put to the witness that the Appellant had been a landlord since its establishment and did not have a life before the developer transferred the apartments to the Appellant. The witness confirmed that being a landlord was a significant part of the Appellant's business, but it was also a developer the witness said. It was put to the witness that the Appellant might be both, but that it was undoubtedly a landlord as it was holding the apartments and engaging in the VAT exempt activity of letting the apartments, therefore, the surrender of the Option agreement only related to the apartments, which allowed the Appellant to continue doing what it was doing without interference. The witness stated that it was letting apartments for longer than the Appellant had intended.

26.16. Counsel for the Respondent asked the witness why the decision was made to surrender the Option agreement at a cost to the Appellant of €3,400,000 plus VAT of €459,000, being a total cost paid by the Appellant of €3,859,000, rather than let the Option agreement expire in December 2024. The witness stated that advice was received, and that the Appellant's Financial Controller was in a better position to answer that question. It was put to the witness that she was a director of the Appellant and the witness stated that she took a lot of advice. Again, it was put to the witness by counsel for the Respondent that the Appellant paid €3,400,00 plus VAT for an Option agreement and that two years later it still held the apartments the subject matter of the Option agreement, but that it had not been made clear why the Option agreement would not have naturally been left to expire at no cost to the Appellant. Counsel for the Respondent asked why the Appellant would spend €3,400,000 plus VAT on the surrender of an Option agreement, when it effectively did nothing with the apartments except continue to lease them. The witness confirmed that she had testified at length and produced the meeting notes dated May 2021, wherein there was intention to sell the apartments, in order to develop the business and acquire other properties.

26.17. The witness was asked if the Option agreement related to anything else and the witness confirmed that it only related to the apartments and by acquiring the Option agreement it meant that the Appellant was in the position of acquiring something else on the sale of the apartments. The witness stated that the intention to sell was in the meeting notes dated May 2021, submitted in support of the appeal. Furthermore, counsel for the Respondent put it to the witness that there had been no attempt to sell, and no evidence had been adduced of the Appellant placing the apartments for sale on the market such as valuations or contact with an estate agent. The witness stated that the Appellant was looking at all options before selling the apartments, such as redevelopment of the apartments. It was put to the witness that by redeveloping the apartments, it could be interpreted as enhancing the asset, to ensure that more apartments could be rented out by the Appellant.

26.18. The witness was asked by counsel for the Respondent to point to the objective evidence that there was an intention to sell the apartments on the part of the Appellant, not the group. The witness stated that the Appellant genuinely never had the opportunity to sell the apartments, because of different circumstances that arose. It was put to the witness that the Appellant was engaging with an Architect in relation to an additional floor. The witness stated that it was also

engaging with its financial advisors to create funds to purchase other assets. Counsel for the Respondent reminded the witness that the first time that the Respondent received the meeting notes of May 2021 was just prior to the appeal, despite its previous requests. The witness was asked if the meeting notes were in relation to a group meeting. The witness stated that it was a directors' meeting and that it never occurred that she should be more diligent in terms of how discussions are recorded, and that not only does the group need to do that, but that separate directors' meetings should be held for each company.

26.19. Counsel for the Respondent suggested to the witness that all that had been established was that in March/April 2022, the relevant VAT period, the Appellant was a landlord and held other properties. The witness stated that the Appellant also held a [redacted] and developed other properties.

26.20. It was put to the witness that it was the Respondent's position that the Appellant was engaged in an exempt activity, which was the letting of the apartments and the surrender of the Option agreement, permitted that activity to continue. It was put to the witness that an auctioneer had never even been engaged and there was no evidence of anyone being engaged to put the apartments on the market for sale. The witness stated that the Appellant had the apartments valued recently.

27. The Appellant's Financial Controller gave evidence on behalf of the Appellant. The Commissioner sets out hereunder a summary of the evidence given by the Director of the Appellant's Financial Controller:

27.1. The witness explained that he is the [redacted] also with responsibility for the Appellant's finances and that he joined the group in October 2013. The witness confirmed that the Appellant was established on 4 November 2014 and that this was the date of incorporation of the Appellant. The witness stated that on that date, the Appellant held no assets. However, on 31 December 2014 it held the commercial and the residential interests in the apartments and their block. In addition, he said the Appellant held a property interest in [redacted] which was sold in 2019.

27.2. In relation to the structure of meetings, the witness gave evidence that operations meetings were held for the group and that was when he usually attended meetings. The witness relayed that it was a family business and business discussions would quite often go off on tangents and move from one company to the next and back again quite quickly. The witness referred to the meetings that took place in May 2021 and the Capex projects.

27.3. The witness was asked about the Appellant's purchase of the Option agreement and the decisions made in relation to that purchase. The witness testified that the purchase of the Option agreement was time bound, as they wanted the "wheels in motion". The witness gave evidence that in October/November 2021, valuations were obtained from various auctioneers about the current market value of the apartments which he stated was in or around between €11,200,000 and €11,700,000.

27.4. The witness was asked to explain, why the decision was made to purchase the Option agreement. The witness stated that the reason for the decision was in the documentation submitted, in particular in the Capex spreadsheet which was presented to the group's financial institution. The witness gave evidence that the group was aware from discussions with its financial provider, that its financial provider would finance approximately half the amount that the group required for its Capex projects and that the group would have to find the remaining finance required. Therefore, he said the sale of the apartments, being a non-core asset, were where the balance of the funds would come from.

27.5. The witness was asked about the rental income from the letting of the apartments. The witness testified that in recent months it would have been in the amount of approximately €840,000. The witness confirmed that included in that income, were service charges and any commercial rents that the Appellant received. So, he said that the total of those three components came to €840,000. The witness was asked would he retain the apartments from a commercial perspective, and he stated that the bottom line was that the apartments were making an income of €453,000 due to the Appellant not being able to increase rents and he set out various reasons why. He continued that he would "sell it in the morning", but that it was not going to be sold unless there was an immediate reinvestment opportunity, because there was €453,000 of an income being generated there.

27.6. The witness was cross examined by counsel for the Respondent. The witness confirmed that the Appellant was established on 14 November 2014, just one month before it purchased the apartments. The witness was referred to the meeting notes dated 31 May 2021, under the heading "Other Properties". The witness stated that this referred to the apartments and the purchase of the Option agreement, in the context of a Capex meeting, as it wanted to have that actioned and completed by year end.

27.7. Counsel for the Respondent referred the witness to the Capex spreadsheet and his evidence that in May 2021, funds were required to carry out spending on other projects. It was put to the witness that his evidence was that if the apartments were sold, a loan to its financial advisor in the amount of €4,500,000 would first have to be discharged, leaving the amount of in or about €6,000,000. It was put to the witness that number was not the real amount, as it did not factor in the amount of €3,400,000, plus VAT paid to surrender the Option agreement. The real amount available was therefore in or about €2,600,000. The witness stated that the amount paid for the surrender of the Option agreement was reflected in the accounts as a liability. It was further put to the witness by counsel for the Respondent that if the Appellant went to its financial provider for financing, the financial provider would take that liability into account. The witness stated that he understood, and that the money was still outstanding in the Appellant's accounts as a liability. It was put to the witness that it was a simple point, namely why would the Appellant spend €3,400,000 plus VAT, when it could have waited two years for the Option agreement to expire if it was in the process of creating access to funds in order to invest in other projects. The witness gave evidence that, at that point in time, it was discussed that the funds from the sale of the apartments would be used for capital expenditure, but circumstances change. He said nevertheless it remained the intention to sell the apartments.

27.8. Counsel for the Respondent directed the witness to the Appellant's Notice of Appeal that was filed, in particular to page 5 therein and the grounds of appeal. It was put to the witness that in relation to the surrender of the Option agreement, the grounds of appeal stated that: "*The abandonment of the option enables [the Appellant] to benefit from the future taxable sale of the apartments as it will obtain all of the consideration rather than the value which was attributable to the units in December 2014. While the option was in existence [the Appellant] had the entitlement to the rental income from the apartment and the value of the units as at December 2014, when the option was granted, in the event of a sale of the development. Any uplift in the value of the apartments would have arisen to the [MFP] while the option continued to be held by these individuals*."

27.9. Counsel for the Respondent suggested to the witness that the value of the apartments was increasing beyond what had been originally agreed in the Option agreement dated December 2014, and to ensure that the uplift in price of the apartments went to the Appellant, rather than to the individual family members,

that this was the reason why the release of the surrender was sought. The witness agreed. It was put to the witness that this was a different reason to what was now being suggested, namely spending on acquiring new assets and redevelopment, and that it was not stated in the Appellant's Statement of Case either. The witness disagreed relaying that in his view, it was the exact same reason, as buying out the Option agreement allowed expenditure on a Capex programme that was being planned.

27.10. The witness was asked why the Appellant created a director's loan of €3,400,000 only to achieve the amount of €2,600,000 for a Capex programme, it made no sense. It was put to the witness that the surrender of the Option agreement was not to create funds for capex projects, and there was no evidence of that because the apartments were never sold.

Appellant's submissions

28. The Commissioner sets out hereunder a summary of the submissions made by counsel for the Appellant, both at the hearing of the appeal and in the documents submitted in support of this appeal:

28.1. The Appellant has sought to claim input VAT in the amount of €459,000 arising from the surrender of the Option agreement. The Appellant acquired the apartments from a connected party, being the developer, which carried out the development for the purpose of selling the completed apartments. The Respondent has denied the input VAT claim on the basis that the apartments are currently being used for VAT exempt purposes, i.e. letting. This is notwithstanding the existence of specific anti-avoidance legislation which provides that the sale of a residential property by a party connected with the developer of the property is always subject to VAT regardless of when the sale occurs.

28.2. Section 59(2) VATCA 2010 enables an accountable person to claim input credit on VAT charged on the purchase of goods and services where those purchases are used for the purpose of the accountable person's taxable supplies.

28.3. The transfer of the apartments in 2014, from the developer to the Appellant, occurred pursuant to section 64(9)(c)(ii) VATCA 2010 and it is a connected supply. The Appellant has incurred input VAT of €459,000 in relation to the surrender of the Option agreement with the MFP. As this enabled the Appellant to obtain all the taxable proceeds from the future sale of the apartments, the VAT is fully recoverable by the Appellant.

28.4. Section 64(9)(c)(ii) VATCA 2010 provides for a "connected supply" meaning "*a supply or transfer of a capital good which is a supply or transfer on which a seller would, but for the application of this subsection, be obliged to calculate an amount of tax due in accordance with subsection (8)"*

28.5. Section 94(8)(c) VATCA 2010 provides that where VAT would arise if the residential property were supplied by the developer or a connected party, particular provisions of Section 64 VATCA 2010 are not to apply. When the developer moved from intending to supply immovable goods, into letting the apartments, section 94(8) VATCA 2010 came into play. Section 94(8) VATCA 2010 sets out the basis on which supplies of residential property by a developer are to be treated for VAT purposes.

28.6. There are three conditions that are required to be satisfied in section 94(8)(b) VATCA 2010. There was no dispute that the apartments are an immovable good, such that the requirement in section 94(8)(b)(i) VATCA 2010 was satisfied. In relation to section 94(8)(b)(ii) VATCA 2010, this was satisfied as it was the developer that made the supply and it was the developer of the immovable goods in the course of a business of developing immovable goods or a person connected with that person within the meaning of section 97(3) VATCA 2010. Furthermore, in relation to section 94(8)(b)(iii), the person who developed those immovable goods was entitled to a deduction under Chapter 1 of Part 8 VATCA 2010 for tax chargeable to that person in respect of that person's acquisition or development of those immovable goods. Thus, section 98(8)(b) VATCA 2010 was applicable to the Appellant. If the Appellant sells the apartments in the future, that will be considered a taxable supply and tax will be chargeable on that supply, which is considered a supply of the immovable good.

28.7. In relation to the surrender of the Option agreement, the treatment of the Option agreement should mirror the treatment of the underlying asset. Currently, the apartments are being let and residential letting is regarded as an exempt activity for the purposes of VAT. However, while the letting of the apartments is an exempt activity, the Option agreement relates to the asset, namely the apartments, which when sold will be a taxable event. Therefore, the tax treatment of the Option agreement should mirror the underlying asset i.e. the tax treatment of the surrender of the Option agreement should mirror the tax treatment of the sale of the immovable good.

28.8. Reference was made to section 19(2) VATCA 2010. A supply not only includes a transfer of immovable goods, but it also refers to the right to dispose of an immovable good and that relates to the Option agreement. It creates an interest in the immovable good. Section 19(2) VATCA 2010 states that "supply", in relation to immovable goods, shall be regarded as including the transfer in substance of (a) the right to dispose of the immovable goods as owner, or (b) the right to dispose of the immovable goods.

28.9. Refence was made to the decision in *Case 3 AC 2003* which concerned an option to acquire an interest in land. The relevance of this decision was that it supports the view that an option curtails a right and it creates an interest in the property, and this has relevance to section 19(2) VACA 2010 and the right to dispose of immovable goods. Reference was made to the decision wherein it states that:

> "*The option operates to reduce the full ownership rights of the grantor in respect of the underlying asset and, in the absence of other factors, should properly be accorded the same tax treatment as the disposal of the underlying asset*."

Therefore, the grant of an option should mirror the underlying asset.

28.10. Reference was made to the decision in *Landlinx Estates Limited v The Commissioners For Her Majesty's Revenue and Customs* [2020] UKFTT 220 ("*Landlinx").*The appeal raised the question of whether the release (for a consideration) of an option to purchase land was a taxable supply of services or an exempt supply of an interest in land for VAT purposes. The question that arose was the correct VAT treatment of the surrender of an option to acquire land. Reference was made to paragraph 90 of the decision which stated that:

> "*In the present case, the land which was the subject of the Option Agreement, as we understand it, had already been "consumed" by virtue of its first occupation and, therefore, subsequent transactions concerning the land should be exempt because they had left the production process."*

28.11. Therefore, section 94(8) VATCA 2010 creates a kind of seal on the apartments, until such time as it is sold either by the developer or the connected party, which is the Appellant, because it is going to be considered a taxable supply once it is sold. It should be treated as a new property as it has not been sold to date and there has been no taxable supply.

28.12. Once the surrender of the Option is considered a taxable supply, the Appellant is entitled to the input VAT immediately, because it is considered preparatory work

for the eventual taxable supply of the good. reference was made to paragraph 102 of the decision which stated that:

> *"We consider that the release of a call option to acquire land for a consideration should be taxed in the same way as the grant of the option i.e. it is an exempt supply. Not only does Note 1 to Group 1 Schedule 9 VATA so provide, but the decision of the CJEU in Lubbock Fine, where a surrender of a lease was treated in the same way and entitled to the same exemption as its grant, clearly indicates that the release of an option over land should be treated in the same manner as its grant*."

28.13. The grant of the Option agreement was a creation of an interest in land and the surrender of the Option agreement should mirror the underlying apartments, which will be a taxable supply once sold.

28.14. Reference was made to the Respondent's Tax and Duty Manual entitled "VAT Treatment of the Supply of property - Supply of property". In particular reference was made to paragraph 1.2 entitled "When does a supply of property take place for VAT purposes?" which stated that: "*For a supply of property to take place it is not necessary that the legal title to the property has been transferred to the purchaser. It is sufficient that the purchaser has acquired, essentially, the right to dispose of the property.*" In addition, reference was made to paragraph 8 entitled "VAT treatment of options, easements and rights of way" under the heading "VAT treatment of Options" which stated that: *"Where an option is granted to a person for the right to buy a property after a certain period of time, the VAT treatment depends on the VAT status of the underlying asset*." Therefore, the surrender of the Option agreement and the cost of VAT incurred by the Appellant should be treated in the same manner as the underlying asset, namely the apartments, which when sold will be a taxable supply in accordance with section 94(8) VATCA 2010.

28.15. Reference was made to the decision in Case C-42/19 *Sonaecom SGPS SA v Autoridade Tributária e Aduaneira ("Sonaecom"*), which concerned the deductibility of input VAT paid by Sonaecom in respect of expenditure relating, first, to consultancy services connected with a market study commissioned with a view to possible acquisitions of shareholdings in other companies and, secondly, to the payment to BCP Investimento SA of a commission for organising and putting together a bond loan, where neither the acquisition nor the investments, in view of which the loan was taken out, materialised. This case is different to this

appeal as the actual use to which the release of the option was used for was the purposes of selling the asset when the time was right. In respect of question 1, the Court of Justice of the European Union ("CJEU") said, yes you are entitled to a deduction where it does not materialise.

28.16. Reference was made to paragraph 41 wherein the CJEU opined that:

> "*Furthermore, in accordance with settled caselaw, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to the right to deduct is, in principle, necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement. The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them is a component of the costs of the output transactions giving rise to the right to deduct*."

28.17. Furthermore, reference was made to paragraph 42 which stated that:

> "*However, a taxable person also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct where the costs of the service in question are part of his or her general costs and are, as such, components of the price of the goods or services which he or she supplies*."

28.18. In relation to the second question that was asked of the CJEU, that there was capital obtained, but that the capital was used for another purpose, the matters addressed by the court in question two are different to those in this appeal and are not relevant, such that no reliance was placed on this part of the decision. In relation to the first question, in this appeal the direct and immediate and the use of the cost was related. While a taxable supply has not yet occurred, the evidence was that there was an intention to sell the apartments, which will be a taxable supply, and the cost of the surrender of the Option agreement was related to the eventual supply. Therefore, it was a direct and immediate link to a taxable supply or in the alternative, it formed part of the general costs in relation to the eventual taxable supply.

28.19. Reference was made to paragraph 39 of *Sonaecom* wherein the CJEU stated that:

> *"The principle that VAT should be neutral as regards the tax burden on a business requires that the first investment and expenditure incurred for the*

purpose of, and with a view to, commencing a business must be regarded as an economic activity; it would be contrary to that principle if such an activity commences only when taxable income arises. Any other interpretation would burden the trader with the cost of VAT in the course of his or her economic activity without allowing him to deduct it would create an arbitrary distinction between the investment expenditure incurred for the needs of the business before actual exploitation of the business or expenditure incurred during the exploitation."

28.20. In this appeal an Option agreement was created and surrendered and that was linked to the underlying asset. A VAT charge arose herein, which the Appellant has incurred. However, when the Appellant sells the apartments, because of the approach of the Respondent, the Appellant will not be receiving input VAT once the apartments are sold and that offends the fiscal neutrality of the VAT system.

28.21. The surrender of the Option agreement related to a taxable event, so there was VAT charged on the surrender of the Option agreement, which the Appellant incurred, and the Appellant should be entitled to reclaim the VAT incurred. The evidence of an intention to sell the apartments was clear.

Respondent's submissions

29. The Commissioner sets out a summary hereunder of the submissions made by the Respondent, both at the hearing of the appeal and in the documents submitted in support of this appeal:

29.1. The issue to be determined in this appeal was whether the VAT cost of €459,000 incurred by the Appellant in acquiring the surrender of the Option agreement was, on an objective view of the facts and surrounding circumstances, incurred by the Appellant acting for the purposes of its taxable supplies. It is the Respondent's position that it was not.

29.2. Therefore, the test to be applied was, what was the Appellant's economic activity and why was the cost incurred? Therefore, to ascertain whether the VAT incurred was deductible, this was what must be considered in this appeal. The Appellant's economic activity at the material time, namely March/April 2022, the date of the VAT invoice, was a VAT exempt activity namely, the letting of apartments, and that constituted the letting of immovable residential goods.

29.3. The cost of input VAT is allowed for exempt supplies and as such, there was no right to deduct the VAT on the surrender of the Option agreement as the input

cost had a “direct and immediate” link with letting exempt immovable residential goods. The surrender of the Option agreement allowed the Appellant to continue to carry on its exempt activity, namely residential lettings and was in no way related to a taxable supply.

29.4. The cost incurred by the Appellant on the surrender of the Option agreement was directly and immediately linked to the Appellant's actual use of the property, namely, residential letting. The surrender of the Option agreement permitted the Appellant to continue to carry on the activity of residential letting. It was that “actual use” to which the cost incurred on the surrender of the Option agreement was linked. However, as residential letting is an exempt activity, no deductibility was allowed.

29.5. The Appellant claimed that it was entitled to the cost of the input VAT on the surrender of the Option agreement, on the basis that if the property was ever sold it would be a taxable supply. Not only does that not satisfy the “direct and immediate” test, but it was the Appellant's actual use, namely the letting of residential property, which took precedence over an intention, in order to determine deductibility of VAT. What the Appellant was seeking to do was to link a possible future taxable sale of the apartments, with the surrender of the Option agreement. The surrender of the Option agreement was used to maintain the Appellant's exempt activity, namely residential letting. By the surrender of the Option agreement, the Appellant continued to let the apartments. Therefore, the actual use of the surrender of the Option agreement was to enable the Appellant to continue to let the apartments.

29.6. As to the matter of case law, it was the actual use that was relevant for the purposes of ascertaining whether VAT was deductible. So, the actual use of the cost incurred, was what took precedence over any intention that there may have been. There was no objective evidence of the Appellant's intention to sell the apartments at the time the input VAT cost arose, in March/April 2022 and it was the actual use, that took precedence over any intended use of the apartments.

29.7. The surrender of the Option agreement was a supply of services not a supply of goods and, therefore, it does not mirror the underlying supply and it was not part of any overhead cost. The surrender of the Option agreement does not conform to the definition of a capital good. In March/April 2022, the date of the surrender of the Option agreement, the economic activity that the Appellant was engaged in was the letting of immovable residential goods.

29.8. Reference was made to Article 135 (1)(j) of the Principal VAT Directive which states that:

"*Member States shall exempt the following transactions - The supply of a building or parts thereof and of the lands on which it stands, other than the supply referred to in (a) of Article 12 (1)."*

29.9. Reference was made to section 97(4) VATCA 2010 which states that:

"*A landlord's option to tax may not be exercised in respect of all or part of a house or apartment or other similar establishment to the extent that those immovable goods are used or to be used for residential purposes, including any such letting:*

(a) governed by the Residential Tenancies Act;

(b) the Housing Rent Book Regulations; (c) the Housing Act."

29.10. Reference was made to section 59 VATCA 2010 which governs deductibility. The purpose of section 59 VATCA 2010 is to relieve VAT, where VAT was paid in the course of economic activities, and so long as those activities were taxable. Subsection (2) therein states that:

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

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

29.11. Reference was made to the decision in Case C-98/98 *Commissioners of Customs and Excise v Midland Bank Plc* where the Court considered: *"[t]he ability of a taxpayer to deduct an input cost and on how that direction immediate links arise*." The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct VAT. Reference was made to paragraph 30 of the decision in Case C-98/98 *Commissioners of Customs and Excise v Midland Bank Plc*, wherein the Court stated that:

"*It follows from that principle as well as from the rule enshrined in paragraph 19 of the judgment in BLP Group, cited above, according to which, in order to give rise to the right to deduct, the goods or services acquired must have a direct and immediate link with the taxable transactions, that the right to deduct the VAT charged on such goods or services presupposes that the expenditure incurred in obtaining them was part of the cost components of the taxable transactions. Such expenditure must therefore be part of the costs of the output transactions which utilise the goods and services acquired. That is why those cost components must generally have arisen before the taxable person carried out the taxable transactions to which they relate*."

29.12. Reference was made to the decision in Case C-104/12 *Finanzamt Köln-Nord v Wolfram Becker*. In considering the direct link test that is to be applied, an Appeal Commissioner must consider all the circumstances surrounding the transactions concerned and take account only of the transactions which are objectively linked to the taxable person's taxable activity. The existence of such a link must thus be assessed in the light of the objective content of the transaction in question. Reference was made to paragraph 22 of the decision, wherein the Court stated that:

"*Finally, it is apparent from the case-law that, in the context of the direct-link test, which the tax authorities and national courts are to apply, they should consider all the circumstances surrounding the transactions at issue and take account only of the transactions which are objectively linked to the taxable person's taxable activity."*

29.13. In ascertaining whether there was a direct and immediate link to a taxable supply, objective evidence was required and subjective evidence or a vague idea as to what might occur in the future, was not sufficient evidence. There must be objective evidence of that direct and immediate link to a taxable supply.

29.14. What must be considered was what the actual use of the cost incurred was and the decision in *Sonaecom* supports that position. What was most notable was that the second issue in *Sonaecom* was the most relevant to this appeal, because *Sonaecom* was authority for the proposition that actual use must take precedence over any vague future use.

29.15. In *Sonaecom*, the second cost incurred related to input VAT on a bank commission for organising a loan intended to provide its subsidiaries with the means for making the shareholding acquisition, but that particular share

acquisition did not proceed, and the loan was used for something else. Reference was made to paragraphs 45, 46 and 47 of the decision, wherein the CJEU held that:

> "45. *Thus, since, in accordance with the case-law of the Court, the costs relating to those consultancy services are part of Sonaecom's general costs in respect of the economic activity which it carries out in its capacity as a mixed holding company, that company enjoys, in principle, the right to deduct in full the VAT paid on those services.*
>
> *46. In addition, as has been pointed out in paragraph 40 above, the fact that, ultimately, the transaction did not materialise has no effect on the right to deduct VAT, which is retained.*
>
> *47. It should nevertheless be specified that if it should transpire that the applicant in the main proceedings supplied services subject to VAT, which are characteristic of its economic activity, only to some of its subsidiaries, which it is for the referring court to verify, the VAT paid on the general costs can be deducted only in proportion to those inherent to the economic activity of the applicant in the main proceedings in its capacity as a taxable person, in accordance with a method which it is for the Member States to determine (see, to that effect, judgment of 5 July 2018, Marle Participations, C-320/17, EU:C:2018:537, paragraph 37)."*

29.16. Moreover, reference was made to paragraph 57, 58 and 59 of the decision, wherein the CJEU stated that:

> "57. *In addition, it is apparent from Article 20(6) of the Sixth Directive, which concerns the adjustment of the deduction of input tax, that that deduction must, as the Advocate General observed in point 55 of her Opinion, be adjusted as precisely as possible to actual use in order to avoid 'unjustified benefits' or 'unjustified prejudice' for the taxable person*.
>
> *58. Thus, it follows not only from Article 17(2)(a), but also from other provisions of the Sixth Directive that that directive is based on the logic that the deduction of input tax paid by the taxable person must correspond as precisely as possible to the actual use of the goods and services purchased by him or her.*
>
> *59. Consequently, an actual use of goods and services takes precedence over the initial intention."*

29.17. Thus, it follows that the Principal VAT Directive is based on the logic that the deduction of input VAT paid by a taxable person must correspond as precisely as possible to the actual use of the goods and services purchased by that person. Consequently, an actual use of goods and services takes precedence over any intended use and the appeal herein concludes there, because the Appellant actually used the surrender of the Option agreement to ensure that it could continue letting the apartments, because when the Option agreement was surrendered there was no risk to the Appellant of the apartments being sold and its taxable activity in effect being interfered with.

29.18. Therefore, in March/April 2022, the relevant vatable period, the actual use was to allow the Appellant to continue letting the apartments. There was no evidence of any other intention. However, if it is found that there was some vague intention this does not matter as *Sonaecom* was authority for the proposition that actual use must take precedence over intended use, and this second principle established in *Sonaecom* was in fact determinative of this appeal.

29.19. There was no intention at all to sell the apartments, in fact three years later the apartments remain unsold. The apartments were never put on the market and an auctioneer was never engaged to conduct the sale of the apartments. That was the greatest indicator of all, that in fact there was never any intention to sell the apartments.

29.20. Reference was made to section 94(8) VATCA 2010, and the three conditions to be satisfied. In particular reference was made to the condition at (ii) which states that: "*The person who makes that supply is a person who developed the immovable goods in the course of a business of developing immovable goods or a person connected with that person and within the meaning of section 97 (3)"* Therefore, in order for VAT to arise on the sale of the apartments in the future, the Appellant must still be connected to the developer at that point in time. As of now both entities are connected, but they must remain connected at that point of sale, which was a condition that can only be met at the time of the sale of the apartments. There was no objective evidence of a future sale, and the case law establishes that it is that objective evidence of a direct and immediate link which was required, in order that a claim for input VAT can be successfully made.

29.21. Reference was made to the decision in *Brendan Crawford, Inspector of Taxes v Centime Limited* [2005] IEHC 328, at paragraph 5.3, wherein the High Court held that:

"*While I will return to the proper interpretation of Rompelman subsequent to reviewing certain other authorities which have followed on from it, it seems to me that on any reading of the above passage the true test is that a person is entitled to be treated as a taxable person provided that they have a genuine intention to deal with the asset in a manner which would qualify for treatment as a taxable person. That test is subject to the caveat that it is for the person making the claim to show that this is so and that, as part of that process, that person may be required to produce some objective evidence as to what their true intention was. In other words the mere statement by a person as to what their intention in respect of a particular asset is, or was at any material time, is not something which the appropriate authorities in a member state are bound to accept. Thus if a person is unable to produce any, or any sufficient, objective evidence as to what their true intention was, the relevant authorities are not obliged, necessarily, to accept a mere assertion on the part of such party as to what their intention in fact was. The reference by the court to the suitability of premises needs to be seen in that context. It is possible to envisage many cases where there may be significant doubt as to whether a party actually had a genuine intention to exploit premises in a particular commercial way having regard to the fact that such premises were unsuitable for the type of economic activity proposed*."

29.22. There was no objective evidence adduced of an intent to sell the apartments in March/April 2022, and the clearest evidence of that would have been the placing of the apartments for sale on the market. It was difficult to ascertain exactly what the Appellant's intentions were, as the evidence of the Director of the Appellant was mostly in relation to the group. The meeting notes dated May 2021, did not assist the Appellant in this appeal and many decisions of the group were made at family occasions. The Capex plan was also not of assistance to the Appellant as it did not specifically refer to the Appellant, rather, it was evidence in relation to the group nor did it reference that the surrender of the Option agreement would cause a liability to the Appellant of €3,400,000 plus VAT. There was no objective evidence that the group was seeking to undertake a Capex programme. It was difficult to understand how a commercial entity, which was apparently seeking to engage in some sort of Capex programme, would spend the amount of €3,400,000 plus VAT on the surrender of an Option agreement, that if it waited a further two years, would have expired.

29.23. There was no explanation proffered by the Appellant why this occurred. It occurred, the Respondent submitted, because the apartments were a very lucrative and viable business, with a turnover in the region of €800,000 per annum. Consequently, this was a viable and valuable business on its own, which was accepted by the Director of the Appellant. The evidence was that "*We were looking at all options"* including looking at options to redevelop the apartments with additional floors. The best evidence here was that the apartments remain to be sold and have not been sold to date, because the apartments are a valuable asset to the Appellant and/or the group, and this was the business of the Appellant.

Material Facts

30. Having read the documentation submitted and having listened to the oral evidence adduced and the legal submissions at the hearing of the appeal, the Commissioner makes the following findings of material fact:

30.1. The Appellant is a limited liability company and part of the group.

30.2. The group includes the Appellant and the developer of the apartments.

30.3. The members of the MFP are the beneficial owners of the Appellant and of the developer.

30.4. In 2006/2007, the apartments were developed by the developer.

30.5. The apartments are capital goods for VAT purposes and the developer, as developer of the apartments, was a capital goods owner.

30.6. On 23 December 2014, the developer entered into an agreement with the Appellant for the sale of the apartments and commercial units to the Appellant.

30.7. The transfer of the apartments and commercial units in 2014, from the developer to the Appellant, occurred pursuant to section 64(9)(c)(ii) VATCA 2010.

30.8. As the developer had reclaimed VAT in the amount of €1,311,314 on the development costs associated with the apartments that were sold to the Appellant, the Appellant then took over the CGS obligations of the developer, in accordance with section 64(9) VATCA 2010.

30.9. On 22 December 2014, the Appellant entered into an Option agreement with the MFP, which granted the MFP the right to purchase the apartments (not the commercial units) from the Appellant for their market value at the date the Option agreement was granted. This amounted to €6,200,000 plus 1% interest per

annum calculated on a cumulative basis from 22 December 2014 to the date of exercise of the Option agreement.

30.10. The Option agreement was for a period of 10 years from December 2014.

30.11. The Option agreement had an expiration date of 22 December 2024. The Appellant charged the MFP €100 for the grant of the Option and no VAT was applied to this charge.

30.12. On 22 December 2014, when the Appellant entered into an Option agreement with the MFP, the Appellant held no interest in the apartments, as it did not enter into the agreement for sale until the following day, 23 December 2014.

30.13. In April 2022, the MFP surrendered the Option agreement in consideration of a fee of €3,400,000 plus VAT of €459,000, being a total amount of €3,859,000 payable by the Appellant to the MFP, for the surrender of the Option agreement.

30.14. This payment in the total amount of €3,859,000 for the surrender of the Option agreement, was made by the Appellant despite the Option agreement expiring two years later, in December 2024.

30.15. In March/April 2022, the Appellant claimed an input VAT credit in the amount of €459,000 which gave rise to a claim for repayment of VAT by the Appellant in the amount of €441,414 in its VAT return for the period March/April 2022.

30.16. There was no dispute that the apartments are an immovable good.

30.17. The Appellant was in receipt of the amount of €840,000 per annum by way of rental income from the apartments (including service charges and commercial lettings).

30.18. Since December 2014, the Appellant has been in the business of the letting of immovable goods, namely the apartments, a VAT exempt activity, and since that date has been a landlord.

30.19. In 2021, the Appellant was considering options to redevelop the apartments with additional floors and had engaged the services of an Architect with sketches being drawn up of the proposed redevelopment.

30.20. The business decisions of the group, which included the Appellant, were often made at family occasions and dinners.

Analysis

The burden of proof

31. The appropriate starting point for the analysis of the issues is to confirm that in an appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example, in the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another ("Menolly Homes")* [2010] IEHC 49, wherein at paragraph 22, Charleton J. stated that:

> *"The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable".*

32. The Commissioner also considers it useful herein, to set out paragraph 12 of the judgment of Charleton J. in *Menolly Homes,* wherein he stated that:

> "*Revenue law has no equity. Taxation does not arise by virtue of civic responsibility but through legislation. Tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute…*"

33. The law regarding the burden of proof and the reasons for it has been reaffirmed in recent subsequent judgments, for example in *McNamara v Revenue Commissioners* [2023] IEHC 15, *Quigley v Revenue Commissioners* [2023] IEHC 244 and *J.S.S., J.S.J., T.S., D.S. and P.S. v A Tax Appeal Commissioner* [2025] IECA 96.

34. However, when an appeal relates to the interpretation of the law only, Donnelly J. and Butler J. clarified the approach to the burden of proof, in their joint judgment for the Court of Appeal in *Hanrahan v The Revenue Commissioners* [2024] IECA 113 ("*Hanrahan*"). At paragraphs 97-98 the Court of Appeal held that:

> *"97. Where the onus of proof lies can be highly relevant in those cases in which evidential matters are at stake……..*
>
> *98. In the present case however, the issue is not one of ascertaining the facts; the facts themselves are as found in the case stated. The issue here is one of law;....Ultimately when an Appeal Commissioner is asked to apply the law to the agreed facts, the Appeal Commissioner's correct application of the law requires an objective assessment of what the law is and cannot be swayed by a consideration of who bears the burden. If the interpretation of the law is at issue, the Appeal Commissioner must apply any judicial precedent interpreting that provision and in the absence of*

precedent, apply the appropriate canons of construction, when seeking to achieve the correct interpretation……."

Statutory interpretation

35. In relation to the relevant decisions applicable to the interpretation of taxation statutes, the Commissioner gratefully adopts the following summary of the relevant principles emerging from the judgment of McKechnie J. in the Supreme Court in *Dunnes Stores v The Revenue Commissioners* [2019] IESC 50 and the judgment of O'Donnell J. in the Supreme Court in *Bookfinders v The Revenue Commissioners* [2020] IESC 60 as helpfully set out by McDonald J. in the High Court in *Perrigo Pharma International Designated Activity Company v McNamara, the Revenue Commissioners, the Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 ("*Perrigo*") at paragraph 74:

"*The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd. v The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*

(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;

(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";

(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;

(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.

(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;

(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:

> *"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible.""*

36. The Commissioner is of the view that in relation to the approach to be taken to statutory interpretation, *Perrigo*, is authoritative in this regard, as it provides an overview and template of all other judgments. It is a clear methodology to assist with interpreting a statute. Therefore, the Commissioner is satisfied that the approach to be taken in relation to the interpretation of the statute is a literal interpretative approach and that the wording in the statute must be given a plain, ordinary, or natural meaning as per subparagraph (a) of paragraph 74 of *Perrigo*. In addition, as per the principles enunciated in subparagraph (b) of paragraph 74 of *Perrigo*, context is critical.

37. Furthermore, the Commissioner is mindful of the recent decision in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43 ("*Heather Hill*") and that the approach to be taken to statutory interpretation must include consideration of the overall context and purpose of

the legislative scheme. The Commissioner is mindful of the *dictum* of Murray J. at paragraph 108 of his decision in *Heather Hill*, wherein he stated that:

> *"It is also noted that while McKechnie J. envisaged here two stages to an inquiry – words in context and (if there remained ambiguity), purpose- it is now clear that these approaches are properly to be viewed as part of a single continuum rather than as separated fields to be filled in, the second only arising for consideration if the first is inconclusive. To that extent I think that the Attorney General is correct when he submits that the effect of these decisions - and in particular Dunnes Stores and Bookfinders – is that the literal and purposive approaches to statutory interpretation are not hermetically sealed".*

38. To a certain degree it might be said that these cases suggest that the "literal" and "purposive" approaches to statutory interpretation are no longer hermetically sealed. To the extent that the line between what is now permissible has become blurred, Murray J. in *Heather Hill* sets out "*four basic propositions that must be borne in mind"* from paragraphs 113 to 116 as follows:-

> "*113. First, 'legislative intent' as used to describe the object of this interpretative exercise is a misnomer: a court cannot peer into minds of parliamentarians when they enacted legislation and as the decision of this court in Crilly v. Farrington [2001] 3 IR 251 emphatically declares, their subjective intent is not relevant to construction. Even if that subjective intent could be ascertained and admitted, the purpose of individual parliamentarians can never be reliably attributed to a collective assembly whose members may act with differing intentions and objects*.
>
> *114. Second, and instead, what the court is concerned to do when interpreting a statute is to ascertain the legal effect attributed to the legislation by a set of rules and presumptions the common law (and latterly statute) has developed for that purpose (see DPP v. Flanagan [1979] IR 265, at p. 282 per Henchy J.). This is why the proper application of the rules of statutory interpretation may produce a result which, in hindsight, some parliamentarians might plausibly say they never intended to bring about. That is the price of an approach which prefers the application of transparent, coherent and objectively ascertainable principles to the interpretation of legislation, to a situation in which judges construe an Act of the Oireachtas by reference to their individual assessments of what they think parliament ought sensibly to have wished to achieve by the legislation (see the comments of Finlay C.J. in McGrath v. McDermott [1988] IR 258, at p. 276)*.

115. Third, and to that end, the words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about. The importance of this proposition and the reason for it, cannot be overstated. Those words are the sole identifiable and legally admissible outward expression of its members' objectives: the text of the legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when a statute is passed. In deciding what legal effect is to be given to those words their plain meaning is a good point of departure, as it is to be assumed that it reflects what the legislators themselves understood when they decided to approve it.

116. Fourth, and at the same time, the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose. The best guide to that purpose, for this very reason, is the language of the statute read as a whole, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information of the kind described by McKechnie J. in Brown. However - and in resolving this appeal this is the key and critical point - the 'context' that is deployed to that end and 'purpose' so identified must be clear and specific and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language."

39. The *dictum* of Murray J. in *Heather Hill* was considered and approved by the Court of Appeal in the decision in *Hanrahan*. The Court of Appeal noted that the trial judge had cited and relied on the approach to the interpretation of taxation legislation that Murray J. in the Court of Appeal identified in the decision of *Used Car Importers Ireland Ltd. v Minister for Finance* [2020] IECA 298. Murray J., when considering the provision at issue, at paragraph 162 of the judgment stated that:

"[it] falls to be construed in accordance with well-established principle. The Court is concerned to ascertain the intention of the legislature having regard to the language used in the Act but bearing in mind the overall purpose and context of the statute."

40. Moreover, the Court of Appeal in *Hanrahan* at paragraph 83 held that:

"*Thus, the High Court correctly held that in interpreting taxation statutes generally, context and purpose are relevant. Therefore, not only does s. 811 direct Revenue and the court to have regard to the purpose of the provisions at issue but even in a more general manner the context and purpose of the statute is relevant*."

41. Of note, the Court of Appeal in *Hanrahan* at paragraph 79, when referring to the *dictum* of Murray J. in *Heather Hill,* in relation to the analysis of context and purpose, stated that:

> "*Murray J. was very alive to the dangers of pushing the analysis of the context of the provision too far from the moorings of the language of the legislative section; the line between the permissible admission of "context" and identification of "purpose" may become blurred if too broad an approach to the interpretation of legislation is taken…..….He said that "the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose. The best guide to that purpose, for this very reason, is the language of the statute read as a whole, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information of the kind described by McKechnie J. in Brown…*"

42. Where there is an ambiguity in a tax statute it must be interpreted in the taxpayer's favour. In *Bookfinders*, O'Donnell J. explained that this rule against doubtful penalisation, also described as the rule of strict construction, means that if, after the application of general principles of statutory interpretation, there is a genuine doubt as to whether a particular provision creating a tax liability applies, then the taxpayer should be given the benefit of any doubt or ambiguity as the words should be construed strictly "*so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language*".

43. If there is any doubt, then a consideration of the purpose and intention of the legislature should be adopted. Then, even with this approach, the statutory provision must be seen in context and the context is critical, both immediate and proximate, but in some circumstances perhaps even further than that.

44. There is abundant authority for the presumption that words are not used in a statute without meaning and are not superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain. In particular, the Commissioner is mindful of the *dictum* of McKechnie J. in *Dunnes Stores* at paragraph 66, wherein he stated that:

> "*each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning*."

45. The purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the Court or Tribunal is to seek to ascertain the meaning of the words. The general

principles of statutory interpretation are tools used for clear understanding of a statutory provision. It is only if, after that process has been concluded, a Court or Tribunal is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language.

46. The Commissioner will now proceed to consider the statutory provisions articulated in this appeal.

Substantive issue

47. The issue to be determined in this appeal is whether VAT in the amount of €459,000 incurred by the Appellant in acquiring the surrender of an Option agreement was incurred by the Appellant acting for the purposes of its taxable supplies. It is the Respondent's position that it was not and there was no objective evidence to support such a contention.

48. In support of the Appellant's arguments that it was entitled to its claim for input VAT paid in the amount of €459,000, in relation to the surrender of the Option agreement, the Commissioner heard evidence from two witnesses, namely the Director of the Appellant and the Appellant's Financial Controller.

Chronology of events

49. The Commissioner notes that in or around 2006/2007 the apartments were developed by the developer. The apartments are capital goods for VAT purposes, and it was the case that the developer of the apartments was a capital goods owner. Section 2 VATCA 2010 defines "capital goods" as meaning "*developed immovable goods…*". Furthermore, section 19 VATCA 2010 provides for the supply of goods and states that "*For the purposes of this Act "supply", in relation to immovable goods, shall be regarded as including the transfer in substance of – (a) the right to dispose of the immovable goods as owner or (b) the right to dispose of the immovable goods".*

50. Section 64 VATCA 2010 provides for the CGS. The Commissioner understands that a property for the CGS is deemed to have a 20-year "VAT life" and the entitlement to VAT recovery in relation to a property depends on whether the activities that it was used for are taxable/VAT deductible activities. The CGS regulates that entitlement to deductibility over the "VAT life" of the property based on the actual taxable use. In accordance with section 94(8)(c) VATCA 2010, the Commissioner notes that the developer was entitled to avail of the special rules for the CGS for residential property developers who have let properties, where the developer's initial intention was to sell the property, but subsequently let the property due to market conditions.

51. The Commissioner further notes that on 23 December 2014, the Appellant entered into an agreement with the developer for the sale of the apartments and commercial units to the Appellant. The Commissioner notes that the Appellant was incorporated on 4 November 2014 [1] and this was confirmed in evidence by the Appellant's Financial Controller. Furthermore, the Commissioner observes that a contract was entered into on 23 December 2014, between the Appellant and the developer for consideration in the amount of €6,845,727, which was apportioned as the amount of €740,000 for the commercial units and the amount of €6,105,727 for the residential apartments, and which as submitted by the Appellant, was based on an independent valuation. The Appellant contended that the decision for the sale of the apartments by the developer to the Appellant, was due to the significant bank debt of the group at that time.

52. The Appellant submitted that the transfer of the apartments in 2014, occurred pursuant to section 64(9)(c)(ii) VATCA 2010 and it was a connected supply. The Commissioner notes that section 64(9)(a) VATCA 2010 defines a "connected supply" as meaning "*a supply or transfer of a capital good which is a supply or transfer on which a seller would, but for the application of this subsection, be obliged to calculate an amount of tax due in accordance with subsection (8)*" There was no dispute that the Appellant took over the CGS obligations of the developer in accordance with section 64(9) VATCA 2010. The Appellant posited that subsection (9) provides that a clawback will not apply if the seller and the purchaser agree in writing that the purchaser will take on the CGS liabilities in relation to the property. The Appellant submitted that section 64(9)(c)(ii) VATCA 2010 provides that such a transaction is deemed not be a supply for the purposes of the Act and that this was why the Appellant inherited the capital goods record of the property.

53. Hence, the Appellant contended that it "stepped into the shoes of [the developer]" and accepted responsibility for all CGS obligations of the developer. Consequently, no VAT was chargeable on the supply to the Appellant and no new CGS life began at the time of the supply. The Appellant argued that section 64(9) VATCA 2010 "*unambiguously provides that the sale is ignored, and no new capital goods scheme requirements are created.*"[2] The Appellant submitted that as it stepped into the shoes of the developer, the Appellant "*should be regarded as the developer of the property for VAT purposes"* and that *"All future acquisitions/disposals relating to this property should fall within s.94(8) VATCA."*[3] The Commissioner notes that since acquiring the apartments in December

[1] Transcript Day 1, page 78
[2] Correspondence dated 11 December 2024, from Azets ("the Appellant's representative")
[3] Correspondence dated 11 December 2024, from the Appellant's representative

2014, the Appellant has continued to carry out the annual CGS adjustments of 1/20th of the VAT reclaimed by the developer on the development of the apartments.

54. The Commissioner observes from the correspondence submitted in this appeal that the Appellant was described as an entity that holds investment property, for example it was stated in correspondence that "*[i]n 2014 a decision was taken to sell the apartments and commercial units to [the Appellant], which holds investment property."*[4] Moreover, it is noted that the Respondent's Outline of Arguments made reference to the apartments being described in the Appellant's accounts for the financial years 2019, 2020, 2021 and 2022 as "investment property" and that the accounts for the financial years 2019 and 2020, described the Appellant as "an investment property holding company". Furthermore, the Commissioner notes that the Respondent's Outline of Arguments stated that "investment property" is defined in the 2020, 2021 and 2022 accounts as "*property held either to earn rental income, or for capital appreciation (including future re-development) or for both, but not for sale in the ordinary course of business*".[5]

55. The Commissioner notes that on 22 December 2014, prior to the agreement with the developer for the sale of the apartments and commercial units to the Appellant on 23 December 2014, the Option agreement dated 22 December 2014 was entered into by the Appellant and the MFP, for consideration in the amount of €100.00. The Option agreement granted the MFP the right to purchase the apartments from the Appellant for their market value at the date the Option agreement was granted. This amounted to €6,200,000 plus 1% interest per annum calculated on a cumulative basis from 22 December 2014 to the date of exercise of the Option agreement. The Option agreement had an expiration date of 22 December 2024.

56. The Commissioner observes that whilst the overall development consisted of commercial and residential units, the Option agreement related only to the residential units. The Commissioner listened to the evidence of the Director of the Appellant that at the time, the concern for the group was that it might lose everything due to its financial difficulties and the Option agreement was something that would protect the family and leave them with an asset should that happen. The Director of the Appellant testified that the directors would have received advice prior to the Appellant entering into the Option agreement. The Director of the Appellant gave evidence that: "*It's a family business so, I mean we think of both sides. But as I said, it stays within the family and we built it, we developed it, we want to sell it and as I said, we're one of all. Why wasn't it suggested to us by our advisors to*

[4] Index to Book of Pleadings, Correspondence and Authorities, page 71
[5] Index to Book of Pleadings, Correspondence and Authorities, page 24

do it the other way? I don't know, they advised us to do it one way or the other and that's what you pay these guys for, and that's what you respect them for, and that's what we did at the time. And why wasn't it done the other way, you would have to ask the advisors, at the time, why wasn't it."

57. Of note, on 22 December 2014, when the Appellant entered into the Option agreement with the MFP, the Appellant held no interest in the apartments as it did not enter into the agreement for the sale of the apartments until the following day, 23 December 2014. Furthermore, the Commissioner notes that in April 2022, the Appellant made an offer to the MFP to surrender the Option agreement for the consideration of the amount of €3,400,000, plus VAT in the amount of €459,000 payable by the Appellant to MFP. Notably, this transaction occurred despite the Option agreement being due to expire on 22 December 2024, some two years later. The Commissioner notes that the description on the invoice dated 30 April 2022, from the MFP to the Appellant stated: "*Surrender of all rights and obligations under the Option Agreement for the purchase of [the apartments].*"

58. The Appellant has sought recovery of the VAT paid on the transaction, in the amount of €459,000 arising from the surrender of the Option agreement, which gave rise to a repayment claim for input VAT by the Appellant in the amount of €441,414 in its VAT return for the period March/April 2022 and which is the subject matter of this appeal. The Appellant submitted that the claim was made in accordance with section 59(2)(a) VATCA 2010 which permits an accountable person to claim an input credit on VAT charged on the purchase of goods and services, where those purchases are used for the purpose of the accountable person's taxable supplies. The Appellant posited that it incurred input VAT in the amount of €459,000 on the surrender of the Option agreement by the MFP, which enabled the Appellant to obtain all the taxable proceeds from the future sale of the apartments, hence the VAT was recoverable.

Section 64(9) VATCA 2010

59. It was contended for by the Appellant that the surrender of the Option agreement was a supply of a capital good for the purposes of section 64(9)(a) VATCA 2010. The Commissioner notes the correspondence from the Appellant's representative to the Respondent dated 11 December 2024 in that regard. In particular, the Commissioner notes the submission of the Appellant that "*[a]s [the Appellant] stepped into the shoes of [the developer], [the Appellant] should be regarded as the developer of the property for VAT purposes. All future acquisitions/disposals relating to this property should fall within s.94(8) VATCA*." The Commissioner understands the Appellant's argument was that as the surrender of the Option agreement directly related to the asset, namely the apartments, then that transaction should also fall under the CGS.

60. In response, the Commissioner notes the correspondence from the Respondent dated 3 March 2025, which stated that the Appellant did not develop the apartments during a property development business and was therefore not the developer. Furthermore, the Commissioner notes that the Respondent argued that "*the [Appellant] has taken over the Capital Goods Scheme (CGS) obligations on the property under the provisions of section 64(9) of the Value Added tax Consolidation Act 2010 (VATCA) by "stepping into the shoes" for CGS. Separately [the Appellant] are obliged to charge VAT on the supply of the properties when they dispose of them, under the provisions of section 94(8)(b) VATCA where the three conditions set out in section 94(8)(b) VATCA 2010 are fulfilled. [The Appellant] are a person connected to the developer, as set out in section 94(8)(b)(ii). [The Appellant] did not develop the residential property in the course of a property development business and therefore is not the developer*".

61. Section 64(9)(a) VATCA 2010 defines a "connected supply" as meaning "*a supply or transfer of a capital good which is a supply or transfer on which a seller would, but for the application of this subsection, be obliged to calculate an amount of tax due in accordance with subsection (8).*" The Commissioner has considered section 64(9) VATCA 2010, and the interpretation contended for by the Appellant, namely that it "stepped into the shoes" of the developer and in consequence, should be regarded as the developer for any subsequent transactions. Whilst the Commissioner is satisfied that what occurred on 23 December 2014, when the apartments were transferred to the Appellant, may be described as the Appellant "stepping into the shoes" of the developer for the purposes of the CGS, it cannot be said that what occurred in some way transformed the Appellant into the developer of the apartments. The Commissioner is satisfied that the Appellant was not the developer of the apartments and there was no evidence to support such a contention. The evidence adduced at the hearing of the appeal was that the developer, another entity in the group, was the developer of the apartments in or about 2006/2007.

62. The Commissioner understands there was no dispute between the parties that the Appellant took over the CGS obligations of the developer, in accordance with section 64(9) VATCA 2010. The Appellant submitted that section 64(9)(c)(ii) VATCA 2010 provides that such a transaction was deemed not be a supply for the purposes of the VATCA 2010 and that this was the basis upon which the Appellant inherited the capital goods record of the apartments. Thus, the Appellant became a capital goods owner, in accordance with section 63(1) VATCA 2010, on the transfer of the apartments. Section 64(9) VATCA 2010 provides that where a purchaser and seller agree in writing that the purchaser will take on the CGS liabilities in relation to the property, the purchaser "steps into the shoes" of the seller accepting responsibility for all CGS obligations of the seller and no VAT is

chargeable on the supply and no new CGS life begins at the time of the supply. However, that supply was the supply that occurred on 23 December 2014 between the developer and the Appellant. The Commissioner is satisfied that section 64(9) VATCA 2010 had no application to the surrender of the Option agreement, a separate and distinct supply that occurred in April 2022, some eight years later and the Commissioner was presented with no legislative basis for such a contention.

Whether there was a supply of a capital good

63. Counsel for the Appellant submitted that if the Appellant sells the apartments in the future, which will be considered a taxable supply and VAT will be chargeable on that supply, which will be considered a supply of immovable goods pursuant to section 19 VATCA 2010. Therefore, the tax treatment of the surrender of the Option agreement should mirror the tax treatment of the underlying asset, such that the surrender of the Option agreement was also a supply of an immovable good, in accordance with section 19 VATCA 2010. The Commissioner observes that section 63(1) VATCA 2010 defines a "capital goods owner" as *"…a taxable person who incurs expenditure on the acquisition or development of a capital good*".

64. The Commissioner notes from the evidence adduced and the documents submitted in this appeal that the Appellant was involved in the residential letting of the apartments, namely the letting of immovable goods and has done so since it acquired the apartments on 23 December 2014. The letting of the apartments is regarded as an exempt activity for the purposes of VAT, and there was no dispute that this was so. Thus, no deduction of VAT is allowed by the Respondent for goods and services supplied based on Article 135(1)(l) of the Principal VAT Directive, which exempts the leasing or letting of immovable property. The Commissioner notes that Article 135(1)(j) of the Principal VAT Directive exempts the supply of a building or parts thereof and the land. Section 94 VATCA 2010 transposes Article 135 of the Principal VAT Directive into Irish law. Article 168 of the Principal VAT Directive restricts the right to deduction or refund of the VAT incurred on goods and services used for the purposes of taxed transactions. Section 59(2)(a) VATCA 2010 transposes Article 168 of the Principal VAT Directive into Irish legislation.

65. However, whilst the letting of the apartments, being an immovable good, was an exempt activity for the purposes of VAT, the Appellant argued that the surrender of the Option agreement related to the underlying asset, namely the apartments, which when sold will be a taxable supply. Therefore, the tax treatment of the surrender of the Option agreement should mirror the tax treatment of the sale of the immovable good at that time and the surrender of the Option Agreement should be deemed a supply of immovable goods also. That was so, counsel for the Appellant submitted, as the surrender of the Option

agreement related to the supply of immovable goods and "*the VAT incurred constitutes a capital good of which [the Appellant] is the capital good owner*."

66. As set out heretofore in this Determination under the heading "Appellant's submissions", the Appellant relied on the decisions in *Case 3 AC 2003* and *Landlinx* to support its argument that the tax treatment of the surrender of the Option agreement should mirror the underlying asset namely, the apartments. The Appellant contended that the decision in *Case 3 AC 2003* supports the view that the granting of an option curtails the rights of a freehold, and if section 19(2) VATCA 2010 was considered, the Option agreement interfered with the right to disposal of the immovable goods, namely the apartments. The Commissioner was directed by counsel for the Appellant to *inter alia* the following passage of the decision, in support of its position that the tax treatment of the surrender of the Option agreement should mirror the tax treatment of the underlying asset, which stated that:

    "*The option operates to reduce the full ownership rights of the grantor in respect of the underlying asset and, in the absence of other factors, should properly be accorded the same tax treatment as the disposal of the underlying asset*."

67. Having considered *Case 3 AC 2003* the Commissioner observes *inter alia* that the decision relates to the granting of an option, rather than the surrender of an option, which is not the matter at issue in this appeal. Therefore, the Commissioner considers that the decision was not relevant or supportive of the Appellant's position in this appeal, because this appeal related to the surrender of an option not the granting of an option, which is a notable distinguishing factor herein.

68. Furthermore, counsel for the Appellant directed the Commissioner to the decision in *Landlinx*. The Respondent submitted that *Landlinx* "*is a decision of the First Tier Tribunal in the UK and is not binding, or even of any persuasive authority*" and the Respondent argued that the decision was incorrect. The Commissioner notes that the appeal raised the question whether the release (for a consideration) of an option to purchase land was a taxable supply of services or an exempt supply of an interest in land for VAT purposes. The question that arose was what the correct VAT treatment of the surrender of an option to acquire land was. Reference was made to paragraph 91 of the decision which stated that:

    "*In the present case, the land which was the subject of the Option Agreement, as we understand it, had already been "consumed" by virtue of its first occupation and, therefore, subsequent transactions concerning the land should be exempt because they had left the production process*."

69. Also, counsel for the Appellant directed the Commissioner to the following paragraphs in *Landlinx* which the Appellant stated supported its position that the tax treatment of the surrender of the Option agreement should mirror that of the underlying asset:

> "*102. We consider that the release of a call option to acquire land for a consideration should be taxed in the same way as the grant of the option…the decision of the CJEU in Lubbock Fine, where a surrender of a lease was treated in the same way and entitled to the same exemption as its grant, clearly indicates that the release of an option over land should be treated in the same manner as its grant.*
>
> *……*
>
> *104. In the light of our conclusion that a supply of land and buildings within Article 135(1)(j) is not confined to supplies of goods and can include an option (and its surrender)….;"*

70. Therefore, counsel for the Appellant argued that the interest in the apartments acquired by the Appellant on the surrender of the Option agreement was a capital good. The Commissioner notes that it was submitted that the granting of the Option agreement was a creation of an interest in land and the expenditure incurred on the surrender of the Option agreement was expenditure on the acquisition of that interest in the immovable property consisting of the apartments.

71. The Respondent disagreed with the Appellant's arguments. The Commissioner notes that the Respondent submitted that "*the grant or release of an option is not treated as a supply of immovable property as it does not involve the transfer in substance of the right to dispose of the immovable goods as owner or otherwise as required under s19(2) VATCA*." The Respondent argued that the VAT treatment of an option should follow the underlying supply which, herein, in March/April 2022, was the letting of immovable goods, namely the apartments.

72. Section 2(1) VATCA 2010 defines "capital goods" as meaning "*developed immovable goods and includes refurbishment within the meaning of section 63 (1), and a reference to a capital good includes a reference to any part thereof and the term "capital good" shall be construed accordingly;".*

73. Section 2(1) VATCA 2010 provides that "immovable goods" has the same meaning as "immovable property" has in Article 13b (inserted by Council Implementing Regulation 1042/2013 of 7 October 2013) of Council Implementing Regulation 282/2011/EU of 15 March 2011. Article 13b of Council Implementing Regulation 282/2011/EU provides that:

"*For the application of Directive 2006/112/EC, the following shall be regarded as 'immovable property': (a)any specific part of the earth, on or below its surface, over which title and possession can be created; (b)any building or construction fixed to or in the ground above or below sea level which cannot be easily dismantled or moved; (c)any item that has been installed and makes up an integral part of a building or construction without which the building or construction is incomplete, such as doors, windows, roofs, staircases and lifts; (d)any item, equipment or machine permanently installed in a building or construction which cannot be moved without destroying or altering the building or construction*."

74. Section 19(2) VATCA 2010 provides that "supply", "*in relation to immovable goods, shall be regarded as including the transfer in substance of (a) the right to dispose of the immovable goods as owner, or (b) the right to dispose of the immovable goods*".

75. Having regard to the aforementioned statutory provisions, the Commissioner is satisfied that the surrender of the Option agreement was not a supply of "immovable goods" as it did not involve the transfer in substance of the right to dispose of an immovable good as owner or otherwise, as required under section 19(2) VATCA 2010. Furthermore, the surrender of the Option agreement does not accord with the definition of immovable good in section 2(1) of VATCA 2010 which, as set out above, has the same meaning as "immovable property" has in Article 13b. Consequently, the surrender of the Option agreement was not a capital good as defined in section 2(1) VATCA 2010 as posited by the Appellant in this appeal. Thus, the Commissioner is satisfied that the surrender of the Option agreement was not a supply of immovable goods as contended for by the Appellant. Hence, the Commissioner is not satisfied that the VAT treatment of the surrender of the Option agreement must "mirror" that of the underlying asset, namely the apartments, which is an immovable good, as the surrender of the Option agreement was not the supply of an immovable good.

76. Furthermore, the Commissioner is satisfied that the decision in *Landlinx* has no application to the facts of this appeal. The decision in *Landlinx* concerned Article 135(1)(j) of the Principal VAT Directive and held that it was not confined to supplies of goods and can include an option (and its surrender). The Commissioner is not satisfied that Article 135(1)(j) of the Principal VAT Directive can be interpreted as extending to include the surrender of an option. The Commissioner did not find the decision to be persuasive in that regard nor is the Commissioner bound to follow the decision.

77. Accordingly, the Commissioner does not accept the Appellant's argument that the surrender of the Option agreement was a supply of immovable goods and the

Commissioner finds that the surrender of the Option agreement did not create a capital good, as posited by the Appellant. The Commissioner is satisfied that the surrender of the Option agreement did not fall within the definition in section 2(1) VATCA 2010 of "capital goods". Moreover, the surrender of the Option agreement in April 2022, cannot be described as a transaction that was subject to the provisions of section 64(9) VATCA 2010.

Direct and immediate link, actual and intended use

78. The Appellant posited that there was a direct and immediate link to an output transaction giving rise to the input VAT herein, because in order to retain its right to ownership of the apartments, the Appellant made a payment for the surrender of the Option agreement, which enabled the Appellant to sell the apartments in the future, on which output VAT will arise. However, the Respondent dismissed the Appellant's argument and stated that the surrender of the Option agreement allowed the Appellant to continue to carry on the VAT exempt activity of residential letting and it was that "actual use" which the VAT cost, incurred on the surrender of the Option agreement, was linked to. Therefore, the Respondent argued that as residential letting is an exempt activity for the purposes of VAT, no deductibility was allowed.

79. The Respondent submitted that it refused the Appellant's claim for input VAT incurred on the surrender of the Option agreement on the basis that there was no "direct and immediate link" "*between the Appellant's input transaction, the charge arising on the surrender of the Option agreement, and a taxable output transaction to permit the Appellant, as a taxable person, to deduct VAT incurred on that purchase/charge*." The Respondent argued that the "direct and immediate link" was not to the apartments, but rather to the letting of the apartments, which cannot be taxed due to the provisions of section 97(4) VATCA 2010.

80. Section 97(4) VATCA 2010 provides that: "*A landlord's option to tax may not be exercised in respect of all or part of a house or apartment or other similar establishment to the extent that that those immovable goods are used or to be used for residential purposes, including any such letting— (a) governed by the Residential Tenancies Act 2004, (b) governed by the Housing (Rent Books) Regulations 1993 (S.I. No. 146 of 1993), (c) governed by section 10 of the Housing Act 1988, (d) of a dwelling to which Part II of the Housing (Private Rented Dwellings) Act 1982 applies, or (e) of accommodation which is provided as a temporary dwelling for emergency residential purposes*".

81. Also of note and relevant herein is section 59(2) VATCA 2010 which provides that: *"[s]ubject to subsection (3), in computing the amount of tax payable by an accountable person in respect of a taxable period, that person may, in so far as the goods and services*

are used by him or her for the purposes of his or her taxable supplies or of any of the qualifying activities, deduct – (a) the tax charged to him or her during the period by other accountable persons by means of invoices, prepared in the manner prescribed by regulations, in respect of supplies of goods or services to him or her".

82. The Appellant claimed that it was entitled to claim the VAT input cost on the grounds that when the apartments are eventually sold, it will constitute a taxable supply. The Respondent submitted that such a proposition does not satisfy the "direct and immediate" test to be applied to a claim for input VAT and it was the Appellant's actual use, namely the letting of residential property, that took precedence over any intended use to determine the deductibility of VAT. In support of its argument, the Commissioner notes that the Appellant relied on the decision in *Sonaecom.*

83. The decision in *Sonaecom* concerned a request for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union ("TFEU"). The request was in the form of two questions to the CJEU. The first question that was asked of the CJEU was "*is it compatible with the deductibility rules laid down in the [Sixth Directive], specifically Articles 4(1) and (2) and 17(1),(2) and (5), to deduct tax borne by the appellant, [Sonaecom], in respect of consultancy services connected with a market study commissioned with a view to acquiring shares, where that acquisition did not materialise?"* and the second question that was asked was "*is it compatible with the deductibility rules laid down in the [Sixth Directive], specifically Articles 4(1) and (2) and 17(1),(2) and (5), to deduct tax borne by the appellant, [Sonaecom], in respect of the payment to [BCP Investimento] of a commission for organising and putting together a bond loan, allegedly taken out with a view to integrating the financial structure of its affiliated companies, and which, since those investments failed to materialise, was ultimately transferred to Sonae, SGPS, the parent company of the group?"*

84. Counsel for the Appellant submitted that it was relying on the first question, but not the second question in support of its appeal. However, the Respondent submitted that the second question was highly relevant in this appeal and was in fact determinative of the appeal. The Commissioner will address the Respondent's arguments hereunder in her Determination, in due course.

85. Counsel for the Appellant referred the Commissioner to paragraphs 41 and 42 of the decision of the CJEU which stated that:

> "*41 Furthermore, in accordance with settled case-law, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to the right to deduct is, in principle, necessary*

before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement. The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them is a component of the cost of the output transactions giving rise to the right to deduct (judgment of 17 October 2018, Ryanair, C-249/17, EU:C:2018:834, paragraph 26 and the case-law cited).

42 However, a taxable person also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct where the costs of the services in question are part of his or her general costs and are, as such, components of the price of the goods or services which he or she supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole (judgment of 17 October 2018, Ryanair, C-249/17, EU:C:2018:834, paragraph 27 and the case-law cited)."

86. Counsel for the Appellant posited that section 94(8) VATCA 2010 creates a "*kind of seal*" on the apartments, until such time as they are sold, because the sale of the apartments will be considered a taxable supply. Thus, the Appellant was entitled to the input VAT immediately on the surrender of the Option agreement, because it was preparatory work for the eventual taxable supply of the immovable good, namely the apartments.

87. The Commissioner observes that in support of the Respondent's argument, that the Appellant's contentions do not satisfy the "direct and immediate" test to be applied to a claim for input VAT, counsel for the Respondent also relied on the decision of the CJEU in *Sonaecom.* In fact, counsel for the Respondent submitted that in relation to the decision of the CJEU on the second question, it was determinative, as it was the actual use of the goods that was relevant for the purposes of determining deductibility of input VAT. Counsel for the Respondent directed the Commissioner to the following paragraphs of the decision in *Sonaecom,* wherein the CJEU held that:

"52. Under Article 17(2)(a) of the Sixth Directive, the taxable person is entitled to deduct input tax in so far as the goods and services 'are used' for the purposes of his or her taxable transactions.

53. Consequently, and as the Advocate General observed in point 54 of her Opinion, it follows from the wording of that provision that the right to deduct input tax is founded on an approach which is principally based on the actual use of the goods and services purchased by the taxable person.

54. An analysis of the context of which that provision forms part and of its purpose and that of the Sixth Directive support that literal interpretation.

55. As regards the context of which Article 17(2)(a) of the Sixth Directive forms part, it should be noted that, with regard to the deductibility of input tax paid on mixed-use goods, sub-subparagraphs (a) to (d) of the third subparagraph of Article 17(5) of that directive list various corrective measures which the Member States may adopt in order, inter alia, to apply more precise rules for calculating the deductible proportion than that laid down in the second subparagraph of Article 19(1) of that directive, taking account of the specific characteristics of the activities of the taxable person concerned.

56. In that context, as the Advocate General observed in point 55 of her Opinion, Member States may provide for calculation methods different from the turnover-based allocation key provided for in the Sixth Directive if the method chosen guarantees a more precise result (see, to that effect, judgment of 8 November 2012, BLC Baumarkt, C-511/10, EU:C:2012:689, paragraphs 23 to 26, and of 9 June 2016, Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft, C-332/14, EU:C:2016:417, paragraph 33).

57. In addition, it is apparent from Article 20(6) of the Sixth Directive, which concerns the adjustment of the deduction of input tax, that that deduction must, as the Advocate General observed in point 55 of her Opinion, be adjusted as precisely as possible to actual use in order to avoid 'unjustified benefits' or 'unjustified prejudice' for the taxable person.

58. Thus, it follows not only from Article 17(2)(a), but also from other provisions of the Sixth Directive that that directive is based on the logic that the deduction of input tax paid by the taxable person must correspond as precisely as possible to the actual use of the goods and services purchased by him or her.

59. Consequently, an actual use of goods and services takes precedence over the initial intention.

60. As regards the purpose of Article 17(2)(a) of the Sixth Directive and that directive taken as a whole, it should be noted that an approach according to which the right to deduct input VAT is based solely on the intention of the taxable person as regards the use of the goods and services purchased, not on their actual use, would risk undermining the very functioning of the VAT system.

61. As pointed out, in paragraph 38 above, the deduction arrangement is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his or her economic activities. The common system of VAT therefore ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT (judgments of 14 February 1985, Rompelman, 268/83, EU:C:1985:74, paragraph 19, and of 28 February 2018,

Imofloresmira – Investimentos Imobiliários, C-672/16, EU:C:2018:134, paragraph 38 and the case-law cited).

……

64. In that context, Article 17(2) and (3) of the Sixth Directive provides that a taxable person is entitled to deduct input tax paid only in respect of the goods and services which have a link with taxable output transactions. On the other hand, where goods or services acquired by a taxable person are used for purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected or input tax deducted (see, to that effect, judgment of 14 September 2017, Iberdrola Inmobiliaria Real Estate Investments, C-132/16, EU:C:2017:683, paragraph 30 and the case-law cited).

65. As the Advocate General observed in point 58 of her Opinion, a right to deduct input tax existing solely on the basis of a former intention of the taxable person to carry out transactions subject to VAT and which does not, therefore, take account of the nature of the transactions actually carried out by that taxable person would afford him or her a competitive advantage over other undertakings which have carried out similar transactions, which would as a consequence be contrary to the principle of fiscal neutrality.

66. Thus, in accordance with Article 17 of the Sixth Directive, for the purposes of deducting input VAT paid on services, account must be taken of the actual use of the goods and services purchased by the taxable person, not of the use intended by him or her."

88. The Appellant argued that in accordance with section 94(8)(b) VATCA 2010 the future sale of the apartments by the Appellant will be subject to tax as the three requirements provided for in section 94(8)(b) VATCA 2010 are satisfied. There was no dispute that the apartments constituted an immovable good, such that the requirement in section 94(8)(b)(i) VATCA 2010 was satisfied. The Appellant was connected to the person who developed the property in the course of its development business in satisfaction of section 94(8)(b)(ii) VATCA 2010 and in accordance with section 94(8)(b)(iii) VATCA 2010 "*[the developer/the Appellant was entitled to a VAT deduction on the acquisition or development of the property*." Thus, the Appellant posited that the corollary of this was that the surrender of the Option agreement created a capital good, as the Appellant acquired an interest in the property, and it therefore related to the supply of immovable goods. The Appellant posited that the surrender of the Option agreement and the VAT liability incurred by the Appellant

was directly linked to the asset, being the apartments. Thus, when the apartments are eventually sold, VAT will be charged on the sale.

89. Of note, the Respondent pointed out that the requirement in section 94(8)(b)(ii) VATCA 2010 that the Appellant be connected to the person who developed the property in the course of its development business, was a requirement that can only be satisfied at the time of any sale. The Commissioner agrees with the Respondent in that regard, and that it was not possible for the Appellant to satisfy that requirement, until such time that section 94(8)(b) VATCA 2010 is engaged, and the apartments are the subject of a sale.

90. Counsel for the Respondent submitted that not only does the position proffered by the Appellant not satisfy the "direct and immediate" test, but it was the Appellant's actual use, namely the letting of residential property, which takes precedence over any intended use, to determine the deductibility of VAT (see *Sonaecom*). The Commissioner heard evidence from the Director of the Appellant in relation to the Appellant's business activities. In particular, the Director of the Appellant testified that the Appellant was not a landlord. The Commissioner notes the evidence of the Director of the Appellant that "*We're not landlords. It was never our intention to be landlords…. That's not our core business, our core business is what we do day-to-day, it's our bread and butter, it's the trading companies and it's development basically, as they say, to build, develop. If some of them enhance our business great*[6]*…..We're not landlords. It takes a lot to manage a property of that size and it's not our core business. I know if we invested it in something else we could get a bigger return for it. It gives us more opportunity, as I said, to grow our business, to keep us interested, but also like add to our portfolio and what that portfolio looks to us like now is we could buy, add, sell. I don't know what it is. We're not landlords, we're developers.* [redacted] *Day-to-day that's our core business. We like to buy and develop. But we're certainly not landlords and it's nothing that I have an interest in to keep.*"[7]

91. However, despite the evidence from the Director of the Appellant, the Commissioner observes from the documentation submitted in this appeal that the Appellant has been involved in letting the apartments (and some commercial premises), since 2014. This activity is a VAT exempt activity in accordance with section 59(2) VATCA 2010 and there was no dispute between the parties that residential letting was an exempt activity for the purposes of VAT. Moreover, the Director of the Appellant did not dispute that the Appellant was a landlord, but rather qualified it as being a "landlord by default". The Commissioner

[6] Transcript Day 1, page 19
[7] Transcript Day 1, page 42

notes that it was put to the Director of the Appellant that the Appellant "did not have a life" before the apartments were transferred to the Appellant in December 2014, and that the Appellant was in fact, in the business of being a landlord. Having regard to the evidence adduced in this appeal, the Commissioner is satisfied that the Appellant was a landlord.

92. In addition, the Commissioner has considered the document entitled "Directors Meeting – Capex/Investment Meeting 31 May 2021" wherein it is stated under the heading "Other Properties" that: *"…Apartment Block: [the Appellant] to purchase the call/put option before the year is complete.* [redacted]." Two further documents were submitted entitled "Director's Meeting" dated 10 May 2021 and 25 May 2021. The meeting notes dated 10 May 2021 referenced the Appellant and stated that *"[the Appellant] & Units - alternative options for an extra floor -* [redacted] *options. Look at all options to get best market value for site – what other idea's can we propose…".* The meeting notes dated 25 May 2021 referenced the Appellant only under the heading "Old Notes" and the Commissioner notes it repeats what the Commissioner has set out in the meeting notes dated 10 May 2021. The Commissioner has also considered the Capex spreadsheet, consisting of a one-page document, that was presented to the Appellant's financial provider, and which was handed to the Commissioner at the hearing of the appeal.

93. Both the Director of the Appellant and the Appellant's Financial Controller were asked why the meeting notes were not produced prior to the hearing of the appeal when requested by the Respondent in prior correspondence with the Appellant. The Commissioner notes the evidence of the Director of the Appellant was that it was her view that the Respondent requested "board minutes" and she further stated that *"[s]o there was no official Board Minutes. These are Minutes around the table ad hoc*."

94. Counsel for the Appellant submitted that these documents are objective evidence that supported an intention on the part of the Appellant to sell the apartments. The Commissioner is not satisfied that the reference made in the meeting notes dated 31 May 2021 to the Appellant *"to purchase the call/put option before the year is complete"* was objective evidence supportive of an intention on the part of the Appellant to sell the apartments. Moreover, there was no reference to a sale of the apartments nor to an auctioneer being engaged. In fact, the Commissioner notes the reference in the meeting notes dated 10 May 2021 to an Architect being engaged to look at "*alternative options for a second floor*". This was consistent with the evidence of the Director of the Appellant that an Architect was engaged by the Appellant in relation to the apartments, as it was considering a plan to redevelop the apartments with additional floors. The Commissioner is satisfied that the meetings notes submitted do not specifically reference the sale of the

apartments by the Appellant or that there was an intention to sell the apartments by the Appellant.

95. Accordingly, the Commissioner does not consider that objective evidence has been produced by the Appellant in this appeal to support the contention that the Appellant had an intention to sell the apartments in March/April 2022, when the surrender of the Option agreement took place, which was the relevant period when the VAT was incurred by the Appellant.

96. The Commissioner is satisfied that the test to be applied was, is there an "immediate and direct link" between the Appellant's input cost, being the cost paid for the surrender of the Option agreement and the output costs for the Appellant (as per *Sonaecom*). The Commissioner is satisfied from the evidence adduced, that it was common case that the Appellant was engaged in VAT exempt activities, namely the letting of immovable residential goods, being the apartments. For VAT purposes, no input VAT credit is allowed for exempt supplies. The Respondent argued that there was no right to deduct the VAT on the surrender of the Option agreement, as this input cost had a "direct and immediate" link to the letting of exempt immovable residential goods. That was so, counsel for the Respondent submitted, because the surrender of the Option agreement allowed the Appellant to continue to carry on its exempt activity, namely residential letting and the surrender of the Option agreement was not related to a taxable supply.

97. Having considered the submissions and evidence adduced in this appeal, including the case law opened to the Commissioner, the Commissioner is satisfied that there was no objective evidence adduced to support a direct or immediate link between the Appellant's input VAT cost incurred on the surrender of the Option agreement and its taxable outputs, because the Appellant's activities were that of a VAT exempt activity, namely the letting of immovable goods, being the apartments and the surrender of the Option agreement permitted the Appellant to continue with that activity.

98. Moreover, having regard to the decision of the CJEU in *Sonaecom*, the Commissioner is satisfied that actual use takes precedence over any intended use. Having considered the documentation and evidence adduced in this appeal, the Commissioner accepts the Respondent's argument. The Appellant has been carrying on a VAT exempt activity, namely the residential letting of the apartments, since it acquired the apartments in December 2014. Whilst the Director of the Appellant posited that "they were not landlords", it was clear to the Commissioner that the Appellant was in the business of being a landlord, having carried on the activity of letting the apartments since 2014, which is an exempt activity for the purposes of VAT. The Commissioner is satisfied that the surrender of the

Option agreement allowed the Appellant to continue with an exempt activity and there was no evidence adduced to support a finding that the surrender of the Option agreement was related to a taxable supply.

99. Furthermore, and as previously stated by the Commissioner, no documentary evidence was submitted by the Appellant to support its argument as to an intention to sell the apartments, such as the engagement of an auctioneer or meeting notes that expressly refer to a sale of the apartments by the Appellant and the rationale for same, as part of a commercial business decision. What was apparent to the Commissioner was that in 2021, the Appellant was considering redeveloping the apartments further, with an additional floor to the apartments. The meeting notes submitted do not support an intention on the part of the Appellant to sell the apartments in 2021 or in 2022. All that was referenced in the meeting notes was that the Appellant was "*to purchase the call/put option before the year is complete*". No rationale for this action point was proffered in the meeting notes.

100. In addition, the Commissioner notes that it was highlighted by counsel for the Respondent during her cross examination of the Appellant's Financial Controller that it was not sufficiently explained why, from a commercial perspective, the Appellant would proceed to pay the amount of €3,400,000 plus VAT, for the surrender of the Option agreement when it was due to expire two years later, on 22 December 2024. The Appellant's Financial Director did not explain to the Commissioner, if the Appellant had a Capex programme and was in the process of acquiring capital to purchase other assets, why it would proceed to discharge the amount of €3,400,000 plus VAT for the surrender of the Option agreement, and taking into consideration its other liabilities with its financial provider in the amount of €4,500,000[8], it would be left with, consequent to the sale of the apartments, an amount of in or around €2,600,000[9] to contribute to its "bank" of capital to acquire assets in this supposed Capex programme.

101. The Commissioner is satisfied that the surrender of the Option agreement allowed the Appellant to continue to carry on its exempt activity, namely residential lettings. Furthermore, the Commissioner is satisfied that there was no evidence adduced to support a finding that the Appellant intended to sell the apartments in March/April 2022, the relevant period. Even so, the Commissioner is satisfied that the actual use which was a VAT exempt activity, takes precedence over any intended use,.

[8] Transcript Day 1, page 101
[9] Transcript Day 1, page 106

The Principle of Fiscal Neutrality

102. The Appellant argued that the cornerstone of the operation of the VAT system set out in the Principal VAT Directive was fiscal neutrality, i.e. that input VAT was deductible by businesses with the ultimate VAT cost being borne by the consumer. Thus, the Appellant posited that "*a business is entitled to deduct immediately from the tax for which it is liable in respect of its supplies, the tax invoiced to the business on goods or services supplied to it. This right arises at the moment when the deductible tax becomes chargeable under Article 167 of the VAT Directive."*

103. In accordance with Article 167 of the Principal VAT Directive, a right of deduction arises at the time the deductible tax becomes chargeable. However, of notable importance is that in accordance with Article 168 of the Principal VAT Directive, the right to a deduction or refund of VAT is restricted to goods and services used for the purposes of taxed transactions.

104. The Commissioner has considered the recent decision of the High Court in *Killarney Consortium C v The Revenue Commissioners* [2024] IEHC 732 wherein Mr Justice Mulcahy considered Article 167 and Article 168 of the Principal VAT Directive. This decision was not referred to by the parties. However, the Commissioner is satisfied that the following paragraphs are relevant to this appeal, as follows:

> "*77. It is helpful to recall, in light of the case law, what EU law requires in relation to taxable transactions.*
>
> *78. In accordance with Article 167 of the Principal VAT Directive, the entitlement to deduct VAT paid on goods or services supplied to a taxable person arises at the time the VAT becomes chargeable, i.e., at the time of the transaction on which VAT was paid. VAT can be deducted where the goods and service are used or intended to be used for the purpose of the taxable transactions of the taxable person.*
>
> *79. Put simply, a person who is required to charge VAT on the provision of services (or goods) is entitled to deduct immediately, from the VAT they must return to the revenue authorities, any VAT they pay on goods and services used in the provision of that service. This is a fundamental principle of the common system of VAT.*
>
> *80. It is necessary that the input transactions on which VAT is sought to be deducted be closely connected with the output transactions on which VAT is charged,…."*

105. As the Commissioner has found, that the surrender of the Option agreement was not "closely connected" to a taxable supply, an output transaction, but rather related to an exempt activity, namely the letting of immovable property, the Commissioner is satisfied

that the Appellant has not shown on balance, an entitlement to reclaim input VAT paid on the surrender of the Option agreement. The Commissioner is satisfied that the jurisprudence establishes that the common system of VAT ensures complete neutrality of taxation of all economic activities, provided that they are subject to VAT. No evidence was adduced to support the Appellant's argument that the surrender of the Option agreement related to a taxable supply.

106. The Commissioner is satisfied for the reasons set out heretofore, that the Appellant's business activities for the relevant period were VAT exempt activities, namely the letting of immovable property, being the apartments. Therefore, there was no right to deduction in relation to a VAT exempt activity. Hence, the Appellant's appeal fails.

Conclusion

107. In accordance with the well-established principles in relation to the burden of proof, the onus of establishing that the Appellant was entitled to its claim for input VAT in the amount of €459,000, in relation to the surrender of the Option agreement falls to the Appellant.

108. The Commissioner is satisfied that the surrender of the Option agreement was not a capital good nor an immovable good as defined in section 2(1) VATCA 2010. Thus, the surrender of the Option agreement was not a supply of an immovable good for the purposes of section 19 VATCA 2010. Moreover, the surrender of the Option agreement did not create an interest in land. Rather, the surrender of the Option agreement allowed the Appellant to continue to carry on the exempt activity of letting the apartments, which activity it had carried out since December 2014, when it acquired the apartments from the developer. The Appellant was not the developer of the apartments and whilst the Appellant "stepped into the shoes" of the developer for the CGS, this did not mean that the Appellant was deemed to be the developer thenceforth.

109. The Commissioner does not accept the Appellant's argument that where the granting of the Option agreement created an interest in land, the surrender of the Option agreement meant that this was also the transfer of an interest in land, which should be considered a taxable supply and "mirror" the tax treatment of the underlying asset, namely the apartments. The Commissioner is satisfied that the surrender of the Option agreement was not a supply of an immovable good nor was it the case that the Appellant acquired an interest in the apartments on the surrender of the Option agreement.

110. Furthermore, for the reasons set out heretofore, the Commissioner does not accept the Appellant's argument that as the eventual sale of the apartments will be a taxable supply subject to the provisions of section 94(8) VATCA 2010, the Appellant, at this

remove, should be entitled to the input VAT claim for the cost incurred on the surrender of the Option agreement. The Commissioner has found that section 94(8)(b)(ii) VATCA 2010 is capable of being satisfied only at the point of sale of the apartments.

111. The Commissioner is satisfied that in order to make a claim for input VAT, there must be a direct and immediate link between input costs and taxable outputs and that actual use takes precedence over any intended use (as per *Sonaecom*). The Commissioner is satisfied that there was no evidence adduced to support a finding that the Appellant intended to sell the apartments in March/April 2022, the relevant period. Furthermore, at the time of the hearing of the appeal, the apartments had not been sold and as stated, the evidence was that redevelopment of the apartments was being considered. Furthermore, the Commissioner is satisfied that even if she is incorrect in her finding that there was no direct and immediate link to a taxable supply to entitle the Appellant to its claim for input VAT, it was actual use, namely the letting of the apartments, rather than any intended use that took precedence. The Commissioner is satisfied that the use was a VAT exempt activity, namely residential letting, in accordance with section 59(2) VATCA 2010.

112. Finally, the Commissioner notes that the Appellant sought to rely on the Respondent's Tax and Duty Manual entitled "VAT Treatment of the Supply of property - Supply of Property", in particular the Appellant relied on paragraph 8 entitled "VAT treatment of options, easements and rights of way", wherein it states that:-

> "*Where an option is granted to a person for the right to buy a property after a certain period of time, the VAT treatment depends on the VAT status of the underlying asset."*

113. However, the Commissioner is satisfied that this relates to the granting of an option and how the granting of an option is to be treated for VAT purposes. As this appeal concerned the surrender of an option, the Commissioner is satisfied that the Respondent's Tax and Duty manual was not of assistance to the Appellant in its arguments herein and had no application to this appeal.

114. Accordingly, the Commissioner finds that the Appellant was not entitled to its claim for input VAT on the surrender of the Option agreement as this input cost had a "direct and immediate" link with letting exempt immovable residential goods, a VAT exempt activity and there was no evidence adduced that the surrender of the Option agreement had a direct and immediate link to a taxable supply. The Commissioner is satisfied that the surrender of the Option agreement allowed the Appellant to continue to carry on its exempt activity, namely residential letting. Hence, the Commissioner finds that the Appellant was not entitled to claim input VAT on the cost of the surrender of the Option agreement.

Determination

115. As such and for the reasons set out above, the Commissioner determines that the Appellant has failed in its appeal. Therefore, the decision of the Respondent dated 27 July 2023, to refuse a VAT input credit claimed by the Appellant in relation to its VAT return for the period March - April 2022, in the amount of €459,000, shall stand.

116. The Commissioner appreciates this decision will be disappointing for the Appellant. However, the Commissioner is charged with ensuring that the Appellant pays the correct tax and duties. The Appellant was correct to appeal to have clarity on the position.

117. This Appeal is determined in accordance with Part 40A TCA 1997. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) TCA 1997.

Notification

118. This determination complies with the notification requirements set out in section 949AJ TCA 1997, in particular section 949AJ(5) and section 949AJ(6) TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ TCA 1997 and in particular the matters as required in section 949AJ(6) TCA 1997. This notification under section 949AJ TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

119. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.

Claire Millrine
Appeal Commissioner
10 July 2025