

VAT and Property Checklist



This checklist is designed as an aide memoire for those involved in considering the VAT implications of a contract ostensibly relating to land, whether acting for the person making the supply or the recipient of the supply.

It is suggested that the questions be addressed in the order indicated.

1. Is it the supply of an interest in land?¹

If YES move to 2

While rights under a purchase contract are treated as interests in land, dilapidations payments, liquidated damages and statutory compensation are not regarded as representing a supply at all, for VAT purposes; and agistment, or grazing, agreements are not regarded as a supply of land but of grass. See Shipleys' VAT on UK Property & Construction regarding mesne profits, milk quotas, options, payments under rent guarantees, restrictive covenants, reverse premiums on grant, assignment or surrender of lease and Tomlin orders.

2. If it is an interest in land, is the land in the UK (which, for VAT purposes includes the Isle of Man)?

If NO the supply is outside the scope of UK VAT*. If YES move to 3.

3. If it is the supply of an interest in land in the UK, will it be made in the course of business, or deemed to be so made?²

If NO there should be no VAT implications, but note that BUSINESS in UK VAT law may be equated with the phrase ECONOMIC ACTIVITY in EC law, and the Sixth Directive says that the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity. If YES move to 4.

4. Is the transaction between members of a VAT group?

If YES such supplies are ignored for VAT purpose. If NO move to 5.

5. Is the supply to be made for a consideration?

If NO and the supply is a supply of services there are no VAT implications. An interest in land other than a freehold or a lease of land for a period in excess of 21 years is a supply of services; the supply of a freehold or a longer lease is a

¹ The definition of an interest in land is considered more fully in Shipleys' VAT on UK Property & Construction.

² This would include the assumption of an obligation, as under a "building lease". There is also a deemed supply where goods forming part of the assets of a business cease to be, whether because the goods cease to be so used or the person ceases to be in business; as well as where goods forming part of the business assets are put to any private use (the latter being treated as a supply of services for a consideration equal to "the full cost of supplying those services" – Para 7 Sch. 6 VATA 1994.)

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supply of goods. See Shipleys' VAT on UK Property & Construction for information on the value of the supply where there is no consideration or not all the consideration is in money.

If there is consideration or it is a supply of goods move to 6.

6. Is the interest supplied in the context of the transfer of a business (or a viable part thereof) as a going concern* (TOGC)?

If YES, provided certain requirements are fulfilled (including the requirement that the transferee be registered for VAT if the transferor is, and that the goods or services transferred are used in the same kind of business by the transferee as that of the transferor³), and if, where the supply is, or includes, a NEW* freehold⁴ or land subject to an option to tax, the transferee has, no later than the relevant date, (a) exercised an option to tax in relation to the land which has effect on the date of the transfer and has given HMRC any written notification of the option to tax required by Sch. 10 VATA 1994; and (b) notified the transferor that Article 5(2B) of the VAT (Special Provisions) Order 1995 does not apply to him⁵, such a supply is treated as neither a supply of goods nor of services; it is outside the scope of VAT. If acting for the purchaser see also 7.1 et seq.

Otherwise, move to 8.

7.1 If acting for the purchaser in the context of a TOGC involving a new* freehold or of land or buildings subject to an option to tax by the transferor, will the purchaser fulfil the requirements referred to at 6 above with respect of any such supply?

If the purchaser fulfils the requirements described at 6 above (but see also 18.4 below, there is no supply thereof for VAT purposes of any such land or buildings.

Move to 7.2

7.2 If acting for the purchaser and the supply is made by a taxable person in the context of a TOGC in circumstances where the supply is treated as being neither a supply of goods nor of services, is the purchaser a member of a partially exempt VAT group?

If YES the transferee may be deemed to make himself a self-supply at standard rate, under S.44(5) VATA 1994, if VAT is not charged.

³ Note that, under UK law, for the TOGC rules to apply, it remains essential that the immediate transferee uses the assets transferred in carrying on the same kind of business as that of the transferor, whether or not as part of an existing business (and, if only part of business is transferred that the part transferred is capable of separate operation).

⁴ It is easy to overlook the fact that a freehold farm, for example, may include buildings or "works of civil engineering" which have been built within the last three years and are therefore "new" freeholds.

⁵ Article 5(2B) applies to a transferee where –

- (a) the supply of the asset that is to be transferred to him would become, in relation to him, a capital item as described in regulation 113 VAT Regulations 1995 if the supply of that asset to him –
 - (i) were to be treated as neither a supply of goods nor a supply of services; or
 - (ii) were not so treated; and
- (b) his supplies of that asset will, or would fall, to be exempt supplies by virtue of paragraph 12 Sch 10 VATA 1994.

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Move to 7.3

7.3 If acting for the purchaser and the supply is made by a taxable person in the context of a TOGC, does the supply involve any item which may be subject to an adjustment under the capital goods scheme?

If YES, the transferor should be required to provide information to enable such adjustments to be made in or for the remaining intervals.

Move to 7.4

8. If acting for the purchaser and the supply is made by a taxable person in the context of a TOGC, have arrangements been made for the transfer to the purchaser of records relating to the business?

S.49(5) VATA 1994 empowers the transferee to require the transferor to provide such information as he may reasonably require relating to a business transferred as a going concern.

If the grant is in respect of land or a dwelling or dwellings, is it, or is it for the erection of, holiday or limited access accommodation*?

If YES, in the case of such a property, if it is “new” (that is, under construction or construction was completed less than three years before), any supply is standard-rated. If it is not new, the rent is subject to VAT at the standard rate; but any premium on the grant of a lease and the supply of the freehold of such a non-new building is exempt. If NO, move to 9.

9. Otherwise, is the property:

- a building constructed (or under construction) and either designed as a dwelling or dwellings or intended for use solely for a relevant residential purpose* or a relevant charitable purpose*;
- a protected building* (a building designed to remain as or become a dwelling or number of dwellings or intended for use solely for a relevant residential purpose* or a relevant charitable purpose* after the reconstruction or alteration and which is a listed building) which has been, or is, the subject of a substantial reconstruction*, or
- a building (or a part building) converted, or being converted, into a dwelling or a number of dwellings or for use solely for a relevant residential purpose*, where it was previously a non-residential* building* or a non-residential part of a building?

If YES, except where it is caught as holiday or limited access accommodation, as above, no VAT is chargeable. The supply is either zero-rated or exempt. But note that, if the grant relates to a housing estate, for example, and the supply includes an interest in the land occupied by parts of the estate such as roads, VAT at standard rate is chargeable if the interest is the freehold and it is under construction or NEW (broadly, up to three years after completion of construction). If the roads etc are on an older estate or a lesser interest therein is involved, the supply of that element is exempt unless affected by an option to tax. If NO move to 10.

10. Otherwise, is it

- a building or part of a building intended for use as a dwelling or dwellings*;

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- a building intended for use solely for a relevant residential purpose*;
- an interest in land to be granted to a relevant housing association* which will give to the grantor a certificate stating that the land is to be used (after any necessary demolition work) for the construction of a building or buildings intended for use as dwelling(s) or solely for a relevant residential purpose or
- an interest in land to be granted to an individual who is going to build his own home* thereon, other than in the course of a business?

If YES, no VAT may be charged, even if the grantor has exercised an option to tax, except where a grant in relation to a building or part of that building is made to a person who intends to make a grant of that building or part of that building which will be zero rated by virtue of it being made after the conversion of a non-residential building or a non-residential part of a building into a building designed as a dwelling or number of dwellings or a building intended for use solely for a relevant residential purpose. If NO move to 11.

11. Otherwise, is it one of the following supplies?

- Grant or any right to occupy a box, seat or other accommodation at a sports ground, theatre, concert hall or other place of entertainment;
- Provision of pitches for tents or of camping facilities;
- Provision of seasonal pitches for caravans (broadly one provided for a period of less than a year or where continuous occupation is not legally possible);
- Grant of facilities for parking a vehicle, other than where such facilities are close to a dwelling or commercial premises with which they are let by the same landlord [HMRC accept that this does not include the sale of a freehold or a car park – although it may be standard-rated for another reason – but they suggest that the letting of a purpose-built car park is standard rated.⁶];
- Grant of any right to take game or fish⁷;
- Grant of any right to fell and remove standing timber;
- Grant of facilities for housing, or storage of, an AIRCRAFT or for mooring, or storage of, a SHIP, boat or vessel; for a continuous period of use exceeding 24 hours; or
- for a series of 10 or more periods, whether or not exceeding 24 hours in total, where, broadly, this constitutes a pre-arranged regular use and the grantee is a school, club, association or organisation representing affiliated clubs or constituent associations.

If YES VAT at the standard rate is chargeable. If NO move to 12.

⁶Reversing the VAT Tribunal decision, the Court of Session, in CCE v. Trinity Factoring Services Ltd, decided that, in the absence of any provision in the lease prohibiting use for parking vehicles, the nature of the premises being let (lock-up garages and converted mews stables which could be used for parking vehicles or for other purposes such as storage) resulted in the letting being subject to VAT, even though, in a number of cases, there had been an agreement prior to the grant that the intended use was for domestic storage.

⁷ VAT is chargeable on sporting rights sold, leased or licensed separately from the land and also on that part of the rent under a lease where “valuable” sporting rights are included; i.e. more than 10% of the total rent is attributable to them.

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12. Reverse premium on grant or assignment of lease

12.1 Is the supply the grant of a new lease where the *lessor* is giving consideration to the prospective lessee?

If YES, it is a supply by the *lessee* which will be standard-rated if the incoming tenant provides benefits outside the normal lease terms, for example acting as anchor tenant. Otherwise the supply will be outside the scope of VAT. If NO MOVE TO 13.

12.2 Is the supply an assignment of a lease where the *assignor* is giving consideration to the assignee?

If YES, it is a supply of an interest in land by the assignee which is standard-rated. If NO move to 13.

13. Surrenders

Is the supply the surrender of a lease, whether the consideration is given by the lessee or the landlord?

If YES in either case the supply is treated as if it were a grant of a lease by the person receiving the consideration, and VAT is chargeable if it would be due on an ordinary grant of a lease by the person receiving the consideration. If YES move to 18. If NO move to 14.

14. If the transaction is a variation or exchange (and a variation will often be in the form of an exchange) is it covered by HMRC's statement – quoted in Shipleys' VAT on UK Property & Construction?

Where there is doubt, the position should be agreed with HMRC. Otherwise move to 15.

15. Is there any significant value attributable to shooting or fishing rights involved?

If YES see earlier comments. If the grant is only of the shooting or fishing rights VAT at the standard rate is chargeable on the consideration attributable to such rights, if the supply is made in the course of a business. If the grant is of a lease or licence wherein more than 10% of the rent is attributable to shooting and fishing rights, VAT at the standard rate is chargeable on the relevant part of the rent. If NO move to 16.

16. Otherwise, is the property in question (or any part of it) the freehold of a building or work of civil engineering which is NEW* (broadly, under construction or physically completed within the last three years) and not designed as a dwelling or dwellings nor intended for use for a relevant residential or relevant charitable purpose?

If YES, VAT at the standard rate is chargeable on the consideration – or that part attributable to the new freehold; but see also 17. If NO move to 18.

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17. If the grantor and grantee are (or will be) connected at the time the grant is made, is the supply a standard-rated taxable supply for a consideration in money at less than its open market value and the recipient of the supply not entitled to credit for all the VAT on the supply?

If YES, HMRC may – within three years after the time of supply – direct that the value of the supply shall be taken as the open market value, under Para 1 Sch. 6 VATA 1994.

18. Subject to the foregoing the supply is exempt save that the grantor may exercise an option to tax grants therein unless denied that right in the circumstances described below at 18.5.

18.1 Has an option to tax been made, and not revoked; and accepted by HMRC where their acceptance is required.

If not (or, if made, if validly revoked before the time of the supply), yet VAT is charged, the grantee is not technically entitled to reclaim that amount as input tax from HMRC, even though the grantor has to account for it to HMRC. Where revocation is still possible a warranty may be appropriate.

18.2 Does the contract prohibit the addition of VAT, even though VAT is due as a result of an option to tax?

If YES, the grantor will still have to account to HMRC for VAT deemed to be included in the unchanged amount of consideration if an option to tax applies (including one made by a member of the same VAT group) affecting grants of interests in that property (and is obliged to issue a VAT invoice to the grantee).

18.3 Is the consideration stated to be exclusive of VAT properly chargeable?

If YES, be aware that, even if there is no option to tax in place at the time contracts are exchanged, the grantor can still exercise an option to tax before completion; so that VAT might be added to determine consideration payable subsequently.

18.4 Is there a supply for VAT purposes on payment of the deposit (as opposed to – normally – completion)?

Deposits payable under a contract may represent a payment, and therefore a supply to that extent at that time. It will be such at an auction, for example. But if the deposit is to be paid to, say, a solicitor, as stakeholder pending completion, no payment is regarded as received at that time. See Shipleys' VAT on UK Property & Construction for more detail on time of supply.

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18.5 Is the supply a grant in relation to land (or a building or a part of a building) which is intended or expected to be, within the Capital Goods Scheme and either the grantor, a person involved in financing the development (or a person connected with either) likely to occupy the property within the capital goods adjustment period (of up to ten years) wholly or mainly NOT for making VATable supplies or while not a taxable person? [see Shipleys' VAT on UK Property & Construction for more details on the terms used].

If YES, despite an option to tax being exercised, VAT may not be charged. If NO, the option will apply to the supplies. 19. Are rental adjustments on completion required?

If so, these are outside the scope of VAT. But note that, where the rent is normally subject to VAT, the VAT position is affected by the basis upon which the seller accounts for VAT on rents receivable and on whether the adjustments are made by reference to rents paid or rents due. See Shipleys' VAT on UK Property.

Warning: The hazard of the 3 year cap

Where a contract provides for the consideration to be a given sum plus VAT "property chargeable", there may be circumstances where the amount of VAT, not the ex-VAT consideration, "properly chargeable" is finally determined more than three years after the sale, and yet still in time for it to be claimed from the purchaser. Note that the 3 year cap may deny the purchaser the right to reclaim the VAT as input tax from HMRC.

This possibility should be recognised and addressed in the contract terms.

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LONDON

10 Orange Street
Haymarket
London
WC2H 7DQ

T +44 (0)20 7312 0000
F +44(0)20 7312 0022
E advice@shipleys.com

GODALMING

3 Godalming Business Centre
Woolsack Way
Godalming
Surrey
GU7 1XW

T +44 (0)1483 423607
F +44 (0)1483 426079
E godalming@shipleys.com

BIRMINGHAM

2nd Floor
3 Brindley Place
Birmingham
B1 2JB

T +44 (0)121 698 8566
F +44 (0)121 698 8600
E birmingham@shipleys.com

* See Shipleys' VAT on Property and Construction for more details

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