



## **Practical VAT Update 47: June 2024**

*Looking Again at Property TOGCs*

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### *Looking Again at Property TOGCs*

#### *1. Introduction*

Property TOGCs are an important topic and a “hardy perennial” in terms of VAT queries.

I first looked at it in July 2021, revisited it well over a year ago, and think it’s about time we had another quick trip down TOGC lane.

Let’s start by asking: what is the point of a TOGC? Why do people like them? The simple answer is that they help you avoid VAT.

Any transfer of a business could, potentially, be a TOGC, and as noted in section 2, every such transfer must meet certain conditions. And it definitely has to be a “business” not just an asset which is being transferred.

This Update, however, is focused on TOGCs involving land and property. There are – surprise! – special rules for TOGCs which include land and property, if they are to amount to a TOGC at all. Clearly, there is a degree of circularity there, but it’s VAT, so you’ll be used to that by now.

We also address some of the key issues which crop up in dealing with property TOGCs, and in particular, the transfer of what HMRC call a “property rental business”.

This matters, because as noted above, and as discussed in greater detail below, a TOGC must be a transfer of a business, not just an asset or a collection of assets... to find out more, read on!

If you have any questions about TOGCs and property VAT, please don’t hesitate to give me a call on **02871 876 220** or email me at [ciaranmcgee@cjmtax.co.uk](mailto:ciaranmcgee@cjmtax.co.uk).

#### *2. What Makes A TOGC?*

The day will no doubt arrive when I go through the “general” idea of a TOGC in detail... but we’re not there yet.

Accordingly, what I’ve set out here is a quick overview of the standard TOGC conditions, which have to be met in every case, and of how the TOGC rules work. It is worth noting that these rules each have their own “interesting” aspects which have been examined in case law, etc, and so this should not be taken as anything like the final word on the subject! It should give you an idea, however...

First of all, and very importantly, when the TOGC conditions are met, they **apply automatically**. In other words, it doesn't matter what you or the other party wants – if the conditions are met, they apply to the transaction.

TOGC treatment effectively ignores the transfer of assets in question: the transfer is treated as “neither a supply of goods nor a supply of services” and is outside the scope of VAT.

Whether the proceeds should be included on the VAT return is a good question. My view is that they should not be: no supply has taken place for VAT purposes. However, I have heard of HMRC asking for the sales figure to be included in Box 6, and am aware of reputable VAT advisers who say the same. So I suppose it is up to the taxpayer in question...

Secondly, and just as importantly, **all** of the conditions which must ordinarily be met for the TOGC rules to apply must also be met for transfers of property businesses.

In summary, these conditions are:

- the **assets**, such as stock-in-trade, machinery, goodwill, premises, and fixtures and fittings, **must be sold as part of the TOGC**
- the buyer must intend to use the assets in carrying on the **same kind of business** as the seller - this does not need to be *identical* to that of the seller, but the buyer must be in **possession of a business** rather than simply a set of assets
- where the seller is VAT-registered, the **buyer must be VAT-registered already with a VAT number in hand or be required to be VAT-registered as a result of the transfer**
- where only **part of the business** is sold it must be capable of **separate operation**
- there must not be a series of **immediately consecutive transfers** of the business

Some of these conditions crop up further below.

In particular, the “same kind of business” condition colours HMRC’s approach to the sale of a property by a landlord to the tenant. Moreover, the “no immediately consecutive transfers” condition is discussed in section 8 as part of the issue with nominees, etc. All fascinating stuff!

However, the bulk of this Update is about the ADDITIONAL conditions which must be met for a TOGC to apply when property is involved. Let’s take a closer look...

If you have any questions about the general rules applying for TOGCs, please don’t hesitate to give me a call on **02871 876 220** or email me at [ciaranmcgee@cjmtax.co.uk](mailto:ciaranmcgee@cjmtax.co.uk).

### *3. When Do I Need To Worry About The Additional Conditions?*

It’s worth asking yourself whether you need to think about these extra conditions at all.

I'm a big believer that knowing whether you can simply ignore a potentially complex and worrying set of tax rules improves your quality of life... Maybe not a lot, but still, I like it - like a Paul Daniels magic trick...

The additional conditions are relevant **only** where one of the following two conditions are met:

- The transfer involves property (whether land or buildings or both) which is subject to the option to tax ("OTT"), or
- The transfer involves a "new" commercial property (i.e.: a property which is less than three years old). Note that this includes civil engineering works which are "new", too...

This is likely to pop up in two broad kinds of scenario, and the following examples should help to illustrate the situations you need to look out for...

- **Example 1: Shedding Pounds**

Giles MacDonald is getting older and has agreed to sell his farm to Sam Spade, one of his more enterprising neighbours, for a total value of £1 million.

Sam isn't too worried about VAT, as he can get it all back, but his accountant, Minnie Moon, points out that Stamp Duty Land Tax ("SDLT") is charged on the VAT-inclusive amount and it cannot be reclaimed... Minnie suggests that they look at a TOGC. Sam gets back to Giles and asks him about the VAT position on the farm.

Giles is selling the whole business to Sam, there won't be any immediate onward transfer, or anything else: it looks like a TOGC. Minnie agrees. However, there may be an issue with some of the buildings on the farm...

Just over two years ago, Giles built three new sheds on the farm to house equipment, etc. Minnie knows that selling these sheds will create a charge to VAT: they're less than three years old (meaning they are "new") and they're commercial buildings.

Can Sam avoid VAT (and extra SDLT)? Yes, quite possibly, but to find out how, you'll have to read on...

Our second example deals with the more contentious issue of a "property rental business". In this instance, it is necessary to show that you have a TOGC as well as addressing the additional property conditions...

- **Example 2: Opting Out Of Tax...**

Connie Chan owns a decent-sized property portfolio in Northern Ireland. It includes some residential properties, and also an industrial estate outside Ballymena. Some years ago,

on the advice of her accountant, Rhett Butler, she opted to tax the industrial estate, and has been charging VAT on her rents ever since.

She has now been approached by Carpetbaggers Ltd, a company seeking to acquire commercial properties all over the UK. Carpetbaggers Ltd are interested in buying the biggest unit on the estate, which is occupied by a local firm of solicitors as their offices.

Connie is a prudent investor and has leases with all of her tenants. She is happy to sell for the price being offered, but Rhett warns her that VAT will be due on the sale and Carpetbaggers Ltd have already said that the price of £300,000 is “inclusive of any VAT charged”...

Connie is a bit worried – she doesn’t want to lose £50,000! Can she opt out of the VAT? Again, the answer is “probably”, and you’ll have to read on to find out how...

Readers will see that the two scenarios are quite different.

Nevertheless, the additional TOGC property conditions apply in both cases and so I’m going to look at them first, before getting stuck into what a “property rental business” is for TOGC purposes. That bit only relates to Connie’s situation, not to Giles’s.

Before going on, it is worth noting (for the avoidance of doubt and confusion!) that **unless VAT would otherwise arise** on the transfer of the property then the additional conditions need not be met.

In other words, unless the VAT treatment of the supply is **other than zero-rated or exempt**, then the property may be included in the overall TOGC along with all of the other business assets in the “Giles” scenario...

Note that if Connie’s property was exempt from VAT, then the sale would simply be exempt (albeit, theoretically and for reasons I am not going to delve into here, it might be a TOGC of an exempt business...).

If you are not sure whether you need to worry about these additional conditions, please don’t hesitate to give me a call on **02871 876 220** or email me at [ciaranmcgee@cjmtax.co.uk](mailto:ciaranmcgee@cjmtax.co.uk).

#### *4. What Exactly Are The Property Conditions?*

So what are these additional conditions?

There are two, both of which must be **met by the buyer**. The buyer must have:

- Opted to tax the property in question, and

- Notified the seller that their option to tax will not be disapplied under the anti-avoidance provision set out in VATA 1994, Schedule 10, paragraph 12 in respect of supplies they intend to make of the land or building

Both of these conditions must be met in advance of the “**relevant date**”. If they are not met, then TOGC treatment **will not apply at all**.

This can be a tricky issue in certain circumstances, but in general it is safest to ensure that both conditions have been dealt with **before**:

- Any payment has been made – including a deposit, or
- A VAT invoice has been issued for the transfer

The deposit issue can be a real head-scratcher in certain circumstances... Best to avoid if possible, especially given that even a tiny deposit received before the additional conditions are met will prevent TOGC treatment altogether!

However, it is possible to have a deposit without triggering the “relevant date”, and so give everyone a bit more breathing space.

The problem arises because a deposit which is treated as part-payment for the purchase creates a tax-point, and so a “relevant date” arises. Not good...

However, where the deposit funds are transferred to (say) one of the solicitors to be held by them as “stakeholder”, this gets round this issue completely. The deposit is then released to the seller once the sale completes, and everyone is happy. Well, that’s the idea...

### **Why Do They Have To Make It So Complicated?**

It is fair enough to ask why these conditions exist.

The reason for these conditions is fairly straightforward: HMRC do not want a situation to arise where there is a risk of VAT being lost.

In other words, if the TOGC is to apply to what is likely to be a high value transfer, HMRC want assurance that VAT will, ultimately, be accounted for on the supplies of the property in future. These conditions essentially protect the VAT on any future stream of rents or other supplies...

If you are not sure about “stakeholders”, deposits or anything else mentioned here, please don’t hesitate to give me a call on **02871 876 220** or email me at [ciaranmcgee@cjmtax.co.uk](mailto:ciaranmcgee@cjmtax.co.uk).

## *5. Who Is On The Hook?*

This is where VAT world strikes again...

Even though it is **the buyer** who must make an OTT in advance of the transaction, and also confirm that the OTT anti-avoidance rule does not apply in respect of the property, it is actually the **seller's** job to make sure these conditions are met.

In fairness, given how the VAT system works, this makes sense – if VAT is due, it is the seller's responsibility to collect and account for it.

However, this does create an onus on the seller to make sure that they have evidence for their position.

Accordingly, the seller is well advised to seek evidence of the buyer's OTT. Once upon a time, this was usually achieved by way of the HMRC notification letter, and for OTTs made prior to 1 February 2023, it probably still will be. But the times they are a-changin'...

### What Notification Letter?

A couple of points need to be made here...

First of all, legally-speaking, the OTT takes effect once it has **been made and duly notified** to HMRC by the opter.

HMRC's subsequent acknowledgement of the OTT has no legal force. So, legally-speaking, the notification letter doesn't really add anything... and never really did.

Secondly, HMRC were very slow to provide these letters. Since the coronavirus crisis, this had become even worse – colossal delays were being reported in getting a response. Clearly, this kind of delay can create real difficulties in practice - especially in a sale situation with a tight deadline.

To be fair to HMRC (for once), their new process does take this delay out of the system (see **January 2023's Update** and **HERE** for details). In effect, the opter will now receive an automatic bounce-back email when they make their OTT (via email) – and nothing more. So this will have to do for everyone - I am not sure how this will end up playing out in practice.

Where the seller is worried that the OTT may not exist, or may not be valid for some reason, they may wish to try to cover the potential VAT bill - for example, by getting the buyer to put the full VAT amount on escrow until HMRC reply.

The commercial mess this can create is pretty obvious...!

### It Doesn't Apply, Honest...

What about the "disapplication" statement?

First of all, what is it getting at? Basically (*very basically!*) it's a confirmation that the anti-avoidance rule for the OTT won't apply after the transaction (again see the January 2023's Update for more...).

What the seller should be looking for is some evidence that the buyer won't be letting or selling the property to a connected party who will occupy it for exempt purposes. And it's only relevant if the property is within the Capital Goods Scheme (or would be if it was subject to VAT... but that's getting into the weeds, a bit). Basically, if the value is more than £250,000, care is needed, and see **February 2023's Update** for a bit more.

Typically, this issue is covered off by way of an enforceable warranty whereby the buyer promises that the anti-avoidance rule won't apply, and can be sued if it goes wrong... speak to a good lawyer!

For the purposes of VAT law, the seller **must have** the buyer's notification of the non-disapplication of the option to tax via the anti-avoidance rule.

Even if you don't get a warranty, I would always advise a seller to get this in writing, and indeed it is typically included in the sale contract under the "VAT conditions" in any event...

### **What Happens When The Conditions Are Met?**

Well, if we assume that, in both of our examples above, Sam and Carpetbaggers Ltd were able to provide Giles and Connie (as the sellers) respectively with evidence that they had opted to tax and that their OTT would not be disapplied by the scary anti-avoidance rule, then the TOGC conditions sound like they'd be met.

However, we need to look more closely at Connie's case and the nature of a "property rental business", and this is what the following sections cover.

If you need advice on evidencing the additional conditions, please don't hesitate to give me a call on **02871 876 220** or email me at [ciaranmcgee@cjmtax.co.uk](mailto:ciaranmcgee@cjmtax.co.uk).

## *6. What Is A "Property Rental Business" Anyway?*

So far, what has been said applies to both Giles's case as well as Connie's. However, from here on, the Update deals with the fairly vexed question of whether we can say we have a TOGC at all...

As Connie's case demonstrates, it is entirely possible to have a TOGC which involves no more than the transfer of land or property.



From HMRC's perspective, this creates a certain difficulty in distinguishing between the sale of an *asset* and the sale of a *business*. Only the latter can amount to a TOGC.

Add in the fact that there can be real savings of SDLT and cash-flow benefits for VAT, and HMRC can be expected to take a sceptical approach to these sorts of TOGC.

### **A Grisly Business? Or Just An Asset Swap?**

Before getting stuck in to the nitty-gritty of the "property rental business" definitions in section 7 below, it is helpful to understand HMRC's mindset.

In essence, they are looking for evidence that what is being transferred amounts to a business:

- In the hands of the **seller before** the date of transfer, and
- In the hands of the **buyer after** the date of transfer, and for a decent period (at least) after that date

What is more, they will want evidence that the *business* is being transferred, not just assets which can be used in a business.

This will usually mean, in practice, that a property will need to be subject to a lease at the time of transfer and that the benefit of this lease will need to be transferred together with the property, though some exceptions to this "standard" position are outlined below.

It also means that a tenant purchasing a property from its landlord cannot in principle avail of TOGC treatment, since it will not be carrying on a property rental business after the transfer. One way around this is to set up a property holding company to acquire the property, though many taxpayers will not wish to do this. We have a look at this in more detail in Example 3, below.

If you need advice on property rental businesses, please don't hesitate to give me a call on **02871 876 220** or email me at [ciaranmcgee@cjmtax.co.uk](mailto:ciaranmcgee@cjmtax.co.uk).

## *7. What Do HMRC Think About It?*

HMRC's views on this subject are well worth having, given how little we have to go on by way of firm statutory rules.

In reading HMRC's guidance, it is important to note that the term "**freehold**" is used for convenience's sake, but the examples given would also apply in instances of long leaseholds (and in Scotland the "interest of the owner"). Just in case you were wondering...!

**What's In...?**

First, let's look at what HMRC confirm are OK as property rental business TOGCs. In their VAT Notice 700/9, they confirm that it will be a TOGC if you transfer:

- the freehold of a property, which you let to a tenant, and sell the freehold with the benefit of the existing lease, a business of property rental is transferred to the buyer - this is a business transferred as a TOGC, even if the property is only partly tenanted
- the lease of a property (which is subject to a sub-lease) and you assign your lease with the benefit of the sub-lease
- a building where there's a contract to pay rent in the future, but where the tenants are enjoying an initial rent-free period, even if the building is sold during the rent-free period, you're carrying on a business of property rental capable of being transferred
- a property and have found a tenant, but not actually entered into a lease agreement when you transfer the freehold to a third party (with the benefit of a contractual agreement for a lease but before the lease has been signed), there is sufficient evidence of intended business activity for there to be a property rental business capable of being transferred
- a number of let freehold properties, and you sell one of them, the sale of this single let or partly let property can be a TOGC of a property rental business

Note that the absence of a lease is not fatal to TOGC treatment... even so, it will be important to have **plenty of other evidence** to demonstrate ongoing business activity at the time of transfer.

In real life, an existing lease is by some distance the easiest way of proving business activity.

Their guidance also takes a look at some of the less straightforward situations, saying that a transfer will be "capable of being a TOGC if you":

- grant a lease of the property, but retain an interest that has a value of no more than 1% of the value of the land or property immediately before the transfer (disregarding any mortgage or charge)
- are a tenant of a building, you have sub-let part of that building, and you surrender your lease to the landlord with the benefit of the subleases, then you are transferring your property rental business because the landlord will become the landlord of the sub-tenants
- are a property developer selling a site as a package (to a single buyer) which is a mixture of let and unlet, finished or unfinished properties, and the sale of the site would otherwise have been standard-rated
- are a business, owning land which you begin to develop with the intention of constructing buildings for sale (and these supplies would be taxable supplies), and you perform work on the land such as widening roads and installing utilities - if a

part of this partially developed land is then sold to a property developer who intends to complete the development and sell the newly constructed buildings, this transaction can be part of a TOGC because although you never made taxable supplies, there was the intention to do so

- have a partially-let building which is capable of being a property rental business, providing that the letting constitutes economic activity, but such cases should be considered on their facts - HMRC would not see a TOGC if the letting element of the transaction was so small as to be negligible
- purchase the freehold and leasehold of a property from separate sellers without the interests merging and the lease has not been extinguished, providing you continue to exploit the asset by receiving rent from the tenant

In certain situations, these examples can prove very helpful – but they are heavily caveated. In other words, take care!

Oh, and don't forget – ALL OF THE STANDARD TOGC CONDITIONS MUST ALSO BE MET!

### What's Out...?

Let's have a look now at what HMRC say *cannot* qualify as a TOGC...

Their guidance states that no TOGC will exist "if you":

- are a property developer who has built a building, and you allow someone to occupy temporarily (without any right to occupy after any proposed sale) or you are 'actively marketing' it in search of a tenant, there is no property rental business being carried on
- grant a lease retaining an interest that has a value that is greater than 1% of the value of the property immediately before the transfer (disregarding any mortgage or charge) - where more than one property is transferred at one time, this test should be applied on a property-by-property basis rather than for the entire portfolio
- sell a property freehold to the existing tenant who leases the whole premises from you, this cannot be a TOGC because you are not transferring your property rental business to the tenant

The last bullet-point is probably the most common in practice. It is, however, possible to avoid it (though not without a bit of planning...), as noted above.

Let's take Connie from Example 2 above, and change the story a bit...

- **Example 3: Propping Things Up?**

Connie has been approached separately by one of her tenants, Way Ahead, a partnership which runs a hair salon and beauty parlour. They have been good tenants for four years now, and their lease still has three years to run.

Connie is happy to discuss selling the unit for ca. £100,000, and suggests to Rhett that a TOGC could be used for this sale, like the one to Carpetbaggers Ltd.

Rhett has some sad news: as Way Ahead are tenants, they wouldn't be carrying on the "same business" after the sale, and so the "normal" TOGC conditions couldn't be met.

Ashley Wilkes, Way Ahead's accountant, however, has a solution. Why not set up a property holding company, "Propco"? It could buy the property from Connie, borrowing the money from the bank to fund it (instead of the partnership borrowing directly from the bank). Propco could acquire the lease and then continue the letting to Way Ahead as before.

Rhett agrees this would seem to solve the problem – but are the partners in Way Ahead happy to deal with the various hassles that this structure would create? Ashley is going to have a chat with them about corporate capital gains, directors' personal guarantees, and company administration...

Connie can't wait to find out what they'll say, but as Rhett advises, either she charges VAT because it's not a TOGC, or she doesn't, because it is a TOGC. Other than that, it's Way Ahead's problem...

### **A Job Lot?**

If a number of properties are sold together as a single portfolio, this can amount to a single TOGC, even if not all the properties are let. For example, the sale of a chain of shops or pubs could be a TOGC whereas the sale of a grouping of diverse properties might not be.

It is in the latter case that HMRC scrutiny can be expected. They confirm that:

"HMRC will need to consider the transfer of a number of sites or buildings, where some of the sites or buildings are let, or partially let and some are unlet, on a case by case basis."

In doing so, they will look at:

- the nature of the sites or building and their use
- whether the assets can be identified as a single business or an identifiable part of a business
- if all the normal TOGC conditions are met

As ever, get your ducks in a row and try to make sure you can cover off the kinds of things they mention earlier on...

That said, if Connie, whom we met in Examples 2 and 3, sold the *entire* industrial estate to Carpetbaggers Ltd, and – say – one or two of the units were empty, but the rest were subject to valid leases, you'd have to say that it looks very much like a TOGC. As long as you get your property conditions in place!

If you aren't sure if what you're transferring (or buying!) is or is not a property rental business, please don't hesitate to give me a call on **02871 876 220** or email me at [ciaranmcgee@cjmtax.co.uk](mailto:ciaranmcgee@cjmtax.co.uk).

### *8. Odds & Ends: Don't Skip This Bit...*

There are some further areas to cover off before we wrap up this month's Update. Let's have a look at them in turn.

#### **Making Adjustments... For Rent Paid Or Due**

When a tenanted building is sold or a lease is assigned part of the way through a rent period, an adjustment is normally made to the consideration at the point of completion.

These adjustments may be for rent collected, or for water and power charges, etc, paid for in advance prior to the sale or assignment.

These adjustments are **not consideration** for a supply and are therefore outside the scope of VAT. In other words, **they do not appear** on the VAT return (and are not subject to VAT).

Moreover, logically, for VAT purposes the consideration for the sale of the building or the assignment of the lease is the full value of the supply before any adjustment is made.

#### **Is It Beneficial?**

Given its origins in France, it is maybe not a huge shock that VAT does not deal very well with concepts such as trusts, nominees and other equitable interests.

While it might not be a shock, however it can create significant complications! Beneficial ownership, trusts, etc, etc, are all major parts of the property market in the UK, and so is VAT. Clash of the Titans? Well, maybe not quite that, but getting one or both of them wrong can hurt...

Some effort has been made to ease the pain for transfers to nominees, however. HMRC comment as follows:

“Where only the beneficial ownership of a property rental business is transferred, and the legal title is retained by the seller, there may be a TOGC. If the seller’s ownership is reduced to being no more than that of a bare trustee, it’s accepted that the property, together with its lettings may be transferred as a ‘going concern’.”

To really take the edge off, HMRC have provided a “statement of practice” (including proposed wording for documentation). The wording is **optional** and can be found at section 8 of VAT Notice 700/9 (see the links at the end of the Update, as normal).

The “no consecutive transfers” rule is rarely a problem with “normal” TOGCs. However, where there is a nominee arrangement and a transfer of a property rental business, it is potentially both easier to have such a transfer, and certainly (as a result) more common in practice.

Accordingly, HMRC comment as follows:

“Where there’s a transfer of a beneficial interest from A to B to C on the same day this is seen as a series of consecutive transfers, **even where the legal title** is transferred directly from A to C. The condition [that there should not be a series of consecutive transfers] is not met and TOGC does not apply to any of the transactions.” *[Emphasis added]*

Accordingly, care is needed both from the VAT perspective and from the legal perspective to ensure that the end result is as desired.

If you have any questions about either rental adjustments or nominee transfers, please don’t hesitate to give me a call on **02871 876 220** or email me at [ciaranmcgee@cjmtax.co.uk](mailto:ciaranmcgee@cjmtax.co.uk).

## *9. Summary: What Are The Key Points I Need to Remember?*

The basic TOGC conditions must always be met and where they are, they apply automatically. The key focus is on the transfer of a “business” (rather than an asset or assets), though immediately consecutive transfers are a no-no, even if it is a business.

Moreover, transfers involving property which would otherwise be subject to VAT must meet two additional conditions, namely:

- a. The buyer must OTT before the “relevant date”, and
- b. The buyer must also notify the seller that the OTT anti-avoidance rule does not apply to the transaction, again before the “relevant date”

It is possible to have a TOGC of a single asset, i.e.: a property for rent, but to qualify as a TOGC, it must amount to the transfer of a “property rental business”. There are various ways of doing this, but the most straightforward is to have a lease in place both before and after the transfer.

Where a tenant wishes to buy out the landlord, be aware that the TOGC conditions won't be met without something more, usually the use of a property holding company or something similar.

Rental adjustments don't hit the VAT return, but if you're arranging a sale to a nominee, watch out...!

You may also find the following links of use:

- **HMRC's VAT Notice on TOGCs (700/9) can be found [HERE](#)**
- **HMRC's VAT Notice on OTTs and TOGC (742A, para 11) can be found [HERE](#)**
- **HMRC's guidance on their new OTT process can be found [HERE](#)**

Hopefully this Update has been helpful, and should you wish to discuss any of the issues arising – or indeed anything else VAT-related – please don't hesitate to contact me for a free, no obligation initial enquiry.



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