



TC02371

Appeal number: TC/2010/807

*VAT – s 49 VATA - whether transfer of a business as a going concern
where no supply by outgoing trader to new trader - yes on facts – whether
legitimate expectation means not liable to VAT – stayed pending Noor*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**MARK YOUNG
T/A THE ST HELENS**

Appellant

- and -

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

**TRIBUNAL: JUDGE BARBARA MOSEDALE
JULIAN SIMS ACA CTA**

Sitting in public at Barrack Block, Southampton on 27 September 2012

Mr J Platt, of JLP Partnership, for the Appellant

Mr Robinson, Officer of HMRC, for the Respondents

DECISION

1. Mr Young appeals against a review decision by HMRC issued on 21 October
5 2009 that his effective date of VAT registration was 14 February 2009. He had
actually applied to be registered for VAT with effect from 1 September 2009. HMRC
have intimated that they will levy a penalty for late notification, but have not yet done
so.

The facts

10 2. The facts relevant to this appeal were not in dispute and we find as follows:

3. There had been a restaurant on the site (“the premises”) of Mr Young’s
restaurant for around 25 years. The property was sold in around 2003 to a gentleman
called Rupert who ran a restaurant under the name of “The St Helens Restaurant” for
about a year. It was not successful and Rupert was unable to sell the business or the
15 premises.

4. A company called Bonne Bouchee Caterers Limited (“Bonne Bouchee”) had
been established between Mr Young and his partner. It was VAT registered. It started
off life as a contract caterer: Mr Young is a chef. Rupert and Mr Young became
acquainted and agreed that Rupert would grant Bonne Bouchee a lease of the
20 premises together with the fixtures and fittings so that Bonne Bouchee could operate a
restaurant at the site. This restaurant was also called “The St Helens Restaurant”.

5. Owning nothing but the food and wine, and leasing everything else, Bonne
Bouchee operated the restaurant for a few years. It achieved an AA rosette.

6. But by late 2008 Bonne Bouchee was in financial difficulties. It owed its
25 suppliers large sums and its turnover had suddenly fallen significantly.

7. Mr Young consulted Mr Platt, who was concerned that Bonne Bouchee was
trading while insolvent. On his advice, Bonne Bouchee ceased to trade. On 4
February 2009, which was approximately 7 to 10 days after Bonne Bouchee ceased to
trade, Mr Young, accompanied by Mr Platt, consulted an insolvency practitioner. Mr
30 Tickell, the insolvency practitioner, advised that the company’s lack of assets meant
that no one would be prepared to become liquidator of the company as the company
would be unable to pay the liquidator’s fees. Mr Young was advised to write to his
creditors to tell them that the company was insolvent, had ceased trading, and that any
creditor, could, if it wished, takes steps to wind up the company. Otherwise
35 Companies House would be notified and the company would in due course be struck
off the register.

8. Mr Young took this advice and the next day, 5 February 2009, wrote to all the
company’s creditors. One of the creditors, of course, was Rupert, the landlord of the
premises occupied by the restaurant. Rupert’s immediate action, taken on 6 February

2009, was to forfeit the lease and serve notice of eviction on Bonne Bouchee. Mr Young had to hand the keys of the restaurant over to bailiffs.

9. Suppliers of Bonne Bouchee repossessed or had already repossessed goods supplied. The wine, for instance, was repossessed by the vintner.

5 10. No creditor took action to wind up the company: it was not worth their while to do so. Many months later, Bonne Bouchee was automatically struck off the register at Companies House and dissolved.

10 11. Mr Tickell had also advised Mr Young that there was nothing to stop him starting up a new business. Mr Young also talked to HMRC's advice line. He understood from this that if he commenced trading in his own name he would not be obliged to register for VAT until his takings went over the registration threshold.

15 12. Therefore, after the premises were repossessed, Mr Young opened negotiations with Rupert with a view to taking a new lease of the premises in his personal capacity so that he could re-open the restaurant, and run the business free of the debt of the previous business. Mr Young re-opened the restaurant on 14 February 2009 under the new name "The St Helen's."

20 13. Mr Young's evidence was that, other than the lease which was almost immediately terminated by the landlord, the only asset Bonne Bouchee was left with when it ceased trading was its reputation, although he regarded that reputation as generated by his personal reputation as a chef. Anything that could be repossessed had been (or was shortly thereafter) repossessed, and as the lease covered the fittings as well as the premises, the entire contents of the restaurant reverted to the landlord when the lease was forfeited.

14. There was no sale of anything by Bonne Bouchee to Mr Young.

25 15. Mr Young applied in July 2009 to be registered for VAT with effect from 1 September 2009 based on his turnover since 14 February 2009.

The law on liability to VAT registration

16. Schedule 1 to the Value Added Tax Act 1994 ("VATA") provides as follows:

"Liability to be registered

30 1.(1)....., a person who makes taxable supplies but is not registered under this Act become liable to be registered under this Schedule –

(a) at the end of any month, if the value of his taxable supplies in the period of one year then ending has exceeded £67,000

(b)

35 17. It is not in dispute that if it was only supplies actually made by Mr Young which were to be taken into account, Mr Young was correct not to register for VAT until 1

September 2009. HMRC's case however is that it is not just the value of Mr Young's supplies which must be taken into account.

18. Section 49 VATA provides:

49 Transfers of Going Concerns

- 5 (1) Where a businesscarried on by a taxable person is transferred to another person as a going concern, then –
- (a) for the purpose of determining whether the transferee is liable to be registered under this Act he shall be treated as having carried on the business ...before as well as after the transfer and supplies by the
- 10 transferor shall be treated accordingly.....

19. It was HMRC's case that the supplies made by Bonne Bouchee ought, under s 49 be treated as supplies made by Mr Young, with the effect that Mr Young was liable to be registered for VAT from the moment that he commenced trading on 14

15 February 2009. The appellant accepts that HMRC is correct *if* there was a transfer of a business to him as a going concern, but considers that there was no such transfer.

20. After 6 February when the lease was forfeited, Bonne Bouchee had no assets with the possible exception of goodwill. It made no transfer to Mr Young. Even if there was goodwill attached to the premises, Bonne Bouchee could not have

20 transferred it to Mr Young as it no longer possessed the premises. Therefore, we find there was no supply (in the VAT sense) between Bonne Bouchee and the appellant. Bonne Bouchee transferred nothing to Mr Young and Mr Young purchased nothing from Bonne Bouchee.

21. Was the business carried on by Bonne Bouchee (a taxable person) transferred to

25 Mr Young as a going concern? The matters to be considered in answering this question are as set out by the High Court in *Kenmir v Frizell* [1968] 1 WLR 329:

30 “(page 335) In deciding whether a transaction amounted to the transfer of a business regards must be had to its substance rather than its form....In the end the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern the activities of which he could carry on without interruption...the absence of [an assignment of goodwill] is not conclusive if the transferee has effectively deprived himself of the power to compete. The absence of an assignment of the premises, stock-in-trade or

35 outstanding contracts will likewise not be conclusive, if the particular circumstances of the transferee nevertheless enable him to carry on substantially the same business as before.”

22. Was there a transfer of a business as a going concern to Mr Young? There are 3 issues to be resolved:

- 40 • Did the transfer of possession of the premises and fixtures & fittings to an intermediate person (the landlord) mean that there was no transfer of a business as a going concern by Bonne Bouchee to Mr Young?

- Did the time lapse between Bonne Bouchee ceasing trade and Mr Young commencing trade mean that there was no transfer of a business as a going concern by Bonne Bouchee to Mr Young?
- Was Mr Young put in a position so that he was able to carry on the business of Bonne Bouchee?

Transfer to intermediate person

23. Where a business transfers in quick succession from one person, to another person and then to a third person, and the intermediate person only holds the business momentarily, or does not operate it as a business, then the transfers are probably not treated as supplies of a going concern within Article 5 of the VAT (Special Provisions) Order 1995. That provides as follows:

“5(1)there shall be treated as neither a supply of goods nor a supply of services the following supplies by a person of assets of his business

–

(a) their supply to a person to whom he transfers his business as a going concern where -

(i) the assets are to be used by the transferee in carrying on the same kind of business, whether or not as part of any existing business, as that carried on by the transferor, and

(ii) in a case where the transferor is a taxable person, the transferee is already, or immediately becomes, as a result of the transfer, a taxable person....”

24. Therefore, as the intermediate person does not use the assets to carry on the business, the conditions of Article 5(1) would not appear to be met. But does this reasoning apply to the provisions of S 49 VATA?

25. There is a major distinction between the two provisions. Although both relate to, and refer to the transfer of a business as a going concern, only the application of Article 5 is limited to a situation where there is a supply of assets.

26. “Supply” has a very specific meaning in VAT. A supply is something that is done for consideration: s 5(2)(a) VATA. In other words, Article 5 applies where one person sells the assets of his business to another person and transfers his business to that person as a going concern at the same time: Article 5(1)(a).

27. But s 49 does not require there to be any kind of a supply. It applies where there is a transfer of a business as a going concern irrespective of whether there is a supply.

28. The reason for the distinction must be that the objective of the provisions are different. The effect, and presumably objective, of S 49 is to prevent an existing business which has already been registered benefiting from the registration threshold again simply by transferring it to a new legal entity.

29. The objective of the provision of the Sixth VAT Directive which Article 5 implements was stated by the CJEU in the case of *Zita Modes C-497/01* to be simplification and avoiding a substantial VAT liability on the commencement of a business. Its effect is also to prevent the outgoing owner of a business selling its assets and disappearing without accounting for the VAT due on the sale of the assets. Article 5 achieves its effect by deeming the sale of assets not to be a supply when a business is transferred as a going concern.

30. So, in summary, s 49 applies wherever there is a transfer of a business as a going concern; Article 5 only applies where such a transfer occurs between persons at the same time as a supply of assets. A literal interpretation of s 49 is that it is enough for a going concern to be transferred. No supply in the VAT sense is required. A purposive interpretation of s 49 would lead to the same result because, as we have said, it is concerned with preventing the same business continuing under new ownership but unregistered for VAT. There is no reason why its application should be limited to cases where there is a supply of assets between the outgoing owner and the new owner.

31. A number of Tribunal decisions have been to the same effect.

32. In *Sams Bistro VTD 19973* (not cited to us) the business was sold by the previous owner to an individual who was the controlling shareholder in a company. He then immediately let the business assets to the company who continued to run the business. The Tribunal held that the company was liable to register for VAT immediately under s 49.

33. In *Harper t/a Tee Time Catering (VTD 20176)* (not cited to us) a golf club outsourced its inhouse catering to a third party (Mr & Mrs Whitt). The premises and equipment was owned by the golf club. The Whitts contract with the golf club terminated and the Whitts deregistered for VAT. Mr & Mrs Harper entered into a new agreement with the club to provide in house catering. It seems the Harpers never met the Whitts. There was no transfer of anything from the Whitts to the Harpers: no stock, no assets, no goodwill and no business records were transferred.

34. Nevertheless, the Tribunal held that s 49 applied and there was a transfer of a business as a going concern. It said at paragraph 17:

“This was a going concern until [the Whitts] ceased trading on Friday 7 October 2005. On Monday 10 October, pursuant to an identical agreement with the Club, Mr and Mrs Harper carried on the very same business of inhouse caterers. They operated from the same premises, using the same facilities and the same equipment and subject to the same liabilities to the Club. There was no break in trading of any significanceThe fact that the business came to Mr and Mrs Harper via the Club rather than direct from the Whitts does not alter what they acquired. There is no statutory requirement that there has to be only one single transaction to effect the transfer and equally there is no statutory requirement that there has to be consideration passing from the transferee to the transferor. The effect of what took place between

the Whitts, the Club and the Harpers was to put the Harpers in possession of the business previously carried on as a going concern by the Whitts, the activities of which said business, the Harpers could and did carry on without interruption.”

5 35. We consider that these cases correctly applied the law, and we apply the same interpretation of the law to this appeal. We consider that it is irrelevant that nothing was supplied (in the VAT sense) by Bonne Bouchee to Mr Young.

36. Therefore, the fact that nothing was supplied by Bonne Bouchee to Mr Young is no answer to the question whether there was a transfer of a going concern to Mr
10 Young.

Time Lapse

37. There was a break in trading of between 2 or 3 weeks from when Bonne Bouchee closed the restaurant and Mr Young reopened it. Does this mean, as per *Kenmir*, that Mr Young was not able to carry on the business without interruption?

15 38. This has been considered in a number of cases. Advocate General Slynn in the case of *JMA Spijkers v Gebroeders Benedik Abbatoir CV* (1986) 2 CMLR 296 said:

20 “The fact that at the date of transfer trading has ceased or has been substantially reduced does not prevent there being a transfer of a business if the wherewithal to carry on the business, such as plant, building and employees, are available and are transferred”

39. Like *Kenmir*, this was an employment law case but the same principles would apply. The CJEU itself said in that case that the “duration of any interruption” in the business transferred was a factor to be considered in the overall assessment of whether there was a transfer of a business as a going concern.

25 40. It is clear from this that the mere fact of a break in trading is insufficient by itself to prevent a transfer. We must consider all the circumstances of the case and the duration of the break.

41. In *Montrose DIY Ltd VTD* (1988) 2652 the Tribunal held that a two month break in trading, on the facts of that case, was insufficient to prevent the transfer
30 being a transfer of a going concern.

42. In this case we consider the break in trading of 2 to 3 weeks to be a factor which we must consider (and we do consider it below) but it is not conclusive against there being a transfer as a going concern.

Did Mr Young carry on the same business as Bonne Bouchee?

35 43. There was no transfer of any assets by Bonne Bouchee to Mr Young. But the question is whether Mr Young was put in a position where he could carry on the substantially the same business as before. Here the particular circumstances, similar to those in *Harpers*, was that possession of the premises and fixtures and fittings

reverted to the landlord (Rupert) who then leased them to Mr Young. So (via a movement of possession from Bonne Bouchee via Rupert to Mr Young), Mr Young obtained the property necessary to allow him to carry on the business.

5 44. He did not obtain any stock in trade from Rupert or the Company: but from what evidence we had this was not necessary in order for him to carry on substantially the same business.

10 45. There was no direct transfer of any goodwill by Bonne Bouchee. Whether the goodwill Bonne Bouchee had was attached to the premises or the chef or both, Mr Young had the benefit of it as the new business had both the same premises and same chef.

Conclusion

15 46. When Bonne Bouchee ceased trading, it was not immediately anticipated that Mr Young would continue the business in his own capacity. But within a week or two of that cessation, and as soon as the lease was forfeited, that was the intention of Mr Young.

20 47. It is clear that fundamentally Mr Young saw it as the same business being continued by him in his personal capacity, just free of the debts which encumbered the old business. Very little changed. There was a name change but it was minor. New stock had to be purchased, but we find that is insignificant in a business which deals in perishable food. The new business had the same premises and equipment.

25 48. We find it was fundamentally the same business. It was a going concern. Mr Young was able to immediately commence trading when given possession of the restaurant: he had everything Bonne Bouchee had bar the stock. The break in trade was at most of three weeks and we find this did not mean it was a different business. The business was *transferred* to Mr Young as a going concern even though (as far as Bonne Bouchee was concerned) the transfer might be seen as involuntary and even though the transfers of the premises and equipment was via the landlord.

30 49. We find that the business carried on by Bonne Bouchee was transferred to Mr Young as a going concern. Mr Young was therefore liable to be registered from 14 February 2009.

Decision on preliminary issue

50. That concludes the appeal against the appellant in so far as the question of his liability to be registered for VAT.

35 51. However, it was also the appellant's case that HMRC would be in some way be estopped from enforcing any assessment against him arising out of his late registration because, he says, he only decided to go ahead and take over the running of the restaurant in his own name in reliance on advice from the HMRC National VAT Helpline. His case is that he was told that he would not be liable to immediately

register for VAT and he was hoping the pricing advantage that gave him would enable the new business to be successful.

52. The Tribunal did not deal with these submissions at the hearing. However, as the main issue (the appellant's liability to register for VAT from 14 February) has been decided against the appellant, it becomes necessary to deal with them.

53. Two issues fall to be decided:

- Whether as a matter of fact the appellant had a legitimate expectation that he would not be liable to be registered for VAT until his own trading receipts put him over the threshold. In considering this, the Tribunal will consider whether an unqualified representation to that effect was made to him and whether he acted to his detriment in reliance on it;
- Whether as a matter of law, any legitimate expectation of the appellant could lead to this Tribunal having the jurisdiction to discharge HMRC's decision which is the subject of this appeal.

54. The decisions of the High Court in *National Westminster Bank* [2003] STC 1072 and *Arnold* [1996] EWHC Admin 52 are that the Tribunal does not have such jurisdiction. However, the decision of the House of Lords in *J H Corbitt (Numismatists) Ltd* [1981] AC 22 suggests obiter that the Tribunal could adjudicate on whether the terms of an extra statutory concession had been met, and the decision of the High Court in *Oxfam* [2009] EWHC 3078 is that this Tribunal does have such jurisdiction. There is certainly CJEU authority that member States must give effect to legitimate expectations where the taxpayer has directly effective rights under the Principle VAT Directive: *Stichting goed Wonen* C-376/02 and *Marks & Spencer* C-62/00. The Upper Tribunal will be considering the matter afresh in the forthcoming cases of *Noor* (at first instance [2011] UKFTT 349 (TC)) and *Trade Sale Ltd* (Upper Tribunal ref: FTC/07/2012) in a hearing in December 2012.

55. In these circumstances, unless either party objects, we stay resolution of the second part this appeal until after the final resolution of the appeals in *Noor* and *Trade Sale Ltd*. This means our decision recorded in paragraph 49 is a decision on what has become a preliminary issue in this appeal.

56. This document contains full findings of fact and reasons for our preliminary decision. Any party dissatisfied with this preliminary decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**BARBARA MOSEDALE
TRIBUNAL JUDGE**

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RELEASE DATE: 15 November 2012