



TC02520

Appeal number: TC/2011/02617

*VAT- Transfer of going concern – Restaurant premises reverting to
Landlord on termination of tenancy – purchase of assets by the Landlord –
was there a transfer of a going concern – yes – Appeal dismissed.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**BRENDA MASSEY t/a
THE BASEMENT RESTAURANT**

Appellant

- and -

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

TRIBUNAL: JUDGE LADY JUDITH MITTING

Sitting in public in Birmingham on 19 March 2012 and 26 November 2012

Mr Ashwyn Kagdadia, Chartered Accountant, for the Appellant

Mrs Sylvia Knibbs, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. Mrs Brenda Massey appeals against the decision of the Commissioners dated 10
5 November 2010, and upheld on review dated 1 March 2011, that on or about 14 June
2009 she had acquired The Basement Restaurant business as a transfer of a going
concern and should thus have been registered for VAT with effect from that date.

2. Mr Kagdadia, representing Mrs Massey, did not challenge that if the Tribunal
were to find there had been a transfer of a going concern, then she would have been
10 correctly registered from that date on the rolling taxable turnover basis. His
contention was that there had been no such transfer of the business, she having merely
accepted the surrender of the lease of the business premises. This was the issue
before the Tribunal.

3. The case was originally heard on 19 March 2012 when the Commissioners
15 called no oral evidence and Mr Giles Massey gave evidence on behalf of his mother,
Mrs Brenda Massey, who did not attend. At the conclusion of the day's hearing there
were so many unknown factors and contradictions in the oral and documentary
evidence that it was quite impossible to determine the facts. The hearing was
therefore adjourned to allow the Commissioners to call Mr James Piggott, the
20 outgoing tenant, and for Mrs Massey to give oral evidence. On the resumed hearing,
I therefore heard oral evidence from Mr Piggott, Mrs Massey and also Mr Giles
Massey who was recalled.

The Facts

4. The facts were in part not in dispute but there were fundamental differences on
25 certain key issues and in respect of those issues I set out the evidence and make
reasoned findings.

5. No 1 Spencer Street, Leamington Spa is an 1850's style semi-detached house in
a part residential, part commercial area. Mrs Massey purchased the property in the
late 1980s. Shortly after the purchase she had the basement converted into an
30 apartment which she rented out and she set up a children's nursery on the ground
floor, she herself occupying the top floor. The nursery still continues and is still
operated by Mrs Massey and she continues to live on the top floor. Dates were rather
vague but I was told that in the early 1990s, Mrs Massey applied for and obtained
consent to convert and operate a licensed restaurant from the basement. It was
35 immediately named, and still carries the name, The Basement Restaurant. The
restaurant business traded for a number of years as a successful family run restaurant
with a strong regular clientele. For the first few years of trading, Mr Giles Massey
and his brother Simon ran the restaurant, Simon acting as chef and Giles as front of
house. Simon then at some stage left the business to complete his university degree
40 and Giles took over as chef, further kitchen and waiting staff being employed on a
casual basis. Giles' involvement in the business ended in approximately 1999 when
he went abroad. Thereafter Mrs Massey employed a succession of chefs including Mr
James Piggott.

6. Mr Piggott began working as a chef in the restaurant in 2001 and for the next five years worked alongside Mrs Massey. In 2006, Mr Piggott thought the restaurant was looking rather tired and Mrs Massey was in fact talking of closing it. He felt ready for a new challenge and after discussion and negotiation with Mrs Massey and
5 Mr Giles Massey, it was agreed that Mr Piggott would take a lease of the basement from Mrs Massey and he would take over the operation of the business. With effect from 1 June 2006, Mr Piggott operated and ran the business as his own. Under the terms of the lease dated 15 June 2006, Mr Piggott took the premises for a term of 10 years with break clauses at 3 and 7 years. He applied to be registered for VAT, his
10 registration being granted with effect from 1 June 2006. On acquisition, he paid Mrs Massey £20,000 being made up of £18,000 for goodwill and £2,000 for fixtures and fittings.

7. On acquisition, Mr Piggott closed the restaurant for some 8 weeks whilst he carried out a complete refurbishment. He spent approximately £50,000. He provided
15 new toilets, a new bar area, a new solid oak floor and a range of new equipment and furniture including a coffee machine and grinder, a bar fridge, tables and chairs, fireplace, lighting, cutlery, crockery and glassware.

8. Mr Piggott ran the restaurant successfully but after a couple of years, realising his long term future did not lie in the restaurant business, decided he would take up
20 the three year break clause. How much notice he gave to Mrs Massey was disputed. The lease provided for three months notice. Mr Piggott thought that he gave approximately 4 months but Mr Giles Massey in his oral evidence said that he only gave between one week and 10 days notice. Mrs Massey could not remember but thought it would have been in the region of two to three months. In cross examination
25 she stated that she would be happy to accept, and so I find, that he would have given the three months contractually required of him.

9. On Mr Piggott's leaving the restaurant, the business was taken over, in circumstances described below, by Mr Giles Massey. An area of dispute between the parties concerned the date when Mr Piggott ceased trading and the date when Mr
30 Massey commenced, both being relevant to the length of the period of closure between the two. Mr Massey had told the Commissioners in a phone call dated 15 July 210 that the business had been closed for between 4 and 6 weeks. In her first of three witness statements, Mrs Massey put the period of closure at a "few weeks". Piecing together the oral and documentary evidence I conclude, and find as a fact, that
35 Mr Piggott ceased trading on Friday 12 June 2009 and Mr Giles Massey commenced on 24 June. I take this from Mr Piggott's oral evidence and contemporaneous documents. In a letter to the Commissioners dated 26 June 2009, Mr Piggott advised them that he had "handed over" the business on 13 June. In his application to cancel his registration, he stated he ceased to trade on 13 June. His accounts were made up
40 to 12 June 2009 and this is also the date given in his self assessment tax return. In his oral evidence he gave his final day's trading as Friday 12 June ending with a leaving party that night and handing over the keys the following day, the 13th. Mr Massey's first card payments are recorded as 24 June so the business had to have been operating on or before that date. All this evidence points to a period of closure from 13 June to
45 23 June.

10. During the ten day period of closure, Mr Massey worked enormously hard drawing up menus, tasting and learning his way round the kitchen again. The entire family helped out in cleaning up. No new major items of equipment had to be purchased as Mr Piggott had left everything behind. Mr Piggott had however
5 completely exhausted the food and drink stocks and there had to be a complete restocking. Other than this, nothing more needed to be done before Mr Massey could open for business. From 24 June 2009, Mr Massey has continued to act as chef and employee of his mother.

11. The major factual area of disagreement between the parties concerned the nature
10 of a payment of £5,650, made by Mr Massey to Mr Piggott on his departure. The sum was made up of £6,000 less £350 being one week's rent as Mr Piggott had accidentally cancelled his standing order for the rent one week prematurely. Mr Piggott told the Tribunal that he owned all the fixtures and fittings but was not going
15 to need them as he was going travelling. He thought that they would realise between £6,000 and £8,000 at auction but did not want the hassle of going through this process. Knowing that Mr Massey was going to be taking over as chef and that the business would be continuing to run, he offered the entire fixtures and fittings to Mr Massey for £6,000, an offer, he told me, Mr Massey accepted and for which Mr Massey compiled an inventory of everything to be included and left on hand-over.
20 The cheque was handed over on 13 June, the day after Mr Piggott's cessation.

12. On the first day of his evidence, Mr Massey had made no reference to the payment and indeed the fact of it was not known to the Tribunal. When he was recalled however, he accepted the payment had been made but disputed its nature. It was, he told the Tribunal, a payment made entirely out of generosity. It was paid in
25 recognition of Mr Piggott's services to the restaurant and was purely and simply a gesture of friendship to someone who had become disillusioned with the business and could probably do with the money to go travelling. Mr Massey was adamant that it did not represent a payment for fixtures and fittings. He did accept that Mr Piggott had requested the payment but he had, he said, no recollection of the conversation so
30 could not remember whether Mr Piggott had told him why he wanted the money or indeed whether he, Mr Massey, had asked him why. Equally he could not remember what his reaction had been to the request and he had no recollection of having drawn up an inventory. He accepted in cross examination that when he took over from Mr Piggott, he did not need to purchase any equipment and that he merely took over the
35 use of all the fixtures and fittings left behind by Mr Piggott.

13. Mrs Brenda Massey had not been a party to the discussions over the payment and the first she knew of it, she told the Tribunal, was when Giles came to her and told her Mr Piggott wanted £6,000. She could not recollect whether she had asked
40 Giles why Mr Piggott had wanted it. She had been very much against making him any payment. However various friends advised her that she should make the payment, and accepting their advice, she agreed to it as recognition for the fact that he had spent a lot of his own money on the premises in the past. She described the payment as a gesture of friendship and goodwill. She stated categorically that it did not represent a purchase of fixtures, fittings nor indeed anything else.

14. The payment was made out of the business current account held in the joint names of Mr & Mrs Massey. This had been the business account for a great number of years and indeed was the account into which Mr Piggott's rental money was paid. I accept the payment originated from Simon and a bank transfer of £6,000 from Mr S
5 Massey is shown on the relevant statement coming in the day before the cheque payment went out to Mr Piggott.

15. I accept Mr Piggott's explanation of this payment and find as a fact that it was a payment made by the Masseys to Mr Piggott for the fixtures and fittings which he left behind. I make this finding for a number of reasons. First Mr Piggott had a clear
10 recollection of the circumstances in which the payment came to be made. He remembered the conversation with Mr Massey and that Mr Massey had drawn up an inventory. I do not find it credible that Mr Massey could not have any recollection of the conversation. £6,000 was a large sum of money which he and his mother could ill afford, as witness the fact it had to be borrowed from Simon. Secondly it makes
15 obvious and abundant sense that Mr Piggott would want some recompense for his fixtures and fittings. He had acquired them on the transfer of the business to him or by subsequent purchase. They quite clearly were all owned by him and he was hardly going to walk away from assets which held to him a substantial value. Thirdly it was
20 common ground that Mr Piggott had requested the payment and the amount. It is hardly a likely scenario that the recipient requests and names the amount of a payment later to be described as a gesture of friendship and goodwill. In this context it should also be noted that Mr Massey, particularly, had described how let down he and his mother felt at Mr Piggott's decision to leave. They both felt that he had left them in the lurch and they were disappointed in him. Again this is not consistent with the
25 payment representing a gesture of goodwill.

16. Mrs Massey in her evidence, both documentary and oral, stated that she had always wanted nothing more than to receive the rental payments. She had at no time wanted to take back the running of the business or to operate the restaurant herself. However when Mr Piggott surrendered the lease, she still needed the income to
30 continue to meet the mortgage repayments. Very much against her will she therefore saw no alternative but for herself and Giles to operate the restaurant. She was asked in her evidence in chief whether she had tried to re-let the premises at the time to which she replied that other than "asking around" she had not. She was reconciled, she said, to operating the business on a temporary basis because a restaurant can die
35 very quickly on a closure, however short. It had to be kept running. It was therefore decided that she and Giles would operate it in the short term and on a temporary basis pending eventually trying to find a new tenant.

17. When Mr Massey gave evidence on the first day, he maintained that he had retained none of Mr Piggott's staff but employed friends from when he had operated
40 the business prior to Mr Piggott taking it over. However when recalled, Mr Massey accepted that as many of Mr Piggott's staff as wanted to stay had stayed and he had merely replaced one or two that had not. He described his style of cooking as rather more traditional than Mr Piggott's had been. He changed suppliers and he also operated totally different opening times. Mr Piggott had opened lunchtimes on
45 Saturdays and Sundays and seven days a week in the evenings. Mr Massey did not

open lunchtimes at all and only opened Monday and Tuesday evenings when there was a pre-booked party.

Legislation

18. The relevant legislation can be found in Section 49(1) Value Added Tax Act 1994 and Schedule 1, paragraph 1 (2) of the same Act.

“49(1) Where a business carried out 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 b the transferor shall be treated accordingly.

Schedule 1, para 1(2) of the VAT Act 1994 states:

(1) Where a business carried on by a taxable person is transferred to another person and the transferee is not registered under this Act at the time of the transfer... the transferee becomes liable to be registered under this Schedule at that time if:-

(a) The value of his taxable supplies in the period of one year then ending at the time of the transfer has exceeded (relevant VAT threshold).

Case Law

19. I was referred by the parties to the following cases

Sawadee Restaurant v HMRC 15933

Nicholas Spence v HMRC 20563

Andrew Harber v HMRC 12979

Mr & Mrs D Harper v HMRC 20176

The Appellant's Submissions

20. It was Mr Kagdadia's contention that Mrs Massey at no time purchased a business or any assets with which to run a business. All she did was to accept a surrender of the lease and reacquire her own premises. It had never been her intention to start a business and she only did so having been left in the lurch by Mr Piggott.

21. Further, the business that Mrs Massey, employing her son Giles as chef, did run was a wholly different business from that run by Mr Piggott. The style of cooking was different; hours of opening were different; staff were different and suppliers were different.

22. Thirdly, there was a significant break in trading between Mr Piggott's cessation and Mrs Massey's commencement.

23. Mr Kagdadia referred to HMRC's Public Notice 700/9, asserting that the main conditions for the transfer of a going concern had not been met, the relevant
5 conditions being that the assets should have been sold as part of the transfer and that those assets were to be used by the purchaser with the intention of carrying on the same kind of business as the seller.

24. Relying on the cases of *Nicholas Spence* and *Sawadee*, Mr Kagdadia submitted that none of the criteria for the transfer of a going concern had been met. He stressed
10 that there was no sale of goodwill and that there was no transfer of either wet or dry stock.

The Respondents' submissions

25. Mrs Knibbs contended that everything pointed to there having been a transfer of a going concern. Stressing that it was the substance of the transaction which had to be
15 studied, the effect of what happened was to put Mrs Massey in possession of a business which could be operated as such. She maintained that the period of closure was insignificant.

The approach to be taken by the Tribunal

26. The test repeatedly applied by the tribunals in cases such as this is that laid
20 down by Widgery J (as he then was) in *Kenmir v Frizell* at page 164:

“In deciding whether a transaction amounted to the transfer of a business regard must be had to its substance rather than its form, and the consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. In the end the vital consideration is whether the
25 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. Many factors may be relevant to this decision though few will be conclusive in themselves. Thus, if the new employer carries on business in the same manner as before this will point to the existence of a transfer, but the converse is not necessarily true because a transfer may
30 be complete even though the transferee does not chose to avail himself of all the rights which he acquires thereunder. Similarly, an express assignment of goodwill is strong evidence of a transfer of the business but the absence of such an assignment is not conclusive if the transferee has effectively deprived himself o the power to compete. The absence of an assignment of premises, stock-in-trade or outstanding
35 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.”

Conclusions

27. I have already found as a fact that the payment of £6,000 (minus one week's rent) was not a gratuitous gesture of friendship and goodwill but was a payment for the fixtures and fittings. By this transaction, Mrs Massey purchased the assets which Mr Piggott had used in his operation of the business and which were to be used by her son Giles when he opened. There are two further relevant findings of fact which should be made. On the first day of Mr Massey's evidence, he maintained first that Mr Piggott had run the business down to such an extent that it had become what he termed "a drinking establishment" rather than a restaurant. Secondly, he asserted that Mr Piggott had left behind him no assets other than a few broken tables and chairs which he could not get through the door. Both of these assertions were contradicted by Mrs Massey, whose evidence I accept. She spoke of Mr Piggott catering for a younger clientele but she stated that it was still very much a restaurant. She also stated that Mr Piggott had taken nothing away with him. He certainly left no consumable stock but everything else remained and was in useable condition. From these findings it is clear that Mr Piggott left behind him an established restaurant with an established clientele.

28. Looking at the "whole of the circumstances", it can be seen that there were in effect two transactions and the Tribunal has to consider them in combination. First, Mr Piggott surrendered his lease to Mrs Massey, the effect of this being that she immediately acquired the business premises to use as she wished. Secondly, by payment out of the jointly held business account, she and Giles acquired all of the fixtures and fittings which Mr Piggott had used. The combination of the two was to quite clearly put Mrs Massey in the position where she could carry on precisely the same business as had Mr Piggott. All she and Giles, her employed chef, had to do was to restock the consumables. I fully accept Mrs Massey's evidence that in the long term she did not want or intend to run the restaurant but as she expressly stated in her oral evidence, she realised that on a temporary basis she and Giles were going to have to run it until they could find another tenant to take it on.

29. The length of time for which she intended to run it is immaterial. What matters is that she had acquired a business which she could run for as long as she wished. She had the premises and she had the equipment.

30. I accept there was no formal transfer of the goodwill. There clearly was goodwill in the address of the premises, the name of the restaurant and the length of time for which it had been trading successfully. Rather than being formally transferred to Mrs Massey, this goodwill in effect, reverted to her on the termination of Mr Piggott's tenancy. I do not think this materially alters the overall position.

31. As far as employees were concerned, they had all been employed, as is common in a small restaurant business on a casual shift basis. There would therefore have been no formal transfer of employees but insofar as they wished to carry on working for Mr & Mrs Massey, they could. They were not dismissed.

32. I find the period of closure of 10 days to be irrelevant. A 10 day closure for cleaning, redecorating, restocking and devising fresh menus is not material in the life

of a long running restaurant. It was certainly not long enough to cause any significant disruption to the trading pattern. Equally, I find that Giles' decision to vary opening hours and to offer a different style of cuisine is immaterial. They were matters of preference, of choice. The fact that the business carried on by the transferee is not identical to that previously carried on does not matter.

33. My conclusion is that in the circumstances outlined in this Decision, Mrs Massey acquired a business which she was able to carry on in substantially the same way as it had been carried on previously by Mr Piggott. I therefore uphold the Commissioners' decision that there had been a transfer of a going concern and I further uphold their decision that the correct date of registration should have been 14 June 2009. The Appeal is dismissed.

34. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this 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.

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**LADY JC MITTING
TRIBUNAL JUDGE**

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RELEASE DATE: 5 February 2013