



TC02640

Appeal number: TC/2012/02863

*VAT – INPUT TAX – Article 5 of VAT (Special Provisions) Order 1995 –
sale of printing machinery and office equipment to appellant not to be
treated as a supply of goods on basis the seller of the machinery and
equipment had transferred its business as a going concern to the appellant -
– appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

H Q GRAPHICS LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE SWAMI RAGHAVAN
MICHAEL BELL ACA CTA**

Sitting in public at 45 Bedford Square, London on 23 August 2012

**Howard Moss, chartered accountant of Kingswood Chartered Accountants for
the Appellant**

Lynne Ratnett, Officer of HMRC for the Respondents

DECISION

Introduction

5 1. This appeal relates to HMRC's decision to disallow the appellant's input tax claim on an invoice for the sale of machinery from Nowelle Ltd t/a Graf ("Nowelle") to the appellant.

2. The Respondents argue that the sale of machinery to the appellant was a supply to a person to whom Nowelle had transferred its business as a going concern. Under
10 Article 5 of the VAT (Special Provisions) Order 1995 the purchase cannot therefore be treated as a supply of goods.

3. The appellant says there was no transfer of business as a going concern between Nowelle and itself. There was simply a transfer of the machinery.

Evidence

15 4. We had before us a bundle of documents. This included correspondence between the parties, the invoice relating to the machinery, VAT forms in relation to the appellant and Nowelle, PAYE End of Year returns showing staff employed for the appellant and Nowelle, details of equipment leased by the appellant from HSBC, and
20 bank statements of Harlequin Design (London) Limited ("Harlequin"), a company who had controllers in common with the appellant and which was also a customer of Nowelle and the appellant. At the hearing we also received copies of draft accounts for Nowelle for the period ended 6 May 2011 and a copy of the Statement of Affairs on the 23 June 2011 being the date of the resolution winding up Nowelle.

5. For the appellant we heard oral evidence from Mr Moss in the course of his
25 submissions. HMRC were able to ask cross examine this and the Tribunal asked further questions. Mr Moss is a partner in Kingswood Chartered Accountants the accountants who acted for Nowelle and the appellant as well as other associated companies. As well as assisting with payroll he gave accountancy advice to the various companies.

30 6. For the Respondents we heard oral evidence from Mr Shawn Dhaliwal, the HMRC Officer who issued the decision letter of 26 September 2011 against which the appellant appealed. Mr Moss was able to ask questions in cross examination on this evidence.

Law

35 7. Section 5(3)(c) of the VAT Act 1994 enables the Treasury to provide by order with respect to any description of transaction that it is to be treated as neither a supply of goods nor a supply of services.

8. Article 5 of the VAT (Special Provisions) Order 1995 which is made under that power provides as follows:

5—

5 (1) Subject to paragraph (2) below, 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—

10 (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...;

15 (b) their supply to a person to whom he transfers part of his business as a going concern where—

(i) that part is capable of separate operation,

20 (ii) 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 in relation to that part, and

(iii) 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...”

25 *Cases*

9. We were referred to:

Kenmir v Frizzell & Others [1968] 1 All ER 414

Background and Facts

30 10. Background facts relating to the appellant’s application for VAT registration and the procedural history to the appeal were agreed between the parties and where relevant have been included within our findings of fact.

35 11. We found both the witnesses Mr Moss and Mr Dhaliwal to be credible. In evaluating Mr Moss’s evidence we took into account that he was an advisor to the company rather than someone who made business decisions for it. Direct evidence about the operation of the business and its business decisions would have been preferable but no directors or managers from the appellant or the seller Nowelle attended. Nevertheless we were able to make relevant findings of fact on the basis of Mr Moss’s evidence. It was clear to us he had a close and ongoing professional relationship with the companies. He was knowledgeable about the business operation

of Nowelle, the appellant and the other associated companies and was aware of the rationale for their strategic business decisions.

12. There was no significant disagreement between the parties as to the factual circumstances surrounding the sale of the machinery and equipment. The issue
5 between the parties was whether the circumstances amounted to a transfer of business as a going concern for the purposes of the relevant legislation. From the documentary evidence before us and the evidence of Mr Moss and Mr Dhaliwal we found the following.

13. The input tax which is the subject of this appeal relates to assets sold by
10 Nowelle to the appellant on 4 May 2011. It is necessary to set out the background to the seller and buyer of the assets and to explain what activities each were carrying out around the time of the sale of the assets.

The seller - Nowelle

14. Nowelle was incorporated on 30 November 2005. Its business was printing and
15 in particular it serviced retailers providing them with large format and high quality banners advertising sales and promotions. Its customers included Selfridges and Marks & Spencers. Printing was digitised and different printers were needed to produce the different sizes of materials. The company employed staff who were skilled in operating the machines and also staff who involved in boxing / packaging
20 materials and carrying out administration.

15. The company was registered for VAT on 22 March 2006. Its business address was Unit 6, IO Centre, Hatfield, AL10 9EW.

The run-up to sale – state of business / invoices

16. Nowelle was profitable in the years 2006 to 2009 however the change in
25 economic climate resulted in fewer orders and in 2010 the company started to make losses. In 2011 the director was concerned that the business was running into difficulties. Trading in January to March of the year was weak and in late April there was a concern that the company was not going to be able to pay its debts as they fell due.

17. We noted the following from the schedule of output tax in the bundle for the
30 period 1 April 2011 to 6 May 2011.

18. The turnover was in the region of £16/17,000.

19. As well as the sale of the machinery on 4 May 2011 which is the subject of the
input tax claim which is the subject of this appeal the next most significant sum at
35 £11,481 was an invoice dated 30 April 2011 for “jobs for the month – april 2011”. Mr Moss explained this related to work invoiced to Harlequin. There was also a sum of £3,241.40 for work done for the retailer Hackett and some much smaller sums for work done for Ralph Lauren. Those invoices were also dated 30 April 2011.

20. Mr Moss told us the Harlequin invoice was reflective of previous invoices that would have been issued to Harlequin. He thought the jobs referred to on the invoice would have most likely been done during the period of the month. Nowelle's practice was generally to invoice for jobs towards the end of the month.

5 21. The schedule of output tax also records for 4 May 2005 an amount of £1,000 in respect of "Sale of Stock as agreed at close of business today."

22. No significant business activity was undertaken by Nowelle in May 2011 and on 23 June 2011 a resolution was passed winding up Nowelle.

The buyer – HQ Graphics Limited

10 23. Mr Moss told us the perception was that Nowelle had run into difficulties because of the significant labour costs associated with larger print runs. The business owners wanted to have a business which was less labour intensive, did smaller print runs and tenders on line.

24. HQ Graphics was incorporated on 14 April 2011.

15 25. A Form VAT 1 Application for Registration to HMRC signed 21 April 2011 by Mr Derek Wallis, director the appellant was received by HMRC on 3 May 2011.

26. The VAT 1 showed its business address was stated as being 4th Floor, 26/27 Great Sutton Street, London EC1V 0DS. It was a voluntary registration with the appellant intending to make taxable supplies. The registration was requested to start
20 on 14 April 2011.

27. The business activities were shown as "retail point of sale printed materials."

28. The Director's details were shown as Derek John Wallis.

29. Mr Wallis stated he was also director of six other companies of which one was Nowelle. He resigned as a director of Nowelle on 16 February 2011.

25 30. The registration date for the appellant was 14 April 2011 with a VAT registration number of 111 5842 25.

31. The VAT application for registration put a figure of £600,000 as a turnover estimate. Mr Moss thought this had been worked out using estimates of the production capacity of the machinery and then adding a small profit.

30 32. The appellant started business from when it acquired the machines in May 2011.

Customer base for this type of print business

33. There was no particular loyalty among customers. The firm might be used for some work but not others. It would depend on who the marketing team at the retailer

chose to use and the print company putting themselves up in front of buying agents. It was the sort of business where you were only as good as your last job.

Common ownership / control of seller and buyer

34. Both Nowelle and the appellant had a common shareholder, Mr Derek Wallis. Mr Wallis owned the appellant, and also had 70% of the ordinary shares of Nowelle, the remaining 30% being held by Mr Stephen Woodley.

35. Mr Wallis was a director of Nowelle up until his resignation on 16 February 2011.

36. Mr Wallis was also involved in a number of other companies, one of which was Harlequin. Harlequin was a customer of Nowelle and then became a customer of the appellant.

37. The business premises of Nowelle and subsequently the appellant were owned by Harlequin Holdings Ltd.

Other equipment leased to HSBC

38. On 6 May 2011 the appellant entered into an equipment leasing agreement with HSBC for various pieces of equipment including cutting machines / guillotines and printers. The cash price of the goods was £181,025.63. This equipment was previously used by Nowelle who leased the assets through HSBC as well.

Premises

39. Nowelle operated from premises in Hatfield. It was a tenant of Harlequin Holdings Ltd who was the freeholder. The premises were on the market for sale with vacant possession. Nowelle had made plans to use premises in Welwyn Garden City. The buyer for the Hatfield premises withdrew. The appellant decided to use the Hatfield premises rather than incur the costs of relocating to Welwyn Garden City and having to kit out and develop the new site. Mr Moss estimated these costs to be in the region of £50-100,000.

40. The appellant was invoiced for rent from Harlequin Holdings on 30 May 2011.

The sale of the machinery and equipment

41. The invoice from Nowelle to the appellant dated 4 May 2011 was for £78,000 with VAT included of £13,000. The appeal relates to HMRC's decision to reduce the appellant's claim for input tax for the period 06/11 by £13,000 on the basis that that there had been a transfer of a going concern between Nowelle and the appellant.

42. The invoice was headed "Sale of Machinery". The assets specified were various printers including a number of "hp Designjet 5500" printers, and a "Vutek PV UV 320" printer. The invoice also referred to "other assets, office equipment, computers,

printers and racking as agreed which included “various Apple Mac Computers, Accessories & Software.”

Employees

5 43. A number of employees of Nowelle and subsequently the appellant had specialist knowledge / skills in operating the printing machines. There were also employees whose job it was to box and distribute the product and to carry out administration.

10 44. Nowelle had 21 employees as at 5 April 2011. All 21 of these employees are shown as starting at the appellant on 9 May 2011. In addition Mr D Wallis ended his employment with Nowelle on 31 March 2011 and started at the appellant on 9 May 2011.

15 45. Out of the 22 employees (the 21 employees plus Mr Wallis) 7 were shown as starting on 9 May 2011 but also finishing on 9 May 2011. The records do not show the date the employees left Nowelle but the longest the gap could be is 5 April 2011 to 9 May 2011.

46. Out of the 22 employees who worked for Nowelle from end March/ early April 2011, 15 of them became employees of the appellant.

20 47. After 9 May 2011, 5 employees left the appellant. In 2011/12 the appellant employed 4 additional employees to those who started on 9 May 2011. The earliest new hire by the appellant following the tranche of employees who started on 9 May 2011 was 1 August 2011.

48. There was no formal agreement between the companies or between the staff members of Nowelle and the appellant that they would be transferred to the appellant.

The appellant’s business after the sale

25 49. Bank accounts for the period May to July 2011 of the appellant show a small amount of transactions in May 2011 and then significantly more in June and July of 2011. Amounts of salary were paid to employees in June 2011. Several inflows of large amounts came in from Harlequin – it is not clear to what extent this was for work done or whether it represented transfer of funding. The appellant was making
30 purchases of supplies from at least as early as 8 June 2011.

Procedural history of this matter

50. On 28 July 2011 the appellant submitted its first VAT return for the period 06/11 (from 14 April 2011 to 30 June 2011).

35 51. HMRC undertook a check of the return on the basis that it was a first period repayment return of £25,752.67.

52. Following the submission by the appellant of the requested information (the 10 largest VAT bearing invoices and bank statements), the information was considered by Officer Shawn Dhaliwal.

53. By letter dated 17 August 2011 Officer Dhaliwal set out his contentions regarding certain transactions. Consequently in relation to the invoice number GRI 4171 from Nowelle Ltd dated 4 May 2011 for £78,000 with VAT included of £13,000, Officer Dhaliwal reduced the original claim by £13,000.

54. By e-mail dated 6 September 2011 the appellant confirmed their business address was Unit 6 the IO Centre, Hearle Way, Hatfield, Hertfordshire, AL10 9EW. They stated that at the time of registering for VAT they were relocating and had used the business address of Harlequin as it was a company sharing common control with the appellant.

55. By letter dated 26 September 2011 HMRC advised the appellant of the amounts by which the VAT return for period 06/11 would be amended. The revised repayment to the Appellant was reduced from £25,752.67 to £12,752.67.

56. By letter dated 12 January 2012, Officer Hanrahan of HMRC wrote to the appellant upholding the decision that there had been a transfer of going concern and agreeing the claim was to be reduced. Officer Hanrahan contended that the conditions in VAT (Special Provisions) Order 1995 Article 5 had been met in that the appellant had many of the same customers and traded from the same premises. It was carrying on similar work, staff previously employed by Nowelle were now employed by the appellant and the director was previously a director of Nowelle.

57. The appellant's representative, Kingswood submitted an appeal to the Tribunal dated 2 February 2012.

25 *Appellant's arguments*

58. The invoice was raised by Nowelle in good faith and without any objective other than to properly transfer ownership of certain assets from one entity to another and properly account for the VAT due on the sale of these assets.

59. The assets sold were a mixture of various types of equipment which in themselves were not principally directly involved in the operation of a printing company but form part of a series of assets that only if used with other assets would allow an entity acquiring them to undertake the business of printing. These assets did not constitute all the assets owned by Nowelle Ltd.

60. There was no sale of the business of Nowelle Ltd to the appellant and there was no sale and purchase agreement written or otherwise.

61. There was no disposal of goodwill by Nowelle Ltd to the appellant.

62. There was no parallel share structure or Board of Directors.

63. Any common customers as between the appellant and Nowelle arose out of the common control. Nowelle had other customers who did not transfer across to the appellant.
- 5 64. There was the transfer of employees but not all employees were eventually retained.
65. The fact that the appellant operated out of the same premises as Nowelle Ltd arose for reasons totally unconnected with the sale of assets by Nowelle Ltd to the appellant (profitability, cash flow, loss in terms of time, inconvenience and relocation costs).
- 10 66. HMRC were wrong to conclude the circumstances surrounding the demise of Nowelle Ltd gave rise to a transfer of a business as a going concern. While substance over form type arguments may be relevant where transactions have the sole purpose of avoiding tax there was no intention to avoid tax here, on the contrary subject to the liquidator of Nowelle Ltd submitting outstanding information to HMRC, HMRC
15 should fully recover all tax due by Nowelle.
67. Nowelle Ltd properly accounted for the output tax of £13,000 on its sales invoice and this is included in the total output tax of £29,401.60. The unpaid VAT of Nowelle Ltd is £9,314.90 and in total £10,028.91 when the unpaid VAT for the quarter ended 31 March 2011 is included. On any equitable approach it is
20 inappropriate for HMRC to disallow the full £13,000 and in the first instance any reduction should be limited to £9,314.90 but more reasonably taking account of all the unpaid VAT to £10,029.
68. Once the liquidator of Nowelle Ltd has submitted corporation tax computations to HMRC for year ended 31 December 2010 and the period ended 6 May 2011
25 HMRC will be able to offset the VAT apparently still due against the repaid corporation tax under s130 Finance Act 2008. In their Notice 700/9 HMRC say the main purpose of the TOGC rules is to:
- 30 “Protect Government revenue by removing a charge to tax and entitlement to input tax where the output tax may not be paid to HMRC. For example where a business charges tax which is claimed as input tax by the new business but never declared or paid by the old business.”
69. The input tax claim of £13,000 should be allowed to stand as otherwise HMRC will have benefited from unjust enrichment.
- 35 70. The Kenmir case is not relevant as it is an employment case dealing with employment legislation.
71. In relation to burden of proof it is HMRC’s responsibility to provide evidence to support their case as it was their decision in the first place to disallow the repayment claim by the appellant. HMRC have not provided any factual evidence in support of

their position. The appellant's case is made more difficult because it is difficult to produce evidence that something was not there e.g. that there was no agreement.

Respondents' arguments

5 72. The term "going concern" has the meaning that at the point in time to which the description applies the business is live or operating and has all parts and function necessary to keep it in operation as distinct from it being only an inert aggregation of assets.

73. Businesses which are experiencing difficult trading problems can still be a going concern and this applies to Nowelle.

10 74. Case law establishes that the key approach is to look at the overall effect of what has happened. *Kenmir* stresses the need to take all factors into account. Individual factors are taken together as a whole, not looked at independently.

75. The following indicators support HMRC's decision;

(1) The business continued to be run from the same premises.

15 (2) There were common customers in that Harlequin was the major customer,

(3) There was a very close relationship between the two companies in that Derek Wallis was a director of Nowelle Ltd although resigning on 16 February 2011 he remained as Company Secretary. As at the date of completing the VAT Registration for the appellant (21 April 2011) he indicated he was director of the
20 company.

(4) The vast majority of the staff employed by Nowelle during the year ended 5 April 2011 were shown to be employees of the appellant for the year ended 5 April 2012 which was the year the appellant commenced trading.

25 (5) Equipment previously used by Nowelle was subsequently leased to the appellant through HSBC thus enabling the appellant to continue in the same type of business as Nowelle.

30 76. The supply of the machinery put the appellant in possession of an identifiable business; it had the equipment to carry on the business. The appellant intended to use the assets for carrying on the same kind of business. The effect of the transfer being to put the appellant in possession of a business which could be operated as such.

77. It is not necessary for jobs or contracts to be transferred or for there to be a contract of sale, or purchase of goodwill in order for there to be a transfer of a going concern.

35 78. While there may not have been the intention to trade from the same premises the appellant did and still does trade from the same premises as previously used by Nowelle Ltd.

79. The output tax due from Nowelle has not been paid and therefore the concessionary treatment that HMRC might have otherwise been able to give did not apply. HMRC could consider this concession if the output tax was subsequently paid but as at the date of the hearing was not in position to do so.

- 5 80. The burden of proof lies with the appellant to show there had been a supply between Nowelle and the appellant and that the supply was not part of a transfer of a business as a going concern.

Discussion

10 *Issue for determination under Article 5 of the VAT (Special Provisions) Order 1995 (“the 1995 Order”)*

81. On the basis of the parties’ submissions and the evidence before us much of the requirements of the 1995 Order are not in issue.

15 82. The supply of machinery and equipment by Nowelle to the appellant on 4 May 2011 was a supply of assets of Nowelle’s business within the meaning of the relevant provision. The assets were assets which were to be used by the appellant “in carrying on the same kind of business...as that carried on by the transferor” or the same kind of business as that carried on by the transferor in relation to the part transferred. Nowelle and the appellant were both engaged in printing for retailers. Mr Moss mentioned it was the intention of the appellant to have smaller print runs in order to reduce labour costs but this is a matter of scale and does not affect our view that the appellant was engaged in the same kind of business as Nowelle. This was a case where the transferor, Nowelle, was a taxable person, and that being so, the appellant, as the transferee, satisfied the condition that it was already a taxable person having become registered from 14 April 2011.

25 83. The key issue for our consideration was whether under article 5(1)(a) of the 1995 Order the supply of assets to the appellant was a supply “to a person to whom [Nowelle] transfers [its] business as a going concern”.

30 84. If the whole of Nowelle’s business was not transferred, then article 5(1)(b) also needs to be considered i.e. whether the supply of assets to the appellant was supply “to a person to whom [Nowelle] transfers part of [its] business as a going concern”. For article 5(1)(b) to apply the part of the business transferred needs to be capable of separate operation.

35 85. The legislation does not provide a definition of what is meant by “transfers his business as a going concern”. HMRC refer the High Court decision in *Kenmir* which set out the matters to be considered in answering the question of what amounted to a transfer of business as follows:

40 “(page 335) In deciding whether a transaction amounted to the transfer of a business regard 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

5 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 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.”

86. Mr Moss argued this was not of relevance because it related to particular employment legislation.

10 *Is Kenmir restricted to the context of employment law?*

87. *Kenmir* was indeed an employment law case. The particular statutory provisions in issue were s1 and para 1 Schedule 1 of the Redundancy Payments Act 1965 and Schedule 1 of the Contracts of Employment 1963, paragraph 10(2) of which provided:

15 “If a trade or business or an undertaking...is transferred from one person to another, the period of employment of an employee in the trade or business or undertaking at the time of the transfer shall count as a period of employment with the transferee and the transfer shall not break the continuity of the employment”

20 88. Looking at the judgment of Widgery J in the case it can certainly be seen that in relation to his consideration of the significance of there being a lack of transfer of goodwill his reasoning is developed by reference to the aim of the particular employment legislation at issue:

25 “Schedule 1 to the Act of 1963 is concerned with continuity of employment and uses the phrase “transfer of business” to describe a situation which a change of employer should not be regarded as a break in the continuity of employees’ engagements. If a business has no goodwill because it is at a low ebb, or because it sells all its production to an associated company, the factory premises might be sold and all the activities of production transferred to the new owner without interruption; yet if counsel’s argument is right, the employees’ accrued rights under the Acts of 1963 and 1965 would be lost unless the transfer included a formal empty phrase purporting to include goodwill.”

35 89. But, the propositions set out in the excerpt at [85] above that regard must be had to substance rather than form, and whether the effect of the transaction was to put the transferee in possession of a going concern, the non-conclusive nature of the factors mentioned, and the question of whether the activities of the going concern could be carried on without interruption can, and has, been applied more widely.

40 90. There are a number of decisions of the VAT Tribunal and of this Tribunal (of which *Mark Young t/a The St Helens* [2012] UKFTT 702 (TC) and *Brenda Massey t/a The Basement Restaurant* [2012] UKFTT 102 (TC) are relatively recent examples) which apply the propositions set out in *Kenmir* to the context of VAT. The relevant

propositions in *Kenmir* were also endorsed at High Court level in the case of *Customs and Excise Commissioners v Dearwood Ltd.* [1986] STC 327 which considered whether there had been a transfer of business as a going concern in the context of Regulation 12(1) of the Value Added Tax (Special Provisions) Order 1981 which in
5 so far as relevant to the issue here contained identical wording to the 1995 Order. It is not correct therefore to see the propositions set out in *Kenmir* as only confined to the context of employment law.

Lack of Sale and Purchase Agreement

91. In any case even if *Kenmir* does not carry the relevance that HMRC suggest this
10 does not assist Mr Moss's arguments. The legislation raises the question of whether the appellant is a person to whom Nowelle transfers its business as a going concern. There is no statutory requirement that there be a formal agreement transferring the business. The absence of a Sale and Purchase Agreement does not mean the business cannot have been transferred. Even if *Kenmir* were not applied it is difficult to see
15 what other approach could be taken to seeing whether there was a transfer of business other than looking at the circumstances of the transaction. In relation to burden of proof Mr Moss argued that as it was HMRC's decision to disallow the repayment claim it was for them to provide evidence to support their case. We do not think that is correct. It is for the appellant to demonstrate that the appellant was not a person to
20 whom Nowelle transferred its business. Mr Moss referred to the difficult position the appellant faced in having to prove a negative namely in showing that an agreement to transfer the business did not exist. The appellant does not face such an uphill struggle. It just has to bring evidence on the circumstances of the transaction, and the activities of Nowelle and the appellant at the relevant time to show that it was more likely than
25 not that Nowelle did not transfer its business to the appellant. We have in any event accepted that a formal Sale and Purchase Agreement did not exist but as mentioned above this is not determinative.

92. Mr Moss's argument that "substance over form" arguments are only relevant
30 where there is tax avoidance does not take the matter further. In looking at the circumstances of the transactions between Nowelle and the appellant there is no form that has been overridden or disregarded. To the extent it is the lack of form in the shape of a formal sale and purchase agreement that the appellant complains has been disregarded then as stated above such formality is not a requirement of the legislation.

93. We have no reason to doubt that the transaction was not for tax avoidance but
35 this is irrelevant to the question of whether the effect of the transaction was such that the appellant was a person to whom Nowelle transferred its business or part of its business. Similarly when Mr Moss says the invoice for the machinery was raised in good faith and without any objective other than to transfer ownership of the assets from Nowelle to the appellant we have no reason to doubt this is the case but this also
40 does not help us on the issue of whether there was a transfer of business as a going concern.

94. The absence of a comprehensive agreement dealing with sale and purchase and an agreement is perhaps not altogether surprising given the degree of inter-relatedness

between Nowelle and the appellant flowing from Mr Derek Wallis' ownership interest and involvement in both the companies. Further the nature of Nowelle's business was that it consisted of short term contracts for specific pieces of work. There would therefore have not been a need for a formal transfer of ongoing contracts to the appellant.

95. We turn now to the various other circumstances argued by the parties as pointing to a particular conclusion on whether there was a transfer of a business as a going concern.

Whether assets sold could without more be used for a printing business

96. Mr Moss argues the assets sold were not principally used in the printing business and more would be needed for an acquirer to undertake a printing business. As discussed above, the issue is whether the appellant was a person to whom Nowelle transferred its business or part of its business. It does not need to be established that the assets transferred were the business. In any event although there was a residual category of "other assets office equipment...racking, accessories and software" on the invoice the hp Designjet printers and the Vutke PV UV 320 printers were items that an acquirer would use to undertake printing. Further, within a matter of days from the transfer, the appellant also took over the lease on a significant value of other equipment including, cutting machines, guillotines and printers. On the evidence the appellant was trading from May / June but there was no evidence provided to us other machinery or equipment the appellant needed to start trading and no evidence in the bank statements of the appellant provided that suggested that further machinery needed to be bought.

97. Mr Moss also argued that the assets sold did not constitute all the assets owned by Nowelle however there was no evidence put before us to substantiate this. Even if Nowelle had retained assets this would not necessarily address the possibility of there having been a transfer of part of a business.

Significance of common ownership / control

98. HMRC refer to the close relationship in terms of ownership and control as between Nowelle and the appellant as being an indicator which supports their decision that there was a transfer of business. In his written submissions Mr Moss argued there was no parallel share structure or Board of Directors. While there is not an exact correspondence of ownership and directorships as between the two companies Mr Wallis has played a significant part in both. As mentioned above the inter-relatedness may be relevant to explaining why there was no formal agreement, but we are not persuaded that in and of itself it tends to suggest that the transaction between Nowelle and the appellant was a transfer of business. It is quite possible that related companies enter into a transaction which is simply an asset sale. Whether that is part of a transfer of business will depend on other factors.

Customers in common

5 99. Another indicator which forms the basis of HMRC's decision is that Nowelle
and the appellant had a common major customer in the form of Harlequin. In written
submissions the appellant argues that Nowelle had a number of customers but that the
appellant did not have any of these customers other than Harlequin. Harlequin became
10 a customer because of the common control connection but it did not have an
agreement with Nowelle or with the appellant and was free to go to the market to
source the best quotes for any particular job.

15 100. Mr Moss's evidence that Nowelle had a number of customers was consistent
with the fact a number of different retailers were shown on the schedule of output tax
for Nowelle in April 2011. However to the extent there was no evidence that these
customers had moved across to the appellant we do not think that can be taken as
pointer toward to there not being a transfer of business because we accept that the
business consisted of carrying out particular bespoke print jobs and repeat business
could not be assumed. In respect of Harlequin becoming a customer of the appellant
20 even if the reason for that was because of the common control element it remains the
case that business that Nowelle was doing for Harlequin was subsequently carried out
by the appellant. Harlequin may well have been free to source the best quotes but
there was no evidence before us that it became a customer of the appellant only after
having gone through such a process. That a repeat customer of Nowelle also became a
customer of the appellant is a factor which in our view points towards there having
25 been a transfer of business.

Operating from same premises

101. Nowelle did jobs for major and high-end retailers including M&S, Selfridges,
Ralph Lauren and Hackett. The appellant's business strategy was to do printing for
retailers but in smaller and less labour intensive print runs. From what Mr Moss told
30 us we accepted that the main way in which business was acquired was through
pitching for business for specific jobs from the marketing teams of these retailers.
Taking this into account the location of the particular premises in Hatfield would not
we think be a factor of any significance in attracting or retaining trade. While the
factor of whether the premises of the transferor and transferee were the same was
35 relevant to consider it is not one which we give any significant weight given the kind
of business Nowelle and the appellant were engaged in.

102. But, to the extent there is any relevance attached to the appellant operating out
the same premises we disagree that this is undermined by the appellant having had an
intention to move to other premises. In examining whether there was a transfer of
40 business or not we think the fact of where the appellant actually ended up operating
from is relevant to understanding whether the business could be carried on after the
transfer without interruption.

Employees

103. HMRC point to the fact that a significant number of employees who were employed by Nowelle in 2011 subsequently became employees of the appellant. Mr Moss said there was no agreement that staff would be transferred and not all the employees were eventually retained. He also argued that the reasons for the common employees arose from their specialist skills to use the printers and also due to Mr Wallis's concern that the livelihoods and welfare of employees that he knew were at stake.

104. We think the level of identity between Nowelle's workforce and that of the appellant is a strong indicator towards there having been a transfer of business irrespective of whether there had been any formal agreement to transfer them. Again the commonality of ownership and control between the transferor and transferee may go some way to explain any lack of formality. In addition to printers, computers and other specialist office equipment the business of Nowelle required skilled operators to use the machines, persons to box and distribute the materials and administrators. As of 9 May 2011 the appellant was in a position to use the labour Nowelle had used. This was not restricted to skilled machine operators but also to persons who were familiar with the administration of Nowelle's business. The appellant did not make any new hires of staff until some months later. The fact that some of these employees left later on is something that could have happened whether there was a transfer of business or not so does not help with the issue before us.

105. Similarly, in relation to the argument as to Mr Wallis's reasons for hiring staff from Nowelle, we did not have evidence before us on which to make a finding on the point, but even if we had, the fact there may have been an underlying altruistic motive to hiring staff who had previously worked at Nowelle would not mean that looking at the transaction in the round there could not have been a transaction which amounted to a transfer of business.

106. In his cross-examination of Mr Dhaliwal Mr Moss drew attention to the fact that information about the employees of Nowelle and the appellant had not been considered by HMRC when Mr Dhaliwal made his decision on behalf of HMRC on 26 September 2011 and further that it did not appear that HMRC had made any internal record of its reasons for reaching the conclusion it did. In relation to the first point it should be noted that it is open to the Tribunal to examine all the relevant evidence put before us on the issue. This is not the sort of appeal (in contrast to other appeal settings where the Tribunal is directed by specific statutory provisions) where the Tribunal must restrict itself to considering information that was available to HMRC at the time the decision was made. The second point on HMRC's conduct in recording its decision making does not have a bearing on the question of whether the transaction between Nowelle and the appellant was a transfer of a business as a going concern.

Absence of disposal of goodwill

107. Mr Moss argues it is significant that there was no disposal of Nowelle's goodwill. As pointed out in *Kenmir* the absence of an assignment of goodwill is not

necessarily conclusive if the transferee had effectively deprived himself of the power to compete. We heard from Mr Moss that there was little in the way of brand loyalty or repeat business from Nowelle's customers. Nowelle would have to put itself in the frame for specific jobs through pitching to the marketing teams at the retailers. To the extent there was ongoing business coming in from Harlequin, that was a company which was part of the same group of companies in which Mr Wallis was involved and Harlequin was in our view unlikely to start using an unrelated company for its requirements. In terms of ability to compete, in May 2011 Nowelle was in financial difficulty, it had sold machinery and equipment to the appellant and also transferred across leased equipment. There was no evidence that other machinery or skilled labour to operate the machines remained with Nowelle such that it was in position to compete. The absence of an assignment of goodwill in these circumstances is not conclusive of there not being a transfer of business as a going concern.

Duration between Nowelle stopping business and appellant starting its business

108. According to *Kenmir* a vital consideration in deciding whether a transaction amounts to a transfer of business 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..." In considering whether the appellant could carry on the business without interruption it is relevant for us to consider the duration of any interruption in business. We note that Nowelle had been invoicing for work done up until April 2011 and that on the evidence before us the appellant had started to conduct business in May 2011. Whatever interruption there was between the business of Nowelle stopping and the business of the appellant starting was minimal by any account and certainly insignificant in the context of a printing business creating bespoke materials for retailers.

Conclusion on whether there was a transfer of business as a going concern

109. On 4 May 2011, the appellant had printers and office equipment transferred to it worth £65,000 and a lease for other equipment in the order of £181,000 transferred to it on Friday 6 May 2011. Out of 22 of Nowelle's employees 15, started with the appellant on Monday 9 May 2011. In the course of May 2011 the appellant was open for business in the same kind of business that Nowelle was conducting. As of that month the appellant had the machines and equipment to enable it carry out printing for clients who were retailers, it had employees who knew how to operate the machines and employees familiar with boxing, distribution and administration of printing for such clients and it had premises from which to operate from. A repeat customer of Nowelle came across to the appellant. The demise of Nowelle starting in April 2011 and the incorporation and starting up of the appellant at the same time was not a co-incidence but part of a business strategy to steer the printing business into a less labour intensive and more benign business environment.

110. In our view the combination of these circumstances points towards there being a transaction between Nowelle and the appellant which amounted to a transfer of Nowelle's business as a going concern. Without labour, machinery and equipment or premises, Nowelle was not able to and did not continue with other business after the

transaction. The effect of the transaction was that there was a transfer of all of its business so the issue of whether there was a transfer of part of the business and the issue of whether the part was capable of separate operation does not arise. The appellant was therefore a person to whom Nowelle had transferred its business as a going concern for the purposes of the 1995 Order.

111. Accordingly the supply of machinery and equipment from Nowelle to the appellant on 4 May 2011 is not to be treated as a supply of goods or services.

Payment of output tax, unjust enrichment and HMRC concession

112. Mr Moss argued Nowelle had properly accounted for the output tax of £13,000 on its sale and that if the appellant's input tax claim was denied this would amount to HMRC being unjustly enriched. Even if that were not accepted the unpaid VAT of Nowelle was £9,314.90 (or £10,028.91 if other unpaid VAT for the quarter ended 31 March 2011 is included) so it would be inequitable if HMRC did not limit their disallowance of £13,000 to take account of these figures. Mr Moss argued further that once the liquidator has submitted corporation tax computations to HMRC for the year ended 31 December 2010 and the period ended 6 May 2011 HMRC will be able to offset VAT due against the repaid corporation tax under s130 Finance Act 2008. He points to Notice 700/9 and the stated aim of the transfer as a going concern rules being "to Protect Government revenue by removing a charge to tax and entitlement to input tax where the output tax may not be paid to HMRC".

113. HMRC disagreed that the output tax of £13,000 had been paid. They said the corporation tax position was not settled, and the position on any set off against corporation tax was moot.

114. On the basis of the evidence before us we were not able to make a finding that the output tax of Nowelle had been paid as at the date of the hearing. Nor were we able to determine the impact if any that the set off provisions in s130 Finance Act 2008 had or would have on the VAT due from Nowelle.

115. In any case we do not think either of these points if established would help the appellant. Applying the relevant statutory provisions of the 1995 Order to our findings of fact, the conclusion is that the supply of machinery is not to be treated as a supply of goods or services. There is no basis in those provisions or any other statutory provisions which would allow the Tribunal to find that the appellant could, despite there being no supply, claim entitlement to all or some of the input tax on the basis that otherwise HMRC would be unjustly enriched. The fact that one of the purposes of the provisions set out by HMRC in its Notice 700/9 refers to a situation where the output tax has not been paid (the other purpose expressed as being to relieve the buyer of a business from the burden of funding any VAT on the purchase) does not enable the Tribunal to read in further conditions to the 1995 Order which are not set out there.

116. HMRC mentioned that where they are satisfied that the amount thought to be input tax as shown on an invoice has been declared and paid to HMRC by the seller

the purchaser may be allowed to recover the amount as though it were VAT by way of concession. The applicability and operation of any such concession available to HMRC is not however something this Tribunal has jurisdiction to deal with.

Conclusion

5 117. There is nothing in any of the appellant's arguments as to unjust enrichment, inequity, or the operation of a concession by HMRC which causes us to depart from the conclusion that the supply of machinery and equipment on 4 May 2011 is, pursuant to the 1995 Order, not to be treated as a supply of goods or services. The appellant's appeal against HMRC's decision to disallow input tax on the invoice for
10 the machinery and equipment fails and the appeal is dismissed.

118. 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
15 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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**SWAMI RAGHAVAN
TRIBUNAL JUDGE**

RELEASE DATE: 11 April 2013

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