



TC04022

Appeal number: TC/2012/04139

VAT - transfer as a going concern - Fleming claim – person - Section 24 FA 1989 - entitlement to claim - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ROBERT CROSS

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE SCOTT
MR PETER SHEPPARD**

Sitting in George House, George Street, Edinburgh on 6 August 2014

Having heard Mr Nigel Gibbon of Nigel Gibbon & Co for the Appellant and Mrs E McIntyre, Officer of HMRC, for the Respondents

DECISION

The Appeal

1. This is an appeal against a decision issued by HMRC on 23 November 2011 (“the
5 disputed decision”). That decision was to issue to the Appellant recovery assessments
(i) under section 80(4)A of the Value Added Tax Act (“VATA”) 1994 in regard to tax in
the amount of £48,655, and (ii) under section 78A VATA 1994 in regard to statutory
interest in the sum of £91,187. Accordingly the total recovery assessments amounted to
10 £139,842. Those recovery assessments were issued on the basis that the Appellant had
been paid the tax and statutory interest in error (see paragraph 12 below).

Agreed Facts

2. The Appellant was originally registered for VAT as a sole proprietor with effect
from 1 April 1977. By 30 April 1985, he was trading as a sole proprietor retailing motor
vehicles. He was also trading as a sole proprietor as Robert Cross T/A Royal Garage
15 (petrol retailing) and Robert Cross T/A Airdrie Property Developments Co (letting
commercial properties).

3. He decided to incorporate the retailing of motor vehicles only. He purchased an
“off-the-shelf” company and changed its name to R J Cross Limited (“the company”). The
employees, all of the stock and physical assets and the outstanding contractual
20 arrangements were transferred to the company. Outstanding bills arising from the period
prior to the transfer to the company were met by the Appellant.

4. Application was made to HMCE, by both the Appellant and the company, for
reallocation of the VAT registration number from the Appellant to the company on the
basis that there had been a transfer of the business as a going concern in terms of
25 Section 33 VAT Act 1983. That took effect from 1 May 1985.

5. The Appellant applied for a new VAT registration for his remaining businesses as a
sole proprietor and that also with effect from 1 May 1985.

6. The company ceased trading in 1996 and was deregistered for VAT during that year.
The company was then dormant until it was formally dissolved on 17 December 2010.

30 7. The Appellant ceased trading as a sole proprietor in or about August 2008 and
deregistered for VAT.

8. On 23 March 2009, the Appellant's representatives submitted a voluntary disclosure
in relation to VAT overpaid on demonstrator, rental and courtesy vehicles in the
Appellant's motor vehicle retail business, as a sole proprietor, covering the period from
35 1981 to incorporation of the company (“the claim”). A separate claim was also lodged on
behalf of the company for the period from 1 May 1985 onward. These were what are
known as Fleming claims. Those claims were made in terms of Section 80(1) VATA 1994.

9. The claim was subsequently adjusted and on 12 November 2009 HMRC wrote to the Appellant's representatives intimating that £48,655 would be repaid together with statutory interest in the sum of £91,187.

10. Although not relevant to this appeal, in 2011 there was correspondence between the Appellant's representatives and HMRC regarding possible revision of the claim in light of the decision in *Nordania Finans*.

11. Following that correspondence, HMRC reviewed the information that they held and decided that they had been in error in admitting the claim from the Appellant. Accordingly, the recovery assessments, which are the subject matter of this appeal, were issued.

The disputed decision

12. The relevant detail in the decision letter enclosing the two recovery assessments was:-

“Based on information provided in the original claim it is apparent that your business was transferred as a going concern to R J Cross Ltd in May 1985.

When the business was transferred as a going concern your rights to make a claim for overpaid VAT were relinquished and passed on to R J Cross Ltd.

Your claim as a sole proprietor for the period 1981 to 1985 is therefore ineligible.”

Arguments

HMRC

13. (a) The Appellant had no right to submit the claim as the legal entity with the right to submit the claim was the company.

(b) The onus of proof lies with the Appellant.

(c) On the balance of probabilities the right to make the claim was transferred to the company when the business was transferred as a going concern.

(d) When the business was transferred incorporeal moveable property would have been transferred with it.

(e) The Appellant has failed to demonstrate that the right to make a claim was retained by him and the decision in *Midlands Co-operative Society Ltd v HMRC*¹ (“*Midland*”) supports that position.

¹ [2008] STC 1803

(f) The only situation in which he would have retained the right to make the claim would have been where the VAT registration number had not been taken over by another entity.

5 (g) In their skeleton argument HMRC had two (vague) arguments about the assignment by the company to the Appellant of the right to seek interest in regard to the company's claim. However, we were not addressed orally thereon by either party and the assignment was not produced in evidence. We simply record the position for completeness.

Appellant

10 14. (a) When the business was transferred as a going concern the Appellant had no right to make a claim for overpaid VAT. Accordingly he did not expressly transfer any such right to the company as he could not do so.

15 (b) Therefore when it became possible to make such a claim, having not transferred any such right, the right vested in him since it was he who had overpaid the output VAT.

20 (c) The right to make the claim rests with the entity that actually overpaid VAT unless there is an express provision in a transfer agreement assigning such a right.

(d) In the absence of any such express provision, as here, the right to make the claim remained with the Appellant.

25 (e) Accordingly the claim had been correctly processed and the recovery assessment is invalid.

The Issue

30 15. The Appellant argued that the only issue for the Tribunal was whether or not the right to make the claim for repayment of overpaid VAT was, in fact, transferred from the Appellant to the company in May 1985.

16. HMRC have not identified "the issue" in isolation although in their submissions they do contend that the right to make the claim was transferred to the company. Their primary contention is that the only party entitled to make the claim is the company.

35 17. We do not accept the Appellant's limited scope for the issue before us. We take the view that it is more broad than that and that the question to be answered is quite simply whether the Appellant had had the right to make a claim for repayment of overpaid Value Added Tax ("VAT") in terms of Section 80 VATA 1994. If he did then the recovery assessments cannot be confirmed.

The Evidence

40 18. We heard evidence from Mr Cross and he explained that in order to minimise expenditure on legal fees, because effectively he was transacting with himself as a sole

proprietor and majority shareholder, he saw no reason to have anything other than the minimum documentation. He certainly had not even contemplated assigning any right to potential repayments of VAT, not least because he had not envisaged that possibility. We accepted that.

5 19. We also heard evidence from Mr Mansfield, the officer of HMRC who made the
disputed decision in this matter. He was very clear that firstly, he had never come across
this problem before and that secondly the decision was predicated on the view that where a
business is transferred as a going concern the right to claim repayments of VAT “went”
10 with the VAT registration number. That might be a direct claim or alternatively an offset
in a VAT return.

20. It seems almost certain that the only documentation that was signed relating to VAT
would have been the statutory form of application (VAT 68). Unfortunately, the specimen
form, provided to the Tribunal at document 175 in the bundle and, accepted by both parties
as being the relevant form most certainly was not. It was the form in use following the
15 change in Regulations in September 1985. The previous form is that provided for in
Regulation 4(5)(d) of the 1980 Regulations (see paragraph 24 below) and can be found in
Schedule 1 of the 1980 Regulations. It is subtly different but in essence is not materially
different. We annex a copy at Appendix A.

The legislation

20 *Transfer of a business as a going concern*

21. The primary legislation in force at the relevant time was Section 33 VATA 1983
which read as follows:–

“33 (1) Where a business carried on by a taxable person is transferred to another
person as a going concern, then -

25 (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 transferor shall be treated
accordingly; and

30 (b) any records relating to the business which, under paragraph 7 of Schedule 7 to
this Act, are required to be preserved for any period after the transfer shall be
preserved by the transferee instead of by the transferor, unless the
Commissioners, at the request of the transferor, otherwise direct.

(2) Without prejudice to subsection (1) above, the Commissioners may by
regulations make provision for securing continuity in the application of this Act in
35 cases when a business carried on by a taxable person is transferred to another person
as a going concern and the transferee is registered under this act in substitution for
the transferor.

(3) Regulations under subsection (2) above may, in particular, provide-

- (a) for liabilities and duties under this act of the transferor to become, to such extent as may be provided by the regulations, liabilities and duties of the transferee; and
- (b) for any right of either of them to repayment or credit in respect of tax to be satisfied by making a repayment or allowing a credit to the other;

but no such provision as is mentioned in paragraph (a) or (b) of this subsection shall have effect in relation to any transferor and transferee unless an application in that behalf has been made by them under the regulations.”

22. As can be seen section 33(2) provides for secondary legislation in the form of regulations. Although Mr Gibbon quoted from, and relied upon, the VAT (General) Regulations 1985 SI 1985/886 those Regulations only came into operation on 1 September 1985 and we are concerned with the relevant Regulations as at 1 May 1985.

23. There were two relevant Regulations in force at that time and they were:

- (a) The Value Added Tax (General) Regulations 1980 (the 1980 Regulations) SI 1980/1536 (Regulation 4(5)-(8)) and,
- (b) The Value Added Tax (Special Provisions) Order 1981 SI 1981/1741 (Regulation 12).

24. Regulation 4(5)-(8) of the 1980 Regulations reads:-

“4(5) Where-

- (a) a business is transferred as a going concern,
- (b) the registration of the transferor has not already been cancelled,
- (c) on the transfer of the business the registration of the transferor is to be cancelled and either the transferee becomes liable to be registered or the Commissioners agree to register him under paragraph 7 of Schedule 1 to the Act or treat him as liable to be registered under paragraph 11(1)(b) of that Schedule, and
- (d) an application is made on the form numbered 3 in Schedule 1 to these regulations by or on behalf of both the transferor and the transferee of that business,

the Commissioners may as from the date of the said transfer cancel the registration of the transferor and register the transferee with the registration number previously allocated to the transferor.

(6) An application under paragraph (5) of this regulation shall constitute notification or as the case may be a request by the transferor under paragraphs 8 to 10 of Schedule 1 to the Act.

(7) Where the transferee of a business has under paragraph (5) of this regulation been registered with the registration number of and in substitution for the transferor of that business –

- 5 (a) any liability of the transferor existing at the date of the transfer to furnish a return or to account for or pay tax under regulations 51 or 53 shall become the liability of the transferee,
- (b) any right of the transferor, whether or not existing at the date of the transfer, to credit for or to repayment of input tax shall become the right of the transferee, and
- 10 (c) any right of either the transferor, whether or not existing at the date of the transfer, or the transferee to payment by the Commissioners under section 3(5) of the Act shall be satisfied by payment to either of them.

(8) In addition to the provisions set out in paragraph (7) where the transferee of a business has been registered with the registration number of and in substitution for the transferor during a prescribed accounting period subsequent to that in which the transfer of the business took place but with effect from the date of the transfer of the business, and any –

- (a) return has been furnished,
- (b) tax has been accounted for and paid, or
- 20 (c) right to credit input tax has been claimed,

either by or in name of the transferee or the transferor, it shall be treated as having been done by the transferee.”

25 25. We annex the text of Regulation 12 of The Value Added Tax (Special Provisions) Order 1981 SI 1981/1741 at Appendix B. In summary, it only provides that a transfer as a going concern will be treated as neither a supply of goods nor a supply of services; in other words there is no VAT chargeable on the transfer.

The Claim

26. Section 80(1) VATA 1994 reads:-

“80 (1) Where a person-

- 30 (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
- (b) in doing so, has brought into account as output tax an amount that was not output tax due,

the Commissioners shall be liable to credit the person with that amount.

80(1A) Where the Commissioners-

(c) have assessed a person to VAT for a prescribed accounting period (whenever ended), and

(d) in doing so, have brought into account as output tax an amount that was not output tax due,

they shall be liable to credit the person with that amount.”

Recovery Assessments

27. The recovery assessment for the tax was made under section 80 (4A) VATA 1994 and that reads –

“4A) Where-

(a) an amount has been credited under subsection (1) or (1A) above to any person at any time after 26 May 2005, and

(b) the amounts so credited exceeded the amount which the Commissioners were liable at that time to credit to that person,

the Commissioners may, to the best of their judgement, assess the excess credited to that person and notify it to him.”

28. The recovery assessment for the interest was made under section 78A(1) VATA 1994 and that reads: -

“(1) Where –

(a) any amount has been paid to any person by way of interest under section 78, but

(b) that person was not entitled to that amount under that section,

the Commissioners may, to the best of their judgement, assess the amount so paid to which that person was not entitled and notify it to him.”

Discussion

29. We agree with HMRC that the right to make a claim in terms of section 80 VATA 1994 is incorporeal moveable property and, as Mr Gibbon conceded, that *Midland* is authority for the proposition that it is possible to transfer such a right. However he stated that it did not answer the point as to whether or not Mr Cross had done so. Of course, that case could not do so. We must look at the facts in this case.

30. Sadly, we have very little with which to work. Mr Cross’ evidence was that he had paid all of his debts, and collected debts due to him, as at 30 April 1985 and since he assumed that there were no debts due to him by HMCE he had made no arrangements in

regard thereto. He had apportioned all bills as between pre and post 1 May 1985. He thought that everything had been concluded at or about 1 May 1985. He had not assigned any potential right to claim anything from anyone, but nor had he reserved any such rights, not least because he controlled the company.

5 31. There is no doubt that when the business was transferred as a going concern in May 1985 the Appellant had no right to make a claim for overpaid VAT. It was only when section 24 Finance Act 1989 came into force on 1 January 1990 that any such right arose. Prior to that date the only mechanism to reclaim overpaid VAT was through the VAT return. Therefore had VAT been overpaid by the Appellant in the first period of
10 1985 it would have had to have been the company which made the adjustment in the return since they then operated the VAT registration number.

15 32. We endeavoured to explore with Mr Gibbon how an adjustment in VAT, in the ordinary course of business, not being a Fleming claim, might have been viewed. The problem is that this was not an arm's length transaction. Mr Gibbon freely admitted that had it been such then there would have been documentation, which either included or excluded various issues. In this case Mr Gibbon conceded that there was nothing in writing and the only evidence is that Mr Cross did not assign the right to a repayment claim because he knew that there was none at the time.

20 33. The factual situation with which we are faced is that certainly there was no assignation since such a possibility was never envisaged. HMRC argue that the Appellant has failed to demonstrate that the right to make any claim had remained with him and indeed has produced no evidence to support that contention. That was acknowledged in evidence on a negative rather than a positive basis.

25 34. HMRC's argument is that where there is a transfer of a business as a going concern, everything is transferred, including incorporeal moveable property, unless specified to the contrary. We agree with that general proposition which is why there is usually extensive documentation in such cases.

30 35. They state that accordingly, the right, if any, to make a claim for repayment of VAT "went" with the transfer of the registration number. To all intents and purposes, HMRC see the transferee as "standing in the shoes" of the transferor. It is for that reason that the records of the predecessor business are usually required to be retained by the transferee (section 33 (10(b))).

35 36. HMRC's approach can also be seen in the explanatory notes attached to the VAT 68. Under the heading "Consequences of reallocation of a VAT registration number" the attention of the transferor and the transferee is directed to a number of matters including at paragraph c "All the outstanding VAT debts and rights of the transferor relating to the business conducted in the period before the transfer will pass to the transferee." Of course, that is merely HMRC's understanding of what the legislation means and it is not binding on this Tribunal or anyone else but it indicates the general
40 thinking at that time, and indeed now.

37. We have no relevant documentation in this case and the Appellant never thought about reserving any possible claims to himself.

38. Since the Appellant never contemplated the possibility of any repayment, on the balance of probabilities, when he incorporated the business, and transferred the VAT number, did he retain any aspect of the rights and liabilities arising from the business retailing motor vehicles? On the balance of probabilities we think not. It is clear that he intended that, once the loose ends at the time of transfer were “tidied up”, the business would be conducted very much as previously (save only with the inclusion of another director which was the reason for the incorporation). That was the case. There was nothing to distinguish this transfer of a business on incorporation from any other mainstream such transfer.

39. However, in our view, it is not as simple as that. The right to make the claim is a statutory right which only arose long after the transfer of the business as a going concern. As we indicate above the recovery assessments can only be confirmed if HMRC are correct in saying that the Appellant had no right to make the claim. Did he have the right to do so, derived from statute?

40. Regulation 4(8) of the 1980 Regulations bears close examination (it is set out in full at paragraph 24 above). Clearly, an obvious purpose of this Regulation is to cover the position where there is a gap between the transfer of the business and the transfer of the VAT registration number. However, what is its full import, and that, in the context of the facts of this case?

41. It is certainly the case that the company has been registered with the registration number of, and in substitution for, the Appellant during all of the prescribed accounting periods subsequent to that in which the transfer of the business took place but with effect from the date of the transfer of the business. Although returns have been furnished and input tax claimed in the name of the transferee ie the Appellant, we are particularly concerned by the question of payment of tax. The words to which we have paid particular attention are:-

“... where...
(b) tax has been accounted for and paid either by or in name of the transferor, it shall be treated as having been done by the transferee.”

42. There is no qualification referring to payment of tax after the date of the transfer of the business. It is a straightforward statement that the transferee, in this instance, the company, that is treated as having “inherited” all that has been done in the name of the transferor, in this case the Appellant. It is also consistent with the rest of the regulations and section 33.

42. Mr Gibbon argued at some length that the terms of section 33 and the regulations and, indeed, the VAT 68 dealt only with input tax and therefore of necessity should be read as excluding any output tax. To an extent, of course, he is correct in that output tax is not mentioned but that is because the legislative intention at that time was to exclude repayments of output tax. That decision having been taken, there could be no reference to output tax. There would have been no point. That only altered when the UK Government

were forced to change the legislation and the right to claim repayment of output tax was introduced with effect from 1 January 1990 by section 24 Finance Act 1989.

43. We do not accept that when considering the impact of section 33, the regulations and the VAT 68 on the interpretation of wording in VATA 1994, output tax should be excluded or ignored.

44. Section 80 VATA 1994 refers to “a person” who has accounted for output tax.

45. In the first instance, we find that as a result of Regulation 4(8) of the 1980 Regulations that person is the company.

46. If we are wrong on that, what is the position? Stating the obvious, only a person who is registered for VAT can account for VAT. Section 96 VATA 1994 states that “taxable person’ means a person who is a taxable person under section 3”. That section reads:-

“(1) A person is a taxable person for the purposes of this Act while he is, or is required to be registered under this Act.....

(2) Schedules 1 to 3A shall have effect with regard to registration.”

47. It is our view therefore that a “person” in the context of this legislation can only be a taxable person and in this instance that taxable person is the company.

48. For all these reasons therefore we find that the Appeal should be dismissed and the two recovery assessments in the sums of £48,655 and £91,187 are confirmed.

49. 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.

**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 19 September 2014

5

**TRANSFER OF A BUSINESS AS A GOING CONCERN
APPLICATION FOR RE-ALLOCATION OF A VAT REGISTRATION NUMBER**

Part A. To be completed by the Transferee

10

On*I/we acquired a business as a going concern from (the transferor). *I/We *enclose/have previously submitted Form VAT 1 and request that *I/we be permitted to use the VAT registration number previously used by the transferor.

15

If the request is granted *I/we accept that:

20

(i) *I/we will remit to the Commissioners of Customs and Excise, with *my/our first tax return, payment for all tax due for the whole of the period covered by the return;

20

(ii) *I/we will furnish any returns due from, but not furnished by, the transferor;

(iii) *I/we will pay on demand to the Commissioners any tax due in respect of supplies made by the transferor prior to the transfer of the business;

(iv) any return completed in the name of the transferor for any period subsequent to the date of the transfer will be deemed to have been furnished by *me/us;

25

(v) any payment made by the Commissioners to the transferor prior to the re- allocation to me/us of the registration number will satisfy any liability of the Commissioners to pay *me/us.

Signed (Transferee) Date
*Proprietor/Partner/Director/Company secretary

30

*Delete as appropriate

Part B. To be completed by the Transferor

35

On*I/we transferred a business as a going concern to (the transferee). With effect from that date *I/we ceased to be liable or eligible to be registered under Part 1 of the Finance Act 1972, or *I/we withdraw *my/our request to be treated exceptionally as liable to be registered. *I/We agree to the VAT registration number previously allocated to *me/us being allocated to and used by the transferee.

40

If the request is granted *I/we accept that:

(i) *my/our outstanding right to credit for input tax in respect of supplies made by *me/us prior to the date of the transfer will become a right of the transferee;

45

(ii) any payment made by the Commissioners to the transferee will satisfy any liability of the Commissioners to pay *me/us.

Signed (Transferee) Date
*Proprietor/Partner/Director/Company secretary

50

*Delete as appropriate

Value Added Tax – Regulation 12 – 1981

5 **12.** There shall be treated as neither a supply of goods nor a supply of services—

(1) the following supplies by a person of assets of his business:

- 10 (a) their supply to a person to whom he transfers his business as a going concern-
- (i) where 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
- 15 (ii) where, in a case in which the transferor is a taxable person, the transferee is already, or immediately becomes as a result of the transfer, a taxable person or a person defined as such in section 2(2) of the Manx Act;
- 20 (b) their supply to a person to whom he transfers part of his business as a going concern-
- (i) where that part is capable of separate operation,
- 25 (ii) where 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
- 30 (iii) where, in a case in which the transferor is a taxable person, the transferee is already, or immediately becomes as a result of the transfer, a taxable person or a person defined as such in section 2(2) of the Manx Act;
- 35 (2) the assignment by an owner of goods comprised in a hire-purchase or conditional sale agreement of his rights and interest thereunder, and the goods comprised therein, to a bank or other financial institution.