



TC04400

Appeal number: TC/2012/05870

VAT – recovery assessment – s 80(4A) VATA 1994 – Fleming claim – transfer of a going concern – whether entitlement to claim passed on transfer – VATA (General) Regulations 1980 regulations (4)-(8) – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ALAN STRINGFELLOW

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER ROBERT ACKROYD**

**Sitting in public at Alexandra House, The Parsonage, Manchester on 3
December 2014**

Mr Joel Stringfellow for the Appellant

Mr Bernard Haley, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. Alan Stringfellow (hereinafter referred to as “the Appellant”) disputes the
5 decision of the Respondents (“HMRC”) on 14 March 2012 to issue a recovery
assessment, in the sum of £18,852.15 under s 80(4)(A) of the Value Added Tax Act
 (“VATA”) 1994, and £39,627.07 statutory interest under s 78A VATA 1994. The total
 amount claimed is therefore £58,479.22. The recovery assessment, which was issued
 on the basis that the Appellant had been repaid the tax and statutory interest in error,
10 relates to an earlier claim, spanning the years 1974 to 1986.

Background

2. The Appellant was registered for VAT, as a sole proprietor, with effect from 1
April 1973 carrying on business as a motor trader in the Ripley area of Derbyshire
under VAT Registration Number 126 6909 52.

3. The Appellant later retired from the business and now resides in the Isle of Man.
15 Stringfellows Limited, (“the limited company”) was incorporated on 4 June 1986. The
limited company took over the business activities of the Appellant, by way of a
transfer of a going concern (“TOGC”) on 1 September 1986. The Appellant
submitted Form VAT 68 and VAT Registration Number 126 6909 52 was formally
20 transferred from the Appellant to the limited company.

4. On 15 October 1997 the limited company went into liquidation and on 24
March 1998 the limited company’s VAT registration was cancelled. The company
was dissolved on 15 December 2000.

5. On 12 November 2008 the Appellant submitted a voluntary disclosure, making
25 a (“Fleming”) claim for overpaid output tax relating to the VAT margin on motor
cars. Following correspondence between the parties, the original claim was revised
and agreed in the sum of £18,852.15 VAT which amount plus interest was repaid to
the Appellant on 23 July 2010.

6. HMRC reviewed the claim following the ECJ case of *Nordania Finans A/S, BG*
30 *Factoring A/S v Skatteministeriet*(Case C-98/07) [2008] E.C.R. I-1281, to establish
whether such claims should be restricted due to partial exemption implications.
HMRC assert that the claims should not have been made in any event because the
legal entity entitled to the VAT claim was the limited company which had ‘retained’
the VAT registration number on completion of the transfer of the business as a going
35 concern. In such circumstances the new legal entity takes on responsibility for any
previous under or overpayments.

7. When the transfer of the business from the sole proprietor to the limited
company took place on 1 September 1986, any rights of the transferor Appellant,
whether or not existing at the time of the transfer, to credit for or to repayment of

that all rights entitlements and liabilities in relation to VAT have been passed to the transferee.”

10. The relevant Regulations in force at that time of the TOGC were the Value
5 Added Tax (General) Regulations 1980 (“the 1980 Regulations”) SI 1980/1536
(Regulation 4(5)-(8)).

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

“4(5) Where

- (a) a business is transferred as a going concern,
- 10 (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
15 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
20 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.

25 (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 -

- 30 (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
35 the date of the transfer, to credit for or to repayment of input tax shall become the right of the transferee, and
- (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
40 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
- 5 (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.”

10 11. The current Value Added Tax Regulations 1995 (1995/2518) provides as follows:

“6-(3) Transfer of a going concern.

Where the transferee of a business (or part of a business) has under paragraph (1) above been registered under Schedule 1 to the Act in substitution for the (transferor of it), and with the transferor's registration number-

- 15 (a) any liability of the transferor existing at the date of the transfer to make a return or to account for or pay any VAT under regulation 25 or 40 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 be the right
20 of the transferee.”

12. HMRC contends that the Appellant had no right to submit the claim as the legal entity with the right to submit the claim was the limited company, which has now been dissolved. The onus of proof lies with the Appellant and the relevant legislation supports the assertion that the right to make the claim was transferred to the company
25 when the business was transferred. The proposition was recognised in *Midlands Co-operative Society Ltd v HMRC*[CA] 2008 STC, which also supports that proposition. When the business was transferred, incorporeal moveable property would have been transferred with it. The Appellant has failed to demonstrate that the right to make a claim was retained by him.

30 **Conclusions**

13. VAT Registration Number 126 6909 52 was issued to the business of the Appellant and covered the entirety of the period from 1 April 1973 (registration) to 24 March 1998 when deregistration occurred. The business was transferred as a going concern with effect from 1 September 1986 to Stringfellows Limited.

35 14. It is accepted that the Appellant's VAT claim in respect of his eligible vehicles was not an actual asset of the business at the time of the transfer in 1986, irrespective of whether the proprietor of the business was not aware that such a claim existed. It is also accepted that the right to make the VAT claim (or the rights to submit claims for overpaid VAT generally) was not expressly transferred to the limited company.
40 However that does not mean that the right to make the claim remained with the

Appellant. Unless the right was specifically retained, it passed both by operation of law under the TOGC to the limited company, and pursuant to regulation 4(7) of the 1980 VAT Regulations.

15. The facts and issues to be decided in this appeal are almost identical to those of *Robert Cross v HMRC* [TC/2012/04139] where Judge Anne Scott said:

“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.

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 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.”

16. Claims made on behalf of companies that have been dissolved, wound up or struck off are not valid claims unless the right to make the claim has been specifically retained or assigned to the person making it. If the right to make the claim has not been retained or assigned before a company is dissolved wound up, or struck off, the right to claim becomes ‘ownerless goods’ and the property of the Crown as ‘Bona Vacantia’, from the date of the company’s dissolution. The right to make the claim therefore vested in the Crown and only the Crown could pursue that right. However, if the right to make the claim has not been exercised before the expiry of the relevant time limit (31 March 2009 in this case), the right expired and cannot be resurrected.

17. It is clear that the claim submitted by the Appellant is an invalid claim as no action was taken to either reserve the right to make any outstanding claim or formally assign the right to make a claim to the sole proprietor.

18. We accordingly dismiss the appeal and confirm the recovery assessments in the total sum of £58,479.22.

19. 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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MICHAEL CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 12 MAY 2015

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