



**TC04542**

**Appeal number: TC/2014/04142**

*VAT – INPUT TAX – Article 5 of VAT (Special Provisions) Order 1995 –  
whether sale of assets to the appellant was the transfer of a business as a  
going concern and not to be treated as a supply of goods – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**AMOR INTERIORS LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE VICTORIA NICHOLL  
                    JANET WILKINS**

**Sitting in public at Cambridge County Court on 29 June 2015**

**Mr Kindred, chartered accountant of Alan S. Kindred, for the Appellant**

**Mr Ridley, officer of HM Revenue and Customs, for the Respondents**

## DECISION

### *Introduction*

1. This appeal relates to the decision made by the Respondent (“HMRC”) to  
5 disallow the claim by the Appellant (“Amor Interiors Limited”) for £13,676.32 input  
tax on its VAT return for the period 05/11. The input tax related to a series of  
purchases from Old Mill Furniture Limited that HMRC decided constituted the  
transfer of a going concern (“TOGC”). Amor Interiors Limited argued that the assets  
were sold in the normal course of Old Mill Furniture Limited’s business and that it  
10 did not acquire the whole or part of Old Mill Furniture Limited’s business as a going  
concern.

### *The Facts*

2. Mr Kindred advised Amor Interiors Limited and Old Mill Furniture Limited at the  
time of the relevant transactions. He represented Amor Interiors Limited at the  
15 hearing and gave evidence under oath. Mr Barrs is a director and shareholder of  
Amor Interiors Limited and was a director and an owner of Old Mill Furniture  
Limited at the time of the relevant transactions. Mr Barrs gave evidence under oath.  
Mr Metson is an officer of HMRC and he made the decision which is the subject of  
this appeal. Mr Metson gave evidence under oath. The oral evidence of Mr Kindred,  
20 Mr Barrs and Mr Metson was cross examined. From this evidence and the evidence  
in the bundle of documents we found the following facts:

3. Old Mill Furniture Limited operated an upholstery and interior design business. It  
made 16 transfers of assets to Amor Interiors Limited between 15 March 2011 and 30  
May 2011. Each transfer was the subject of a separate but sequential invoice. Both  
25 Old Mill Furniture Limited and Amor Interiors Limited were VAT registered at the  
time of the transfers. Amor Interiors Limited was named Sitting Pretty Interiors  
Limited at the time of the transfers. It changed its name to Barrs Design Limited on  
27 June 2012 and to Amor Interiors Limited on 9 October 2012. It is referred to as  
Amor Interiors Limited throughout this decision.

4. Amor Interiors Limited did not supply copies of the invoices but Mr Metson had  
made a manuscript record of the narrative on the 16 invoices when carrying out his  
assurance visit on 13 October 2011 and these were provided at the hearing. The  
invoices were for consideration plus VAT and the aggregate VAT charged on the 16  
invoices was £13,676.32. The narratives on the VAT invoices were copied down by  
35 Mr Metson as follows:

Invoice 9406 dated 15 March 2011 for “Compressor, container with  
items in it, sewing machines x3, button making machine and foam  
saw”

40 Invoice 9407 dated 21 March 2011 for “All wallpaper pattern books  
and paint samples”

Invoice 9408 dated 28 March 2011 for “All stock, fixtures and fittings,  
tools, sundries, racking and remnant fabric”

- Invoice 9409 dated 28 April 2011 for “All electrical tools, and compress, compressor and hand tools and staple guns”
- Invoice 9410 dated 28 April 2011 for “All fabric books, frames that are polished at Old Mill Furniture workshop and last stock bits”
- 5 Invoice 9411 (date not noted) for “Computer, all fixtures and fittings, desks, signs including external... various stock”
- Invoice 9412 dated 6 May 2011 for “Various items of stock”
- Invoice 9413 dated 9 May 2011 for “Various items of stock”
- Invoice 9414 dated 12 May 2011 for “Various stock items”
- 10 Invoice 9415 dated 16 May 2011 for “Various stock items”
- Invoice 9416 (date not noted) for “Various items of stock”
- Invoice 9417 dated 20 May 2011 for “Various items of stock”
- Invoice 9418 dated 24 May 2011 for “New stock”
- Invoice 9419 dated 24 May 2011 for “New stock”
- 15 Invoice 9420 dated 27 May 2011 for “Various stock items”
- Invoice 9421 dated 30 May 2011 for “Various stock”

5. Old Mill Furniture Limited had financial difficulties at the time of the transactions which are the subject of this appeal. Mr Kindred explained that the transfers by Old Mill Furniture Limited were made to provide it with cash flow so that it could  
 20 continue trading. Amor Interiors Limited paid all 16 invoices in full, including the VAT invoiced, to Old Mill Furniture Limited. A liquidator was appointed to Old Mill Furniture Limited on 24 October 2011. Old Mill Furniture Limited did not submit any VAT returns from and including the period ending 03/11 until the liquidator was appointed.

25 6. Mr Kindred and Mr Barrs claimed that Old Mill Furniture Limited continued to trade after the 16 transfers to Amor Interiors Limited. They did not produce any further evidence of Old Mill Furniture Limited’s continued business nor an explanation of how it could trade without the assets transferred to Amor Interiors Limited. Mr Metson first raised the issue of whether a TOGC had taken place by  
 30 telephone with Mr Kindred on 13 October 2011 during his VAT assurance visit. He then asked for Mr Kindred’s views on this in his letter of 14 October 2011. Mr Kindred explained at the hearing that no evidence was provided about Old Mill Furniture Limited’s retained assets and continuing trade because all of its records were transferred to the liquidator.

35 7. Mr Barrs told us that while Old Mill Furniture Limited and Amor Interiors Limited operated very similar businesses, they had a different customer base. Old Mill Furniture Limited had exclusively trade customers and Amor Interiors Limited has retail customers. Old Mill Furniture Limited and Amor Interiors operated from the same premises.

40 8. The 2011-2012 PAYE records of Old Mill Furniture Limited and Amor Interiors Limited show that on 29 May 2011 five of Old Mill Furniture Limited’s eight

employees left its employment and that all five were shown as being employed by Amor Interiors Limited on or before 30 May 2011. Mr and Mrs Barrs also became employees of Amor Interiors Limited at a later date. Mr Metson was not aware of the transfers of staff at the time of making his decision. Amor Interiors Limited did not  
5 object to the late addition to the document list of the PAYE records evidencing the staff transfers.

9. Mr Kindred asked for a review of Mr Metson’s decision and this was carried out by Mrs Asma Marah on 3 July 2014. Mrs Marah’s review concluded that the decision issued by Mr Metson should be upheld.

10 *The Relevant Law*

10. Section 4(1) of the Value Added Tax Act 1994 (“VATA”) provides that:

“VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.”

15 11. Section 5(3) of the VATA provides that:

“The Treasury may by order provide with respect to any description of transaction-

- (a) that it is to be treated as a supply of goods and not as a supply of services; or
- 20 (b) that it is to be treated as a supply of services and not as a supply of goods; or
- (c) that it is to be treated as neither a supply of goods nor a supply of services;”

25 12. Article 5(1) of the Value Added Tax (Special Provisions) Order 1995 provides that:

“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 –

- 30 (a) their supply to a person to whom he transfers his business as a going concern where -
  - (i) the assets are to be used by the transferee in carrying on the same kind of business, whether or not as part of any existing business, as that carried on by the transferor, and
  - 35 (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 or a person defined as such in [section 3(1)] of the Manx Act;
- (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,

(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

5 (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 or a person defined as such in section 3(1)] of the Manx Act.”

13. The cases that we were referred to are:

*Baytrust Holdings Ltd v Inland Revenue Commissioners* [1971] 3 All ER 76

10 *Kenmir v Frizzell and Others* [1968] 1 All ER 414

*Shire Equip Ltd v Commissioners of Customs and Excise* (MAN/83/52)

*Jaymix v Commissioners of Customs and Excise* (LON/83/265)

*H Q Graphics Limited v Commissioners for Her Majesty's Revenue & Customs* [2013] UKFTT 226 (TC)

15 14. We were also referred to VAT Notice 700/9.

#### *Submissions*

15 15. Amor Interiors Limited's argument is that the input tax charged on the 16 transfer invoices is recoverable as the transfers were made in the normal course of Old Mill Furniture Limited's trade. At the time of the transfers Old Mill Furniture Limited and  
20 Amor Interiors Limited were both trading and they continued to do so after the transfers.

16. Amor Interiors Limited's observations on HMRC's Statement of Case stated are that HMRC is relying on hindsight. At the time of the transactions there was no intention for Old Mill Furniture Limited to cease trading but it was subsequently  
25 forced into compulsory liquidation, with the Official Receiver seizing its remaining assets as part of the liquidation process. It disputes that "everything" was transferred to Amor Interiors Limited as alleged by HMRC.

17. HMRC argue that the conditions set out in Article 5(1) of the VAT (Special Provisions) Order 1995 were satisfied and that the transfers were a TOGC or the  
30 transfer of part of a business which was capable of separate operation. There was a transfer of stock and assets, and of staff, between two VAT registered parties, and the transferee carried on the same kind of business as that carried on by the transferor. Where there is a TOGC that meets the conditions specified in Article 5, there is no supply for VAT purposes and the transfers are outside the scope of VAT.

35 18. HMRC noted that if Old Mill Furniture Limited had paid over the "tax" collected under the 16 invoices to HMRC, Amor Holdings could apply for recovery of the input tax under the practice set out in HMRC guidance VTOGC4200. This practice is allowed under HMRC's care and management powers in cases where no tax is at risk. Where however there has been no return rendered in respect of the "tax" and it has not  
40 been paid to HMRC this special concession treatment is not appropriate.

19. HMRC consider that as there were common directors in both businesses who would have been aware when the input tax claim was made by Amor Holdings Limited that the output tax had not been declared, it is not in the interests of natural justice that they should extract a tax advantage. HMRC consider that this is the classic case that the legislation intends to stop from occurring as noted in paragraph 1.5 of VAT Notice 700/9. This states that one of the main purposes of the VAT TOGC provisions is “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. 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.”

### *Discussion*

20. The decision for the Tribunal was whether the transfers from Old Mill Furniture Limited to Amor Interiors Limited amounted to the transfer of a business as a going concern and, if so, whether the transfer met the conditions set out in the VAT (Special Provisions) Order 1995 so that the transfer was outside the scope of VAT.

21. There is no definition of a transfer of a going concern for VAT purposes. HMRC cited the guidance given by Widgery J in *Kenmir v Frizzell and Others* [1968] All ER:

“In deciding whether a transaction amounted to the transfer of a business regard must be had to its substance rather than its form, and 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 effect of the transaction was to put the transferee in the 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.”

22. There are cases covering a wide range of factors to be weighed in considering whether there has been a TOGC and the following provide guidance on issues raised in this case.

23. In both *Shire Equip Ltd* (MAN/83/52) and *Jaymix* (LON/83/265) the Tribunals held that the fact that invoices were issued which showed VAT being chargeable was irrelevant in considering whether the actual effect of the transfer was of a business as a going concern.

24. In *Chevenings Ltd v C & E Comrs* (1990) (Decision Number 6171) and *MPH Leisure Limited* (2006) VAT Decision 19778 it was held that it does not matter whether the transfer is effected in a single transaction or a number of transactions.

25. In *HQ Graphics Limited v The Commissioners for Her Majesty’s Revenue & Customs* [2013] UKFTT 226 it was held by Judge Raghavan that the level of identity between the transferor and the transferee’s workforce was “a strong indicator towards there having been a transfer of a business irrespective of whether there had been any formal agreement to transfer them”. In this case, Amor Interiors Limited had the

same premises and staff available as those previously employed by Old Mill Furniture Limited. They had experience of Old Mill Furniture Limited's business which Mr Barrs confirmed was the same as Amor Interiors Limited's business other than in respect of its customer base.

5 26. Mr Metson's correspondence with Mr Kindred about the TOGC, and indeed Mr Metson's evidence, was delivered in a manner that was fair to Amor Holdings Limited, giving Amor Interiors Limited many opportunities to provide evidence to support its claim.

10 27. Mr Kindred did not dispute any of the factual evidence provided by Mr Metson, only his conclusion that there had been a TOGC. Mr Barrs and Mr Kindred claimed that there had not been a TOGC because Old Mill Furniture Limited intended to continue to trade until it was put into insolvent liquidation on 24 October 2011. Mr Barrs claimed that Old Mill Furniture Limited continued its business with trade customers but he could not explain why no other VAT invoices appeared to have been raised (other than those which are the subject of this appeal) between 15 March 2011 and 30 May 2011. He said that his accounts staff dealt with invoices.

15 28. We took a broad view of the circumstances and found that we could not accept Amor Interior Limited's claims. We did not find a credible explanation of how Old Mill Furniture Limited's upholstery and interior design business could have continued after the transfers, given both the loss of the five employees and the transfer of "all" stock, fixtures and fittings, electrical tools, machines and desks listed on the invoices summarised in paragraph 4 above.

20 29. We found that the weight of factors pointed to the transfers being a TOGC and that the conditions of Article 5 of the VAT (Special Provisions) Order 1995 were satisfied. The narratives on the invoices listed in paragraph 4 above demonstrate that Amor Interiors Limited received all of the assets required to carry on the same kind of business as Old Mill Furniture Limited and Mr Barrs confirmed that they do carry on the same kind of business. The transfer of five members of staff, leaving only the directors at Old Mill Furniture Limited, also weighed in favour of the transfers being a TOGC.

25 30. As Mr Barrs was adamant that he intended that Old Mill Furniture Limited should continue to trade until it was forced into liquidation, we did consider whether there had been the transfer of part of its business rather than of the entire business. In view of the assets transferred as shown by the invoices set out in paragraph 4 above, and the transfer of staff as set out in paragraph 8 above, even if Old Mill Furniture Limited had continued to trade in some way it is evident that sufficient assets and staff had been acquired by Amor Interiors Limited to enable it to use them to carry on the same kind of business following the transfers. The conditions in Article 5(1) (b) of the Value Added Tax (Special Provisions) Order 1995 had been met so that the transfers as a whole were outside the scope of VAT notwithstanding Mr Barrs' intention.

*Decision*

31. The transfers made by Old Mill Furniture Limited to Amor Interiors Limited were not supplies of goods or services, but the transfer of a going concern that met the conditions of the VAT (Special Provisions) Order 1995. Amor Interiors Limited's  
5 appeal against HMRC's decision to disallow its input tax claim is dismissed.

32. 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  
10 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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**VICTORIA NICHOLL  
TRIBUNAL JUDGE**

**RELEASE DATE: 17 JULY 2015**

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