TC01896

Appeal number: MAN/2010/8137

VAT – input tax – insufficient evidence to justify claim – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

YEASTFIELD LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE Richard Barlow
Peter Whitehead

Sitting in public in Manchester on 10 January 2012

Mr Jonathan Grierson of counsel instructed by Messrs Alan Rashleigh & Co for the Appellant

Mr John Nicholson, of the office of the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. The appellant appeals against the respondents' decision to disallow £56,100 of input tax claimed by the appellant in the prescribed accounting period ending 31 July 2009. HMRC originally gave notice that they had disallowed the input tax in a letter dated 25 June 2010 and gave as the reason "transactions deemed to be subject to TOGC conditions".

2. Following that notice the appellant made submissions in writing to HMRC which led the latter to review the original decision and, in a letter dated 21 September 2010, HMRC conceded that they then no longer felt they could "positively demonstrate that a TOGC definitely took place" and the reviewing officer added the following:

> "It is my view that the evidence provided is insufficient to deem a TOGC. However this lack of objective, contemporaneous evidence also leads me to support Mrs Blake's decision to refuse the deduction of input tax on the assets concerned".

3. We do not agree that HMRC can deem a transfer of a going concern has taken place. Either a TOGC has taken place or it has not. Mr Grierson did not contend that HMRC could not change their mind about the reasons for refusing the input tax and he was right to take that view. What is under appeal is the decision to refuse the input tax rather than the reasons stated for its being refused.

4. Nor did Mr Grierson contend that the burden of proof lay on HMRC. As is well established by authority, in a normal case (in effect usually one in which dishonesty is not alleged), the burden of proving the facts necessary to found its case lies on the appellant which it must satisfy on a balance of probability.

5. The appellant registered for VAT from 1 October 2004 and described its business as "a management company for restaurant franchise". The appellant was visited at the Oca restaurant in Sale, Cheshire on 29 September 2009 by an officer of HMRC who raised questions about missing invoices, an apparent difference between input tax claimed on the return and the working papers for period 07/09 and observed a reference to the purchase of goodwill from another company.

6. Accountants acting for the appellant produced a letter dated 7 October 2009 from Messrs AST Hampsons, solicitors, addressed to the appellant at the Oca restaurant which read as follows.

> "We write to confirm that we acted on behalf of Cafebridge Limited in connection with the sale of the goodwill of OCA Restaurant Limited by that Company. The consideration of £360,000.00 plus VAT of £54,000 was paid by Yeastfield Limited, the funds having been forwarded by the parent Company Hoecroft Limited".

7. That letter does not state when the goodwill was sold but a copy invoice from Cafebridge was produced, which is dated 1st June 2009, and which purports to show the sale of the goodwill for £360,000 plus £54,000 VAT. The appellant asks us to infer that the date on that invoice is also the transaction date.

8. Further correspondence from the accountants acting for the appellant stated that Cafebridge Limited acquired the issued share capital of the appellant company on 21 August 2006 and that Hoecroft Limited acquired the issued share capital of the appellant on 15 May 2009 (presumably from Cafebridge). In other words Hoecroft acquired the share capital of the appellant from Cafebridge only a few days before the appellant bought the goodwill of the restaurant business from Cafebridge, which the letter from AST Hampsons says was paid for by Hoecroft on behalf of the appellant.

9. The appellant's contention is that after Cafebridge sold its shares in the appellant to Hoecroft it continued to operate the restaurant. The accountants stated in a letter dated 8 September 2010 that Cafebridge had acquired a rental agreement from the appellant on 1st June 2009. The appellant had a 25 year lease of the restaurant premises which had begun in 2004.

10. On the face of it therefore Cafebridge were running the restaurant until 1st June and intended to continue to do so, as the acquisition of the rental agreement seems to suggest, but on the same date as it acquired the rental agreement from the appellant it sold the goodwill to the appellant.

11. The explanation given to us by Mr Grierson for the sequence of transactions was that Yeastfield intended to act as a holding company concerning the operation of the restaurant and to charge a licence fee for the occupation of the premises under its lease and some sort of fee for granting to Cafebridge the right to operate the business of which Yeastfield had just acquired the goodwill.

12. The appellant's accountant said in correspondence that Cafebridge failed to continue to run the restaurant because it had "encountered refinancing difficulties, for requirement arising from the property market downtrend, fire damage and litigation costs, unconnected with the operation of the restaurant. Cafebridge in effect vacated on Sunday 28 June without prior warning". The accountant added that the appellant then "decided to work a trial period in full control [of the restaurant] which proved to be commercially viable and is set to continue, although a true, experienced operator is still the preferred option for the operation of the site".

13. The input tax disallowed includes £1,350 in respect of the sale of a van by Cafebridge to the appellant and of fixtures and fittings sold to the appellant by "the relevant owners" which the appellant's accountant claimed were to be added as a further revenue generating charge to the licence fee to be charged to Cafebridge as part of the cost of continuing to run the restaurant.

14. The accountant stated that apart from an invoice for the licence fee for the three month period ending August 2009 "no formal paperwork had been finalised" for the transactions between the appellant and Cafebridge.

15. Mr Grierson told us that the shareholders of the relevant companies were all resident overseas and that he did not know in which country they were resident. He had not been instructed as to their identity or as to the identity of the directors of the companies in question.

16. Mr Nicholson for HMRC told us that Cafebridge had failed to make its tax returns for the periods ending March and June 2009, the latter being the one on which the output tax relating to the sale of the goodwill should have been accounted for.

17. Mr Nicholson contended that the appellant had not proved that the transactions as described in the correspondence had actually taken place or that, if some such transactions had taken place; their true nature was not proven. He pointed out that AST Hampson's letter, which the appellant claims confirms the sale of the goodwill and which we have quoted in full in paragraph 6 above, does not even state when the payment was made and that it does not clearly state between which parties the payment was made.

18. We acknowledge that the fact that Cafebridge has not accounted for output tax does not prevent the appellant from claiming input tax.

19. Mr Grierson referred to the well known case of *Customs and Excise Commissioners –v- Redrow* [1999] STC 161 and relied upon it for the proposition that as long as the appellant received something that would be of benefit to it in the making of taxable supplies in the course of its business, that would entitle it to claim the input tax. He argued that the transfer of the goodwill enabled the appellant to charge the licence fee for the continued operation of the restaurant and indeed we agree that if that had been proved to be the case we would have found that the tax charged on that supply would have been recoverable as input tax.

20. However, we find that the appellant has proved nothing. The evidence is wholly defective in that regard. No evidence was given that satisfied us on a balance of probabilities that any such transaction as that contended for had occurred. The letter from AST Hampsons, whilst no doubt a truthful statement of their belief that the sale of goodwill had occurred, does not prove the true nature of the transaction from the VAT point of view. It was clearly only one of or part of a number of possibly separate or possibly connected transactions contended for by those acting on behalf of the appellant. The surrounding circumstances of the alleged transactions and the fact that, for whatever reason, the operation of the business of the Oca restaurant did come into the hands of the appellant raise sufficient questions to require evidence to clarify the true nature of the transactions. The absence even of documentary evidence purporting to provide that clarification let alone the testimony of witnesses is fatal to the appellant's case because of the burden of proof that lies upon it.

21. We find that the appellant has come nowhere near proving the facts on which its case depends and that the appeal is therefore dismissed.

22. 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.

Richard Barlow

TRIBUNAL JUDGE

RELEASE DATE: 28 February 2012