TC04308

Appeal number: TC/2011/00057

VAT – Fleming claim - preliminary issue re mode of proof of transfer of rights to reclaim between successor NHS bodies.

FIRST-TIER TRIBUNAL
TAX CHAMBER

NORTHERN LINCOLNSHIRE & GOOLE HOSPITALS NHS FOUNDATION TRUST **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD BARLOW
MR JULIAN SIMS

Sitting in public at London on 23, 24 and 25 July 2014; subsequent written submissions completed 7 January 2015.

Roderick Cordara QC instructed by Ernst and Young LLP and Mr Mitchell Moss of that firm for the appellant

Andrew MacNab and Matthew Donmall of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the respondents

DECISION

1. This is a preliminary decision concerning one aspect of the appellant's claim for a 'Fleming repayment' in respect of what it claims are overpayments of tax dating back to the inception of VAT in 1973. The amount potentially in question is not enormous but it is expected that this decision will be of interest to a number of other similar claimants whose appeals have been stood over behind this case. This case is not however, formally, a test case and the litigants in the other appeals will not be bound by this decision.

2. In any event, the preliminary question is partly one of fact and the facts of other appeals may well be different.

3. At the end of the oral hearing we asked the parties to agree the terms of the preliminary issue to be decided. That was because of previous experience by the Judge concerning a case in which the parties had asked the Tribunal to make findings of fact "so far as it was able to do so" as a preliminary issue after which the Commissioners changed their counsel and appealed to the Upper Tribunal on the grounds that the First Tier Tribunal had failed to make another finding of fact. It appears the Upper Tribunal was not told that the First Tier Tribunal had been asked only to make such findings as it was able to do and this Tribunal wishes to avoid such a situation arising in this case.

4. Further written submissions were received by 3 October 2014 but the parties failed to agree the terms of the preliminary issue as requested and indeed it appears they made no attempt to do so. Accordingly the Tribunal directed the parties to agree the terms of the preliminary issue, failing which the matter would be listed before a differently constituted Tribunal.

5. On 12 December 2014 the respondents sent an email containing the agreed terms of the preliminary issue and the appellant has indicated its agreement to this formulation. The Judge was informed of those terms on 7 January 2015 and so we were then then able to consider the preliminary issue.

6. The terms of the preliminary issue are:

> "HMRC's position is that the Tribunal is only being asked to decide on the "entitlement" or "transfer" issue i.e. whether any right of any predecessor body has been transferred to the appellant. In other words, it is to be assumed for the purposes of this appeal (only), that Sheffield Regional Hospital Board, Humberside Area Hospital Authority, Grimsby Health Authority and Scunthorpe Health Authority were registered for VAT; and that each predecessor entity, in its capacity as actual or assumed taxable person, did over declare output tax and overpay VAT, and (notwithstanding the dismissal of the appellant's drugs and prostheses claim by order of Judge Berner dated 11 July 2013) did pay VAT on

purchases of purchases (sic) of drugs and prostheses for onward supply to private patients that they did not deduct as input tax".

7. We note that "any right of any predecessor body" cannot be taken literally as a definition of the preliminary issue as it is clear that many rights were necessarily transferred at each stage and what is actually in issue is whether the right to recover overpaid output tax and/or under claimed input tax was transferred.

8. It also seems likely that although the formulation of the preliminary issue refers to its being assumed "for the purpose of this appeal (only)" that the various bodies were registered for VAT what that is actually meant to convey is that that assumption is for the purposes of this preliminary issue and not the appeal itself.

9. At the hearing HMRC claimed that the appellant would have to prove that each of the predecessors was in fact registered for VAT. At first they appeared to be trying to take that point at this hearing. Had they done so and had the appellant failed to show that was the case then the preliminary hearing would have become meaningless as the appeal would have failed on that narrow point. Subsequently the respondents resiled from that and said they were only reserving the point. We therefore make no finding on this issue, although we would note that the respondents maintain the register which should definitively answer this question.

10. As to whether the predecessors were or were not registered it seems clear that that question raises precisely a yes or a no answer. As the respondents also keep the register which will definitively answer that question it seems barely credible that they are putting the appellant to proof.

11. There would appear to be only a limited number of possibilities:

- The respondents have not checked the register.
- The respondents have checked the register but are keeping the result of the check to themselves.
- The respondents have lost all or part of the register.

12. In order to resolve this particular issue the Tribunal will give directions requiring the respondents to state what the position is.

13. If they have in fact checked the register and have kept the result of that check to themselves I[1] would regard it as most egregious conduct on their part then to put the appellant to proof of a fact known to them. If they have lost part or all of the register I regard it as being somewhat at odds with their criticisms of the appellant and its predecessors to the effect that they should have kept documents dealing with the transfers of rights. If they have not checked the register then it is time they did.

[1] Paragraphs 10 to 13 of this decision are not agreed by the member of the tribunal and are attributable to the judge alone. That does not affect the outcome of the preliminary ruling and it is only this case management issue which is not the unanimous decision of both members of the tribunal.

14. The basic agreed facts relevant to this part of the appeal are as follows.

15. When VAT was introduced in 1973 hospitals at Grimsby, Scunthorpe and Goole were all operated, as they had been since 1947, by Sheffield Regional Hospital Board. In 1974 those hospitals were transferred to Humberside Area Health Authority. HMRC accept that on that transfer the statutory provisions by which the transfer was effected had the effect that any right then held by the Sheffield Board to reclaim VAT was transferred to the Area Health Authority. HMRC only agree for the purpose of this hearing that such a right, if any, would have been transferred but they do not agree that any such right existed; that will be an issue to be decided later. We will refer to this transfer as T1, as the parties have done throughout.

16. Next, in 1982 the Grimsby hospital was transferred to Grimsby Health Authority. The Scunthorpe and Goole hospitals were transferred to the Scunthorpe Health Authority. This transfer was also effected by statutory provisions which HMRC accept had the effect of transferring such rights, if any, to the Health Authorities, that is to say subject to the same caveat as above. We will refer to this as T2.

17. Until T2 it was the case that the Secretary of State held the property occupied by the hospitals but HMRC agree in principle that a right to a refund of overpaid tax or under claimed input tax, if any such right existed, would have been held by the entities which operated the hospitals being the Regional Hospital Boards and the Health Authorities.

18. In 1993 the two Health Authorities transferred the hospitals to the Grimsby Health NHS Trust (the Grimsby hospital) and the Scunthorpe and Goole NHS Trust (the Scunthorpe and Goole hospitals). HMRC dispute that these transfers had the effect of transferring any right to reclaim VAT even if such right had been held by the Area Health Authorities and/or the Regional Hospital Board. They do not agree that those predecessors actually held any such right, though this is not at issue in deciding the preliminary issue. This is T3.

19. Finally, in 2001 all three hospitals were transferred to Northern Lincolnshire and Goole Hospitals NHS Foundation Trust. This is T4. HMRC dispute that these transfers had the effect of transferring to the Foundation Trust any right to reclaim VAT. That is both because, if their argument about T3 is correct, then those rights had ceased to be held by the transferors and also because, they argue, T4 itself was not apt to transfer such rights even if they had been held by the NHS Trusts. HMRC also still rely on the caveat that they do not accept that any right to a refund had ever arisen.

20. It is not in dispute that a right to claim a repayment of overpaid VAT can be transferred from one legal entity to another.

21. The appellant admits that where, or in so far as, its claim to succession of the rights depends on questions of fact the burden of proof lies upon it to establish the facts. It must prove on a balance of probabilities that the transfer occurred although

as with any issue of fact the tribunal is entitled to draw inferences from the proven facts. Where or in so far as the transfer is effected by statutory provisions that is a matter of interpretation and no question of a burden of proof arises.

22. Reference has been made to the principle omnia praesumuntur rite esse acta which we will refer to as the presumption of correctness (with gratitude to Mr F A R Bennion). We should note at once that that presumption only applies to the means by which an intention is given effect and it does not assist in deciding what that intention is or was or whether there was anything of substance underlying the intention. In other words the appellant cannot rely on the presumption of correctness to prove that a right to a refund existed or that it was intended to be transferred but if it proves that any such right did exist and that it was intended to be transferred then it contends that the right can be assumed to have been given effect by proper means at T3 and T4. That presumption cannot apply to T1 and T2 which were effected by statutory instruments and so no question of fact arises as to whether the rights were properly transferred; only one of interpretation. Also, as noted HMRC do not dispute that a right was transferred at T1 and T2 if any such right existed.

23. The transfers at T3 and T4 were subject to a statutory regime contained in the National Health Service and Community Care Act 1990.

24. Section 5 of that Act, so far as is relevant, reads:

> "5(1) Subject to subsection (2) or, as the case may be subsection (3) the Secretary of State may by order establish bodies, to be known as National Health Service Trusts (in this Act referred to as NHS trusts),-
>
> (a) to assume responsibility, in accordance with this Act, for the ownership and management of hospitals or other establishments or facilities which were previously managed or provided by Regional, District or Special Health Authorities; or
>
> (b) to provide and manage hospitals or other establishments or facilities …".

25. It is noteworthy that section 5(1)(a) distinguishes between the NHS trust which will both own and manage the hospitals and the Authorities which previously managed them. In other words it reflects the fact that the predecessors did not own the hospitals, which they only managed, but the successors would own them as well.

26. Section 8 of the Act further reflects that position and reads, as far as is relevant:

> "8(1) The Secretary of State may by order transfer or provide for the transfer to an NHS trust, with effect from such date as may be specified in the order, of such of the property, rights and liabilities of a health authority or of the Secretary of State as, in his opinion, need to be transferred to the trust for the purpose of enabling it to carry out its functions.

(2) An order under this section may create or impose such new rights or liabilities in respect of what is transferred or what is retained by a health authority or the Secretary of State as appear to him to be necessary or expedient.

(3) Nothing in this section affects the power of the Secretary of State or any power of a health authority to transfer property, rights or liabilities to an NHS trust otherwise than under section (1) above.

…

(6) Any property, rights and liabilities which are to be transferred to an NHS trust shall be identified by agreement between the trust and a health authority or, in default of agreement, by direction of the Secretary of State".

27. Paragraphs 1 and 2 of Schedule 2 of the Act provide that "an order under section 5(1) of this Act establishing an NHS trust … shall be made by statutory instrument".

28. Initially, Mr MacNab for the Commissioners was suggested that an order under section 8 would have to be made by statutory instrument, which would be a matter of Parliamentary record. However, the Secretary of State, or any other authority, can only make statutory instruments when so authorised by statute and the clear reference to section 5(1) only in Schedule 2 makes it abundantly clear that the Secretary of State is not authorised to make an order under section 8 by statutory instrument. No particular form of order is prescribed for an order under section 8.

29. Mr MacNab also argued that, as the hospitals have heretofore managed to operate without the refund of VAT, the transfer of rights or, presumably they would say a purported transfer of rights, could not be said to have been needed to be transferred "for the purpose of enabling" the trust to carry out its functions as mentioned in section 8 of the Act. We do not agree with that argument because the necessity or otherwise, required by section 8(1), is to be "in the opinion of" the Secretary of State not that of the tribunal.

30. Of course, the secretary of State cannot have formed a specific opinion that a VAT refund was necessary for the trust to carry out its functions because no such refund was in anyone's contemplation at the time T3 and T4 occurred. In so far as it is relying on section 8(1) of the Act, the appellant must therefore show that the Secretary of State transferred all rights of whatever sort the predecessor held. Or at least that he transferred all rights, with exceptions specified either individually or by class, and that any such exceptions did not have the effect of excluding a right to recover VAT. Section 8(1) certainly envisaged a situation where some rights or liabilities might not be transferred as the word "such" demonstrates is the case ("transfer … such property rights and liabilities … as in his opinion need to be transferred").

31. It would not be at all surprising if the Secretary of State had transferred rights en masse or by classes rather than by listing separately every right being transferred. Indeed we doubt that any such list concerning an organisation as large and

complicated as a hospital could ever be comprehensive and we would expect the Secretary of State to make some kind of generalised transfer. Given that liabilities are also to be transferred it would be potentially very unfair to anyone to whom the predecessors owed a liability to be excluded from pursuing that liability because a comprehensive list could not be drawn up. Also by their nature not all liabilities could be known at the date of transfer and some sort of transfer of the 'unknown unknowns' would be expected as far as liabilities are concerned and by analogy the same could apply to rights. Mrs Morris and Mrs Castledine gave evidence that claims for negligence and other tortious causes were transferred and accepted as transferred by the transferee trusts.

32. In addition, the appellant relies upon section 8(3) of the Act under which a transfer of rights could take place without there being an order under section 8(1) and for which the Secretary of State would not need to have formed an opinion that those rights were necessarily to be transferred for the purpose of enabling the transferee to carry out its functions.

33. The appellant's contentions are as follows.

34. First, it contends that what it calls the short route to the answer to the question whether the rights were transferred is that it is a question of fact bearing in mind the likelihood that the Secretary of State would have taken the necessary steps to vest the outstanding claim in the successor bodies.

35. Reference was made to section 136 of the Law of Property Act 1925 and the rules relating to equitable assignments. We hold that both of those provisions are irrelevant. No equitable assignment occurred and no assignment under the Law of Property Act for the very simple reason that if an assignment did occur it was necessarily under the National Health Service and Community Care Act 1990. As that was the applicable provision it would both supersede and make irrelevant any need to rely on the Law of Property Act or an equitable process.

36. We do not consider that, if or in so far as the appellant has to rely on section 8(3) as opposed to section 8(1) of the 1990 Act, that means that the process by which the transfer is made would then have to comply with the 1925 Act or the law relating to equitable assignments. The transfer would still be by the statutory procedure but it would then be based on the undoubted principle that the Secretary of State can do anything which would be lawful if done by any other body provided there is no prohibition on the Secretary of State so acting. In other words we hold that the effect of section 8(3) is to relieve the Secretary of State from the procedural requirements in section 8(1) but he continues to act under the powers entrusted to him by the statutory regime in the 1990 Act.

37. In principle, the respondents agree that the question must be resolved by reference to the 1990 Act rather than by reference to the law of Property Act or the law relating to equitable assignment. In their written submissions they said: "HMRC agree that consideration of section 136 LPA 1925 and the law relating to equitable

assignments add little, if anything, to the proper analysis". They did not make it clear what little might be added and we hold that the answer is nothing.

38. The appellant also relied on an alternative argument that the law, at the European level, relating to transfers of a going concern provide an alternative to the above analysis. Whilst it is true that where a totality of assets or part thereof is transferred the transferee is to be treated as the successor to the transferor (and the appellant says that means for all VAT purposes), that really begs the question. Was there a transfer of the totality of assets? Is so, it becomes irrelevant for the purposes of this appeal whether that has made the successor bodies the successors of their predecessors in any sense related to a TOGC. The right to claim has been transferred and it is irrelevant how that should be analysed in the context of a possible TOGC when considering the Fleming claim. If there has not been a transfer of the totality of the assets or a part thereof there will not have been a TOGC but at least in the case of 'a part thereof' the question would remain for the purposes of this appeal whether the right had been transferred by being included in that part.

39. The normal rules of evidence apply to this case as with any other. At least where no specific form of proof is prescribed by law a litigant can prove any fact or disprove any fact by either direct evidence or by indirect or circumstantial evidence from which any fact can logically be inferred.

40. It is true that the situation here is that some sort of document was virtually certain to have been made to effect the transfers at T3 and T4. Although the statute required the Secretary of State to make an order by some unspecified means (section 8(1)) and/or to transfer rights by any means open to him (section 8(3))it is reasonable to suppose that the order would have been in writing or at the very least to have been minuted in writing. It is a fact that the hospitals in question were transferred as described above and that the transfers were in respect of both property and the operation of the hospitals. HMRC have not argued to the contrary. Any suggestion that the transfer happened by anything less than some sort of formal process would be bizarre.

41. We find that a document or documents must have been produced to effect or at least to record the transfers.

42. That, of course, says nothing about what might have been contained in that document or those documents.

43. The Commissioners have called for the documents and presented their case as if the primary way the appellant can prove its case must be to produce a document. We have however been provided with the written and oral evidence of Mrs Morris and Mrs Castledine on this issue and comment on it below.

44. However, in this case three things can be said about the documents under discussion. One, as we have already said, we find on a balance of probabilities that some such document or documents must have existed. Two, those documents cannot have referred specifically to VAT repayment claims because at the time in question

no such claims were in contemplation. Three, it may be surprising that, at least for T4, no such documents have been retained because they were in effect the foundation documents for the establishment of the current iteration of the hospitals. It is possible to imagine the documents relating to T3 would have been disposed of as they may have been thought to have become irrelevant once T4 had occurred but difficult to understand why the latest documents were not retained.

45. The last point does not undermine our finding that there was such document. The very existence of the hospitals still being run by the current operators is evidence that by some means the Secretary of State had effected the re-organisation and the transfer of rights and property to the successor operators. And we have already said we accept this would have involved the creation of a document or documents of some sort.

46. The dispute lies in this case is as to the conclusion to be reached about whether the documents were such as to transfer the rights to a reclaim. We have already pointed out that the presumption of correctness will not achieve that. We are prepared to apply the presumption and accept that there was a process of transfer that did comply correctly with the legal requirements to transfer ownership and operation of the hospitals in accordance with the statutory provisions. The transfer of the hospitals was a Government decision and has been effected and we see no reason to doubt that it was done correctly. But the presumption that the correct procedure was adopted does not establish what the substance of the transfer was.

47. We repeat the question we have been asked to decide as a preliminary issue "the Tribunal is only being asked to decide on the "entitlement" or "transfer" issue i.e. whether any right [if it existed] of any predecessor body has been transferred to the appellant".

48. So far as the point of principle is concerned and so far as this Decision may apply to any other appeals is concerned our answer to that question is as follows.

49. In cases where no transfer document is produced, whether any rights and any property of a predecessor body have been transferred can be decided by appropriate indirect or circumstantial evidence. The presumption of correctness is rebuttable but is likely to apply so as to entitle the Tribunal to presume such a transfer was effected in correct form. If the successor body is in fact operating and does in fact own the hospital that will effectively prove that some such transfer of rights did occur. Whether the transfer of rights included a right to re-claim VAT will depend on the circumstances of a particular case. That too may be inferred by indirect of circumstantial evidence but can only be decided in light of the evidence in a particular case and the presumption of correctness will not prove what rights were transferred.

50. We now turn to the specific facts of this case.

51. The appellant called Mrs Candida Morris as a witness. She had been the Chief Executive of the Scunthorpe and Goole NHS Trust in November 1992 when that organisation was set up and on 1 April 1993 when it began to operate the hospitals. In

other words she was involved with those hospitals at the time of T3. In fact before that she had been employed from June 1992 in what was in effect the same capacity in what was called a shadow trust. Technically she was employed by the predecessor between June and November 1992 but that was during the time when plans were being made for the creation of the NHS trust and the transfer of the hospitals.

52. She described how the transfer was part of what was called phase three of the transfers of various hospitals to such trusts in the country. The Department of Health gave advice and oversaw the preparations and transfers and the NHS trust itself relied on professional advice from lawyers and accountants.

53. Mrs Morris frankly admitted that she could not recall the actual wording of the transfer documents but she was equally sure that the model guidance from the Department, examples of which were provided in evidence, was followed and that the guidance was informed by experiences from phases one and two.

54. In particular Mrs Morris said the following:

> "What I am convinced of is the intent and purposes of all the work behind transferring the organisation management (sic) of the hospital to the new trust and all its assets and liabilities …".
>
> [Mr MacNab interrupted] "And likewise you cannot tell us or recall what any of these documents actually contained".
>
> "No. But as I have said, I am certain we will have followed the model guidance about establishing trusts, drawing on the lessons learned from the first wave, and will have included the relevant language, including not just the agreements but the catch-all clause. And we were scrutinised to ensure that we did things properly".
>
> Later, in answer to a question about the relevance of the fact that the VAT claims could not have been known about at the time she said.
>
> "I will accept they were not known about, so they weren't [identified or quantified in the documents]. But hence the importance of the catch-all clause and, you know, the clear intention was to transfer the rights and liabilities. But I accept your point [that they could not be specifically referred to]".
>
> Later still she referred to the catch-all clause being in the model guidance.

55. We have no hesitation in accepting the truth of Mrs Morris's evidence, limited though it is on some specific detail. We find that that evidence is sufficient to prove the appellant's case on the preliminary point so far as those two hospitals are concerned.

56. However the matter does not stop there because there is no doubt that the hospitals were in fact transferred lock, stock and barrel to the NHS Trust and we find this corroborates the contention that somehow the rights were all transferred and

furthermore there has been no suggestion that any other body has shown any intention to claim in respect of the overpaid VAT, if any.

57. We heard evidence from Mrs Marlene Castledine for the appellant. She had worked for the Scunthorpe Health Authority as an in-house accountant and then Scunthorpe and Goole Hospitals NHS Trust and eventually the appellant.

58. She was not able to give evidence about how the various transfers were made or anything directly relating to whether there was any kind of catch-all clause involved in the transfers. She was able to say that in effect at each stage the accounts work was entirely consistent with each of the successors having continued operating in the same was as before the changes were made.

59. In particular at the point where T4 occurred she was able to confirm that all that happened was that the two trusts amalgamated. As she put it: "there were no decisions to be made as to how assets and liabilities were to be allocated all rights and liabilities of each of the [predecessors] were passed to [the appellant]".

60. It is not in doubt that the Grimsby hospital was transferred from the Grimsby Health Authority to the Grimsby Health NHS Trust at T3. The Grimsby Trust changed its name to North East Lincolnshire NHS Trust before it was amalgamated with the Goole and Scunthorpe NHS Trust to form the appellant but nothing turns on that.

61. Just as with the Goole and Scunthorpe Hospitals it is the appellant's case that the Grimsby hospital was transferred lock, stock and barrel to the successor at T3 and Mrs Castledine's evidence corroborates that that was the case because after T4 the three hospitals were all operating in the same way as each other for accounting purposes. Although there is no evidence in respect of the Grimsby hospital of the sort Mrs Morris gave in relation to T3 for the other two hospitals, that hospital was transferred in what we have described as lock, stock and barrel form and the later treatment of all three together in identical fashion corroborates the fact that everything was transferred in the same way at Grimsby at T3.

62. Indeed taking the evidence as a whole it is clear that the Secretary of State intended each hospital to be operated in the same way at each stage and so we conclude that the appellant has made out its case in principle in respect of the preliminary issue and we so find.

63. This document contains full findings of fact and reasons for the preliminary 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: 4 March 2015