[2015] UKFTT 641 (TC)

TC04683

Appeal number: TC/2014/04769

VAT – company under common ownership with appellant starting to carry on appellant's business and appellant ceasing to carry it on – were goods of the business transferred and therefore deemed supply of goods? – no –– appeal stayed to determine consequences of deemed supply of services

FIRST-TIER TRIBUNAL
TAX CHAMBER

BEAUTY ANGELS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ZACHARY CITRON
MR DUNCAN MCBRIDE

Sitting in public at Fox Court, London on 6 May 2015

Mrs Ann Burjack, Director of the Appellant, for the Appellant

Mrs Lisa Fletcher, Officer of HMRC, for the Respondents

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DECISION

1. The issue in this appeal was whether the appellant, a company carrying on a beauty salon business, made a supply of the goods used in the business for deemed consideration when, under the direction of a common shareholder, a sister company (which was not registered for VAT) starting carrying on the business and the appellant ceased to do so.

The appeal

2. The appellant company's VAT return for the three month period between April and June 2012 (referred to as the "6/12 VAT return") was a repayment return in the amount of £10,076.59. This figure was the net of VAT due (output tax) of £967.85 and VAT reclaimed (input tax) of £11,044.44.

3. HMRC informed the appellant in a letter of 18 November 2013 of its decision that additional output tax of £9,913.60 was due on a transfer of stock and assets from the appellant to Beauty Angels Spa Ltd ("BASL"), a company under common ownership with the appellant. HMRC's calculations took the appellant's stock and assets at what they called their "cost value on hand" at the "date of transfer" (£50,408) and subtracted a depreciation charge of £840, giving rise to a "stock and assets cost value" of £49,568. HMRC applied 20% VAT to this figure, resulting in output tax due of £9,913.60. HMRC accordingly amended the appellant's 6/12 VAT return from a repayment of £10,076.59 to a repayment of £163.59.

4. The appellant requested a review of this decision on 14 December 2013. On 5 August 2014, after a delay for which HMRC apologised, HMRC notified the appellant that the review had upheld its original decision

5. On 1 September 2014, the appellant submitted a notice of appeal.

6. An aspect of HMRC's decision-making had (understandably) caused some confusion to the appellant: HMRC had originally written to the appellant on 7 October 2013 stating that the repayment claimed in the 6/12 VAT return would be reduced to nil. HMRC then decided against this approach, preferring the approach of charging output tax on the goods transferred (in its view) to BASL, and so leaving a (much smaller) net amount of repayment. This meant HMRC had to withdraw its original decision at the same time as notifying the appellant of its decision to impose output tax (as summarised above) – unfortunately, all this was not clearly explained to the appellant prior to HMRC's letter of 5 August 2014.

Evidence

7. We had a bundle of documents including correspondence between the parties, a witness statement of Mrs Michelle Mais, an officer of HMRC who had visited the appellant on two occasions, and HMRC's statement of case.

8. We heard oral evidence on oath from Mrs Mais and also from Mrs Ann Burjack. As well as being a director of the appellant and of BASL at relevant times, Mrs Burjack conducted correspondence with HMRC on this matter on the letterhead of Barclay Accountancy Ltd, on which it was described as "Accountants & Tax Consultancy".

Facts

9. The appellant was incorporated on 27 September 2009. At all relevant times, Mrs Burjack was the sole director, and she and her husband, Mr Constantin Burjack, were the sole shareholders.

10. The beauty salon operated by the appellant was in Leytonstone in East London and opened for business in August 2011. Mrs Burjack told us she owned the property and made the ground floor premises available to the appellant (without charge) to carry on the beauty salon business (she kept an office on the first floor). We were shown no documentation but we find by inference that the appellant had a licence to occupy the ground floor from Mrs Burjack.

11. Based on Mrs Mais' report of her visit to the premises in December 2012, the beauty salon comprised a main salon area, a "flotation room" with a large covered bath and a small pool, two sunbed rooms plus a sunbed in the corridor area, a bathroom, a beauty room (facial), two massage rooms, two salt rooms and a spray tan room.

12. Mrs Burjack told us that the assets of the beauty salon around the end of June 2012 (a date whose significance will shortly become evident) included: chairs for customers, mirrors, a reception desk, an air conditioner, spray tan equipment, and a couch and table in the beauty room. Stock comprised items such as hair products and colour. Refurbishments had been made to the premises including its flooring and windows.

13. On 10 April 2012, the appellant became registered for VAT. Mrs Burjack was aware that by registering for VAT, the appellant would be able to recover input VAT. Information provided by the appellant to HMRC prior to its registration indicated that its taxable supplies had not exceeded the VAT registration threshold in the past 12 months, and were not expected to exceed £73,000 in the following 30 days.

14. Mrs Burjack told us that from early on she had considered, in addition to the beauty salon business, starting a business of exporting beauty products, including to Moldova, her native country. This too was reflected in information given by the

appellant to HMRC prior to registration, to the effect that the value of its taxable supplies in the next 12 months was estimated at £150,000, with the note: "(Export to outside of EU countries – as Moldova)". In the registration form itself, it was stated that "you [the appellant] expect to receive regular repayments of VAT"; and that the reason for this was "the company is going to change the trading activity – only export of hair & beauty products". Under the heading "Overseas supplies", the form stated: "I make, or intend to make, supplies only outside the UK".

15. The issues raised in this appeal stem from the fact that from the end of June 2012, the beauty salon business ceased to be carried on by the appellant and started to be carried on by another company, BASL, which had been incorporated on 18 April 2012 with Mr and Mrs Burjack as the directors and shareholders at the relevant times. BASL was not, and was not required to be, VAT registered. BASL made no payment to the appellant at the time of this change in the company carrying on the salon business.

16. As to why this change was effected, Mrs Burjack said that her plan was for the appellant to carry on the beauty product export business (as, indeed, had been stated in the appellant's VAT registration application form), whereas BASL had been set up to take over the salon business; as she put it, she wanted the wages and purchases for the salon business to be processed through BASL. Putting the two businesses into different companies, Mrs Burjack said, might enable the salon business to be operated by a third party, whilst she concentrated on the export business. In the event, she did not procure an outside director for BASL until 2014.

17. The core issue in this appeal is what precisely the appellant did with the goods of the salon business when the June 2012 change described above took place. No contemporaneous documentation (such as legal agreements or board minutes) was entered into by the appellant. As Mrs Burjack made clear at the hearing, because the appellant and BASL were both under her (and her husband's) control, she regarded them as an extension of herself. She saw no need to document transactions between them.

18. At the hearing, HMRC (with the appellant's consent) presented us with summaries from the internet of information contained in unaudited accounts of the appellant and of BASL filed at Companies House. However, we found the information insufficiently detailed to be of assistance in determining what the appellant did with the goods of the salon business at the end of June 2012.

19. HMRC's adjustment to the 6/12 VAT return, the matter under appeal, was made on the basis that the goods of the salon business were "transferred" to BASL at the end of June 2012. Mrs Burjack contended that the appellant did not carry out any such transfer. Rather, it simply allowed BASL to use the goods (as it had to, in order to carry on the beauty salon business) – on an indefinite basis, for no payment.

20. Whether or not the goods of the salon were "transferred" is a mixed question of fact and law to which we will return in our discussion below. Accordingly, the resolution of this appeal is not a matter of whether we "believe" Mrs Burjack when

she asserts that the goods were not transferred. Rather, it is a matter of identifying the core facts, and then considering whether, as a matter of law, they comprise a transfer of the goods.

21. On the evidence before us, the core facts are quite simple, and not in dispute. We find them to be as follows:

(1) From the end of June 2012, the profits and losses of the beauty salon belonged to, and were for the account of, BASL (and not the appellant). From this we infer (and it was common ground between the parties) that BASL began to carry on the beauty salon business from this date, and the appellant ceased to do so. This meant that, as of necessity, the goods of the business began to be used by BASL, whereas before this date they were used by the appellant; it also meant that from this date BASL enjoyed a licence to occupy the ground floor premises from Mrs Burjack, the owner.

(2) There was no observable change to the beauty salon (of a kind that would be evident to its customers) as a result of the change described above that took place from the end of June 2012. Its premises and tangible assets remained as they were, and where they were.

(3) The appellant took no positive action (to the extent a corporate entity can: such as entering into a legal document or holding a board meeting) as regards the salon and its tangible assets at the time of this change. In effect, the appellant did nothing at all; it simply tolerated the fact that BASL had taken control of the salon business and its assets.

The law

The charge to VAT - general

22. Section 4(1) of the Value Added Tax Act 1994 (the "Act") 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." Section 4(2) of the Act provides that "a taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply".

23. Section 3(1) of the Act defines "taxable person" as a person who is, or is required to be, registered under the Act.

24. Section 5(1) provides that Schedule 4 to the Act "shall apply for determining what is, or is to be treated as, a supply of goods or a supply of services."

Special rules for certain transfers of business as going concern

25. Article 5(1) of the VAT (Special Provisions) Order 1995 (SI 1995/1268) states that certain supplies by a person of assets of his business "shall be treated as neither a

supply of goods nor a supply of services". In this category are included (Article 5(1)(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, as that carried on by the transferor, and
>
> (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…."

Goods transferred so as not to form part of business assets - deemed supply of goods for consideration

26. Paragraph 5(1) of Schedule 4 to the Act provides that, subject to provisions that are not relevant here, "where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, that is a supply by him of goods."

27. Paragraph 5(5) of that Schedule provides that neither paragraph 5(1) (cited above) nor paragraph 5(4) (cited below) "shall require anything which a person carrying on a business does otherwise for a consideration in relation to goods to be treated as a supply except in a case where that person … is a person who (disregarding this paragraph) has or will become entitled –

> (a) under sections 25 or 26, to credit for the whole or any part of the VAT on the supply, acquisition or importation of those goods or of anything comprised in them …."

28. The provisions of paragraph 5 to Schedule 4 of the Act referred to above implement Article 16 of Council Directive 2006/112/EC, which provides:

> "The application by a taxable person of goods forming part of his business for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible."

29. Paragraph 9(1) of Schedule 4 to the Act states that paragraph 5 of that Schedule (amongst other provisions) has effect "in relation to land forming part of the assets of, or held or used for the purposes of, a business as if it were goods forming part of the assets of, or held for the purposes of, a business." Under paragraph 9(2) of that Schedule, in the application of paragraph 5 by virtue of paragraph 9(1), "references to transfer, disposition or sale shall have effect as references to the grant or assignment of any interest in, right over or licence to occupy the land concerned". Paragraph 9(3) provides that "grant" includes surrender.

30. Paragraph 6 of Schedule 4 to the Act provides that anything which is a supply of goods or services by virtue of [paragraph 5(1) – cited above] or [paragraph 5(4) – cited below] … is to be treated as made in the course or furtherance of the business (if it would not otherwise be so treated)…"

5 31. Paragraph 6(1) of Schedule 6 to the Act provides that where there is a supply of goods by virtue of paragraph 5(1) of Schedule 4 (amongst other provisions) "but otherwise than for a consideration", then the value of the supply is determined by paragraph 6(2), which in turn provides:

> "The value of the supply shall be taken to be –
>
> 10 (a) such consideration in money as would be payable by the person making the supply if he were, at the time of the supply, to purchase goods identical in every respect (including age and condition) to the goods concerned; or
>
> (b) where the value cannot be ascertained in accordance with paragraph 15 (a) above, such consideration in money as would be payable by that person if he were, at that time, to purchase goods similar to, and of the same age and condition as, the goods concerned; or
>
> (c) where the value can be ascertained in accordance neither with paragraph (a) nor paragraph (b) above, the cost of producing the goods 20 concerned if they were produced at that time."

Goods used for non-business purposes – deemed supply of services for consideration

32. Paragraph 5(4) of Schedule 4 to the Act provides that "where by or under the directions of a person carrying on a business goods held or used for the purposes of 25 the business are put to any private use or are used, or made available to any person for use, for any purpose other than a purpose of the business, whether or not for a consideration, that is a supply of services". This provision does not however, apply (despite paragraph 9(1), cited above) to any interest in land or to any goods incorporated or to be incorporated in a building or civil engineering work (whether by 30 being installed as fixtures or fittings or otherwise): paragraph 5(4A), items (a) and (d).

33. Paragraph 5(4) implements Article 26(1)(a) of Council Directive 2006/112/EC, which provides that the following transaction "shall be treated as a supply of services for consideration":

> "the use of goods forming part of the assets of a business for the private use of a 35 taxable person or his staff or, more generally, for purposes other than those of his business, where the VAT on such goods was wholly or partly deductible"

34. Paragraph 7(1)(b) of Schedule 6 to the Act stipulates that where there is a supply of services by virtue of paragraph 5(4) of Schedule 4 (cited above) but otherwise than for a consideration, then "the value of the supply shall be taken to be 40 the full cost to the taxable person of providing the services…" (with an exception that

is not relevant here); paragraph 7(2) allows for regulations to be made in regard to "how the full cost to the taxable person providing the services is to be calculated"; and such regulations were made in Part 15A of the Value Added Tax Regulations 1995 SI 1995/2518 (Regulations 116A to 116M) (Goods Used for Non-Business Purposes During their Economic Life).

35. The time of supply of services referred to in paragraph 5(4) to Schedule 4 of the Act is provided for in Regulation 81 of the Value Added Tax Regulations 1995 SI 1995/2518.

Tribunal's jurisdiction

36. Under s83(1)(b) of the Act, an appeal shall lie to this tribunal with respect to (inter alia) "the VAT chargeable on the supply of any goods or services …"

The parties' arguments

37. The arguments of the parties can be briefly summarised:

38. The appellant submitted that the change that occurred at the end of the June 2012 to the party conducting the salon business did not entail the appellant transferring the goods of the business: the goods remained under the ownership of the appellant, albeit that the appellant started to make them available to BASL (at no charge) to conduct the salon business. Hence, the provisions of the Act which apply when goods of a business are transferred so as no longer to form part of the assets of a business (in particular, paragraph 5(1) of Schedule 4) do not apply.

39. HMRC argued the reverse: that the change at the end of June 2012 did entail a transfer of the goods of the business by the appellant; that the special rules for transfers of business as a going concern did not apply because BASL was not registered for VAT (see Article 5(1)(a)(ii) of the Value Added Tax (Special Provisions) Order 1995, cited above); and so paragraph 5(1) of Schedule 4 to the Act applied to deem a supply of the goods, and paragraph 6(2)(a) of Schedule 6 applied to deem the consideration for VAT purposes.

40. During the course of the hearing, HMRC, for the first time in the proceedings, began to suggest that there may not have been a deemed supply of goods by the appellant under paragraph 5(1) of Schedule 4 to the Act, but rather a deemed supply of services by the appellant under paragraph 5(4) to that Schedule. HMRC did not come prepared to elaborate on such submissions, and their implications in terms of the time of such supplies and the quantum (if any) of VAT arising, but invited us to adjourn the proceedings part-heard to allow the parties to consider these matters. We shall return to this point in our discussion below.

Discussion

41. The principal point for decision in this appeal is a short one: were the goods of the salon business transferred by the appellant at the end of June 2012 (or not)? We shall first discuss that and then address the issue, which arose for the first time at the hearing, of whether there was a deemed supply of services by the appellant.

Were the goods of the salon business transferred by the appellant?

42. Paragraph 5(1) of Schedule 4 to the Act deems there to have been a supply of goods by the appellant, if the goods forming part of the salon business were transferred so as no longer to form part of "those assets".

43. We consider that the reference to "those assets" in paragraph 5(1) must here mean assets of a business carried on by the appellant (and cannot mean assets of a business carried on by BASL). We find the wording ambiguous in paragraph 5(1) itself, but are guided in our construction by Article 16 of Council Directive 2006/112/EC, which makes it clear that the goods in question must be applied for purposes other than those of "his" (ie here, the appellant's) business.

44. By reason of paragraph 9 of Schedule 4 to the Act, the "goods" of the salon business here means not just the moveable assets but also the licence to occupy the premises granted by Mrs Burjack to the appellant; and "transfer" of that licence would include its assignment or surrender.

45. The condition in paragraph 5(5) of Schedule 4 is satisfied: in its 6/12 VAT return, the appellant was entitled to credit for input tax.

46. Hence, in our view, given that the assets of the salon business no longer formed part of the assets of a business of the appellant after the end of June 2012, the sole issue here is whether or not the goods of the salon business were "transferred". If they were, paragraph 5(1) deems there to have been a supply of goods. We note that Article 16 of Council Directive 2006/112/EC speaks in terms of the "application" of goods for non-business purposes, rather than their "transfer"; however, we are of the view that there is no material difference in meaning between the two terms.

47. We start with preliminary observations about the transfer of property (both land and moveable assets) and the general scheme of the Act. We understand property to be "transferred" when the legal title to that property moves from one party to another. Possession of property can of course move without legal title to the property moving – this is the situation where property is leased. The overall scheme of the Act is to treat a transfer of the "whole property" in goods as a supply of goods, whilst the transfer of the "possession" of goods (something which falls short of the transfer to the "whole property") is treated as a supply of services: this is set out expressly in paragraph 1 of Schedule 4 to the Act. It seems to us that paragraph 5 of that Schedule, with which we are concerned in this appeal, has a similar approach to the dividing line between a

supply of goods and a supply of services: there is a deemed supply of goods when goods are "transferred or disposed of" outside the business (paragraph 5(1)); there is a deemed supply of services where goods are "used" (something which falls short of a transfer or disposal) for non-business purposes (paragraph 5(4)).

5 48. We now turn to the specifics of this case; and since the legal mechanisms for moving legal title are different as between moveable property and land, we shall deal with the two categories in turn.

49. As for the precise conditions under which legal title to moveable property passes, Halsbury's Laws of England tells us (at volume 49, part 3, paragraph 405)
10 that "at common law, the voluntary transfer of the legal title to existing goods may be effected by sale, exchange, mortgage or gift". There was clearly no sale, exchange or mortgage of the appellant's assets, so "gift" is the relevant category here. Halsbury's Laws further states that "a gift of goods inter vivos must, to be effective at law, be made either by deed or by delivery of possession, though beneficial ownership can be
15 transferred in equity by declaration of trust or transfer to a third party as trustee for the donee. A purported gift not effected by one of these methods is nugatory." Here, as there was no deed or declaration of trust (or documentation of any kind), the question is whether there was a gift of the assets of the salon via delivery of possession. As we have found, the salon assets did not in fact change physical position as a result of the
20 change at the end of June 2012; and as the appellant and BASL occupied the same premises (in succession), and as they are both legal persons rather than actual individuals, it is not obvious how "delivery of possession" of the salon assets from the appellant to BASL could have been effected in a purely physical sense. One of the leading cases on transfer of goods also involved assets that did not physically move:
25 in *Re Cole (a bankrupt), ex p Trustee of the Property of the Bankrupt v Cole* [1964] Ch 175, [1963] 3 All ER 433, a husband told his wife that he was giving her the chattels in their shared matrimonial home; he later became bankrupt and his wife wished to exclude the chattels from the bankrupt's estate. It was held (in the Court of Appeal) that mere words of gift were never enough to perfect a gift of chattels, and
30 the donee, in order to establish title to chattels, must prove such act of delivery or change of possession as would be unequivocally referable to an intention by the donor to transfer possession and title in the chattel to the donee. The parallels between the shared matrimonial home in *Re Cole*, and the premises used by both the appellant and BASL (in succession) in our case, are inexact; but the Court of Appeal's insistence on
35 an "unequivocal" act to denote the transferor's intention to transfer possession and title, suggests that in our case (where the appellant was entirely passive, and undertook no "unequivocal" actions whatsoever), legal title to the salon assets was not, as a matter of English law, transferred.

50. As for the licence to occupy, on the facts as we find them, we do not consider
40 this to have "moved" to BASL at all: BASL received its own licence to occupy from Mrs Burjack. Hence, there is no question as to whether the appellant's licence was assigned: it was not. Equally, we do not consider, on the facts as we have found them, that it was "surrendered" back to Mrs Burjack. Hence, there was no act which comprised a "transfer" of the appellant's licence to occupy for the purposes of
45 paragraph 5(1) of Schedule 4, read together with paragraph 9.

51. Although the line is a somewhat fine one as regards the moveable assets of the salon business, our analysis leads us to conclude that the goods of the salon business were not transferred as a matter of law, and that HMRC were incorrect to amend the 6/12 VAT return to reflect a deemed supply of the goods of the salon business. In reaching such a finely balanced conclusion, it is also, on our view, relevant to note that, consistent with the general scheme of the Act as we described it above, a transaction which falls short of a full "transfer" (and is therefore not a supply of goods), may well fall into the category of a supply of services. In our view, the facts of this case do indeed fall squarely within paragraph 5(4) of Schedule 4: at the end of June 2012, the assets of the salon business were made available by the appellant to BASL for use for a purpose other than the business of the appellant.

52. The precise consequences of there being a supply of services by the appellant under paragraph 5(4) of Schedule 4 to the Act, in terms of the quantum and timing of any VAT arising, are matters of some complexity, requiring the application of Part 15A and Regulation 81 of the Value Added Tax Regulations 1995, amongst other provisions. It was unfortunate, in our view, that HMRC did not come to the hearing prepared to make submissions on the application of these provisions (given that the appellant had consistently argued that there had been no transfer of the goods and therefore no supply of goods under paragraph 5(1) of Schedule 4 to the Act). Although we were invited by HMRC to adjourn part way through the hearing, to allow HMRC to prepare such submissions, we decided to conclude the hearing on the particular decision against which the appellant had appealed – HMRC's adjustment to the 6/12 VAT return – given that both parties had prepared for the hearing on that basis.

53. In conclusion, we are able to decide

(1) that HMRC's adjustment to the 6/12 VAT return was incorrect and so the appeal should be allowed; and

(2) that the change in the arrangements surrounding the salon business which occurred at the end of June 2012, as described in our finding of facts at paragraph 21 above, entailed a supply of services by the appellant due to the application of paragraph 5(4) of Schedule 4 to the Act.

We are unable, however, due to insufficient information being presented to us, to decide what the precise VAT implications of our second decision above are for the appellant.

54. As this is an appeal under section 83 of the Act, we have (full) appellate jurisdiction and so we can (and should) decide not just that the adjustment appealed against was incorrect, but also determine what the correct VAT treatment was. We shall therefore stay the proceedings and direct that the parties seek to agree within three months the consequences of our second decision in the immediately preceding paragraph; if they are unable to agree, they will have to return to the tribunal for determination.

Stay of proceedings

55. These proceedings are stayed for a period of three months from the date of release of this decision to enable the parties to consider, in the light of our second decision at paragraph 53 above, whether agreement can be reached on the consequences of such supply of services for the appellant under the Act and other relevant law. There shall be liberty to apply to the Tribunal for further determination. If further time is required, the parties shall make an application to the Tribunal for an extension of time before the expiry of the three month stay, or any extension.

56. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

RELEASE DATE: 9 DECEMBER 2015