



## Same business test an ongoing concern

When a business or part of a business is transferred as a going concern the usual VAT rules are disapplied so that, provided certain qualifications are satisfied, the transfer is not treated as a supply of goods or services and VAT is not charged. The principal qualifications which must be met are that the seller must be a taxable party, the buyer must either be VAT registered or will be VAT registered immediately after completion of the transfer, and the assets being transferred must both be intended to be used and in fact be used for an economic activity.

The precise nature of the third qualification remains unclear. In 2003 the European Court of Justice ruled in *Zita Modes Sarl v Administration de l'enregistrement et des domain* (C-497/01) that for a transfer to qualify as a transfer as a going concern the business being transferred must be capable of being carried on as an independent economic activity and the buyer must intend to continue to operate the transferred business rather than liquidate its assets. HMRC stated that it believed U.K. legislation, which includes the requirement that the buyer carry on the same kind of business as that which the seller conducted prior to the transfer, was in-line with this judgment and no changes were necessary, albeit that the "same kind of business" test is arguably more restrictive than the *Zita Modes* decision requires.

This issue has been at the heart of two recent VAT Tribunal decisions, both of which illustrate the importance of the buyer carrying on the same type of business as that which the seller had been carrying on before the transfer.

### Tezgel<sup>1</sup>

Mr. Tezgel operated a restaurant business. On 5 January 2005 he sold his freehold premises complete with goodwill and fixtures and fittings to Mr. Kocak. On 17 January Mr. Karaaslan, whom Mr. Tezgel had met with Mr. Kocak in the run up to the sale, submitted forms to obtain VAT registration for himself, indicating that he had started trading from the premises on 17 January. There was no written contract between Mr. Kocak and Mr. Karaaslan, but Mr. Karaaslan paid Mr. Kocak approximately 15-20 % of the turnover of the restaurant, which on occasion they referred to as a management charge.

HMRC rejected Mr. Tezgel's claim that the sale of his business qualified as the transfer of a going concern because it said he had failed to show that the transferred assets were being used in the same kind of business that he had carried on. HMRC contended that as the VAT returns were

**HMRC rejected Mr. Tezgel's claim that the sale of his business qualified as the transfer of a going concern because it said he had failed to show that the transferred assets were being used in the same kind of business that he had carried on.**

<sup>1</sup> Tezgel (t/a Master Chef) v Revenue & Customs Commissioners [2007] VADT20462

in the name of Mr. Karaaslan, clearly he was running the business. The buyer had acquired the premises as an investment, granting an informal licence to a third party to carry on the business. The VAT Tribunal upheld this decision.

Mr. Tezgel also argued that as the business remained open from 6 January to 17 January the buyer must have been conducting the business personally between these dates. No evidence was adduced to support this proposition, which was rejected. In our view, if the buyer had been able to give evidence in support, the taxpayer may have succeeded in his appeal as carrying on the same kind of business for 11 days should be sufficient to amount to a transfer of a going concern.

## Dartford<sup>2</sup>

..... it would still have considered there to be a transfer of a going concern (provided GP had intended to hold its interest and receive rent) because where there was an agreement for lease in place the actual receipt of rent was “irrelevant”.

Dartford Borough Council appealed against HMRC’s decision that the freehold sale of a site in respect of which Dartford had entered into a development agreement and an agreement for lease was not a transfer of a going concern.

Dartford entered into a development agreement with Prologis, and subsequently Dartford and Prologis together entered into an agreement for lease with Sainsbury for the construction of a distribution warehouse and maintenance and recycling facilities.

Some months later Dartford agreed to sell its freehold to GP Nominees Limited. The sale agreement stated that the parties considered the sale to be a transfer of a going concern and included a warranty by GP of its intention to continue to let the site. At the date of sale a limited amount of work had commenced on site and various statutory agreements had been entered into which were essential to the development.

HMRC challenged the parties’ treatment of the sale as a transfer of a going concern on the basis that the buyer was not going to be using the land for the same kind of business as Dartford because Dartford had always intended to sell the site rather than retain it and receive rent whereas GP intended to hold it and receive rent.

The Tribunal overruled HMRC. It held that there was nothing in the development agreement which bound Dartford to sell its interest or made a sale likely. Exchange of the agreement for lease with Sainsbury simply made a sale a viable option. Therefore, the Tribunal determined that the site was to be used by GP in carrying on the same type of business as Dartford and so the transfer was a transfer of a going concern.

The Tribunal also held that even if it had been Dartford’s intention to sell its interest prior to completion of the buildings it would still have considered there to be a transfer of a going concern (provided GP had intended to hold its interest and receive rent) because where there was an agreement for lease in place the actual receipt of rent was “irrelevant”. Neither was the amount of development that had taken place at the time of the transfer material. It was sufficient that the development agreement had been entered into.

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2 Dartford Borough Council v Revenue & Customs Commissioners [2007] VADT20423,

Comment

Although HMRC lost resoundingly in *Dartford*, neither of these cases helps to clarify whether the U.K. legislation is, as HMRC contends, compatible with the *Zita Modes* decision. Unless and until there is a successful challenge to HMRC’s position, parties that wish to be confident of securing treatment as a transfer of a going concern must ensure that they do satisfy the rigorously applied “same kind of business test”.

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Irish businessman Derek Quinlan. It acquired Citigroup tower from Royal Bank of Scotland in one of the biggest single property transactions of 2007. Mayer Brown finance partners Nigel White and Ed Parker also advised, together with real estate assistant Emma Lawrence.

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