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Transfer of a Going Concern[1]

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Overview

1. VAT is normally charged on the taxable supply of goods or services in the course or furtherance of a business by a taxable person at the appropriate rate. Where there is a sale of a business effected by the sale of the assets of the business bundled together, VAT would be charged on the supply of each asset according to the rules applicable to each asset (standard rate, reduced rate, zero rate, or exempt), unless the sale is treated as the transfer of a business as a going concern ("TOGC"). In such a case, it must be treated as neither a supply of goods nor a supply of services, and no output tax is then due.

2. The purposes of this rule, as stated in VAT Notice 700/9, are twofold:
    a. to relieve the buyer of a business from the burden of funding any VAT on the purchase. Thereby helping businesses by improving their cash flow and avoiding the need to separately value assets which may be liable at different rates or are exempt and which have been sold as a whole; and

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b. 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.

3. For the purchaser, there is also an SDLT advantage in a property transaction because the consideration is VAT-free so reducing the SDLT charge. If it is not a TOGC and VAT is due, SDLT will be due on the VAT element.

4. An important feature of the TOGC rules is that they are mandatory. Therefore, if VAT is charged in error, the purchaser has no legal right to recover it from HMRC, and should look to the vendor to reimburse it.

5. In this regard, it is important to give consideration to drafting the agreements for transferring the business and including clauses which address VAT where there is doubt over whether a transfer will amount to a TOGC.

6. From the vendor's perspective, advisers will want to ensure protection if VAT is in fact due. From the purchaser's perspective, the stance is generally that the vendor will take a view as to whether or not there is a TOGC. If the vendor insists on receiving an amount in respect of VAT from the purchaser as it considers there has not been a TOGC, the purchaser should require the amount to be placed in escrow until the position has been ascertained.

EU Jurisprudence

7. There is no universal definition of what constitutes a TOGC. It is an EU concept and therefore it is important to bear in mind the Principal VAT Directive and EU jurisprudence in interpreting it.

8. This jurisprudence is nothing new, but it is only in the last few years that the UK has analysed it in detail.

Directive

9. Article 19 provides as follows:

> "**Article 19**
>
> In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and that the person to whom the goods are transferred is to be treated as the successor to the transferor.
>
> Member States may, in cases where the recipient is not wholly liable to tax, take the measures necessary to prevent distortion of competition. They may also adopt any measures needed to prevent tax evasion or avoidance through the use of this Article.

10. Article 29 provides as follows:

> "**Article 29**
>
> Article 19 shall apply in like manner to the supply of services."

EU Case law

Zita Modes Sarl v Administration de l'Enregistrement et des Domaines (C-497/01) [2005] S.T.C. 1059

Background

11. There was a sale by Zita Modes of a ready-to-wear clothing business to another company, Milady, which operated a perfumery.

Question raised

12. The questions raised by the national court in Luxembourg included whether the no-supply rule applied to any transfer of a totality of assets or only to those where the transferee pursues the same type of economic activity as the transferor.

The CJEU Held:

13. The purpose of the TOCG provisions is to facilitate transfer of undertakings and to prevent overburdening the resources of the transferee with a charge to VAT that will ultimately be recovered:

> "39. The context of Article 5(8) and the purpose of the Sixth Directive, as set out in paragraphs 36 to 38 of this judgment, make it clear that that provision is intended to enable the Member States to facilitate transfers of undertakings or parts of undertakings by simplifying them and preventing overburdening the resources of the transferee with a disproportionate charge to tax which would in any event ultimately be recovered by deduction of the input VAT paid."

14. The no-supply rule requires an autonomous and uniform interpretation throughout the Community. The provision of Community law makes no express reference to the law of the Member States for the purpose of determining its meaning and scope:

> "34. However, according to settled case-law, the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question (see, in particular, Case 327/82 Ekro [1984] ECR 107, paragraph 11, Case C-287/98 Linster [2000] ECR I-6917, paragraph 43, Case C-357/98 Yiadom [2000] ECR I-9265, paragraph 26, and Case C-373/00 Adolf Truley [2003] ECR I-1931, paragraph 35)."

15. There is a distinction between the transfer of all or part of a business which constitutes an undertaking capable of independent operation and the mere transfer of assets.

> "40. Having regard to this purpose, the concept of "a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof" must be interpreted as meaning that it covers the transfer of a business or an independent part of an undertaking including tangible elements and, as the case may be, intangible elements which, together, constitute an undertaking or a part of an undertaking capable of carrying on an independent economic activity, but that it does not cover the simple transfer of assets, such as the sale of a stock of products."

16. There are limits to what conditions may be required in order for someone to qualify for TOGC treatment:

"30. Under the second sentence of Article 5(8) of the Sixth Directive the Member States may exclude from the application of the no-supply rule transfers of a totality of assets in favour of a transferee who is not a taxable person within the meaning of that directive or who acts as a taxable person only in relation to part of his activities, if this is necessary to prevent distortion of competition. This provision should be regarded as exhaustive in relation to the conditions under which a Member State which makes use of the option laid down in the first sentence of this paragraph may limit the application of the no-supply rule."

17. There is no requirement that the transferee should pursue prior to the transfer the same type of activity as the transferor:

"44. However, it is apparent from the purpose of Article 5(8) of the Sixth Directive and from the interpretation of the concept of "a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof" which flows from it, as set out in paragraph 40 of [the judgment in *Zita Modes*], that the transfers referred to in that provision are those in which the transferee intends to operate the business or the part of the undertaking transferred and not simply to immediately liquidate the activity concerned and sell the stock, if any.

45. On the other hand, nothing in Article 5(8) of the Sixth Directive requires that the transferee pursue prior to the transfer the same type of economic activity as the transferor."

18. As regards the use which is to be made by the transferee of the totality of assets transferred, Article 5(8) does not contain any express requirement as to that use:

"46. The answer to the first and second questions must therefore be that Article 5(8) of the Sixth Directive must be interpreted as meaning that when a Member State has made use of the option in the first sentence of that paragraph to consider that for the purposes of VAT no supply of goods has taken place in the event of a transfer of a totality of assets, that no-supply rule applies without prejudice to use of the possibility of restricting its application in the circumstances laid down in the second sentence of the same paragraph to any transfer of a business or an independent part of an undertaking, including tangible elements and, as the case may be, intangible elements which, together, constitute an undertaking or a part of an undertaking capable of carrying on an independent economic activity. The transferee must however intend to operate the business or the part of the undertaking transferred and not simply to immediately liquidate the activity concerned and sell the stock, if any.

Finanzamt Ludenscheid v Schriever (C-444/10) [2012] STC 633

Background

19. Ms Schriever ran a retail business selling equipment from premises belonging to her. On 30 June 1996, she transferred the stock and fittings of the shop to Sport S with no mention of VAT on the invoice. At the same time, Ms Schriever leased the premises where the business was carried on to Sport S from 1 August 1996 for an indefinite period with an option to terminate by either party any time.

Questions raised

20. The court was asked the following questions:

> "(1) Is there a "transfer" of a totality of assets within the meaning of the Sixth Directive in the case where a trader transfers the stock and fittings of his retail outlet to a purchaser and merely leases the premises which he owns to the purchaser?
>
> (2) Is it relevant in that regard whether the premises were leased on the basis of a long-term contract of lease for use or whether the lease contract is concluded for an indefinite period and may be terminated by either party at short notice?"

The CJEU held:

21. A key question will be whether the economic activity requires the use of particular premises:

> "27 Where an economic activity does not require the use of particular premises or of premises equipped with fixtures necessary for the pursuit of the economic activity, there may be a transfer of a totality of assets for the purposes of Article 5(8) of the Sixth Directive even without the transfer of property in an immovable asset.
>
> 28 However, where the very nature of the economic activity entails the use of an inseparable bundle of movable and immovable property, such a transfer cannot be considered to have occurred if the transferee has not taken possession of the business premises. In particular, if the business premises are equipped with fixtures necessary for the pursuit of the economic activity, these immovable items must form part of the elements transferred in order for the transaction to qualify as the transfer of a totality of assets, or of a part thereof, for the purposes of the Sixth Directive."

22. There is a transfer of a totality of assets or a part thereof provided that the assets transferred are sufficient for the transferee to be able to carry on an independent economic activity on a lasting basis. This will depend on all the factual circumstances:

> "32 It follows from the foregoing considerations that an overall assessment must be made of the factual circumstances of the transaction at issue in order to determine whether it is covered by the concept of the transfer of a totality of assets for the purposes of the Sixth Directive. In that context, particular importance must be attached to the nature of the economic activity which it is sought to continue."

23. In looking at the factual circumstances, the intentions of the transferee can, or in certain cases must, be taken into account in an overall assessment of the circumstances of a transaction, provided they are supported by objective evidence:

> "37 It is also necessary, in order for Article 5(8) of the Sixth Directive to apply, for the transferee to intend to operate the business, or the part of the undertaking, transferred and not simply to liquidate the activity concerned immediately and sell the stock, if any (see, to that effect, *Zita Modes*, paragraph 44).
>
> 38 In that regard, it follows from the Court's case-law that the intentions of the purchaser can - or, in certain cases, must - be taken into account in the course of an overall assessment of the circumstances of a transaction, provided that they are supported by objective evidence (see, to that effect, Case 268/83 *Rompelman* [1985] ECR 655, paragraph 24; Case C-230/94 *Enkler* [1996] ECR I-4517, paragraph 24; Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 47; and Case C-84/09 *X* [2010] ECR I-0000, paragraphs 47 and 51)."

24. In the particular circumstances of *Schriever* the fact that the business premises were only leased, and not sold, to the purchaser did not constitute an obstacle to the continuation of the seller's activity by that purchaser. Matters such as the duration of the lease and the procedure for terminating it must be taken into account. However, the possibility of terminating a lease contract of indefinite duration by giving short term notice does not of itself decisively support the inference that the transferee intended to immediately liquidate the business.

25. Two further points:
    a. The court emphasised the need for arbitrary distinctions to be avoided where they were not required by the Sixth Directive (now the Principal VAT Directive) [30]; and
    b. The principle of fiscal neutrality would not be respected if the terms and duration of the lease contract could determine the position [44].

UK Jurisprudence

Legislation

26. The UK implemented what are now Articles 19 and 29 of the Principal VAT Directive in the Value Added Tax (Special Provisions) Order 1995 ("SPO") (SI 1995/1268), Article 5 (found in the Appendix).

27. The basic condition for a TOGC is as follows:

    There shall be treated as neither a supply of goods nor a supply of services the supply by a person of assets of his business to a person to whom he transfers his business as a going concern where:

    a. 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
    b. 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.

28. In certain circumstances there are additional requirements:

    a. Where there is a transfer of <u>part</u> of a business as a going concern, that part must be capable of separate operation.
    b. Where there is a transfer of land transferor has opted to tax or in the case of mandatorily standard rated freehold transfers, on or before the "relevant date" (i.e. the earliest tax point if the TOGC no-supply rules did not apply):
        i. the transferee must opt to tax the land;
        ii. the option must take effect;
        iii. the transferee must notify HMRC of the option; and
        iv. the transferee must notify the transferor that the option will not be "disapplied".

VAT NOTICE 700/9

29. HMRC issued VAT Notice 700/9 provides guidance on the TOGC rules. This guidance is particularly important in the context of a TOGC because it seems

that many practitioners have proceeded on the basis of what HMRC says in the Notice rather than fully analysing the actual Principal VAT Directive and judgments of the CJEU.

30. The most recent version was published in December 2012. This guidance is in line with the prescriptive approach generally preferred by the UK as it provides precision and certainty as opposed to the more "wooly" approach adopted by the CJEU.

31. Such an approach to guidance is generally laudable insofar as it provides an element of commercial certainty and in theory a relatively straightforward way of applying the law. However, in the context of a TOGC which is a European concept, such a rigid approach may not be appropriate. Further, where the guidance seeks to be prescriptive, because it cannot be exhaustive, it leaves open the opportunity for holes as it would be impossible to predict all circumstances in which there may be a TOGC.

32. VAT Notice 700/9 sets out the conditions for a TOGC at paragraph 1.2:
    a. the assets must be sold as part of the transfer of a "business" as a "going concern";
    b. the assets are to be used by the purchaser with the intention of carrying on the same kind of "business" as the seller (but not necessarily identical);
    c. where the seller is a taxable person, the purchaser must be a taxable person already or become one as the result of the transfer;
    d. in respect of land which would be standard rated if it were supplied, the purchaser must notify HMRC that he has opted to tax the land by the relevant date, and must notify the seller that their option has not been disapplied by the same date;
    e. where only part of the "business" is sold it must be capable of operating separately; and
    f. there must not be a series of immediately consecutive transfers of "business".

33. At paragraph 1.4, HMRC provide what is included in the meaning of business assets:

> "Business assets can include stock in trade, machinery, goodwill, premises and fixtures and fittings. Where the assets are transferred from one person to another the transfer may, subject to the meeting of the conditions, be covered by the TOGC provisions. For TOGC provisions to apply it is important that the assets, whatever they are and however many are to be transferred, put the purchaser in possession of a business, rather than simply assets. The assets of a business may be transferred in a number of situations."

Approach of UK Courts to TOGC

34. More recently, the courts have been approaching the question of whether or not there is a TOGC through focusing on the Principal VAT Directive and the general EU jurisprudence. Whilst not the only example, (see also *Royal College of Paediatricians and Child Health v Revenue and Customs Commissioners* [2015] UKUT 38 (TCC)) *Intelligent Managed Services Ltd v HMRC* [2015] UKUT 0341 (TCC) is of particular interest.

Intelligent Managed Services Ltd v HMRC [2015] UKUT 0341 (TCC) ("*IMS*")

Background

35. Intelligent Managed Services Limited ("IMS") challenged HMRC's decision to charge tax on the sale of the whole of its business on the basis that it did not qualify as a VAT-free (or "no-supply") TOGC.

36. Virgin Money Management Services Ltd ("VMS") was a member of a VAT group (the "Group") and would use the assets transferred to it by IMS solely to provide services to Virgin Money Bank Ltd which was another member of the Group. It was not intended that VMS would make any supplies to non-Group members.

37. HMRC's position was that the transfer of the business by IMS to VMS could not qualify as a TOGC. This position was based on two primary arguments.
    a. The transfer of assets to VMS should properly be viewed as a transfer to the Group (being the single taxable person), and therefore the Group

had to carry on the “same kind of business” as IMS.

b. VMS’s supplies within the Group had to be disregarded when looking at the business of the Group, and only the external supplies should be considered. The only external supplies of the Group were those of retail banking, which was not the “same kind of business” carried on by IMS.

38. The taxpayer argued:

a. The test applied by HMRC was incorrect as the requirement in Article 5(1)(a)(i) of the SPO, that the transferee used the assets for the "same kind of business" as the transferor, was not compatible with EU law, which only required an intention by the transferee to "operate the business" transferred;

b. By focusing on the intra-group transactions, the effect of the total transfer of business assets provisions was distorted; and

c. the "same kind of business" test breached the European Convention on Human Rights 1950 Protocol 1 art.1 and the Charter of Fundamental Rights of the EU Article 17(1).

FTT Decision

39. In the First-tier Tribunal, the appeal of the taxpayer was dismissed:

a. Although the phrase the "same kind of business" did not appear within Directive 2006/112 Article 19, it was clear from *Zita Modes* that for there to be a transfer of a going concern or a total transfer of business assets the transferee had to intend to operate the business transferred, namely the business of the transferor. It followed that that would inevitably be the same kind of business as that previously carried on. As such, the "same kind of business" requirement in Article 5(1)(a)(i) of the SPO was clearly compatible with EU law. It was accepted that VMS intended to operate the business it acquired from IMS and therefore, but for the effect of the VAT grouping provisions in s. 43 of VATA, there would have been a transfer of a going concern or a total transfer of business assets in the case.

b. However, it was clear from s. 43 that the purpose of s. 43 was to enable a group to be treated as if it were a single taxable entity, with only the

representative member being treated as carrying on the businesses of the other members, which continued to have a separate existence, as well as its own in addition to dealing on behalf of those members with non-members. VMS was not the representative member of the VAT group. Therefore any supply of goods or services between them "shall be disregarded" in accordance with s. 43. The effect of that was that VMS did not make any supplies for VAT purposes and for such purposes its business had effectively ceased. It therefore did not operate the same kind of business as that undertaken by IMS before the transfer. Therefore, there could not be a TOGC.

c. The effect of the VAT grouping provisions on the transaction was simply the inevitable consequence of the fact that the UK had opted to apply both Article 19 of the Principal VAT Directive and the VAT grouping provisions (that supplies between members of a VAT group were to be disregarded). It was irrelevant that such supplies would have constituted a total transfer of business assets if the UK had not exercised the option provided for in that article.

d. As HMRC's decision was in accordance with "conditions provided for by law" as prescribed in the SPO, which were deemed necessary by the UK to secure the payment of taxes, it could not have been in breach of either the Convention or the Charter.

Upper Tribunal

40. The taxpayer appealed to the Upper Tribunal.

41. The Upper Tribunal approached the question from the perspective of the CJEU jurisprudence as above. It distilled the case law into the following six principles at paragraph [36]:

(1) In order to be a transfer of a totality of assets, or part thereof, the assets transferred must together constitute an undertaking capable of carrying on an independent economic activity.
(2) This is to be distinguished from a mere transfer of assets.
(3) The nature of the transaction must be ascertained from an overall assessment of the factual circumstances, which includes the intentions of the transferee, as determined by objective evidence, and the nature of the economic activity sought to be continued.

(4) The transferee must intend to operate the business, or the part of the undertaking, transferred and not simply to liquidate the activity concerned immediately and sell the stock, if any.
(5) Although succession to the business is not a condition, but a consequence of the application of the no-supply rule, the nature of the transaction must be such as to allow the transferee to continue the independent economic activity previously carried on by the seller.
(6) Arbitrary distinctions are to be avoided, where those distinctions do not apply by virtue of the wording or purpose of Articles 19 and 29, and the principle of fiscal neutrality must be respected.

42. The Upper Tribunal determined that it is key (1) to have regard to all the circumstances in determining whether the transaction is a mere transfer of assets or of an undertaking which can carry on an independent economic activity; and (2) to consider the transfer both from the perspective of the transferor and the transferee.

43. The Upper Tribunal also considered that from *Zita Modes,* it is clear that the transferee's intentions cannot be to liquidate the activity. Such an intention would mean that what had been transferred was merely a transfer of assets. The Upper Tribunal, however, took it further and stated that they do not consider the ECJ intended its reference to liquidation to be exhaustive of the factual circumstances that could militate against a conclusion that there had been a TOGC. There may be other circumstance in which a court or tribunal might decide that the transferee's intention led to the conclusion that what had been transferred was not an undertaking but merely assets. There is more to be considered than just an absence of an intention to liquidate or sell.

Application to UK Domestic Provisions

44. The Upper Tribunal went on to assess what the applicable EU law principles mean for the UK's domestic provisions.

45. First, the Upper Tribunal stated that it did not consider that the inclusion of a test which looks to the intentions of the transferee in respect of assets transferred is incompatible with EU law:

> "40 It follows from our analysis of the EU case law that we do not consider that the inclusion, in the UK's domestic provisions which take advantage of Articles 19 and 29 of the Principal VAT Directive, of a test which looks to

> the intentions of the transferee in respect of the assets transferred is incompatible with EU law. It is clear that the question whether there has been a transfer of a totality of assets or part thereof, according to the interpretation of that term consistent with the language and purpose of Article 19, must be addressed by having regard to all the circumstances, and with reference to the perspective both of the transferor and of the transferee."

46. Whilst stating that they do not want to place too much emphasis on the linguistic construction of an CJEU judgment they proceed to do just that in confirming that the reference to "the" business meant the same kind of business, not just the operation of the business:

> "42 It is true that the FTT, at [31], considered the reference to "the" business to be the decisive factor in determining that the "same kind of business" test was compatible with EU law, but in our view that is far from the only factor pointing in that direction. The whole tenor of the judgment in *Zita Modes*, coupled with the approach in *Schriever* and in *X BV*, is that what is required is a transfer of a business, and not merely a transfer of assets, and that the intention of the transferee to carry on the business is one of the factors that goes to establish whether that condition is met. We agree therefore with the VAT Tribunal (Chairman: Dr Avery Jones) in *Winterthur Swiss Insurance Company* (No 19411, 5 January 2006), which regarded the "same kind of business" condition as inherent in the ECJ's judgment in *Zita Modes* (*Winterthur*, at [16])."

HELD

47. The Upper Tribunal stated that, as a matter of fact, VMS was carrying on the same business as that formerly carried on by IMS. The question was whether the fiction created by the VAT grouping rule (VAT grouping has the effect of treating the group as a single person carrying on all the businesses carried on by the group members, but it does not change the nature of those businesses – they remain separate businesses as a matter of fact) meant that the Group is not to be treated as using the assets transferred in carrying out the same kind of business.
48. Counsel for HMRC invited the Upper Tribunal to focus on the external supplies provided by the group, namely retail banking. This was not the same kind of business that had been operated by IMS. Therefore when IMS transferred its business, it was in fact doing no more than transferring assets.

49. In its decision on 7 July 2015, the Upper Tribunal rejected that submission of HMRC. It was wrong, in principle, to identify the nature of a VAT group's

activities solely by reference to the external supplies it made, and then to compare that activity with the transferred business to determine whether it was the same or different. It was necessary to discern the economic substance by considering all of the circumstances.

50. The Upper Tribunal pointed out that the activities of VMS contributed directly to the economic activities of the Group as a whole. Even though the banking support services of VMS were provided internally within the Group, they still formed an integral part of the external retail banking services provided by the Group. The Upper Tribunal recognised that the single taxable person fiction meant that VAT effects of intra-group supplies were disregarded, this did not change the nature of those individual businesses carried on with the Group. The Group should be treated as carrying on all the businesses carried on by its members, which remained separate businesses as a matter of fact.

51. The Upper Tribunal therefore held that there was nothing in the group rules to prevent the transfer of assets by IMS from being a TOGC:
    a. The transfer was of the whole undertaking of IMS in relation to the banking engine services;
    b. The Group had the intention to carry on that business and not to liquidate it; and
    c. The effect of VMS being within the Group was that it is the Group, as a single taxable person, that is treated as the transferee. It is the Group that is treated as carrying on each of the businesses of the group members. Nothing in the VAT grouping rules could alter the fact that the Group continued to use the assets transferred to it by IMS in the "same kind of business" as that formerly carried on by IMS.

COMMENT

52. The result of the decision is ultimately correct, however there is doubt as to whether the reasoning to get there is entirely correct.

53. The Upper Tribunal's insistence on holding onto this requirement of the same kind of business still seems artificial. The taxpayer's argument that what should

really be looked at is whether the transferee intended to continue to operate the business whether the same or not seems inherently more in line with the CJEU jurisprudence. The key point was that the business should not be transferred and then liquidated. The asset transferred should still operate as business assets i.e exploited on an ongoing basis to generate revenue.

54. The court declined to make a reference to the Court of Justice as they viewed the law as clear; however, this may have been a good case for such a reference to resolve the question of whether or not the business must be the same by asking that precise question rather than looking to strict linguistic constructions of an EU judgment. Such an approach to construction is appropriate in UK tax legislation where each word is carefully thought through and has specific meaning. Such an approach is not appropriate for CJEU judgments.

55. As regards groups, the decision appears to mean that, where all other relevant conditions are met, TOGC treatment should apply equally to transfers to VAT groups where the assets are only used for intra-group transactions after the transfer and to other transfers. The impact of this decision is that there may be situations which in the past were not regarded as constituting a TOGC because of the guidance. It will be of interest to clients who are within VAT groups but were not able to recover all of the input VAT suffered or where there has been overpaid SDLT.

What does the future hold?

56. Precisely where we go from here is exciting and potentially uncharted territory.

57. The old approach of HMRC in determining whether there has been a TOGC may be out the window with a more fluid, European approach on the horizon looking instead to apply principles to circumstances.

Immediate changes

58. First, there are clearly areas of VAT Notice 700/9 which will need reconsideration. Most obviously following *IMS* 4.3:

> Where a business is sold and the purchaser is part of a VAT group and uses the new acquisition simply to make supplies to VAT group members, the business has effectively ceased and it cannot be treated as a TOGC. However, if supplies are also being made to businesses outside of the VAT group, a TOGC is possible. For example:

Situation	Status
The purchaser of a property rental business is a member of the same VAT group as the existing tenant	Not a TOGC
A VAT group member sells a property currently being rented to a another group member to a third party	Not a TOGC

59. Indeed, this isn't the first example of HMRC needing to make a shift in their policy in recent times. Following *Robinson Family Ltd v HMRC* [2012] UKFTT 360 (TCC) HMRC had to reconsider certain aspects of their policy (RCB 30/12):
    a. They had to accept that a transaction is not prevented from being treated as a TOGC merely because the transferor of a property rental business retains a small reversionary interest in the property transferred.
    b. They had to accept that the creation of a new asset (a lease or sub-lease) and the retention of the original asset (the freehold or a superior lease) is not automatically incompatible with TOGC treatment.

A New Approach?

60. *IMS* may have opened the doors to a new approach to the question of whether there is a TOGC which is more principles focused.

61. TOGC is a European concept and should be interpreted as such through following fluid principles rather than a rigid "tick box" system.

62. Perhaps it would be possible to adopt the principles from *IMS* and use those as the basis for determining whether or not there is a TOGC rather than a strict set of anecdotes. The principles can be distilled into the following:

    a. **Economic Activity:** In order to be a transfer of a totality of assets, or part thereof, the assets transferred must together constitute an undertaking capable of carrying on an independent economic activity. This is to be distinguished from a mere transfer of assets.

    b. **Nature of Transaction:** The nature of the transaction must be ascertained from an overall assessment of the factual circumstances, which includes the intentions of the transferee, as determined by objective evidence, and the nature of the economic activity sought to be continued.

    c. **Transferee Intention:** The transferee must intend to operate the business, or the part of the undertaking, transferred and not simply to liquidate the activity concerned immediately and sell the stock, if any.

63. This approach is in line with the purposes of the rule. The TOGC rules are not ultimately in place as tax saving mechanisms but rather they assist companies with cash flow by preventing them from having to pay the tax just to claim it back. This is important because it is overall a tax neutral step unless SDLT is considered as well, but this should be a VAT-only comparison. Therefore strict requirements as to its application seem unnecessary.

64. HMRC have said that they are going to release new guidance. It was meant to be out at the end of last year and at the time of writing these notes we are still waiting.

65. In the new guidance, I hope to see a more principles based approach. Whilst examples probably were helpful when the guidance was initially produced; in this day and age, there are far too many permutations to be able to come up with

examples which will fit all scenarios or even enough examples capable of useful transposition.

66. Hopefully the guidance will be reworked in line with the principles above with no further conditions attached. For example, is the current restriction on immediately consecutive transfers of "business" necessary in all circumstances? Instead of having a blanket restriction, would it be better to focus on the facts at hand and determine if there has been a TOGC based on the underlying principles?

67. One would hope to see a relaxation on the same type of business requirement though following *IMS* and given that it is expressly in a statutory order that no one is considering changing, I would be surprised if that happened. Perhaps a CJEU challenge is the only option.

68. In any event going forward, hopefully, the HMRC Guidance follows a principles based approach. If the Guidance lacks credibility and invites challenge, then it becomes useless and creates great uncertainty.

Mary Ashley
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APPENDIX

Value Added Tax Act 1994

Section 49 provides as follows:

49.— Transfers of going concerns.

(1) Where a business, or part of a business, carried on by a taxable person is transferred to another person as a going concern, then—

(a) for the purpose of determining whether the transferee is liable to be registered under this Act he shall be treated as having carried on the business or part of the business before as well as after the transfer and supplies by the transferor shall be treated accordingly.

(2) Without prejudice to subsection (1) above, the Commissioners may by regulations make provision for securing continuity in the application of this Act in cases where a business, or part of a business, carried on by a taxable person is transferred to another person as a going concern and the transferee is registered under this Act in substitution for the transferor.

(2A) Regulations under subsection (2) above may, in particular, provide for the duties under this Act of the transferor to preserve records relating to the business or part of the business for any period after the transfer to become duties of the transferee unless the Commissioners, at the request of the transferor, otherwise direct.

(3) Regulations under subsection (2) above may, in particular, provide—

(a) for liabilities and duties under this Act (excluding sections 59 to 70) of the transferor (other than the duties mentioned in subsection (2A) above) to become, to such extent as may be provided by the regulations, liabilities and duties of the transferee; and

(b) for any right of either of them to repayment or credit in respect of VAT to be satisfied by making a repayment or allowing a credit to the other;

but no such provision as is mentioned in paragraph (a) or (b) of this subsection shall have effect in relation to any transferor and transferee unless an application in that behalf has been made by them under the regulations.

(4) Subsection (5) below applies where–

(a) a business, or part of a business, carried on by a taxable person is transferred to another person as a going concern, and

(b) the transferor continues to be required under this Act to preserve for any period after the transfer any records relating to the business or part of the business.

(5) So far as is necessary for the purpose of complying with the transferee's duties under this Act, the transferee (“E”) may require the transferor–

(a) to give to E, within such time and in such form as E may reasonably require, such information contained in the records as E may

reasonably specify,

(b) to give to E, within such time and in such form as E may reasonably require, such copies of documents forming part of the records as E may reasonably specify, and

(c) to make the records available for E's inspection at such time and place as E may reasonably require (and permit E to take copies of, or make extracts from, them).

(6) Where a business, or part of a business, carried on by a taxable person is transferred to another person as a going concern, the Commissioners may disclose to the transferee any information relating to the business when it was carried on by the transferor for the purpose of enabling the transferee to comply with the transferee's duties under this Act.

Value Added Tax (Special Provisions) Order 1995 (SPO) (SI 1995/1268), Art 5

Article 5 provides as follows:

"(1) 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-

(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

(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)] [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

(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)] [1] of the Manx Act.

(2) A supply of assets shall not be treated as neither a supply of goods nor a supply of services by virtue of paragraph (1) above to the extent that it consists of-

(a) a grant which would, but for an option which the transferor has exercised, fall within item 1 of Group 1 of Schedule 9 to the Act; or

(b) a grant of a fee simple which falls within paragraph (a) of item 1 of Group 1 of Schedule 9 to the Act,

unless the conditions contained in paragraph (2A) below are satisfied.

(2A) The conditions referred to in paragraph (2) above are that the transferee has, no later than the relevant date–

(a) exercised an option in relation to the land which has effect on the relevant date and has given any written notification of the option required by paragraph 20 of Schedule 10 to the Act; and

(b) notified the transferor that paragraph (2B) below does not apply to him.

(2B) This paragraph applies to a transferee where–

(a) the supply of the asset that is to be transferred to him would become, in relation to him, a capital item as described in regulation 113 of the Value Added Tax Regulations 1995 if the supply of that asset to him–

(i) were to be treated as neither a supply of goods nor a supply of services; or

(ii) were not so treated; and

(b) his supplies of that asset will, or would fall, to be exempt supplies by virtue of paragraph 12 of Schedule 10.

(3) In paragraph (2) of this article-

"option" means an option to tax any land having effect under Part 1 of Schedule 10 to the Act;

"relevant date" means the date upon which the grant would have been treated as having been made or, if there is more than one such date, the earliest of them;

"transferor" and *"transferee"* include a relevant associate of either respectively as defined in [paragraph 3 of Schedule 10 to the Act.

(4) There shall be treated as neither a supply of goods nor a supply of services the assignment by an owner of goods comprised in a hire-purchase or conditional sale agreement of his rights and interest thereunder, and the goods comprised therein, to a bank or other financial institution.