TC03119

Appeal number: TC/2011/00578

VAT – Whether transfer of a business can be a transfer as a going concern and/or total transfer of business assets if transferee is a member of a VAT group which makes supplies only to another member of the same VAT group – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

INTELLIGENT MANAGED SERVICES LIMITED — **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
SUSAN HEWETT OBE

Sitting in public at 45 Bedford Square, London WC1 on 14 and 15 October 2013 with further written submissions received from the Appellant on 18 October 2013 and from the Respondents on 23 October 2013.

Peter Mason of Rosetta Tax LLP for the Appellant

Sarabjit Singh, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Intelligent Managed Services Limited ("IMSL") appeals against a decision of HM Revenue and Customs ("HMRC"), contained in a letter dated 20 December 2010, that the transaction entered into by IMSL, under which it transferred the "business carried on by the Vendor [IMSL] of owning, maintaining, operating, using, developing and supporting an information technology infrastructure and know-how for supply to and use by others in the provision of banking support services in the United Kingdom" to Virgin Money Management Services Limited ("VMMSL") a member of the Virgin Money VAT group, was not a transfer of a going concern ("TOGC") or a total transfer of business assets ("TTBA").

2. The issue raised by this appeal, which we are told has never previously been considered, is whether, as a result of the effect of the provisions relating to the treatment of VAT groups, the transfer of a business to a member of a VAT group can be a TOGC and/or a TTBA if the transferee makes supplies only to another member of the same VAT group.

3. IMSL was represented by Mr Peter Mason of Rosetta Tax LLP and Mr Sarabjit Singh appeared for HMRC.

4. On 18 October 2013, after the conclusion of the hearing, unsolicited further written submissions were received on behalf of the appellant.

5. On 23 October 2013, HMRC made an application for permission to make the further written submissions attached to the application in reply to those of the appellant. In the circumstances, it was directed that HMRC be permitted to make these further written submissions and that no further submissions could be made without the permission of the Tribunal.

Facts

6. A statement of facts, prepared on behalf of IMSL and accepted in its entirety by HMRC, provides as follows:

COMPANY DETAILS

(1) IMSL was incorporated in England as Swiss–One Ltd on 21st June 2005 with company number 5486286. Its' registered office was 18 Hanover Square, London W1S 1HX.

(2) On 20th April 2007 Swiss-One Ltd changed its name to Zhubank Ltd.

(3) On 14th September 2007 Zhubank Ltd changed its name to Ivobank Ltd.

(4) On 24th November 2009 Ivobank Ltd changed its name to IMSL.

(5) In November 2009 IMSL moved to The Podium, No.1 Eversholt Street, London NW1 2DN.

(6) Following the acquisition transaction by VMMSL which is the subject of this dispute, the former IMSL team moved to Virgin Money premises, located at 50 Jermyn Street, London, SW1Y 6LX, and at other locations.

(7) At all material times, the Appellant has been registered under the VAT number 885 4431 94.

TRADING ACTIVITIES

First preparatory phase

(8) The initial economic activities of the Appellant at inception in 2005/2006 were that the Company intended to become a deposit-taker and E-wallet provider to customers in the UK and abroad, with a view to launching its offering in 2007. An application was being made for a banking licence from the Financial Services Authority ("FSA"), which was needed to commence this type of trading.

(9) For the period ended 30 June 2006 the Appellant incurred administrative expenses and an operating loss of £5,295,685.

(10) By the end of 2006, the Appellant had recruited key staff and was in the process of putting in place the necessary suppliers that the project required: (see Business Review and Future Developments).

(11) The Appellant commenced User Acceptance Testing with various merchants in late 2006/early 2007.

(12) The Appellant set out its pricing proposals in a Pricing document in April 2007 for merchants and consumers.

(13) The business 5 year plan of November 2007 identified two target markets, "customers" and "merchants". The proposition was to offer the following services within those target markets.

SERVICE	TARGET MARKET	PROPOSITION
Consumer	On-line gambling customers Online shoppers and online social networkers	Secure on-line payments service paying interest
Merchant	Gaming merchants	On-line payments by UK licensed bank
Acquiring	On-line gaming merchants, then 3rd party merchant acquiring	One-stop shop merchant acquirer services
Business deposits	Small/medium enterprises with cash management	Deposit account with competitive interest rates

	needs	
Business payments	International B2B payment requirements	On-line payments service and access to SWIFT
White label	Gaming and non-gaming merchants looking to offer a banking service to their customers	Complete white labeled service, or white label of “Know Your Client”/ Fraud Management.
P2P	Payments service for overseas workers, expatriates, engineering, IT and medical, and online social /auction networks	Secure online payments service

(14) For the financial year to 30th June 2007 the Appellant recorded nil revenue, administrative expenses of £12,310,518 and a net trading loss of £12,317,910.

First operational and further preparatory stage

(15) The Appellant was granted a deposit taking licence on 18 January 2008 and then commenced trading in May 2008. By 30 June 2008, the Appellant’s initial operations included the provision of payment services to the online community including the facilitation of e-commerce payments and cross-border payments for migrant workers. At that point it had 585 customers with balances totaling £8,305. It was intending to grow its customer base during the second half of 2008 through the recruitment of e-commerce merchants and co-marketing.

(16) The Appellant’s accounts for the year ended 30/06/08 recorded fee revenue of £209 administrative expenses of £17,278,429, and an overall loss for the year of £17,550,427.

(17) In a document dated 2007, Mobank Limited, a potential customer offering banking facilities through mobile phone applications, set out its user requirements for using the Appellant as the production platform for its banking and payments business. This included how accounts would be provided, branding by Mobank, details of the enhanced money transmission functionality, how deposits and cash withdrawals would be made, plastic card processing, mobile serving functions, virtual card payments and secure payment, account aggregation features, customer service web and mobile messaging, and data management.

(18) On 1st July 2008 the Appellant provided a detailed presentation to Mobank on the results of its investigation into whether Ivobank could offer that company a white labeled service, consisting of some 71 pages of detailed information. The Appellant set out potential costs for the proposal. Initial

development and testing would cost in the region of £37,000 to £61,000, whilst full analysis, design, build, implement, development, test, resource, infrastructure, licence and software would cost in the range £2.096m to £3.753m.

(19) The Appellant invoiced Mobank £42,000 in respect of the initial Consultancy phase for services it had provided in respect of the above, on Invoice Number 00001 of 4 July 2008.

(20) The Appellant continued to plan for future initiatives in the pipeline, including expansion of geographical reach, card services, worker remittances and white label services, which would be launched in the 2008/2009 financial year.

Regulatory and economic developments affecting the IMSL business

(21) However, by October 2008 the Appellant identified concerns in the economic and regulatory environment. The Appellant set out eight strategic options including close and sell, hibernate, reduce costs/increase focus, stay as is, faster growth-organic, faster growth-inorganic, seek a strategic investor or Asian expansion.

(22) The Appellant continued to review its options in November 2008.

(23) On 12 December 2008 the Appellant engaged with Phoenix Corporate Finance Partners LLP to obtain advice and consultancy with a view to a possible capital raising, merger, acquisition and other similar transactions with a non-banking institution.

(24) Discussions ensued with a view to disposal of the whole of the Company. On 24 April 2009, Nandan Mer of UBA Capital (Europe) Limited. wrote to Michael Sampoerna the ultimate owner of IMSL with details of a non–binding proposal to purchase 100% of the share capital of Ivobank, for the sum of £24 million (assuming £9 million was held as cash on the balance sheet.

(25) On 22 June 2009, Martin Gold of Cambridge Place wrote to Mr. TC Sawyer, Chief Executive of Ivobank Limited, with a non-binding offer to purchase the shares in a range of different ways.

(26) Meanwhile, on 9 April 2009 Mr. Nick Lee of the Financial Services Authority (the "FSA") had written to Mr. Robin Lee-Smith, General Counsel of the Trustee Company which held the shares in Ivobank concerning the Internal Capital Adequacy Assessment Process ("ICAAP") and potential changes to the amount of regulatory capital required.

(27) On 20 July 2009, Mr. Nick Lee of the FSA wrote to the Board of Directors of Ivobank Limited for the attention of David Swanney, Non-Executive Chairman, summarising the findings of the FSA and of the actions expected to be taken in relation to their "ARROW" visits ("Advanced Risk Response Operating Framework"). An immediate injection of capital specified under the Individual Capital Guidance ("ICG") was required by way of a fixed add-on of capital of £20.56m, to be complied with by 31 December 2009.

(28) A document entitled Ivobank "Providing payments solutions" set out the additional regulatory capital requirements. The original model was set out indicating e-wallets either completed or to be completed within 2009, BIN sponsorship/card issuing within 6 months, white labeling within 2009 and card acquisition within 9 months.

(29) Meanwhile, the Company continued to negotiate merchant agreements.

(30) At a board meeting of Friday 4th September 2009, the Trustee explained that following a meeting with Mr. Lawrence Quahe, a lawyer representing the ultimate owner Mr. Michael Sampoerna, that Mr Sampoerna had decided not to supply the required regulatory capital. He would consider alternative offers for the Company and at the same time transform the firm into a technology company and the Board asked the executive directors to consider the development of a business plan to that effect.

(31) On 15th September, Mr. Robin Lee-Smith for the Trustee wrote to Mr. Chris Sowinski at the FSA advising them, as he was required to do under the trust deed, of a non–binding offer in writing to acquire the bank, on behalf of GB Enterprise Finance Limited, who were seeking to form a new deposit taking and business lending bank.

(32) On 15th September 2009, Mr. Robin Lee-Smith for the Trustee, wrote a second letter to Mr. Sowinski at the FSA. Consequent to the ARROW letter of 20th July he informed the FSA that the beneficiary of the trust did not want to provide the additional capital required under the ICG. The Trustee indicated that the business may be developed by supporting the operations by other banks or financial services business, regulatory activities would be wound down and a new business plan prepared.

(33) At a shareholder's meeting of 17 December 2009 an update stated that the requirements to surrender the FSA banking licence had been complied with, staff had reduced from 40 to 18, and the Company had moved to a smaller and cheaper location.

(34) The options and a conclusion were set out. Option 1 was "Go it alone". Option 2 was "Partnering", and was the recommended option under terms which involved Fiserv, the principal banking software provider, being offered 5% of the shares of IMSL.

(35) The document set out details of the "Managed Service", markets and opportunities.

Second preparatory and operational phase: banking processing business

(36) In an email dated 21 December 2009 to the owner's representative Mr. Robin Lee-Smith explained that the current Fiserv licence only permitted processing of the Company's own retail customer accounts and recommended partnering with Fiserv.

(37) By an amendment to an existing agreement with Fiserv dated 31st December 2009 (the "Amendment") IMSL in the second Recital stated that it wished to discontinue operations as a financial institution and instead to provide

processing services to other financial institutions. Under clause 7 of the Amendment, Fiserv agreed to provide its services to IMSL's customers. Under Clause 8 a new Schedule 5b set out the total licence fee, consisting of £1.5m, £250,000 being payable immediately and a second cash payment of £750,000 either on signing of the first customer contract or in stages. A further £500,000 would be treated as paid by Fiserv taking 5% of the share capital of IMSL.

(38) The Business Review of the financial statements for the 18 month period ended 31 December 2009 stated that as a retail bank it had 7,000 customers and retail deposits of £1.3m at its peak, but that it had returned its deposit taking and e-money issuing licences to the FSA on 18 December 2009. On 31 December 2009 the company became an IT managed services company to the banking sector.

(39) The Directors' Report stated that after returning its licences, the principal activities were, through its business relationships, to offer a hosted version of the Integrated Retail Banking solution, providing new entrants and existing financial service institutions with a faster and more cost effective route to market. The offering encompassed end to end Retail Banking services, including online customer and account acquisition and servicing, with real KYC scoring and decisioning. The choice of service ranged from full customer life cycle acquisition to any of the individual customer life cycle stages such as acquisition, or servicing only.

(40) The Directors' Report in respect of "going concern" indicated that the ultimate owner would need to provide sufficient funds to enable the Company to meet its liabilities for the foreseeable future and in any event for a period of not less than 12 months from the date of approval of those financial accounts. Reference was made to divesting the shareholder's interest to a potential purchaser, which was also referred to in Note 3 of the 2009 accounts. The 2009 accounts for the 18 month period showed gross interest revenue of £293,174 and gross fee and commission income of £29,020. Administrative expenses amounted to £19,268,391, and a loss before taxation resulted for the period of £20,275,994. The balance sheet at that point showed share capital of £61,211,307 and retained negative earnings of £55,829,072.

(41) By a status update of 18 January 2001, Mr. Alex Daly, Managing Director of IMSL, set out details of sales and marketing developments, client opportunities and strategic partnerships. Mr. Daly advised that in terms of client acquisition, discussions had been held with a South African bank, a small UK private bank and an American foreign exchange trading company. He advised that in terms of product maintenance and development, configuration and development work had been completed to allow the processing of loans and term deposit accounts in the core banking solution. He projected that further injections of £750,000 would be required in April, July and October.

(42) Various sales presentations were made to Investec on 28th January 2010, Walton and Co, and Pasporte/Metrobank.

(43) IMSL's business at that time offered an "end to end" suite of banking solutions to potential clients, through various types of channels (multi-channel

consumer and SME online banking, mobile banking, cashiering and bill payments), core account processing for retail, treasury and trade finance, business intelligence, and risk management and compliance. These were set out in a proposal to Investec.

(44) In an email dated 19 February 2009, Mr. Daly set out a progress update. The Investec bid had been unsuccessful but three more bids were in place, and meetings/discussions held with Huntswood (banking consultancy) Experian, FICO (formerly Fair Isaac), EDB, SmartStream Technologies, IBM and Orange.

(45) A further presentation was made to Secure Trust Bank on 12th February 2012.

(46) A Shareholder update dated 24th March 2010 indicated that sales efforts had been made to a US bank, Metrobank, Laiki Bank and RBS Private Equity. Sales discussions had been held with Egg, Raphaels & Sons Bank, Weatherbys Bank, Secure Trust Bank, Bank of Ceylon and Virgin Money. Lists of potential business partners and potential equity investors were provided.

(47) By an email update of 15 March 2010 from Mr. Daly to Mr. Chye, the shareholder's representative, and Mr. Lee-Smith of the Trustee of 15 March, the sales progress was outlined. A list of principal partners and sales opportunities was set out, including with Virgin Money. Mr Daly indicated that discussions were under way with them for a managed service but more likely might progress through a direct investment in IMSL. A meeting with Mr. Sawyer confirmed that the shareholder was willing to continue to fund the business in the short term.

(48) By a Note of Meeting at 1 Eversholt Street London NW1 on 19th April 2010, Mr. Daly explained that the current monthly cash "burn" of the operation was £300,000 to £375,000 and raised the issue of directors' responsibilities if this funding were not forthcoming.

(49) By a letter to Mr. Stuart Barnet, Audit Partner of Deloitte dated 22 April 2010, Mr. Daly set out business and financial projections. It was the intention of IMSL to have 2 to 3 new managed service customers for the years 2010 to 2012, and 8, 16 and 4 new decisioning product customers respectively, for the years 2010, 2011 and 2012 (i.e. peaking in the middle of that three year time horizon). The projection was that the Company would become profitable by 2012.

(50) By a further email update of 22 April 2012 from Mr. Daly to Messrs Chye, Sawyer and Lee-Smith, he reported that in respect of sales, two IMSL staff continued to work full time on Metrobank's site and a proposal for additional work was submitted that week. Other leads were in pipeline (Walton & Co Bank and an "Application Taking contract") or not currently progressing (US Bank and RBS Private Equity). In terms of investors, EDB (Norway based) had decided not to proceed. Virgin Money had requested a 3 way mutual Non-Disclosure Agreement with Fiserv which would allow them to perform further due diligence. Other leads were being looked at in addition. A funding request of £500,000 was sought.

(51) By a series of emails from 23 March to 22 April 2010, details of discussions with Essex County Council were explained to Fiserv to price for and set up a municipal Bank of Essex.

SALE OF THE IMSL BUSINESS TO VIRGIN MONEY

Negotiations, IMSL operations during the negotiation period and Sale to Virgin Money

(52) A presentation was made to Virgin Money by the IMSL team on 11th May 2010 which set out details of the IMSL proposition. The IT infrastructure consisted of:

(a) The core banking platform supported by Fiserv.

(b) Adviser and bureaux link supported by FICO, (Fair Isaac Corporation).

(c) KYC /Fraud supported by Quova, 192, GB Group, Complinet and Iovation.

(d) Reconciliation supported by SmartStream.

(e) Payments, supported by Cybersource, AQUA, Synergy, Orbiscom and Metavante.

(f) Other, supported by Coda and Serena.

(53) The services offered by IMSL included processing for bank and savings accounts, term deposits, cash ISA's, credit lines and unsecured loans. The payment solutions included, BACS, CHAPS, international money transfers (SWIFT), SEPA (Single European Payment Area) debits and credits, debit and credit card deposits, and debit card payments.

(54) The overall current offering included savings accounts, multi-language support, SEPA Payments, an on-line Virgin Money customer sign up and decisioning, a Virgin Money branded customer branded web site, off the shelf procedures (call centre and back offices), a data warehouse, reconciliation, payments to and from Cards, BACS and SWIFT, and a virtual payment card.

(55) By Minutes of a Board meeting held on 16th June 2010, the proposed acquisition of IMSL by Virgin Money was recorded. Discussions had been held in 2009 but had broken down. Another approach to buy the shares in May 2010 had been made and a position of agreement reached on 27 May 2010. A share purchase agreement had been sent to Virgin Money's lawyers.

(56) In an email dated 24 June 2010, SJ Berwin (lawyers for IMSL) circulated a draft proposed share sale and asset purchase agreement in respect of the shares of IMSL. A further draft was proposed.

(57) An Exclusivity agreement was signed on 2 August 2010 between the Trustee, IMSL and VMMSL which provided exclusivity for VMMSL from 1 July 2012 to 21 August 2012 in return for funding support in respect of operating costs.

(58) By a disclosure letter of 16 August 2010, details of the IMSL business were set out. Paragraph 4 of that letter stated that at the time of the sale the existing contract customer with Pasporte Limited had been terminated, in order to focus on the disposal.

(59) By a deed of transfer for the business and assets of IMSL dated 16 August 2010 (the "Transfer Deed") the Recitals stated that IMSL agreed to sell and transfer and VMMSL agreed to purchase and take a transfer of the IMSL "Business" as a going concern and the Assets, under the terms of that agreement. In addition, novation agreements became effective in respect of novated contracts.

(60) The Business was defined at paragraph 1.1 of the Transfer Deed as the "business carried on by the Vendor of owning, maintaining, operating, using, developing and supporting an information technology infrastructure and know-how for supply to and use by others in the provision of banking support services in the United Kingdom".

(61) Paragraph 2.1 set out operative provisions for the sale and purchase of the Business as a going concern together with the Business Assets, including:

(a) The Goodwill

(b) The Equipment

(c) The benefit of Transferring Contracts

(d) The Business Intellectual Property Rights

(e) The Information

(f) The Know-how

(g) The Records

(h) The benefit of the Claims.

(62) Paragraph 2.4 of the Transfer Deed stated that business intellectual property rights transferred to the Purchaser.

(63) Paragraph 3 of the Transfer Deed excluded certain assets from the sale, consisting of retained records, certain proprietary names, excluded contracts, a laptop computer, cash in hand, cheques bills and deposits etc. and any other assets or contracts entered into, other than the Assets.

(64) Paragraph 4.1.1 of the Transfer Deed stated that the consideration for the sale of the Business and Assets shall be payment of the sum of £6,450,000.

(65) Paragraph 7 of the Transfer Deed dealt with transferring contracts, which were set out in Schedule 4 of the Transfer Deed.

(66) Paragraph 7.1 of the Transfer Deed dealt with transferring contracts not requiring third party consent. Paragraph 7.2 dealt with those requiring consent. Paragraph 7.3 dealt with the benefit of contracts during the period before they were assigned or novated. Paragraph 7.4 dealt with transferring contracts not capable of being assigned or novated.

(67) Paragraph 17.1 of the Transfer Deed stated that “the Vendor and the Purchaser acknowledge that the transfer contemplated by this Agreement is one to which the Employment Regulations apply. Accordingly with effect from Completion the contracts of employment of the Transferring Employees shall have effect as if originally made between the Transferring Employees and the Purchaser”.

(68) Paragraph 22.2 of the Transfer Deed stated in respect of VAT Warranties that the Purchaser warranted that on Completion, it intended as part of its business to use the Assets (defined as the assets to be sold and purchased as described in Clause 2.1) to provide banking support services to Virgin Bank Limited (and potentially in the future to other companies in the Purchaser’s Group) and not to immediately sell the Assets. The Purchaser also warranted that it was registered for VAT purposes as a member of a VAT Group, which included Virgin Bank Limited.

(69) Paragraph 4.5 of Schedule 2 of the Transfer Deed concerning Warranties stated, in respect of “Operating Costs” that “since 30 June 2010 the Vendor had been operating the Business in the usual course of trading, and has not incurred any expenditure or liabilities in relation to any unusual, exceptional, extraordinary or non-recurring items”.

(70) Schedule 3 of the Transfer Deed set out a list of 15 employees who transferred to the Purchaser.

(71) Schedule 4 of the Transfer Deed set out the 21 contracts which were transferred, including:

(a) Hardware Maintenance Agreement dated 31 December 2009 between Blue Chip Limited and IMSL.

(b) Remote Technical Support Services Agreement dated 23 March 2010 between IBM UK Limited and IMSL.

(c) Hosting and Infrastructure Management Agreement between Ivobank Limited and Pasporte Limited dated 1 January 2007.

(d) Licence and Service Agreement between Fiserv (Europe) Limited and Ivobank Limited dated 3 September 2007 with later addendums dated 3 September 2007 and 29 May 2007 to 6 August 2008.

(e) Fiserv License Amendment dated 31 December 2009 between Fiserv (Europe) Limited and IMSL.

(f) Contract between Albany Software Limited and Swiss-One Limited dated 5 April 2007.

(g) Software Licence and Maintenance Agreement between Aqua Global Solutions Limited and Swiss-One dated 10 May 2007, together with a pre-bought Consultancy Order between Aqua Global and Ivobank Limited dated 15 May 2008.

(h) Software Licence and Maintenance Agreement dated 8 February 2007 between CODA GB Limited and Swiss-One Limited.

(i) Agreement dated 18 February 2007 between I-CD Publishing (UK) Limited and Swiss–One Limited, together with a Service Schedule signed by IMSL on 19 March 2010.

(j) Cyber-Source Commerce Agreement Solutions Agreement dated 12 March 2007 between CyberSource Limited and Swiss-One Limited.

(k) Software Licence and Services Agreement dated 27 February 2007 between eGain and Swiss-One Limited together with eGain Statement of Work dated 9 February 2008.

(l) Master Licence and Service Agreement of 30 September 2006 between Fair Isaac Corporation and Swiss-One Limited, together with Statements of work dated 4 September 2004 and 30 September 2006.

(m) Swift Alliance Hosting Services Level Agreement dated 12 March 2007 between Synergy Service Bureau and Swiss-One Limited.

(n) Service Agreement between InterCall Conference Services Limited and Ivobank Limited in relation to audio, video and web conferencing services.

(o) Master Licence and Support Agreement dated 15 March 2007 between Serena Software Europe Limited and Swiss-One Limited.

(p) Licence Agreement dated 18 May 2010 between Forsyth Business Centre plc and IMSL relating to use of accommodation at 1 Eversholt Street, London NW1.

(q) Master System and Service Agreement dated 27 November 2006 between Smartstream Technologies and Swiss-One Limited.

(r) Engineering Computer Insurance Policies from Aviva Insurance running total period 22 February 2010 to 16 May 2011.

(s) Processing Services Agreement dated 31 March 2007 between Nomad Software Limited and Swiss-One Limited, together with inter-related work order for services dated 16 February 2009 between Ivobank Limited and Metavante Technologies Limited.

(t) Gran Oracle Licence and Services Agreement dated 30 June 2009.

(u) The Microsoft Software Licences.

(72) Schedule 5 of the Transfer Deed set out contracts excluded from the Transfer. Some 59 agreements were not transferred. Most of these were IT supplier contracts.

(73) Schedule 6 of the Transfer Deed set out the Proprietary Intellectual Property Rights transferred. These included

(a) The customer secure internet banking site.

(b) The Merchant API secure internet banking software.

(c) The Merchant web site secure software.

(d) CSV payment processing software.

(e) Automated testing tool and associated test scripts.

(f) Decision rules for account opening and servicing.

(g) Automated control software to operate ICBS, Aqua Global and Websphere.

(h) The 192 power dialer caller solution.

(74) Schedule 7 of the Transfer Deed set out Equipment held by Pasporte, mainly IBM hardware or equipment.

(75) Supplier contracts were novated on 16th August 2010 in favour of VMMSL, including with Fiserv Europe Limited, SmartStream Technologies Limited, Fair Isaac Services Limited, Aqua Global Solutions Limited and Pasporte Limited.

(76) In the Directors' Report of IMSL for the period ended 31 December 2010, they stated that the business and assets of the Company were sold on 16 August 2010. Gross interest receivable of £11,513 and fee income of £20,000 was recorded for the year. Fees and commission payable were £229,697 and administrative expenses amounted to £2,962,898.

(77) In an email dated 5 August 2010, Mr. Mark Eade of Smith and Williamson, Tax Accountants for IMSL, set out potential tax issues surrounding the planned disposal of the IMSL business. He explained that capital allowances are available for qualifying expenditure on "qualifying activities", defined as "a trade". He then proceeded to discuss whether and when there was a disposal event, which can include cessation of ownership and use of the asset for purposes other than those of the qualifying activity. He stated that the main question is, what is the qualifying activity that the company is carrying on when the assets that it purchased (i.e. plant and machinery for capital allowances purposes) are being used? He stated that:

> "It … appears that the trade of IMS was that of being a bank and undertaking white labeling/platform development services (combined - not separate and distinct trades) ….The treatment adopted in previous tax computations submitted to HMRC was to treat IMS as having only one trade.
>
> On that basis that this trade continues into 2010 (up to the point the trade and assets are sold) there should be no permanent discontinuance of the qualifying activity in 2009 (albeit IMSL is no longer pursuing a portion (of) its business, but is concentrating on another area). Accordingly, no disposal and balancing events should arise in 2009 ….
>
> There will be a permanent discontinuance of the qualifying activity at the time the trade and assets are sold out of IMS in 2010…."

(78) IMSL's corporation tax computation submitted to HMRC for the year ended 31 December 2011 indicated that there was a single trade producing a loss for the period and the business was disposed of in the year.

(79) In a letter dated 26 February 2013 from Smith and Williamson LLP to Mr. Robin Lee-Smith, Director of IMSL they stated as tax accountants for IMSL

that the corporation tax returns for the year ended 2010 were submitted to HMRC on 3 November 2011, that there had been no enquiry into the tax return for that period and that the normal window for HMRC to issue a notice of enquiry had expired.

Further preparatory phase: Ownership by the Virgin Money Group

(80) In the Directors' Report and Financial Statements of VMMSL for the year ended 31 December 2010 the Directors stated in the Business Review that that company had embarked on a strategic programme of development to build systems and processes to support the wider banking ambitions of the Virgin Money Group.

(81) In addition, they stated as follows:

> "To support this initiative, the Company acquired the business and assets of Intelligent Managed Services Limited ('IMS') in August 2010 for a purchase consideration of £7.2 million. Previously, IMS was engaged in providing IT managed services to the banking sector, offering a hosted version of an integrated retail banking software suite. This acquisition brings with it a significant additional capability and long-term value and, following the acquisition, the Company has commenced a programme to further develop and enhance the systems and services acquired. "

(82) At Note 1 to the Accounts entitled "Accounting Policies, Note 1.12 of the 2010 VMMSL accounts dealt with "Accounting estimates and judgments" under the heading "Acquisition of IMSL" the Directors stated:

> "As set out in Note 13, the business and assets of IMS were purchased by the company during the year. Judgement was necessary to determine whether the acquisition was a business combination or an asset purchase, Management has determined that the acquisition was a business combination as the IMS team has joined the group and continue to develop the banking systems for the benefit of the group".

(83) Under the heading "acquisition accounting" the Directors set out the requirement for an estimate of the fair value of the assets and determination of the amortisation period, set at 5 years.

(84) At Note 13 the Directors stated that on 16 August 2010 VMMSL entered into a transaction to acquire the business and assets of IMSL as a going concern for a purchase consideration of £6,676,000 plus costs of acquisition of £554,000. Business intellectual property was valued at £2,146,000, equipment at £9,000, which amounted to a provisional fair value of £2,173,000 for the assets acquired, and goodwill of £5,057,000. They stated that purchased goodwill related to the acquired increase in operational capacity arising from the integrated retail banking software suite, to be amortised over its estimated useful economic life of five years.

(85) Note 15 of the VMMSL 2010 accounts set out tangible fixed asset cost, additions, disposals and acquisition. In addition to the IMSL purchase, VMMSL spent £2,428,000 on additional software spend, for the year ended 31 December 2010.

(86) For the financial year ending 31 December 2011, the VMMSL Annual Report contained the following information. In the Review of Activities and Future Developments section of the Directors' Report they stated that during the year, VMMSL continued to work on a strategic programme of development to build systems and processes to support the wider banking ambitions of the Virgin Money Group.

(87) At Note 1.14 the same statement regarding acquisition accounting was made as in the 2010 accounts, i.e. that a business combination and not an asset acquisition had taken place regarding the acquisition of IMSL.

(88) Note 11 of the 2011 VMMSL accounts indicates that it spent a further £10,267,000 on internal computer software development.

(89) The Annual report of Virgin Money Holdings Limited for the year ended 31 December 2011 stated that the Principal Activities during the year were provision of banking services, marketing and direct distribution of personal credit cards under an agreement with Bank of America, provision of individual savings accounts, unit trusts and pensions, marketing and direct distribution of general insurance and life insurance, and operation of a not for profit online charity fundraising platform.

(90) The Directors' Report also stated in the Review of Business and Future Developments that 2011 saw Virgin Money reach a significant milestone in its journey to becoming a full service retail bank: .on 17 November 2011 the Group announced that it had agreed to acquire Northern Rock plc from HM Treasury for £747 million and it proceeded to acquire that bank on 1 January 2012.

(91) The Directors also stated that:

> "During the year, the Group continued its development of the integrated retail banking platform acquired in August 2011 from Intelligent Managed Services Limited".

(92) Note 1.25 of the Virgin Money Group accounts for 2011 concerning the acquisition of IMSL, states that the business and assets of IMSL were purchased by the Group in 2010 and management had decided to treat the purchase as a business combination, not an asset purchase.

(93) At Note 33 of the Virgin Money Group accounts for 2011, concerning acquisitions and IMSL specifically, it is confirmed that VMMSL "has continued to enhance and develop the systems and services acquired".

(94) The Directors' Annual Report and Accounts for Northern Rock plc for the year ended 31 December 2011, owned by the Virgin Money Group from 1 January 2012, stated that:

> "the combined Virgin Money Group operates using the Virgin money brand and provides, at scale, savings, mortgages, credit cards, insurance and investment products, and has a nationwide network of branches".

(95) An extract from the Virgin Money website (as at 16 November 2012) states that the Virgin are working on developing a Virgin current account.

(96) Further extracts refer to the Virgin Fixed Rate E-Bond, the Virgin Easy Access Saver ISA and the Virgin Easy Access Saver Account.

VAT

(97) On 26 April 2007, a letter was sent by Mr. Ian Doig (management accountant for the Company), to the Respondents, proposing a partial exemption method for the Company. He proposed a partial exemption method based on direct attribution and application of a pro rata to non-attributable input tax based on the proportion of customers to whom taxable supplies would be made, compared to the total number of customers to whom supplies would be made.

(98) In a further letter of 11th May 2007, Mr Doig amended his application to include an annex for any new division or company.

(99) Subsequent to a meeting with Mr Oshola Fatinukin of the Respondents, Mr Doig sent a further letter to HMRC on 20th July 2007, setting out proposals for a partial exemption method sectorised at income generating area level. At paragraph 3 and Annex 1 of his letter he identified five different income generating business areas:

(a) Customer accounts - producing income from withdrawal fees, same day payment fees, penalty fees, and foreign exchange fees, together with money market (time deposit) interest earned.

(b) Merchant acquirer fees, being a percentage charge to merchants for the collection of payment of transactions effected through the Company and fees for withdrawals.

(c) Card acquirer fees made to merchants for card processing services.

(d) White labeling fees for offering banking services for other companies.

(e) Site advertising fees for advertising other businesses on the website.

(100) Each sector (or income generating area) would have costs directly attributed to it and a recovery rate based on turnover. As the Company had not commenced trading at this stage, a set of budgeted recovery rates were applied to initial pre-trading periods, based on budgets which went to build up a weighted average recovery rate overall and tax year adjustments for subsequent tax years.

(101) A calculation was prepared for a 33 month period based on financial projections for all five sectors; customer accounts, merchant acquiring fees, card acquirer fees, white labeling and site advertising, which indicated an overall recovery rate of 44.97%.

(102) In a letter of 8th November 2007 from Mr. Doig to Mr. Fatinukin, he confirmed that a 44.97 % recovery rate was being applied for returns 03/07, 06/07 and 09/07 year.

(103) On 2 November 2007, Mr. A.J. Daly, Finance Director, certified that these proposals were a fair and reasonable representation of the extent to which goods and services are used or to be used in making taxable supplies.

(104) On 28 November 2007, Mr. Fatinukin wrote to Mr. Doig approving the proposals. He agreed a weighted method of budgeted average recovery rate for the Registration and Pre-trading periods. At Appendix 2 of the letter, he set out the sectors, and relevant method of recovery in Appendix 3 Annexes 1 to 6. The sixth sector added was "activities not covered by Annexes 1 to 5".

(105) The sectors were: 1. Customer accounts, divided into (A) Fee income and (B) Foreign exchange, 2. Merchant acquirer fees, 3. Card acquirer fees, 4. White labeling, 5. Site Advertising and 6. Activities not covered in Annexes 1 to 6.

(106) The 44.97% recovery rate was applied in periods 12/07 and 03/08.

(107) On or around 14 December 2009, Mr Chris Down, Financial Accountant at IMSL, wrote to Mr Fatinukin to advise that the Company was in the process of returning its banking licence and had changed its name to IMSL and was providing a software platform to the banking industry, whose services were fully taxable, and advised that they would have to withdraw from the agreed partial exemption method.

(108) On 16 December 2009, Mr. Fatinukin emailed Mr. Down to advise him that he thought it likely that the current partial exemption method would be redundant, and requested comprehensive details of all services and activities IMSL will be undertaking.

(109) On 05 January 2010, Mr Down emailed Mr Fatinukin with details of the services IMSL would be undertaking. He stated that IMSL intended to operate two primary products, (1) a decisioning service and (2) a managed service for banks and financial institutions.

(110) Mr Down stated that the "decisioning service" was a managed solution which permitted acceptance of clients via "Know your Customer" to a UK and European approved standard.

(111) Mr Down stated that the "managed service" was a managed internet banking solution offering a full functional "bank in a box", which once contracted with IMSL, would enable the bank to offer savings and term deposits, ISAs, bank accounts, loans, and mortgages. The service could support website, branches, call centre channels, account opening, account administration, payment processing, general ledger, reconciliations, management information and reporting. His opinion was that these services would be VATable, and invited Mr Fatinukin to attend the IMSL offices.

(112) On 15 February 2010, Mr Fatinukin replied by email to Mr Down, with comments on his email. He stated:

> "As discussed, it would seem that some of these services might be taxable however I'm reluctant to provide you with a liability ruling especially when the contracts with the intended clients have not been drawn up. Once you have a contract in place, please forward the contract to me".

(113) On 16th August, Mr Daly wrote to Mr Fatinukin of HMRC, to advise that IMSL was proposing/had entered into a transaction to transfer the whole of the business of IMSL to VMMSL and that he would be treating it as a "transfer of a going concern". He also requested retention of the VAT registration for a period to deal with legacy costs.

(114) Mr Daly set out the facts as at that time. He stated that the Company had planned to operate a savings and e-wallet account, and internet banking facilities, including transfers and payments. He explained that an asset transfer was agreed, in order to avoid legacy risk. He set out (at paragraph 5) key details of the transfer deed, what were included as transferred assets, namely goodwill, equipment, the benefit of transferring contracts, business intellectual property rights, information, know-how, records and benefit of any claims. He set out (at paragraph 6) excluded assets. At paragraph 7, he referred to the purchaser's warranty at clause 22.3.1 that it intended as part of its business to use the Assets to provide banking support services to Virgin Bank Limited and possibly to other members of the Purchaser's group, and not to immediately sell the assets.

(115) Mr Daly stated (at paragraph 8 of his letter) that the sale consisted of fixed assets (with a book value of £8,337), intangible assets consisting of software licence agreements (with a book value of £1,961,191), debtors and prepayments (with a book value of £202,433) and a TUPE transfer of the staff. Goodwill consisting of information, records and benefits of all claims amounted to £4,277,569.

(116) Mr Daly stated (at paragraph 10 of his letter) that after the transfer, the purchaser VMMSL would supply banking processing services to Virgin Money Bank Limited, who in turn provide banking services to retail customers.

(117) Applying article 5 of the Special Provisions Order 1995/2518, Mr Daly concluded (at paragraphs 26, 27 and 34) that a no-supply transfer of business assets had taken place. This is because business assets had been transferred, both parties were taxable persons, and the original planned retail banking business was the same kind of business as that which the Virgin Money VAT Group would undertake.

(118) He advised Mr Fatinukin that he would be treating the transaction as a "transfer of a going concern".

(119) On 27 August 2010, Gemma Houston, Higher Officer wrote to Mr Daly, stating that she had taken over from Mr Fatinukin, and that she would hope to have a response within ten working days.

(120) On 1 October 2010, Ms Houston wrote to Mr Daly, requesting further information. She asked for the sales contract, plus any copies of advertisements and correspondence between IMSL and Virgin Money. She asked how the sale would take place, and how the business will be utilised within the Virgin Money Group.

(121) On 15 October 2010, Mr. Robin Lee-Smith wrote to Ms Houston, providing responses to the questions asked, together with the transfer deed, disclosure letter, escrow agreement and information slides.

(122) On 3 November 2010, Ms Houston responded that the issue had been referred to Policy, who would provide a response to her by 13 December.

(123) On 20 December 2010, Ms Houston issued a decision letter. She noted that the Company had surrendered its banking licence and had written suggesting it would be a fully taxable "technology managed services company". She noted that some consultancy work had been performed for Metrobank, but it had no customers at the accounts date of 31 December 2009. Between the accounts date and the sale to Virgin, it had had a single customer (Pasporte), but it had terminated that relationship on 11 June 2010, i.e. before the transfer took place. It had also terminated supplier contracts which may be required to operate the IT system in the future.

(124) She then set out the warranty that there was no reason that the IT system would not operate satisfactorily if it had customers to whom it could supply services. She went on to set out the transferred assets, goodwill and staff etc. She acknowledged IMSL's view that there was a "transfer of a going concern". She then stated that IMSL ceased to trade as a banking platform in December, and from that point it had only had one customer to whom it supplied consultancy services. The main asset was a banking platform which she understood "is a system to facilitate internet banking operations". She noted that VMMSL intended to use the system to supply banking processing services to Virgin Money Bank Limited.

(125) She concluded that what was being transferred was a collection of assets that at the time of the transfer did not amount to a going concern, other than possibly as an IT consultancy services business. Banking processing services (VMMSL's intended activity) were not the same kind of business as IT consultancy hence TOGC treatment was not available. VMMSL was buying an IT platform rather than a banking processing business. Section 44 of the VAT Act only applied where a business transferred is to be used in making supplies to outside the VAT group, and "there is nothing in legislation or case law to support a view that one can simply look through the VAT group to whichever member is making supplies outside of the group".

(126) She concluded that VAT of £960,638.29 was due and an assessment calculated on 1 November 2011 was raised for £960,638.00.

APPEAL AND FURTHER DEALINGS BETWEEN THE PARTIES

(127) On 17 January 2011, the Appellant's representative CMS Cameron McKenna issued a Notice of Appeal with accompanying Grounds of Appeal.

(128) The Appellants Grounds of Appeal were that the Respondents had erred in law and in fact. They had erred in law because:

(a) They had concluded that the transferred business assets and staff were not a business capable of separate operation and therefore not a TOGC.

(b) Their approach breached both the primary general objectives of the VAT system, neutrality (the same tax burden however many stages of production and distribution there are before the retail trade stage) and the specific objectives of the no-supply rule, to simplify and not overburden taxpayers and protect the revenue authorities from loss of tax.

(c) The conditions permitted to Member States when implementing “TOGC” rules were limited to preventing distortion of competition and prevention of evasion and avoidance. The definition of a transfer of business assets in European case law was not being properly applied, in particular the requirement for the transferee to intend to operate the business assets transferred was ignored or too narrowly defined. Moreover, the “same kind of business” condition was illegal and/or disproportionate on all three sub-limbs of that test, suitability, necessity and fair balance.

(d) The Respondents had erred by stating that there is nothing in case law to support the view that one can simply look through to whichever member making supplies to outside the VAT group.

(129) The Appellant also asserted that the Respondents had made errors of fact.

(a) That the IMSL retail banking business had been terminated, when it was offering consultancy services with a view to finding customers willing to avail themselves of its banking payments services. It was actively looking for customers, and had current live and available functionalities and platform extensions available. Its existing technology included hardware capacity, software architecture and recognized providers, data centres and security procedures.

(b) The Respondents had not assessed whether in fact a business in the preparatory stage of its operations had been transferred, since transfers of preparatory phase businesses can be non-supplies for VAT purposes.

(c) The “same kind of business” condition was being disproportionately applied e.g. in situations where a business was forced to shut down part of its operations for economic and regulatory reasons and was seeking a lifeline going forwards.

(d) The approach of the Respondents was grossly arbitrary and illegal, and thus breached Article 1 Protocol 1 of the European Convention on Human Rights.

(130) On 28 January 2011 the Tribunals Service acknowledged the Notice of Appeal and allocated the case to the standard category. HMRC had 60 days from the date of that letter to provide a Statement of Case.

(131) On 1st March 2011 the Respondents applied for an extension of three months up to 29th June 2011, on the basis that the Grounds of Appeal provided information not previously available and that clarification was being sought on the nature of the supplies made prior to the transfer of a going concern and on some of the statements made in the Grounds of Appeal, and that sufficient time was needed for this information to be provided to and considered by the Policy Branch of HMRC.

(132) On the 28th March 2011 the Appellant objected to the delay since all the information in the Grounds of Appeal had been previously available to the Respondents. It also applied for the appeal to proceed without payment of the tax on the grounds of hardship, given the losses to date, and that the matter be reclassified as Complex, given the matter was likely to involve a lengthy trial and involves a complex and important principle of issue. The Appellant summarised some of the CJEU case law in the parallel area of transfer of undertakings in relation to employment rights.

(133) On the 13 April 2011 Mr JN Chidwick, Hardship Officer at HMRC, wrote to say he would be dealing with the hardship application, and enclosing a copy of a letter from him to IMSL, requested further details of appropriate documentary evidence supporting the application, including company accounts and bank statements.

(134) On 18 April 2011, the Tribunal wrote to say that pending determination of the hardship application, the appeal would not proceed.

(135) On 11 May 2011 CMS Cameron McKenna wrote to Mr Chidwick with relevant details of the grounds for the hardship application.

(136) On 16 June 2011, Mr CD Pike wrote to the Appellant, cc CMS Cameron McKenna, stating that whilst he understood the reasons for the hardship application, the Company's bank balance was sufficient to pay the assessment and he could not accept the application.

(137) On 23 June 2011, CMS Cameron McKenna wrote to the Tribunal requesting a hearing.

(138) On 23 June 2011, Judge Mosedale directed the Parties to serve a List of Documents on which they wished to rely at the hardship hearing on each other and the Tribunal, and to provide copies if required.

(139) On 2 August 2011 the Tribunal wrote to the Appellant's representative requesting details about the hearing which was ready to be listed.

(140) On 22 August 2011, CMS Cameron McKenna wrote to the Tribunal with details, including the witnesses they wished to give evidence.

(141) On 14th October 2011, the Appellant applied for a further witness to give evidence on behalf of IMSL, and for a further five witnesses to be called to give evidence from Virgin Money including those from Virgin, and reasons were given.

(142) On 18th October 2011, Judge Demack heard the Appellant's application. He dismissed the hardship application, directing that the sum assessed be paid by the 30 November 2011, or the appeal would be struck out, and that in the event that the assessment was paid, the appeal would be re-categorised as a complex appeal. He issued directions accordingly on 20 October 2011.

(143) On 21 December 2011 CMS Cameron McKenna wrote to the Respondents, enquiring what the position was, regarding production of their Statement of Case.

(144) On 16th December 2011 the Respondents applied for more time to prepare their Statement of Case and asked for an extension of time, up to 27th February 2012.

(145) On 20 January 2012 the Respondents wrote to CMS Cameron McKenna requesting further information concerning the "economic reality" of the business before and at the point of sale. They asked if any customers and orders existed at the time of the sale, and if so to what extent orders would be satisfied by the purchaser. They asked what licences were extant at the point of sale and which were transferred. They asked whether it was formally agreed between the parties that the transferee might make incidental supplies of the banking platform and if there were agreements or other evidence of the intended use of the banking platform.

(146) On 1 May 2012, CMS Cameron McKenna wrote to the Respondents to respond to their queries in the light of further research into the legal rules, in particular in relation to use, to operate, and whether the notion of a "transfer of a going concern" was a legally valid concept at all, the correct description of a non-supply under article 19/29 of the PVD being a "transfer of a totality of business assets" or "TTBA".

(147) The letter applied the tests of business asset transfer, sufficient combination, the continuation of business identity from various preparatory to operational stages, the fact that economic activity can involve several consecutive preparatory and operational stages, and that there are only two relevant alternative categories from the transferee's point of view, an intention to operate the business or part of the undertaking transferred, or immediately liquidate the assets.

(148) The horizontal insourcing cases of *RBS* and *Village Collection Interiors* were cited, and reference made to the HMRC manuals, in particular concerning transfers of property into a VAT group.

(149) There were no customers at the time of transfer, and a description of the functions of the key transferring contracts was set out. No incidental supplies were being made and it was necessary to look at that the VAT group as a single taxable person to see the use of those assets.

(150) A description of the various operational and preparatory stages was set out in the context of the agreed income generating sectors, as agreed with Mr Fatinukin of HMRC. Various evidential materials were also provided to HMRC.

(151) The letter also started to consider the matters at issue in this appeal. It outlined five issues:

(a) What is the explanation for the term "use" having different "Look-through" treatment in the context of self-supply and input tax recovery for partial exemption purposes, and the term when adopted in article 5(1)(a)(i) of the 1995 Regulations?

(b) Why does a business effectively cease if transferred to one member of a VAT group who only conducts operations for another member of the VAT group, who make retail supplies, when the Respondents' position as regards goods at least is that transfers of the wholesale manufacturing business into a single entity with a retail outlet division is TTBA?

(c) What is the position when a whole is transferred into a part, and how do the various preparatory stages fit in that context?

(d) Is the same kind of business condition legal and proportionate?

(e) From the perspective of human rights, effectively looking at the process, can the Respondents apply the term “use” in different ways to the same transaction without a sufficient explanation?

(152) Attached to the letter was a further letter containing a Request for Further and Better Particulars, based on the above issues, relying on its legitimate expectation for reasonable consistency from the state and a sufficient explanation where the same transaction is treated differently for different rules, per *Jokela v Finland.*

(153) The Appellant asked three questions:

(a) It asked for a sufficient explanation as to why the meaning of “use” should not be applied consistently between the requirement for a ‘look–through’ for partial exemption recovery of input tax and self-supply within VAT groups, and the term “use” as applied to the “same kind of business” requirement for TTBA purposes.

(b) It asked whether the Respondents were discriminating or acting disproportionately given that they had argued in *Village Collection Interiors* that a transfer of a wholesale goods manufacturing business into a vertically integrated manufacturer and retailer was a TTBA, but they were not applying the same treatment to a services business transferring into an entity organised as a VAT group.

(c) If a part of an entity can be transferred out of a whole undertaking and still be a TTBA if it is “capable of separate operation”, why was it that HMRC did not apply a condition to such transfers that the business transferred made direct supplies to external third parties prior to the transfer taking place?

(154) On 23rd May 2012, the Appellant’s representative asked a further question, in the light of the legitimate objectives pursued by the Directive generally and concerning TTBAs in particular. The question raised was to ask the Respondents for a sufficient explanation and justification for the different treatment of the acquisition of business assets, depending on whether the transferee was structured in VAT group or in a single entity organised in divisions and why this should have any bearing on whether TTBA treatment was available.

(155) On 23 May Ms Bushra Razaq of HMRC sent an email to Peter Mason of CMS Cameron McKenna asking for a stay of three months to consider the Further and Better Particulars and respond, and to see if there was scope to resolve the matter without further recourse to the Tribunal. The same day, Peter Mason replied, suggesting a list of four main issues and agreeing to a reasonable

stay of three months in proceedings, and Ms Razaq replied again, stating that the issues raised were agreed and that her policy clients may have further comments and modifications, and a stay of three months was reasonable in that light.

(156) On 24th May 2012 CMS Cameron McKenna served a suggested list of issues.

(157) On 11 July 2012, CMS Cameron McKenna requested an update, and pointed out further case law, *X BV* and *Polski Trawertyn*, that may be relevant to the case.

(158) On 15th August 2012, the Respondents applied for a further two months stay. They erroneously referred in that application to a third Request for Further and Better Particulars but the letter of 11 July 2012 did not constitute such a Request.

(159) On 29th August 2012 the Appellant's representative objected to the delay.

(160) On 6 September 2012 the Tribunal wrote to advise of hearing date of 2 October.

(161) At the hearing on 2 October 2012 Judge Raghavan heard the parties, who agreed a timetable going forwards, and he issued case management directions. The Respondents agreed to incorporate a response to the Requests for Further and Better Particulars in their Statement of Case and that was so directed at paragraph 2.

(162) On 17th October 2012 the Respondents served their Statement of Case. At paragraph 10 of their case they stated that "this Statement of Case will incorporate a response to the Appellant's request for further and better particulars dated 1st May 2012 and 23rd May 2012".

(163) On or around 16th November 2012 the Appellant served its List of Documents, at the front of the consolidated bundles of documents on which it wished to rely, which were served at the same time.

(164) On 16th November 2012 the Respondents served their list of documents on which they wished to rely.

(165) On 22nd February 2013, the Appellant applied to serve an amended list of documents, and requested a further 14 days to serve its witness statements. It also advised, by letter of the same date, the names of the witnesses it would be calling. This Application was granted by the Tribunal on 27th February 2013 and there was a further application for a short extension granted in respect of the third witness.

(166) The Appellant served its witness statements in respect of Tim Sawyer, Alex Daly and David Poulton.

(167) On 5th August 2013, the Appellant served a detailed Reply to the Statement of Case, setting out a response to the Respondents' Statement of Case.

(168) As to the law, the case law on TTBAs and VAT groups had been subject to further CJEU jurisprudence. The CJEU had settled the meaning of a TTBA and the necessary elements, as an independent concept of EU law with its own uniform meaning. It had also declared that, a single taxable person is the outcome of a VAT group.

(169) At paragraph 3 of that Reply, the Appellant stated that in its view, the Respondents had not provided a sufficient explanation to the questions in its Request for Further and Better Particulars respect of:

(a) Different treatment of use between partial exemption and TTBAs.

(b) Different treatment of transfer of wholesale stage of goods business into vertically integrated wholesale and retail operators, versus services.

(c) Transfer of a part of a business is still eligible for TTBA even if had not made supplies in its own right, the test being whether the part was "capable of separate operation"?

(d) Whether TTBA treatment was dependent on how the transferees had organized themselves, as a VAT group or in divisions.

(170) On 5 August 2013, the Appellant also issued a third Request for Further and Better Particulars summarising the above into three questions, and asking a fourth question.

(171) The first three questions were:

(a) Why the term "use" was relevant in the context of TTBA transactions in order to: (a) determine the satisfaction of the "same kind of business" condition; (b) to determine whether a self-supply charge arises under s.44(2) VATA (for transfers of non-capital goods scheme assets less than three years old); and (c) assess differential recovery rates for the reduction of the self-supply charge under s 44(9), but ***not*** for looking to see how business assets transferred into a single taxable person organised as a VAT group, are ultimately used (after an intervening intra-VAT group transaction) by other members of the VAT group in making supplies to third parties;

(b) To ask whether the Commissioners' policy (on TTBAs not being possible where the business assets are transferred into a VAT group which only uses them for transactions with other members of the group) to business asset transfers to a single entity organised in divisions;

(c) To ask whether the Respondents' policy in *Village Collection Interiors*, that a TTBA can occur where wholesale business assets are transferred into vertically integrated retail and wholesale, only applied to goods, and not to services.

(172) Question 4 raised issues concerning the legitimacy of the same kind of business condition. The Appellant set out some examples of an economic analysis of TTBAs between vertically non-integrated operators and other vertically non-integrated operators, and into operational sectors of a vertically integrated operator and asked whether this "same kind of business" condition

was justifiable in some of the examples given, assuming all other conditions for TTBA treatment had been met.

(173) The Appellant asked for a reply by Thursday 26 September 2013.

(174) On 3 September 2013, Ms Linda Adelson of Rosetta Tax advised the Respondents and the Tribunal, that Rosetta Tax was now acting for IMSL in the appeal.

(175) On 18 September, Mr Farhad Shahibi wrote to Ms Adelson to state that the Respondents would not be replying to the Request for Further and Better Particulars. He stated that HMRC had considered the request, and noted that such a request should be made when one party needs further particulars in order to understand the other side's case. He stated that this was an attempt to litigate by correspondence and to go back over ground already covered in their Statement of Case. Accordingly, HMRC would not provide any further particulars in this matter.

Law

Fiscal Neutrality

7. Recital (7) of Directive 2006/112/EEC, the Principal VAT Directive ("PVD") provides:

> The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain.

8. In *Rank Group plc v HMRC* [2012] STC 23 ("*Rank*"), the Court of Justice of the European Union ("CJEU") stated at [55]:

> "According to settled case-law, the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes (see, inter alia, Case C-481/98 *Commission* v *France* [2001] ECR I-3369, paragraph 22; Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraphs 41 and 54; Case C-309/06 *Marks & Spencer* [2008] ECR I-2283, paragraph 47, and Case C-41/09 *Commission* v *Netherlands* [2011] ECR I-0000, paragraph 66)."

And in that case found, at [55]:

> "… in order not to deprive the principle of fiscal neutrality of meaning and so as not to distort the common system of VAT, a difference of treatment for VAT purposes cannot be based on differences in the details of the structure, the arrangements or the rules of the games concerned which all fall within a single category of game, such as slot machines."

Economic Activity

9. Article 9(1) PVD which defines a "taxable person" also, in its second sub-paragraph, provides the following definition of "economic activity":

> Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.

10. In *Slaby v Minister Finansów* [2011] STC 2230 ("*Slaby*") the CJEU having considered the issue of land purchased and used for agricultural purposes but subsequently designated for development stated:

> "50. A natural person who carried out an agricultural activity on land that was reclassified, following a change to urban management plans which occurred for reasons beyond his control, as land designated for development must not be regarded as a taxable person for VAT for the purposes of arts 9(1) and 12(1) of the VAT Directive when he begins to sell that land if those sales fall within the scope of the management of the private property of that person.
>
> 51. If, on the other hand, that person takes active steps, for the purpose of concluding those sales, to market property by mobilising resources similar to those deployed by a producer, a trader or a person supplying services within the meaning of the second sub-paragraph of art 9(1) of the VAT Directive, that person must be regarded as carrying out an 'economic activity' within the meaning of that article and must, therefore, be regarded as a taxable person for VAT."

Transfer of Total Business Assets/Transfer of a Going Concern

11. Article 19 PVD, formerly Article 5(8) of Directive 77/388/EEC (the "Sixth Directive"), provides:

> In the event of a transfer, whether for consideration or not 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.

12. Article 29 PVD provides:

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

13. The first paragraph of Article 19 PVD is implemented into United Kingdom domestic law under s 5(3) of the Value Added Tax Act 1994 ("VATA") which provides:

The treasury may by order provide with respect to any description of transaction–

(a) …

(b) …

(c) that is to be treated as neither a supply of goods nor a supply of services.

14. Article 5(1) of the Value Added Tax (Special Provisions) Order 1995, which was made under s 5(3) VATA, provides:

… 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 transferee

15. Article 5(8) of the Sixth Directive (the predecessor provision to Article 19 PVD) was considered by the European Court of Justice ("ECJ"), as CJEU was then known, in *Zita Modes Sarl v Administration de l'Enregistrment et des Domaines* [2005] STC 1059 ("*Zita Modes*").

16. This case concerned a ready-to-wear clothing business that was sold to a perfumery operator. It was claimed that as a result of Article 5(8) of the Sixth Directive there was no supply of goods. However, the Luxembourg tax authority maintained that the legislation did not apply where the transferor operated a different type of business. The Luxembourg national court asked the ECJ to determine whether 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 the 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 to any transfer of a totality of assets or only to those in which the transferee pursues the same type of economic activity as the transferor.

17. In answer to the question the ECJ stated, at [46]:

"… 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.”

18. More recently, in *Staatssecretaris van Financiën v X BV* [2013] EUECJ C-651/11 (“*X BV*”) after considering Article 5(8) of the Sixth Directive the CJEU stated:

> “31. In the absence of an express reference in the Sixth Directive to the law of the Member States for the purpose of determining the meaning and scope of the concept of a transfer of a totality of assets or part thereof, this constitutes an independent concept of European Union law and must, therefore, be given a uniform interpretation in order to prevent divergences in the application of the VAT system in the Member States (*Zita Modes*, paragraphs 32 and 35, and *Schriever*, paragraph 22).
>
> 32. The Court has interpreted that concept 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 (see *Zita Modes*, paragraph 40; *SKF*, paragraph 37; and *Schriever*, paragraph 24). It is also important, in order for Article 5(8) of the Sixth Directive to apply, that the transferee intends to operate the business, or the part of the undertaking, transferred and not simply to liquidate the activity concerned immediately (*Zita Modes*, paragraph 44, and *Schriever*, paragraph 37).
>
> 33. …
>
> 34. In paragraph 25 of the judgment in *Schriever*, the Court emphasised that, in order to find that there has been a transfer of a business, or of an independent part of an undertaking, for the purposes of Article 5(8) of the Sixth Directive, all of the elements transferred must, together, be sufficient to allow an independent economic activity to be carried on.

VAT Groups

19. Article 11 PVD, formerly Article 4(4) of the Sixth Directive, provides:

> After consulting the advisory committee on value added tax (hereafter, the "VAT Committee"), each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.
>
> A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision.

20. This has been implemented into domestic legislation by what is now s 43A VATA. Insofar as applicable to the present case, s 43A(1) provides:

> Two or more bodies corporate are eligible to be treated as members of a group if each is established or has a fixed establishment in the United Kingdom and–
>
> (a) one of them controls each of the others,
>
> (b) one person (whether a body corporate or an individual) controls all of them, or
>
> (c) two or more individuals carrying on a business in partnership control all of them.

21. Section 43 VATA sets out the effect for VAT purposes for a company being treated as members of a group as follows:

> (1) Where under sections 43A to 43C any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and–
>
> (a) any supply of goods or services by a member of the group to another member of the group shall be disregarded; and
>
> (b) any supply which is a supply to which paragraph (a) above does not apply and is a supply of goods or services by or to a member of the group shall be treated as a supply by or to the representative member;

22. It is clear from the decision of Popplewell J in *Customs and Excise Commissioners v Kingfisher plc* [1994] STC 63 ("*Kingfisher*") that a VAT group is to be considered as a single taxable entity and that supplies made by one member of the group to another are disregarded.

23. As the Tribunal (Judge Berner and Elizabeth Bridge) noted in *University of Essex v HMRC* [2010] UKFTT 162 (TC) noted:

> "18. The holding by Popplewell J in *Kingfisher* that the purpose of what is now section 43 was to enable a group to be treated as if it were a single taxable entity was approved by a majority of the House of Lords in *Customs and Excise Commissioners v Thorn Materials Supply Ltd and another* [1998] STC 725. That case concerned the effect of an agreement under which one VAT group company ("Materials") agreed to sell goods to another ("Home") on terms which provided for 90% of the price to be payable immediately, and 10% on delivery. Materials then ceased to be a member of the VAT group and became separately registered. Subsequently Materials purchased the goods and delivered them to Home. Home paid the remaining 10% of the price. The appellants argued that the advance payment gave rise to a deemed supply which therefore, as to 90%, had to be disregarded, leaving only 10% of the supply to be taxed.
>
> 19. The leading opinion in the House of Lords was given by Lord Nolan, with whom Lords Browne-Wilkinson and Lloyd agreed. Lord Clyde delivered a concurring opinion, but on grounds which did not entirely accord with the reasoning of Lord Nolan, and Lord Hoffman delivered a dissenting opinion. In considering the question whether the

supply of the goods, to the extent of 90%, was permanently excluded from the charge to VAT, Lord Nolan said (at p733):

> "My Lords, I can find no warrant in the 1983 Act for any such consequence. I accept Mr Pleming's submission that art 4(4) and s 29(1) are not designed to confer exemption or relief from tax. They are designed to simplify and facilitate the collection of tax by treating the representative member as if it were carrying on all the businesses of the other members as well as its own, and dealing on behalf of them all with non-members. It is entirely consistent with this approach that the 90% supplies effected by Materials and Resources to Home should be disregarded for the purposes of the 1983 Act, because Materials and Home were not to be treated as carrying on their own businesses at that time. Popplewell J was in my judgment correct in holding, in the *Kingfisher* case, that the purpose of s 29(1) was to enable a group to be treated as if it were a single taxable entity, even though it is not expressed in those terms. The section may have the effect of deferring the charge to tax upon the added value of goods until they are the subject of a supply outside the group, but it does not prevent that charge."

20. The representative member of the group must be treated as if it were carrying on the businesses of all group members, and dealing on behalf of those group members with non-members. But that does not mean that the group members are themselves ignored or that transactions between group members are to be treated as not having taken place. As Lord Nolan said (at p732):

> "That leaves open the question of what is meant by the requirement in s 29(1) that a supply by one member of a group to another must be disregarded. I accept Mr Prosser's [counsel for the appellants] submission that it does not mean that the separate existence of the appellants and Home is to be denied or that the sale agreement and the prepayment are to be treated as not having taken place."

On this basis it was held that, although the intra-group supply between Materials and Home had to be disregarded as a supply for VAT purposes, the 90% of the consideration that was paid in advance was not ignored and had to be taken into account as part of the consideration for the later supply outside the group.

21. Mr Conlon referred us to the dissenting opinion of Lord Hoffman. He argued that in his discussion of the effect of the VAT grouping Lord Hoffman was not differing from the majority, but that he departed from the majority view only as regards the effect of the disregard of the supply between Materials and Home. Lord Hoffman took the view, agreeing in this respect with the decision of the VAT Tribunal (Mr P.

> M. Horsfield QC) (see (1994) VAT decision 12914), that the supply should be disregarded to the extent covered by the advance payment, and there should be no charge to tax on the amount of that advance payment. We can see the basis on which Mr Conlon sought to rely on what Lord Hoffman had to say about the effect of the VAT grouping provisions, but we consider that this should only be followed to the extent that it reflected the opinion of the majority, as set out by Lord Nolan. We therefore do not consider that we should have separate regard to Lord Hoffman's opinion in this respect.
>
> 22. On this basis we turn to consider Lord Nolan's opinion. It is clear from this that the purpose of section 43 is to enable a group to be treated as if it were a single taxable entity, and that the representative member is to be treated as carrying on the businesses of the other members as well as its own and dealing on behalf of those members with non-members. Consistently with this, group members (other than the representative member) are not treated as carrying on business on their own account. However, group members are nevertheless treated as continuing to have a separate existence, and transactions between group members (as opposed to the VAT supplies those transactions give rise to) are not to be ignored.

Summary of Submissions

24. HMRC accepts that IMSL transferred its business to VMMSL a member, but not the representative member, of the Virgin Money VAT group. However, as VMMSL only makes supplies to Virgin Bank Limited ("VBL") another member of the same VAT group, Mr Singh submits that these supplies must be "disregarded" by virtue of s 43 VATA and, as it will not be making any supplies for VAT purposes, the business of VMMSL will effectively cease. It will therefore be impossible for VMMSL to carry on the "same kind of business" as that carried on by IMSL before the transfer as required by Article 5(1)(a)(i) of the Value Added Tax (Special Provisions) Order 1995. Accordingly, the transfer cannot be a TOGC or TTBA.

25. However, Mr Mason, for IMSL, contends that the test applied by HMRC is incorrect as the requirement in the United Kingdom legislation, that the transferee uses the assets for the "same kind of business" as the transferor, is not compatible with European Union ("EU") law which requires an intention by the transferee to "operate the business" transferred.

26. He submits that if the phrase "*an intention to operate the business*" is interpreted in accordance with principles of EU law, in particular fiscal neutrality, proportionality, equal treatment and effectiveness, together with the legitimate objectives of the VAT system, the question to be asked is whether the transferee, at the point of transfer, intended to put the transferred set of activities and assets to work with a view to obtaining income from them and in this case VMMSL clearly intended to operate the business transferred and, as such, as it meets the tests in *X BV* should be capable of attracting TTBA treatment otherwise the principle of neutrality, which is at the core of the VAT system would be breached (see recital (7) PVD and *Rank* at [55]).

27. Alternatively Mr Mason contends that the fiction of a VAT group as a single taxable person has to be given full effect and not interpreted restrictively by focussing on the intra-group transactions between VMMSL and VBL as this distorts the effect of the group and TTBA provisions. He submits that it is absurd to contend the VMMSL has effectively ceased given the definition of "economic activity" in Article 9(1) PVD and *Slaby* at [51], and that HMRC's approach cannot be correct as it leads to the potential for arbitrary distinctions to be made between businesses with different organisational structures.

Discussion

28. The issue to be determined, as we have already noted in paragraph 2 above, is whether, as a result of the effect of the provisions relating to the treatment of VAT groups, the transfer of a business to a member of a VAT group can be a TOGC and/or a TTBA, in accordance with Article 19 and 29 PVD and Article 5(1)(a)(i) of the Value Added Tax (Special Provisions) Order 1995, if the transferee makes supplies only to another member of the same VAT group.

29. Before we turn to the interaction between the TOGC and VAT group provisions, although not strictly necessary to do so as it is accepted that VMMSL intended to operate the business it acquired from IMSL, we first examine Mr Mason's contention that United Kingdom law, as stated in Article 5(1)(a)(i) of the Value Added Tax (Special Provisions) Order 1995 is not compatible with EU law as it seeks to add a restriction to Article 19 PVD, namely that the transferee must carry on the "same kind of business" as that carried on by the transferor before the transfer.

30. In support of his argument Mr Mason relies on the decision of the ECJ in *Zita Modes* where the court stated:

> "29. The first sentence of Article 5(8) of the Sixth Directive provides that **Member States may**, in the event of a transfer of a totality of assets or part thereof, consider that no supply of goods has taken place and that the recipient is the successor to the transferor. **It follows that when a Member State has made use of that option the transfer of a totality of assets or part thereof is not regarded as a supply of goods for the purposes of the Sixth Directive**. Under Article 2 of that directive, such a transfer is thus not subject to VAT (see *Abbey National*, cited above, paragraph 30).
>
> 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**.

> 31. **It follows that a Member State which makes use of the option granted in the first sentence of Article 5(8) of the Sixth Directive must apply the no-supply rule to any transfer of a totality of assets or part thereof and may not therefore restrict the application of the rule to certain transfers only, save under the conditions laid down in the second sentence of the same paragraph**.
>
> 32. **This interpretation is consistent with the purpose of the Sixth Directive, which is to determine the basis of VAT in a uniform manner according to Community rules** (see Case C-400/98 *Breitsohl* [2000] ECR I-4321, paragraph 48). **Like all the exemptions provided for in Article 13 of the Sixth Directive, the no-supply rule laid down in Article 5(8) constitutes an independent concept of Community law whose purpose is to prevent divergences in the application of the VAT system from one Member State to another** (see, in relation to exemptions, Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 11, and Case C-287/00 *Commission* v *Germany* [2002] ECR I-5811, paragraph 44).
>
> 33. **As to the assets transferred and the use made of those assets by the transferee after the transfer, firstly, the Sixth Directive does not include any definition of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof**.
>
> 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) (emphasis added).

As he observes these principles were repeated in *Finanzamt Lüdenscheid v Schriever* [2012] STC 633 at [24] and *X BV* at [31] (see paragraph 19, above).

31. Although the phrase the “same kind of business” does not appear within in Article 19 PVD, it is clear from the decision of the ECJ in *Zita Modes* at [46] (which we have set out at paragraph 18, above) and *X BV* at [32] (see paragraph 19, above) that, for there to be a TTBA or TOGC the transferee must intend to operate **the** business transferred, ie the business of the transferor. It must therefore follow that this will inevitably be the same kind of business as that previously carried on.

32. As such, in our judgment, the “same kind of business” requirement in Article 5(1)(a)(i) of the Value Added Tax (Special Provisions) Order 1995, is, clearly compatible with EU law as stated in *Zita Modes* and *X BV*.

33. As we have already noted it is accepted that VMMSL intended to operate the business it acquired from IMSL and therefore, but for the effect of the VAT group provisions in s 43 VATA, there would have been a TTBA or TOGC in the present case.

34. However, it is clear from s 43 VATA, and the decisions of the High Court in *Kingfisher,* the House of Lords in *Customs and Excise Commissioners v Thorn Materials Supply Ltd and another* [1998] STC 725 and the Tribunal in *University of Essex,* that the purpose of s 43 VATA is 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 continue to have a separate existence, as well as its own in addition to dealing on behalf of those members with non-members.

35. As the Tribunal noted in *University of Essex* at [22]:

> "… Consistently with this, group members (other than the representative member) are not treated as carrying on business on their own account.

36. Turning to the present case, VMMSL is not the representative member of the Virgin Money Group and it is not disputed that it only makes supplies to VBL another group member.

37. Therefore any supply of goods or services between them, although they do take place "shall be disregarded", in accordance with s 43 VATA.

38. The effect of this is that VMMSL does not make any supplies for VAT purposes and for such purposes its business has effectively ceased. It therefore does not operate the same kind of business as that undertaken by IMSL prior to the transfer.

39. Accordingly VMMSL's acquisition of the business from IMSL cannot be a TTBA or TOGC.

40. With regard to Mr Mason's argument that by focussing on the intra-group transactions the effect of the TTBA provisions are distorted we note that in *Abbey National plc v HMRC* [2001] STC 297 CJEU stated at [33]

> "Abbey National's argument that, if the transaction had been an ordinary transfer of business assets and hence a taxable transaction, Scottish Mutual would have been able to deduct the VAT on the costs of the various services acquired in order to carry out that transaction under Article 17(2) of the Sixth Directive must also be rejected. The fact that the transfer of a totality of assets or part thereof does not constitute a taxable transaction for the purposes of that article is simply the inevitable consequence of the fact that the Member State concerned has opted to apply Article 5(8) and that the transfer is not therefore regarded as a supply of services. Consequently, it is immaterial whether the transfer of business assets would have constituted a taxable transaction giving rise to the right to deduct that expenditure if

> the Member State had not exercised the option provided for in that article."

41. Similarly, in our judgment, the effect of the VAT group provisions on the transaction is simply the inevitable consequence of the fact that the United Kingdom has opted to apply Article 19 PVD and that supplies between members of a VAT group are to be disregarded and, as in *Abbey National*, it is immaterial that such supplies would have constituted a TTBA if the United Kingdom had not exercised the option provided for in that article. As such, we do not consider the principles of fiscal neutrality, proportionality, equal treatment and effectiveness, or the legitimate objectives of the VAT system are infringed.

42. We also considered whether, as Mr Mason contends, that the "same kind of business" test fails the Article 1 of Protocol 1 of the European Convention on Human Rights ("ECHR") and Article 17 of the Charter of Fundamental Rights of the EU.

43. Article 1 of Protocol 1 ECHR provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 17(1) of the Charter of Fundamental Rights of the EU which concerns the "Right to Property" states:

> Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

44. Mr Mason submits that the "same kind of business" test, and indeed the reference to a "going concern", are insufficiently precise and foreseeable for the circumstances. He relies on the decision of the European Court of Human Rights ("ECHR") in the case of *Baklanov v Russia* [2005] ECHR 372 in which the Court, finding there had been a breach of Article 1 of Protocol 1 stated, at [46]:

> "The Court accepts that its power to review compliance with domestic law is limited as it is in the first place for the national authorities to interpret and apply that law. However, having regard to the national courts' lack of reference to any legal provision as a basis for the forfeiture of an important sum of money and to the apparent inconsistencies of case-law compared to the national legislation, the Court considers that the law in question was not formulated with such precision as to enable the applicant to foresee, to a degree that is

> reasonable in the circumstances, the consequences of his actions. It follows that the interference with the applicant's property cannot be considered lawful within the meaning of Article 1 of Protocol No. 1 to the Convention. This conclusion makes it unnecessary to ascertain whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."

45. However, it is clear from the decision of the ECR in that case that the Russian court did not refer to any legal provision as a basis for its decision other than a ruling of the Russian Supreme Court which related to legislation no longer in force. Given the existence of VATA and Value Added Tax (Special Provisions) Order 1995, specific legislation on which HMRC has based its decision, the circumstances of the Russian case are clearly not analogous to those of the present and, as such, it cannot support the argument advanced by Mr Mason.

46. Also, as the decision of HMRC was in accordance with "conditions provided for by law" which, by the very implementation of VATA and the Value Added Tax (Special Provisions) Order 1995, were deemed necessary by the United Kingdom to secure the payment of taxes we find that it could not have been in breach of either Article 1 of Protocol 1 ECHR or Article 7(1) of the Charter of Fundamental Rights of the EU.

Conclusion

47. For the above reasons the appeal is dismissed.

Costs

48. This case was re-categorised as "complex" by a direction of the Tribunal (Judge Demack) released on 20 October 2011. The effect of this direction is to give the Tribunal a general discretion as to costs. In view of our conclusion it is appropriate to direct that IMSL pay HMRC its costs of and incidental to and consequent upon the appeal with such costs to be assessed if not agreed.

Right to apply for Permission to Appeal

49. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 13 December 2013