[2019] UKFTT 559 (TC)

TC07352

VAT – transfer of a leasehold property to purchaser – prior sale by that purchaser – whether transfer of a going concern – Zita and Intelligent Managed Services considered and applied – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/05569

BETWEEN

GENERAL DISTRIBUTION STORAGE LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at the Tribunal Centre, Taylor House, Rosebery Avenue, London on 10 July 2019 and 30 July 2019

Geraint Jones QC of Counsel for the Appellant

David Wilson, Litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

Introduction and summary

1. This was the appeal of General Distribution and Storage Ltd ("GDSL") against an assessment to Value Added Tax ("VAT") made by HM Revenue & Customs ("HMRC") on 13 September 2016 for £160,000 ("the Assessment").

2. GDSL was the freeholder of a property ("the Property") which it had leased on 3 November 2015 for a fifteen year period. The tenant operated a Starbucks franchise from the Property.

3. GDSL sold the Property to Hartlone Scaffolding Ltd ("HSL"). The completion date for that sale was 5 April 2016. HSL had already exchanged contracts to on-sell the Property to a third company, Foundry Investments Ltd ("FIL"), and completion of that onward sale also took place on 5 April 2016.

4. GDSL received £800,000 plus VAT of £160,000 for the Property, but did not pay the VAT to HMRC. When HMRC became aware of the sale, they raised the Assessment.

5. GDSL appealed to HMRC and to the Tribunal on the basis that no VAT was due, because the Transfer of a Going Concern ("TOGC") provisions applied. I considered the relevant case law and found that the sale did not come within the TOGC provisions. I refused the appeal and confirmed the Assessment.

The evidence

6. The Tribunal was provided with a slim bundle which included:

   (1) a report from HMRC Officer Newey following a visit to FIL;

   (2) the Lease between GDSL and its tenant;

   (3) HSL's option to tax form, and its VAT certificate;

   (4) the Land Registry TR1 forms recording the transfer of the Property to HSL, and from HSL to FIS;

   (5) the invoice from HSL to FIS for the sale of the Property;

   (6) a document entitled "Provisional Statement of Account" and an invoice, both from Woodroffes, a firm of solicitors, to FIL

   (7) HMRC's decision letter, the Assessment, and GDSL's Notice of Appeal to the Tribunal; and

   (8) various communications between the parties and between the parties and the Tribunal.

7. The Tribunal was also provided with a short witness statement from Mr Jasdip Singh Hare, director of GDSL. Included in the Directions issued by the Tribunal on 3 August 2017 was a direction requiring that "any party seeking to rely on a witness statement…must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute)".

8. However, Mr Hare did not attend the hearing. Mr Wilson confirmed that HMRC had not notified GDSL that Mr Hare's evidence is not in dispute. However, he said that he did not

intend to ask Mr Hare any questions about the evidence in that witness statement, was content for the statement to be admitted into evidence.

9. On the basis of the evidence summarised above, I make the findings of fact set out in the next part of this decision notice.

The facts

10. GDSL registered for VAT with effect from January 2005. Its main business activity was described as cash and carry, dealing in the sale of alcohol and groceries. Mr Hare's witness statement (which, as noted above, was not challenged by HMRC) said that GDSL was "a property business. It buys property to build up its portfolio and also sells them". However, the Tribunal had no information about any properties owned by GDSL other than the Property, about which I now make findings.

11. On 3 November 2015 GDSL leased the Property to a company called 23.5 Degrees Ltd, which operated a Starbucks franchise from the premises. The term of the lease was fifteen years at an annual rent of £60,000 pa, payable quarterly on the traditional quarter days.

12. On 24 November 2015, HMRC issued HSL with a VAT registration certificate. Under "trade classification" is stated "scaffold erection".

13. On 29 January 2016, HSL opted to tax the Property and asked that the option be backdated to 18 January 2016. I infer from this that on or after 18 January 2016, GDSL and HSL had exchanged contracts in relation to a sale of the Property.

14. At some point before 1 April 2016, HSL exchanged contracts to on-sell the Property to FIL. I make that finding in reliance on Woodroffe's Provisional Statement of Account, dated 1 April 2016, which related to FIS's purchase of the Property, and stated that the "Proposed Completion Date" was 5 April 2016. It is clear from the wording on that Statement that FIS had already paid a deposit of £83,000 for the Property and that Woodroffe's were holding a further £747,541.52. The Statement also itemised the search fees and other items.

15. The completion date for both sales was 5 April 2016. HSL paid GDSL £800,000 plus VAT of £160,000. FIS paid £815,000 plus VAT of £163,000.

Whether to make a finding of fact about HSL's business

16. Mr Jones submitted that from HSL's back-to-back sale and purchase of the Property the only reasonable inference was that HSL was engaged in a property investment business. He asked for the Tribunal to make that finding of fact.

17. Mr Wilson submitted that the only evidence before the Tribunal as to the nature of HSL's business was that it had given its main business activity on its VAT registration form as "scaffolding". He added that merely carrying out a back-to-back purchase and sale of a property was an insufficient basis for the finding of fact which Mr Jones was asking the Tribunal to make.

18. I agree with Mr Wilson. The Tribunal had no evidence about HSL other than the VAT registration document and the land registry documents about this single deal. There was no witness evidence from that company, no statutory accounts, and no other documents, not even internet pages or advertisements. Mr Hare's witness statement also contained no information about the nature of HSL's business.

19. Mr Jones is not correct to say that a single back-to-back property transaction leads to the necessary inference that the person carrying out those transactions has a property investment business. As I observed during the hearing, it could instead indicate an adventure in the nature of a trade, and not an investment at all. I decline to make a finding of fact that HSL was carrying out a property investment business. I also decline to make a finding that HSL's purchase and sale of the Property was a property investment transaction.

After the transactions

20. GDSL did not pay the VAT it had received to HMRC, neither did it refund the VAT to HSL.

21. FIS claimed an input tax deduction for the VAT it had paid. On 28 June 2016, Officer Newey made a visit to FIS, enquiring into the claim. He identified that GDSL had not paid over the VAT and wrote to that company. On 14 July 2016, he received a holding reply from Rainer Hughes, a firm of solicitors. No further response was received, and on 13 September 2016, Officer Newey raised the Assessment.

22. On 6 October 2016, Rainer Hughes wrote to HMRC, stating that no VAT was due because the Property had been transferred under the TOGC provisions. On 14 October 2016, Rainer Hughes appealed to the Tribunal[1] on behalf of GDSL, again on the same basis.

The law

23. Article 19 of the Principal VAT Directive ("PVD") provides:

> "In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place, and that the person to whom the goods are transferred is to be treated as the successor to the transferee.
>
> 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.'

24. Article 29 reads "Article 19 shall apply in like manner to the supply of services".

25. The UK has taken advantage of those provisions. Article 5 of the Value Added Tax (Special Provisions) Order 1995 ("the SPO") reads:

> "(1) Subject to paragraph (2) below, there shall be treated as neither a supply of goods nor a supply of services the following supplies by a person of assets of his business—
>
> (a) their supply to a person to whom he transfers his business as a going concern where—
>
> (i) the assets are to be used by the transferee in carrying on the same kind of business, whether or not as part of any existing business, as that carried on by the transferor, and
>
> (ii) where the transferor is a taxable person, the transferee is already, or immediately becomes as a result of the transfer, a taxable person…

[1] The Tribunal file gives the reference for the appeal as TC/2016/05569. This has been used on some of the submissions. However, both parties had at times used the reference TC/2016/05307.

(b) their supply to a person to whom he transfers part of his business as a going concern where—

(i) that part is capable of separate operation,

(ii) the assets are to be used by the transferee in carrying on the same kind of business, whether or not as part of any existing business, as that carried on by the transferor in relation to that part, and

(iii) in a case where the transferor is a taxable person, the transferee is already or immediately becomes as a result of the transfer, a taxable person…"

26. In *Zita Modes Sarl v Administration de l'enregistrement et des domaines* (Case C-497/01) [2005] STC 1059 ("*Zita*"), the CJEU considered Article 5(8) of the Sixth Directive, which was the precursor provision to Article 19 of the PVD. The text read:

> "In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and in that event the recipient shall be treated as the successor to the transferor. Where appropriate, Member States may take the necessary measures to prevent distortion of competition in cases where the recipient is not wholly liable to tax."

27. In *Zita*, the appellant had sold a clothing business to another company which operated a perfumery. The Court was asked to decide whether the no-supply rule applied to any transfer of a totality of assets or only to those where the transferee pursues the same type of economic activity as the transferor. The Court held at [31] that

> "…a member state which makes use of the option granted in the first sentence of art 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."

28. It continued:

> "[40]…the concept of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof must be interpreted as meaning that it covers the transfer of a business or an independent part of an undertaking including tangible elements and, as the case may be, intangible elements which, together, constitute an undertaking or a part of an undertaking capable of carrying on an independent economic activity, but that it does not cover the simple transfer of assets, such as the sale of a stock of products…
>
> [41] …
>
> [42] …concerning the use which is to be made by the transferee of the totality of assets transferred, clearly art 5(8) of the Sixth Directive does not contain any express requirement as to that use.
>
> [43] As regards the fact that art 5(8) provides that the transferee is to be treated as the successor to the transferor, it follows from the wording of that paragraph, as the Commission correctly points out, that the succession does not constitute a condition for the application of the paragraph, but is merely a result of the fact that no supply is considered to have taken place.

> [44] However, it is apparent from the purpose of art 5(8) of the Sixth Directive and from the interpretation of the concept of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof which flows from it, as set out in para 40 of this judgment, that the transfers referred to in that provision are those in which the transferee intends to operate the business or the part of the undertaking transferred and not simply to immediately liquidate the activity concerned and sell the stock, if any.
>
> [45] On the other hand, nothing in art 5(8) of the Sixth Directive requires that the transferee pursue prior to the transfer the same type of economic activity as the transferor.
>
> [46]…art 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."

29. The TOGC provisions and *Zita* were considered by the Upper Tribunal in *Intelligent Managed Services Ltd v HMRC* [2016] UKUT 341 (TC) ("*IMS*"). The UT summarised the principles established by *Zita* at [36] of its judgment:

> "(1) In order to be a transfer of a totality of assets, or part thereof, the assets transferred must together constitute an undertaking capable of carrying on an independent economic activity.
>
> (2) This is to be distinguished from a mere transfer of assets.
>
> (3) The nature of the transaction must be ascertained from an overall assessment of the factual circumstances, which includes the intentions of the transferee, as determined by objective evidence, and the nature of the economic activity sought to be continued.
>
> (4) The transferee must intend to operate the business, or the part of the undertaking, transferred and not simply to liquidate the activity concerned immediately and sell the stock, if any.
>
> (5) Although succession to the business is not a condition, but a consequence of the application of the no-supply rule, the nature of the transaction must be such as to allow the transferee to continue the independent economic activity previously carried on by the seller.
>
> (6) Arbitrary distinctions are to be avoided, where those distinctions do not apply by virtue of the wording or purpose of arts 19 and 29, and the principle of fiscal neutrality must be respected."

30. The UT then said:

> "[37] It is necessary therefore to have regard to all the circumstances in determining whether the transaction is a mere transfer of assets, or of an undertaking which can carry on an independent economic activity. That must

> be considered both from the perspective of the transferor, and what is transferred, and from the perspective of the transferee, who must intend to operate the business as a continuation of the independent economic activity previously carried on by the transferor.
>
> [38] In focusing as well on the intentions of the transferee, the court in *Zita Modes* was making clear that those intentions could mean that something that would, from the transferor's perspective, and on an objective assessment of the assets transferred, be the transfer of an undertaking capable of carrying on an independent economic activity, would not satisfy that test if the transferee instead intended to liquidate the activity. Such an intention would mean that what had been transferred for the purpose of art 19 would merely be a transfer of assets. That that was the focus of the court's attention is clear from the reference made by the court, at para 48, to the interpretation of the concept of transfer which it set out at para 40; that interpretation drew the distinction between the mere transfer of assets and a transfer of assets constituting an undertaking having the relevant characteristics."

The parties' submissions

31. The Tribunal's directions required that the parties exchange skeleton arguments on the same date. Mr Wilson submitted in his skeleton argument that GDSL had failed to show that HSL was carrying on the same kind of business as had been carried on by GDSL and so did not meet the requirement in the SPO. He said that GDSL was renting out the Property for a commercial rent, and HSL had simply carried out a back-to-back deal.

32. Mr Jones's skeleton argument similarly focussed on the SPO, saying that "the sole issue" was either GDSL and HSL were carrying on the same type of business, namely property investment. He provided a supplementary skeleton argument the day before the hearing, which put forward various definitions of "property investment".

33. At the very end of Mr Jones's original skeleton was a single line, which read: "at the hearing the appellant will refer to the principles summarised in para 36 of *Intelligent Managed Services"*. There was no explanation as to how that summary was relevant to the facts of the case, or on what particular subparagraph reliance was placed.

34. In the course of his oral submissions, I drew his attention to *IMS* and to *Zita*, and asked him what part of the passage at [36] he was seeking to rely. He said that at point (6) of that paragraph, the UT had said that "Arbitrary distinctions are to be avoided". He submitted that by seeking to separate two types of property investment business transactions, namely (a) holding a property and renting it out, and (b) turning a capital profit by making a quick sale, HMRC were making an arbitrary distinction.

35. In response, Mr Wilson referred to *IMS* at [37], which states that the transferee "must intend to operate the business as a continuation of the independent economic activity previously carried on by the transferor" and submitted there was no such continuation on the facts of this case.

36. I advised both parties that in making my decision I would be considering the EU case law which underpinned *Intelligent Managed Services*, and asked if they wanted to make further written submissions on that case law, but both said that they did not.

Discussion and decision

37. Having considered the case law and the parties' submissions, I have come to the following conclusions:

(1) The transferee's business before the transfer does not have to be the same as the business of the transferor, see *Zita* at [45].

(2) What is transferred must be capable of operation as a separate economic activity, see *Zita* at [40] and *IMS* at [36(1)]. The Property satisfied that test.

(3) The transferee must intend to operate the business which has been transferred; in other words, it must intend to continue the business carried on by the transferor, see *Zita* at [44] and *IMS* at [36(4)] and [44]. The nature of the transaction must be such as to allow that continuation, see *IMS* at [36(5)]. It is clear that this requirement has not been met, for the reasons set out in the next following paragraph.

38. The transferor was GDSL and there is no doubt that it was carrying on the business of letting the Property. The transferee was HSL. It could not have intended to carry on a business of letting the Property because it had on-sold the Property even before it had become its legal owner. The nature of the transaction – namely, a back-to-back sale and purchase – did not allow that continuation.

39. I have already refused to find as facts that (a) that HSL is running a property investment business and/or (b) that the sale and purchase of the Property is a property investment transaction. As already explained, there was simply no evidential basis for either finding. The burden of proof here is on TGSL and that burden has not been discharged.

40. There is thus no factual or legal basis on which this transaction comes within the TOGC provisions.

41. As a result, I refuse TGSL's appeal, and uphold the Assessment

Right to apply for permission to appeal

42. This document contains full findings of fact and reasons for the decision. If GDSL is dissatisfied with this decision, it 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.

43. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 30 AUGUST 2019