



**TC05691**

**Appeal number: TC/2016/03887**

*VALUE ADDED TAX – Compulsory registration – transfer of going concern for VAT registration purposes – no fundamental break in trading or change in nature of business – transfer of a lease – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DEEZER LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ANNE SCOTT**

**Sitting in public at George House, 126 George Street, Edinburgh on Friday  
17 February 2017**

**No appearance by or for the Appellant**

**Having heard Mr Mark Boyle, Presenting Officer of HMRC, for the  
Respondents**

## DECISION

### Introduction

1. This appeal concerned the decision of HMRC, upheld on review on 23 June 2016, to the effect that the appellant was liable to be registered for Value Added Tax (“VAT”) from 10 July 2015. The rationale for the decision was that because the business was the subject of a Transfer of Going Concern in terms of Section 49 Value Added Tax Act 1994 (“VATA”). The appellant argued that the date for registration for VAT was 1 October 2015.

### 10 Preliminary matter

2. The appellant had previously been represented by an agent. However, that agent wrote to the Tribunal on 1 February 2017 stating that he had withdrawn from acting in this appeal because he had been unable to get instructions from the appellant and he understood that the appellant had ceased to trade. Both the respondents (“HMRC”) and the Tribunal had attempted to contact the appellant in the interim but had failed. There was no appearance by or for the appellant. The appellant had previously been notified of the hearing.

3. Mr Boyle requested that the Tribunal proceed to hear the appeal in the absence of the appellant and relied on Rules 2 and 33 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”). He argued, and I agreed, that the appellant had undoubtedly had notice of the hearing, since notification of the hearing had been issued on 3 January 2017. The appellant’s agent had advanced arguments for the appellant in writing, and in detail, with reference to both legislation and authorities. HMRC had invested resource and cost in preparing for the hearing and wished to avoid any further delay. It was only fair and proportionate that the relatively straightforward point in issue should be dealt with at this juncture since all relevant information was to hand. I had due regard to the Rules and decided to proceed with the hearing.

### The background

4. The appellant traded as The Bell Rock and was incorporated on 2 July 2015. It is one of a number of companies which have operated The Bell Rock Restaurant over the years at premises in Arbroath owned by other companies.

5. The owner of the premises from which the appellant traded acquired those premises with a date of entry of 26 June 2015 and subsequently entered into a lease with the appellant on 7 July 2015 with a commencement date of 10 July 2015 for a period of five years.

6. For many years those premises have been utilised as a fish and chip restaurant/takeaway.

7. The appellant’s representative wrote to HMRC on 17 March 2016 by recorded delivery confirming that the appellant’s turnover had exceeded the registration limit in

August 2015 and the appellant was therefore liable to be registered for VAT on and from 1 October 2015. We note that the appellant had not done so until 24 February 2016. The dispute therefore turns on whether or not the appellant should have been registered for VAT from 10 July 2015 as decided by HMRC or 1 October 2015.

5 8. HMRC had instigated an investigation into who was running the business known as The Bell Rock and had established that previous businesses had been trading as a fish and chip restaurant/takeaway and had turnover which meant that they had a liability to be registered for VAT. HMRC considered them to be taxable persons.

9. The appellant argues that there was no transfer of a business as a going concern.  
10 The appellant simply entered into a lease with the new owner of the premises who had not run the previous business. The appellant only became liable to register for VAT on 1 October 2015. The turnover prior to that did not render it eligible to be registered and there was no voluntary registration.

### **The Legislation**

15 10. The relevant provisions of Section 49 VATA read:-

“49(1) Where a business, or part of a business, carried on by a taxable person is transferred to another person as a going concern then—

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

11. The relevant provisions of paragraph 1(2) of Schedule 1 VATA read as follows:-

“Where a business, or part of a business, carried on by a taxable person is transferred to another  
25 person as a going concern, the transferee is UK-established at the time of the transfer and the transferee is not registered under this Act at that time, then, subject to sub-paragraphs (3) to (7) below, the transferee becomes liable to be registered under this Schedule at that time if—

(a) The value of his taxable supplies in the period of one year ending at the time of the transfer has exceeded £82,000; or

(b) There are reasonable grounds for believing that the value of his taxable supplies in  
30 the period of 30 days beginning at the time of the transfer will exceed £82,000.

12. The relevant provisions of Regulation 5 of the Value Added Tax (Special Provisions) 1995 read as follows:-

#### **“Transfer of a going concern**

5(1) Subject to paragraph (2) below, there shall be treated as neither a supply of goods nor a  
35 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 ...”.

## Discussion

5 13. Briefly put, HMRC’s simple approach is that the appellant did obtain the lease for the premises with all the fixtures and fittings. From the point at which the appellant took over the lease they were in a position to run the business from the premises. They did run exactly the same type of business as the previous businesses in those premises.

10 14. Was there a break in trading? That is a factor that I must consider. There is a suggestion, but no evidence, of a possible break in trading for a matter of weeks. That is not determinative in relation to continuity of a business. Undoubtedly new stock had to be purchased but that is largely irrelevant in a business which deals in perishable food. The appellant used the same name, premises and equipment, as the  
15 previous businesses. It was fundamentally the same business.

15 Mr Boyle referred me to the decision in *Mark Young t/a The St Helen’s v HMRC*<sup>1</sup> and indeed the appellant’s representative had cited that case without advancing an argument thereanent. In some ways the facts in that case are not dissimilar to this case in that there was no transfer of any assets by the previous trader to the appellant  
20 and there was a break in trading. We note the decision of the Tribunal at paragraph 43 where it states:-

“43 ...But the question is whether Mr Young was put in a position where he could carry on substantially the same business as before. Here the particular circumstances, similar to those in  
25 *Harper* was that possession of the premises and fixtures and fittings reverted to the landlord ... who then leased them to Mr Young. So ... Mr Young obtained the property necessary to allow him to carry on the business.

44. He did not obtain any stock in trade from Rupert or the Company: but from what evidence we had this was not necessary in order for him to carry on substantially the same business.

45. There was no direct transfer of any goodwill ...”.

30 14. In this case the trading name of the business remained unchanged through all of the various changes in ownership. The goodwill clearly attached to the premises.

15. I find as a matter of fact that it was reasonable for HMRC to form the view that there was continuity in terms of goodwill, trading operation, and customer base.

35 16. The previous businesses were taxable persons and should have been registered for VAT. In terms of Section 49(1)(a) VATA the appellant falls to be treated as having carried on the business prior to the transfer and the value of the supplies by the previous businesses had exceeded the VAT registration threshold of £82,080.

---

<sup>1</sup> 2012 UKFTT 702 (TC)

17. In those circumstances in terms of the relevant legislation there is a transfer as a going concern and therefore an obligation to register for VAT. Accordingly the relevant date for registration was 10 July 2015.

5 18. We note that the appellant's representative had referred us to *Burgess and Brimheath v HMRC*<sup>2</sup> but we see no relevance whatsoever of that decision which is concerned with discovery assessments in direct taxes.

10 19. 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.

15

**JUDGE ANNE SCOTT  
TRIBUNAL JUDGE**

**RELEASE DATE: 22 FEBRUARY 2017**

20

---

<sup>2</sup> 2016 STC 579