

## TOGC: all together now

### Les Howard reports of a recent tribunal case complicated by a Transfer of Going Concern (TOGC)

The First Tier Tax Tribunal (FTT) heard an interesting case where two taxpayers were co-joined parties; one having transferred its business to the other. The reality of the TOGC meant that HMRC were able to assess the transferor company even though its observations were made on the transferee company. The Tribunal decision brings together a number of important legal and procedural points.

HMRC were unhappy with the declared sales, estimated the correct value of sales, and issued an assessment based on understated sales. That is fairly common. But in this case the question of understated sales then interacted with the (alleged) TOGC as the business was transferred from one taxpayer to the other. It is significant that HMRC's observations were conducted on the second business (transferee) and their findings extrapolated backwards to the first business (transferor).

When HMRC's intervention started in 2016, the business of Withington KFC Services Ltd had recently been transferred to NNS Services Ltd. Both traded as Finger Licking Chicken. The first had not been registered for VAT; the second was not registered at the time of HMRC's intervention.

HMRC undertook invigilation exercises during the period March to May 2017. As part of this exercise the taxpayer completed self-invigilation sheets. On six occasions during that period HMRC Officers made covert purchases, to test the accuracy of the self-invigilation. Further, on 16 and 20 May 2017 HMRC asked two employees to maintain detailed takings sheets. As a result, HMRC concluded that the sales were understated.

There is a side issue here about the poor quality of the taxpayers' record keeping. In particular, there was no working till and no contemporaneous record of takings. Although VAT Regulations do not explicitly require a till, not to do so is 'highly unsatisfactory', according to the Tribunal.

VAT Regulation 67 provides for HMRC to publish a notice containing the conditions for operating a Retail Scheme. All the relevant notices in the 727 series refer to the maintenance of a Daily Gross Takings record, being a record of all payments received as they are received. A taxpayer who fails here will give the impression that he does not want to record all his sales, and be unable to dispute any decision and assessment issued by HMRC.

The FTT briefly considered the important test of 'best judgment'. Since this test relies on the taxpayer having some records for HMRC to work with, NNS Services Ltd's lack of reliable records meant that it was impossible for the taxpayer to overturn the assessment. The Tribunal was satisfied as to HMRC's evidence and methodology. (This contrasts with some other recent Tribunal cases where HMRC had failed to exercise best judgment.)

The next question was whether HMRC could extrapolate their observations made on NNS Services Ltd back to Withington KFC Services Ltd. The Tribunal suggested that, if the transfer was a TOGC, an assessment could be made on the transferor even though the observations and calculations related to the transferee. There is no explicit reference to case law to allow this, and I think the matter is capable of appeal, but I suspect the taxpayers will not appeal this point.

Paras 97-103 of the decision address whether there was TOGC. There was no formal transfer document, so, in the absence of 'form', the Tribunal considered the 'substance'. (This follows the well-known decision in *Kenmir Ltd v Frizzell & others*.) One of the consequences of a TOGC is that the transferee is required to be registered for VAT from the date of transfer where the transferor was a taxable person. The turnover is not reset to zero at that date.

Paras 111-118 describe HMRC's use of a Business Economic Exercise. Many readers will be familiar with this process. This exercise elicited evidence which supported HMRC's overall calculations. (In other circumstances, of course, such an exercise might be used to challenge HMRC's calculations.)

The appeal concerned a number of related matters on both taxpayer companies. In places it needs a little 'reading between the lines' to ascertain exactly what actually occurred.

There is an interesting factor to note. HMRC had registered Withington KFC Services Ltd for VAT with effect from 1 May 2013 and issued a single Return period for 37 months. The company had failed to submit this Return. The company had not filed any Accounts and was in process of being struck off at Companies House. Since the company had failed to submit the Return, it had no right of appeal. HMRC were quite clever in allowing the appeal on this matter to reach the Hearing rather than applying for the appeal to be struck out. The logic is found in paras 120-126. The Tribunal of course found that the appeal on this ground was struck out.

However, HMRC had also issued a Personal Liability Notice against a Director of the company. What surprised me was that this was not appealed, although the taxpayer's representative only notified this at the beginning of the hearing. Of course, had it been appealed, HMRC had effectively protected their position by allowing the appeal to be heard on this issue. Although the company would doubtless not pay the assessment issued against it, the Director remained personally liable for almost £33,000.

The decision is at <https://tinyurl.com/y877et7g>

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