



**15TACD2019**

**BETWEEN/**

**NAME REDACTED**

**Appellant**

**V**

**THE REVENUE COMMISSIONERS**

**Respondent**

**DETERMINATION**

**Introduction**

1. This is an appeal in relation to transfer of business relief pursuant to section 20(2)(c) of the Value Added Tax Consolidation Act 2010, as amended ('VATCA2010') in respect of the VAT period of assessment November-December 2013.
2. The matter at issue is whether the transfer of assets constituted the transfer of an undertaking or part of an undertaking, capable of being operated on an independent basis, in accordance with section 20(2)(c) VATCA 2010.
3. The Respondent raised an assessment to VAT in the sum of €73,600 in respect of the VAT period of assessment November-December 2013, disallowing input credit recovery previously availed of by the Appellant. The Appellant duly appealed.

**Background**

4. By contract dated 28 November 2013, Mr. A, the owner of the Hotel A (hereafter 'the premises'), disposed of the premises, stock, fixtures and fittings to Motels Ltd. for consideration of €1.2m.

5. By contract dated 24 October 2013, signed it was submitted, on 28 November 2013, Motels Ltd. disposed of the premises to its parent company, the Appellant, by way of sub-sale arrangement. The agreement included fixtures, fittings, stock and trade debtors. The Appellant registered for VAT, CT, PAYE and PRSI with effect from 24 October 2013 and the business was described as '*the operation of a hotel*'.
6. The premises, stock, fixtures and fittings were transferred on 28 November 2013 and the Appellant operated the business on and from 29 November 2013. VAT in the sum of €73,600 was not submitted to the Respondent but was claimed as an input credit by the Appellant in its return in respect of the VAT period of assessment November-December 2013. The Respondent raised an assessment to VAT in respect of this period disallowing the input credit claimed by the Appellant. The Respondent submitted that as the Appellant operated the business of and from 29 November 2013, this was evidence that the business was '*capable of being operated on an independent basis*' in accordance with s.20(2)(c) VATCA2010.
7. The Appellant's submission was based on the fact that the Appellant did not intend to trade and did not retain a hotel or publican's licence and that there were fire safety issues. The Appellant submitted that for these reasons, it did not fall within s.20(2)(c) VATCA2010.

## Legislation

### Section 20 (2) VATCA 2010 - Transfers, etc. deemed not to be supplies

*(2) The transfer of ownership of goods -*

*(a) as security for a loan or debt,*

*(b) where the goods are held as security for a loan or debt, upon repayment of the loan or debt, or*

*(c) being the transfer to an accountable person of a totality of assets, or part thereof, of a business (even if that business or part thereof had ceased trading) where*

*those transferred assets constitute an undertaking or part of an undertaking capable of being operated on an independent basis,*

*shall be deemed, for the purposes of this Act, not to be a supply of the goods.*

### **Submissions**

8. On behalf of the Appellant, it was submitted that the Appellant did not intend to trade, did not possess a hotel or publican's licence and that there were fire safety issues. As a result, the Appellant submitted that the transferred assets were not capable of being operated by the Appellant on an independent basis in accordance with s.20(2)(c) VATCA2010.
9. The Respondent submitted that on a plain literal interpretation of section 20(2)(c) VATCA2010, the transfer of assets to the Appellant as an accountable person constituted an undertaking or part of an undertaking capable of being operated on an independent basis by the Appellant and that the undertaking or part thereof, was so operated. The Respondent submitted that the continuation of trade post transfer, was evidence of capability of operation on an independent basis in accordance with s.20(2)(c) VATCA2010.

### **Analysis**

10. In order for the deeming provision in section 20(2) VATCA2010 to apply, the assets transferred must '*constitute an undertaking or part of an undertaking capable of being operated on an independent basis*'.
11. The Respondent stated that the Appellant was an accountable person and that there was no requirement in section 20(2)(c) VATCA2010 for the transferor of the business to be an accountable person and I accept this submission.
12. On behalf of the Appellant, it was submitted that the Appellant was unable to operate the business on an independent basis in accordance with section 20(2)(c) VATCA2010 as it did not possess a publican's licence at the relevant time and that there were fire safety issues.

13. The Respondent submitted that the hotel business did not cease operations. The Respondent stated that when a Revenue officer attended the property on 29 November 2013 (the day after the transfer of the assets) he purchased a beverage from the bartender. On this occasion, alcohol sales were witnessed by the official in question, supporting the position that trade was continuing, albeit in the absence of a licence. The Respondent also relied on the fact that for trade to be taking place on 29 November, certain advance preparations would have been required in relation to stock orders, staff availability and related matters. The Respondent submitted that the continuation of the business, with or without a licence, demonstrated that the assets transferred were part of an undertaking capable of being operated on an independent basis in accordance with s.20(2)(c) VATCA2010 and that they were so operated.
14. The Appellant did not dispute the fact that the trade was taking place on 29 November 2013, rather, the Appellant contended that it did not intend to trade based on the fact that it did not retain a licence. The Appellant submitted that as a result, the Appellant did not fall within the provisions of s.20(2)(c) VATCA2010.
15. The Appellant opened and relied on Case C-497/01, *Zeta Modes Sàrl v Administration de l'enregistrement et des domaines* as authority for the proposition that in transfers of undertakings, the transferee must intend to operate the business or the part of the undertaking transferred, and must not intend to liquidate the business.
16. Thus, in order to qualify for transfer of undertaking relief, an intention to continue the trade is required of the transferee of the undertaking. The Respondent challenged the relevance of *Zeta Modes* on the ground that the Appellant in the within appeal did not cease trading. In fact, the Appellant was carrying on trading operations on 29 November 2013 and this was not disputed by the Appellant. In addition, on 23 October 2014, the Appellant applied for and obtained a publican's licence in relation to the premises known as the Hotel A.
17. Case C-497/01, *Zeta Modes* is also authority for the proposition that transfers may not be excluded from the application of the no supply rule on the basis that the transferee does not hold a business authorisation as required by the Member State for the pursuit of the economic activity. Therefore, the absence of a licence to operate a business will not preclude a transaction from falling within section 20(2)(c) VATCA 2010, once all

other conditions have been met. Paragraphs 51-55 of the judgment in *Zeta Modes* provides;

*'In addition, in accordance with the principle of fiscal neutrality, transactions which, although unlawful, do not relate to products whose marketing is prohibited by their very nature or because of their special characteristics and which may compete with lawful transactions are subject to the taxes normally payable under the Community rules (see, concerning ethyl alcohol imported as contraband from third countries into the customs territory of the Community, Salumets , cited above, paragraphs 19, 20 and 23).*

*Immaterial in this respect is the fact that the pursuit of economic activity is subject in the Member State concerned to a special system of business authorisation (see to that effect Salumets , paragraph 22).*

*It is clear that a trader pursuing an economic activity for which he does not hold a business authorisation may be in competition with traders who do hold the required authorisations.*

*Therefore on the one hand the transfer of a business or a part of an undertaking is generally subject to VAT even if the transferee does not hold the business authorisation required by the Member State concerned for the pursuit of the economic activity which that business or that part of the undertaking enables to be carried on. On the other hand, when a Member State makes use of the option in the first sentence of Article 5(8) of the Sixth Directive, that transfer may not be excluded from the application of the no-supply rule for the sole reason that the transferee does not hold such an authorisation.*

*In the light of the foregoing considerations, the answer to the third question must be that when a Member State has made use of the option in the first sentence of Article 5(8) of the Sixth Directive 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, the restriction by a Member State of the application of that no-supply rule to transfers of a totality of assets where the transferee holds the authorisation for the pursuit of the economic activity which that totality enables to be carried on infringes that provision.'*

18. As trade was taking place on 29 November 2013, a fact undisputed by the Appellant, the Appellant cannot succeed in its submission that it did not intend to trade. Section 20(2)(c) VATCA2010 applies the deeming provision in circumstances where assets of a business are transferred to an accountable person (i.e. the Appellant) and those assets '*constitute an undertaking or part of an undertaking capable of being operated on an independent basis*' [emphasis added]. The fact that trade continued from the date of the transfer, is evidence that the assets transferred were capable of being operated independently, in accordance with the requirements of section 20(2)(c) VATCA2010.

### **Findings and determination**

19. Section 20(2)(c) VATCA 2010 applies to a transfer to an accountable person of the assets or part thereof of a business, where those transferred assets constitute an undertaking or part of an undertaking *capable* of being operated on an independent basis. Where the conditions are met, section 20(2) VATCA 2010 applies to deem the transfer of assets *not* to be a supply of goods for VAT purposes.

20. In this appeal there was a transfer of business assets to the Appellant, an accountable person, which constituted an undertaking or part thereof, capable of being operated on an independent basis and which was so operated. Thus the deeming provision in section 20(2) VATCA 2010 applies to the transaction deeming it *not* to be a supply of goods for VAT purposes.

21. As a result, I determine that the Appellant is not entitled to VAT input recovery in relation to the transaction and I determine that the assessment in respect of the VAT period of assessment November/December 2013, shall stand.

22. This appeal is hereby determined in accordance with section 949AK TCA 1997.

**COMMISSIONER LORNA GALLAGHER**

**February 2019**



**The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997 as amended.**