SUPPLY - Transfer of business as a going concern - Appellant transferred certain assets of his business - No written contract - No mention of transfer of goodwill or existing contracts - No provision for employees, debtors or creditors - Claim by purchaser for input tax - Whether transfer of business as a going concern - No - VAT (Special Provisions) Order 1995 - Appeal dismissed

LONDON TRIBUNAL CENTRE

P J NICHOLAS T/A P A SCAFFOLDING - Appellant
- and -
THE COMMISSIONERS OF CUSTOMS AND EXCISE - Respondents

Tribunal: ANGUS NICOL (Chairman)

MRS ANGELA WEST FCA

Sitting in public in Cardiff on 4 December 2002

G Parker, accountant, for the Appellant

Samuel Grodzinski, counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

DECISION

1. The Appellant, who carried on business as a scaffolder, trading under the name of P A Scaffolding, appeals against an assessment in the sum of £8,191.49 relating to unpaid output tax in respect of a sale of certain scaffolding and other equipment on or about 21 September 1994. The sale was to a company called Phœnix Scaffolding Ltd ("Phœnix), and was apparently evidenced by an invoice dated 21 September 1994 addressed to Phœnix. This invoice shews a total price of £55,000, including VAT of £8,101.49.

2. The sole issue in this appeal is whether that sale was in fact the sale of the Appellant's whole business as a going concern, or was no more than the sale of certain assets of that business. If it was the former, then the transaction does not attract VAT. If the latter, it was a standard-rated supply of goods. Included in the grounds of appeal was the statement that

> "the invoice to Phœnix Scaffolding is not genuine – i.e. it was not raised by the Appellant, and has probably been raised by Phœnix

Scaffolding to obtain a tax credit fraudulently. Phœnix Scaffolding has since gone into liquidation."

The evidence

3. It was at first not intended that the Appellant should be called to give evidence. Mr Parker, his accountant, who appeared for him, told us that, as a result of the Appellant having been a boxer for some years, his memory was impaired and he was punch-drunk. Mr Parker also said, and had informed the Commissioners in a letter dated 21 July 2000, that the Appellant's reading and writing abilities were "somewhat lacking". However, it became clear at an early stage of the hearing that the Appellant's case could not properly be put before the Tribunal without his evidence, and a short adjournment was granted to enable the Appellant to attend. It also became clear during his evidence that the Appellant was able to read, in his own words, "as well as anybody else".

4. The Appellant said that at some time in about September 1994, Nick Wylie, director or proprietor of Phœnix, came to the Appellant's yard and asked him if he wanted to sell it. The Appellant said that he did, and Mr Wylie said that he was interested. They agreed a price of £55,000 and shook hands on the bargain, and thus the sale was concluded. There was no written agreement of any kind, the Appellant said. He said also that all the contracts outstanding were taken over by Phœnix, and Mr Wylie asked the Appellant to work for him. The Appellant said that he agreed to do so "so as not to lose the contracts". He said that all the equipment he had was taken over by Phœnix. Mr Wylie told him that there was no need to charge VAT on the sale. The Appellant said that he asked his accountant about that, and was advised that the sale was the transfer of his business as a going concern, and that therefore VAT should not be charged.

5. The Appellant said that he had not raised the invoice of 21 September 1994. He agreed that it was on his letter-head, but it had not been issued by him. When shewn two other invoices, dated 16 and 23 August 1995, the Appellant at first said that he had not issued those. They were addressed to Manor Plant Supplies Ltd, and were for the sale of scaffolding tubes and related equipment, for the prices of £5,494.54 an £4,462.50 respectively. To those sums, VAT was added in each case. These invoices, the Appellant then said, had been issued by him, and were proper invoices, with the word "invoice" printed on them. The document dated 21 September 1994 was on a piece of headed paper with the word "invoice" typed on, which shewed that it was not genuine. The Appellant repeated that he had sold everything, lock, stock and barrel, to Phœnix, and after that he was working for Nick Wylie.

6. The Appellant agreed that he had carried on business under a number of different names. First there was a company called Malnick Scaffolding Ltd. The "Mal" referred to another man who put money into the business and did all the paperwork. Then he stopped working, and the company just disappeared. Then the Appellant started A P Scaffolding. After that came P A Scaffolding. The A was for his son, Andrew. After that he started another company, P A Scaffolding Hire Ltd, and a third company, A P Scaffolding Newport Ltd, which was trading in Newport. And there was a further company, which he bought. A P Scaffolding Newport Ltd is still trading, and the Appellant said that he is managing director and sole shareholder.

7. A P Scaffolding had a number of customers, builders, roofers, and anyone who wanted scaffolding on hire. He had a number of regular customers, with whom he had a good relationship. The firm had four or five employees, and two or three

subcontractors, possibly more. It traded from Unit 9, Taverners Trading Estate. The firm had a good name and was doing good business. The Appellant agreed that he had been involved in an earlier appeal to the Tribunal (*Peter James Nicholas and Andrew James Nicholas t/a A & P Scaffolding v Customs and Excise Commissioners* (1999) (Decision No 15898), which was also concerned with the issue of whether the appellants in that case had purchased a business as a going concern.

8. He said that he had sold the business to Phœnix because it seemed a good idea at the time, and for the money. He had never sold a business before. He said that he felt that he had had enough; there was a big difference between being out and working on scaffolding on the one hand and being in the office on the other. He thought that he would like to be in the office for a change. But that was a mistake, once he had been in the office for a bit it did not feel right. At the time of the hearing, the Appellant said, he was doing both, working on scaffolding and working in the office. The Appellant said that his employees did not go to work for Mr Wylie, or only one or two of them. He did not know if the subcontractors went to work for Mr Wylie. On further thought, he said he thought that two of them did, though he could not remember their names. He could not remember if he had owed any money to the subcontractors at that time. If so, he paid them, not Mr Wylie. The Appellant's premises were not sold to Mr Wylie, who did not need them, having his own. The Appellant said that he did not charge any price to Phœnix for the customers that he still had. He charged for the scaffolding and equipment; there was probably not £55,000 of equipment there, and there was some goodwill.

9. From September 1994 to August 1995, the Appellant said, he was working for Mr Wylie, who employed him as contracts manager, to look after his own contracts that he had brought to Phœnix. Some of those contracts were very small, he said, but there were some worth £20,000 to £30,000. The price of £55,000 was for the scaffolding and the jobs already in hand. There would also be scaffolding out on these jobs. He agreed that Mr Wylie was getting a very good deal. The agreement was that Mr Wylie would pay him a monthly cheque as wages and an amount every month towards the £55,000. There was nothing in writing between the Appellant and Mr Wylie relating to the sale. He only made about two payments. Then he went bust. He was not a very nice man at all, the Appellant said. He repossessed Somme of the scaffolding from Phœnix, and sold it to Manor Plant Hire Ltd. The two invoices in August 1995 were for those sales. Those, he said, were genuine and had been raised by his office. They represented a quantity of scaffolding sold by P A Scaffolding to Manor Plant.

10. In cross-examination, the Appellant was asked why he had told Mrs Jones, the visiting officer, that he had been on income support from September 1994 to November 1995. He said that he did not know what income support was, and therefore couldn't say whether he had been claiming it or not. He could not remember whether he had ever been on the dole, though he then remembered that he had claimed it in the past but could not say when.

11. Asked about the application for deregistration, the Appellant said that he had not filled the form in, but he had signed it. He said that he had read it before signing. The box "I have ceased to trade" was ticked, and Part A was completed but not Part B, which should have been completed if there had been a transfer of the business as a going concern. Part B was marked "N/A", for not applicable. He said that he had been advised by Mr O'Brien, his then accountant, that there had been a transfer of the business as a going concern. He could not account for the reason why Mr O'Brien, writing to the Commissioners on 9 December 1997 giving

notice of the Appellant's intention to appeal, said that the grounds of appeal were that the Appellant had no recollection of the sales nor of receiving any such sums, and made no mention of any sale of the business as a going concern.

12. Mrs Julie Jones, an officer of Customs and Excise, gave evidence. She referred to a visit report which she wrote in connexion with six visits made by her to the Appellant. In that report she mentioned a "reference" raised by an officer in Cardiff relating to the sale of assets by the Appellant. That "reference", she said, was the disallowance of input tax claimed by Phœnix in respect of the invoice dated 21 September 1994, which had been found on Phœnix's premises. It was not suggested at that or any other time that it was in respect of a transfer of a business as a going concern. In the end, the claim by Phœnix for the input tax in that invoice was allowed. Mrs Jones's visit report also mentioned that when she had asked the Appellant about the sale of assets shewn in the invoice the Appellant said that he could not remember selling them. Later, the Appellant said to her that he did remember the sale, but disputed the figures. He said that he had ceased trading on 22 September 1994, and that he was receiving income support between September 1994 and about November 1995. Lastly, Mrs Jones said that when she saw the Appellant in 1997, he thought that the business had been deregistered in 1994.

The law

13. The law relating to the transfer of a business as a going concern is set out in article 5 of the Value Added Tax (Special Provision) Order 1995. So far as is relevant to this appeal, that article provides:

> "(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) 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....
>
> (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,...."

14. Since the Commissioners refer to it in their statement of case, and the Appellant also contended that the requirements were fulfilled by this transaction,

we refer also to VAT Public Notice 700/9. Under the heading "Special Rules", that Notice states:

> "2.1 General
>
> If all the conditions in paragraph 2.2 are met, special rules apply and you must **not** charge or account for VAT on any of the assets transferred....
>
> 2.2 If you meet **all** of the conditions listed below, the transfer of the assets of the business, other than premises, is **not** a taxable supply and you must **not** charge VAT....

- **The effect of the transfer must be to put the new owner in possession of a business which can be operated as such**. A sale of capital assets is not in itself a transfer of a business as a going concern, but if the effect is to put the purchaser in possession of a business, that is a transfer of a going concern....
- **The business, or part business, must be a going concern at the time of the transfer**....
- **The assets you are transferring must be intended for use by the new owner in carrying on the same kind of business**....
- **There must not be a series of immediately consecutive transfers of the business**....
- **The new owner must be registered for VAT or, at the time of the transfer, become liable to be registered or be accepted for voluntary registration**....
- **There must be no significant break in the normal trading pattern before or immediately after the transfer.**...
- **If you are transferring only part of your business, that part must be able to operate alone**...."

The contentions

15. Mr Grodzinski, for the Commissioners, referred to *Kenmir Ltd v Frizzell and others* [1968] 1 WLR 329, CA, in which the court considered whether a sale of factory premises, fixtures and fittings and plant and machinery amounted to the transfer of a business as a going concern. It was contended in that case that there could be no transfer of a business as a going concern without an assignment of goodwill. The court rejected that contention, and held, at page 335,

> "In deciding whether a transaction amounted to the transfer of a business regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. In the end the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern the activities of which he could carry on without interruption. Many factors may be relevant to this decision though few will be conclusive in themselves."

It was not in dispute, Mr Grodzinski said, that the items of scaffolding and other equipment were sold. There could be no definitive list of factors which proved or disproved that the business had been transferred. The Tribunal should consider whether there had been a transfer of goodwill and of contracts, of debtors and

creditors, whether there was any agreement in relation to the employees or subcontractors, and whether there was a transfer of the overall assets of the business including the premises. One would have expected to see some written evidence of the transfer of the business, if such it was, as in the Appellant's previous appeal to the Tribunal.

16. The points in the present case which pointed to there having been no transfer of the Appellant's business as a going concern were, that there had been a transfer of only one or two of the Appellant's employees to the purchaser, and no transfer of premises. There had been no mention in correspondence, in fact no mention at all until during the hearing, that goodwill or contracts had been transferred. As to the Appellant's credibility, he had said, through his representative, that he was unable to read sufficiently well to carry on business; that his health was impaired so that he was unable to attend the hearing; and that he had told the Tribunal that he had been working for Mr Wylie from September 1994 to August 1995, and had told Mrs Jones that he had been on income support at that time, then saying that he did not know what income support was.

17. The evidence as a whole, Mr Grodzinski contended, was inconsistent with the transfer of the business as a going concern, especially that relating to transfer of contracts and goodwill. There was no sum attributable to the transfer of the benefit of valuable contracts. The price, and the invoice if it had any bearing on the matter, was also inconsistent with the transfer of the contracts and goodwill. The application for deregistration, filled in on the Appellant's instructions and signed by him, stated that there had not been a transfer of the business as a going concern. There were sales of assets by P A Scaffolding, with invoices shewing its heading, address, and VAT number, a year after the sale to Mr Wylie. It had been conceded by the Appellant that VAT was correctly charged on those sales to Manor Plant Hire. Those invoices could not be reconciled with the assertion that P A Scaffolding had been sold lock, stock and barrel to any other person. Mr O'Brien's letter on the Appellant's behalf, of 9 December 1997, announcing that the Appellant intended to appeal, gave brief grounds, but made no mention of any transfer of the business.

18. Mr Parker, for the Appellant, repeated that the Appellant had known nothing about the invoice of 21 September 1994. That document had not been available when the officer visited Phœnix, and had become available later. That suggests that Phœnix may have raised the invoice on a letter-head, not on a proper invoice. Mr Parker suggested, contrary to the evidence, that perhaps the Appellant had not read the application for deregistration. He contended that it was more usual that debtors and creditors were not transferred from one business to a purchaser, nor was it the case that all employees were always transferred.

19. Mr Parker contended that the transaction met all seven of the conditions set out in paragraph 2.2 of Notice 700/9. As to the first point, the Appellant had transferred all contracts and became an employee himself, and scaffolding on site was charged at a weekly rate. The Appellant's business was clearly a going concern at the time. The assets that were sold were intended for use by Mr Wylie in the same kind of business. There was no succession of transfers. There was no evidence as to the VAT status of Phœnix. There was no break in the trading pattern. Lastly, Mr Parker said that the seventh point was met: that the part of the business being transferred was capable of operating alone.

20. There was no evidence that there had been any other invoices issued by P A Scaffolding after 21 September 1994, and the two to Manor Plant Hire arose only after repossession of some scaffolding. In all the circumstances, Mr Parker contended, there had been a transfer of the Appellant's business as a going concern.

Conclusions

21. In accordance with the Court of Appeal in *Kenmir Ltd*, we consider all the circumstances surrounding the transaction which is the subject of this appeal, and we look at the substance of it and not the form.

22. We find he following facts. First, that until some time in about September 1994 the Appellant was carrying on business as a scaffolder under the business name of P A Scaffolding, no doubt with his son, Andrew. Whether he was also trading through P A Scaffolding Newport Ltd was not clear, but does not affect this appeal. At come time during September 1994, probably on or near 21 September, the Appellant was approached by Mr Wylie of Phœnix. An agreement was entered into, which involved the sale of scaffolding and other equipment, including three vehicles. When the Appellant mentioned the conversation with Mr Wylie, in his evidence in chief, his account was extremely brief, and mentioned only taking over the yard. A price of £55,000 was agreed, apparently then and there, and that was that. The bargain was considered to be sealed. There was nothing said, during that conversation, or if there was the Appellant remained silent about it, relating to the vehicles that were sold, work in progress, creditors, debtors, employees, subcontractors, or goodwill. The Appellant made no mention of how the sum of £55,000 was arrived at. In particular, nothing was said about the value of the vehicles or the ongoing contracts. Later, the Appellant said that some of the contracts were worth £20,000 or £30,000. The business was going well, and had a number of regular customers. There was also an amount, unquantified, of scaffolding out on various sites. The agreement itself, of which there was no memorandum in writing, on the Appellant's account, related only to the yard and the price. The premises were not sold. The Appellant became an employee of Phœnix, as the Appellant said, so that he could look after the existing contracts.

23. We heard no evidence from Mr Wylie (perhaps not surprisingly), nor from the Appellant's son, Andrew, who might have been able to remember with some accuracy what had gone on, particularly if he was concerned, with his father, in the business.

24. In the light of the evidence relating to the sales to Manor Plant Hire, we observe firs, in passing, that if the scaffolding, having been sold to Phœnix, was repossessed by the Appellant from Phœnix when it went out of business, that might have been a matter of interest to the other creditors of Phœnix. But the use by the Appellant of the trading name of a business which he now says he sold, lock, stock and barrel, and of its VAT registration number, nearly a year after that sale, seem to us to be wholly inconsistent with the transfer of the business as a going concern, but consistent with a sale of some of the assets of the business. Further, we accept, as the Appellant told us, that he did not fill in the application for deregistration, but we find that it was filled in on his instructions, that he read the completed application, and that he signed it. That

application makes it clear that the Appellant had ceased trading under P A Scaffolding's VAT registration, and that the business had not been transferred as a going concern.

25. The principal single bone of contention was the invoice of 21 September 1994. On the face of it, if it were a genuine invoice issued by the Appellant, in our view it would shew conclusively that there was no more than a sale of assets, since only physical assets are mentioned, contracts, goodwill and other intangible assets being omitted, and VAT is charged. On the other hand, if that invoice was in fact the creation of Mr Wylie, constructed for his own ends, it may be that the items listed therein as being sold might not correspond with the physical items sold. But if that invoice is left out of consideration altogether, in our view the remainder of the evidence still shews that the transaction in question was not the sale of the Appellant's business as a going concern.

26. For the above reasons, and having looked at the substance rather than the form, and considered all the circumstances, we conclude that what took place between the Appellant and Mr Wylie was a sale of assets for a price of £55,000, which was not the transfer of the Appellant's business as a going concern, and which therefore was a taxable supply at the standard rate. For that reason, the appeal is dismissed.

27. Mr Grodzinski said that he had no instructions relating to costs, and asked for leave to apply on the matter of costs. Accordingly we give liberty to both parties to apply as to costs, in the event of either or both wishing to be heard, or in default of agreement as to costs. Any such application should be made not later than 42 days after the date of release of this decision.

ANGUS NICOL

CHAIRMAN

RELEASED:

LON/01/378