

TAXREP 41/00

TRANSFERS OF GOING CONCERNS

Memorandum submitted in December 2000 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales to Customs in response to an invitation to comment issued in September 2000

TRANSFERS OF GOING CONCERNS

Introduction

1. We welcome the opportunity to respond to the invitation to comment in Business Brief 13/2000 dated 28 September 2000.

Mistakes

2. We are aware that it is Customs' policy not to pursue recovery of "tax" wrongly charged on a transaction considered to amount to a TOGC where output tax has been brought to account by the seller. In practice, however, this policy seems to result in a situation where the purchaser, who is almost invariably the innocent party, is compelled to bear the financial consequences of errors.
3. As is admitted by Customs in internal guidance:

“One problem with TOGC is that it is an exception to the general principle of the tax that VAT is due on supplies of goods and services, and businesses are often unaware of the special rules. This is compounded by the fact that often the purchaser of a business is new to VAT and as such it may never have occurred to him that VAT should not be charged.”
4. In situations where tax has been paid in good faith, it seems to us that if Customs intend to continue with their equitable line of pursuing "tax" either from the vendor or the purchaser, then they should take more active steps to recover from the vendor the "tax" wrongly charged, rather than taking a possibly easier option of disallowing the input tax claimed by the purchaser. The current practice of simply disallowing the input tax claim and leaving the purchaser to seek redress from the vendor may give rise to the unfortunate impression that Customs, by not pursuing recovery of the sum wrongly charged as VAT from the vendor, are condoning his actions.
5. The number of instances where tax is wrongly paid by the purchaser of an existing business could be reduced if VAT leaflet 700/1 contained more guidance on the consequences of buying an existing business. If this leaflet, and the other guidance available to those starting up in business made it clear that, in general, VAT should not be payable on the purchase of an existing business, we are sure that there would be many fewer examples of tax being paid incorrectly.

Application of the rules

6. If Customs applied the TOGC rules more generally in the context of transfers of all or part of a business, there would be fewer instances where VAT should be charged on business transfers. This should result in fewer occasions when VAT is charged incorrectly, as vendors and purchasers would be more generally aware that business transfers do not attract VAT. The present practice, which seems to be to construe the provisions narrowly, results in the creation of many "borderline" issues, which could be avoided by a wider interpretation of the law.
7. An example of this can be found in the context of successive transfers of a business. Our members have found that in some instances, officers will accept that successive transfers can

and should be treated as TOGC as long as the intermediary holds the business for a period (perhaps as little as one day). In other cases, officers have insisted that, to qualify, there must be a much longer-term use of the business assets. Often, a vendor will not be aware of and will have no control over a purchaser's use of assets transferred, yet the VAT treatment of his supply could be altered by what the purchaser does. We are aware of instances where vendors have received assessments prompted by actions taken by vendors over which they have no control, even though there was no revenue at stake overall (because tax charged by the vendor would be recoverable by the purchaser).

Published guidance

8. Whilst some practitioners and traders have access to additional material in publications like Croner's VAT Encyclopaedia and the Customs and Excise manuals on "Books on Screen", we are conscious that most practitioners and the general body of traders rely on the VAT Notices and booklets. We consider that, wherever possible, these should be written in "plain English" and should avoid the use of technical terms and VAT jargon. Where technical terminology is unavoidable, it should be fully explained.
9. In terms of the presentation of the guidance, we feel that the leaflet should contain examples that would bring home to readers the impact of the provisions being described. The adoption of a "question and answer" style or the inclusion of a "frequently asked questions" section may also be helpful to the average reader. Although we appreciate that the leaflet needs to be concise, we feel that it also needs to be comprehensive. We consider that a longer, more comprehensive leaflet that contains some of the guidance that, at present, is only available to those with access to other resources (such as the Customs and Excise manuals) would be preferable. There is no doubt that the published guidance available to the majority of taxpayers must be both comprehensive and comprehensible if Customs are to avoid taxpayers having to ask local offices for additional guidance.
10. We feel that it would also be helpful if the application of the TOGC provisions to cross-border transactions were addressed in the published guidance and examples. For example, if an entire, international, business were purchased by a taxable person in the UK, but the only part of that business in the UK comprised a stock of goods, our view is that the transaction constitutes a TOGC. With increasing globalisation, we feel that it would be helpful for this to be confirmed in the published guidance.
11. Given the fact that any revision of the published guidance resulting from this exercise is likely to take a little time to produce, we welcome the fact that (as confirmed in our telephone conversation on 30 November) you will be taking account of the outcome of the *Abbey National* case. It would be counterproductive to produce revised guidance that had to be changed again if the final decision in that case results in further changes to Customs' policy.

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