[2015] UKUT 0341 (TCC)

Appeal number: FTC/27/2014

VAT – whether transfer of a business to a company that was a member of a VAT group was a transfer of a going concern (TOGC) – after transfer supplies made only to other group company – art 5, Value Added Tax (Special Provisions) Order 1995 – s 43, VATA – Principal VAT Directive, Arts 11, 19 and 29

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

INTELLIGENT MANAGED SERVICES LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: MR JUSTICE BARLING
JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Rolls Building, London EC4 on 9 – 10 June 2015

Nigel Pleming QC, instructed by Rosetta Tax LLP, and Peter Mason of Rosetta Tax LLP, for the Appellant

Sarabjit Singh, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is the appeal of Intelligent Managed Services Limited ("IMSL") against the decision of the First-tier Tribunal ("FTT") (Judge Brooks and Mrs Hewett) dismissing IMSL's appeal against the decision of HMRC that the transfer of IMSL's banking support services business, consisting of the business assets and staff, to Virgin Money Management Services Limited ("VMMSL"), a member of the Virgin Money Group ("VMG") VAT group, was not a "transfer of a going concern", with the result that the transfer gave rise to supplies of goods and services that were subject to VAT.

The law

2. It is convenient to start with the relevant Community and domestic law, as that sets the context for the dispute between the parties. We were referred to a number of such provisions, but it will suffice by way of introduction to set out only those we consider to be the most material.

3. The first are the provisions of the Principal VAT Directive (2006/112/EC of 28 November 2006) which authorise the member states to make provision for business transfers not to be regarded as supplies of goods or services. Article 19 relates in terms to goods, and provides:

> "In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place, and that the person to whom the goods are transferred is to be treated as the successor to the transferee.
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> Member States may, in cases where the recipient is not wholly liable to tax, take the measures necessary to prevent distortion of competition. They may also adopt any measures needed to prevent tax evasion or avoidance through the use of this Article."

4. Article 19 is applied to the supply of services by Article 29.

5. The UK has taken advantage of Articles 19 and 29, and has made provision for transfers of businesses as a going concern not to be treated as supplies of goods or services in article 5 of the Value Added Tax (Special Provisions) Order 1995 ("SPO"), which relevantly provides:

> "5(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,

(ii) 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 in relation to that part, and

(iii) 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 …"

6. The actual transferee of IMSL's business, VMMSL, was a member of the VMG VAT group. The authority for the VAT treatment of certain associated enterprises is also derived from the Principal VAT Directive. Article 11 provides:

"After consulting the advisory committee on value added tax (hereafter the 'VAT Committee') each Member State may regard as a single taxable person any persons established in the territory of that Member State who, whilst legally independent, are closely bound to one another by financial, economic and organisational links.

A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision."

7. The UK has enacted provisions relating to VAT groups in ss 43 – 44 of the Value Added Tax Act 1994 ("VATA"). We are principally concerned with the effect of VAT group registration, which appears in s 43(1) as follows:

"Where … any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and -

(*a*) any supply of goods and services by a member of the group to another member shall be disregarded: and

(*b*) any supply which is a supply to which paragraph (1) above does not apply and is a supply of goods or services by or to a member of the group shall be treated as a supply by or to the representative member …"

The material facts

8. Although before the FTT there was extensive factual evidence, including statements of witnesses for IMSL that were not challenged, and the FTT set out in full a lengthy statement of agreed facts, for the purposes of this appeal we are able to describe the position very simply.

9. At the time of transfer to VMMSL on 16 August 2010, IMSL's business was, as described in the deed of transfer of that date, the business of "owning, maintaining, operating, using, developing and supporting an information technology infrastructure and know-how for supply to and use by others in the provision of banking support services in the United Kingdom". IMSL had developed a banking platform (or "banking engine") for the provision of banking processing services for banks which did not have modern systems or which did not wish to build their own advanced payment processing services.

10. Following the transfer of the business, VMMSL provided banking processing services to another member of the VMG VAT group, Virgin Money Bank Limited ("VMBL"), which provided retail banking services to retail customers. The processing services provided by VMMSL were incorporated into the retail banking services offered by VMBL, which comprised retail banking products, accounts and payment processing services, for which the capability provided by the banking engine was an essential component. VMMSL did not provide any services otherwise than to group companies.

The FTT decision

11. At [28], the FTT described the issue to be determined in the following way:

> "… whether, as a result of the effect of the provisions relating to the treatment of VAT groups, the transfer of a business to a member of a VAT group can be a TOGC and/or a TTBA, in accordance with Article 19 and 29 [of the Principal VAT Directive] and Article 5(1)(a)(i) of the [SPO], if the transferee makes supplies only to another member of the same VAT group."

12. The reference, in [28], to a TOGC is to the description used in article 5 of the SPO of a "transfer of a going concern", and the reference to TTBA is to the expression "totality of [business] assets" in Article 19 of the Directive. Nothing turns on the use of these different descriptions; we shall use the familiar acronym TOGC.

13. The FTT's summary was, with respect, a perfectly correct description of the issue to be determined, although it encompassed a number of separate issues between the parties. However, what was not in issue was, first, that IMSL had transferred its business to VMMSL, and secondly that VMMSL had at the time of the transfer intended to operate the business.

14. The FTT began, at [29] – [32], by considering whether the requirement, under domestic law, for the transferee to intend to carry on the same kind of business as that formerly carried on by the transferor was compatible with EU law. It did so although it took the view that it was not strictly necessary because of HMRC's acceptance that VMMSL intended to operate the business it had acquired from IMSL.

15. Having considered the judgment of the Court of Justice in *Zita Modes Sàrl v Administration de l'Enregistrement et des Domaines* (Case C-497/01) [2004] CMLR 533, [2004] STC 1059, which we shall return to later, the FTT decided, at [31] and

[32], that the "same kind of business" requirement in Article 5(1)(a)(i) of the SPO was compatible with EU law.

16. The FTT then noted, at [33], that it had been accepted, not only that VMMSL had intended to operate the business it had acquired from IMSL, but that, apart from the effect of the group provisions in s 43 VATA, the transfer of the business would have been a TOGC. Thus, it was accepted before the FTT (as it was before us) that if VMMSL had not been a member of the VMG VAT group, and had made the supplies of its processing services to VMBL, the conditions of article 5 of the SPO, including that VMMSL was carrying on the same kind of business as formerly carried on by IMSL, would have been satisfied.

17. Having then referred to a number of domestic law authorities on the ambit and effect of the UK's group provisions, and having noted that the purpose of s 43 is to enable a group to be treated as if it were a single taxable entity, with the representative member being treated as carrying on the businesses of other group members as well as its own, and having acknowledged that those group members nonetheless continue to have their own separate existence, the FTT focused on VMMSL as the acquirer of the IMSL business. It reasoned, at [36] to [38], that because VMMSL was not the representative member of the VMG VAT group and that its supplies to VMBL fell to be disregarded by virtue of s 43, the effect was that VMMSL's business had effectively ceased. It did not therefore operate the same kind of business as that undertaken by IMSL prior to the transfer – indeed it did not operate any business – and accordingly VMMSL's acquisition of the business from IMSL could not be a TOGC.

IMSL's appeal to this Tribunal

18. IMSL appealed that finding of the FTT. Before us, HMRC did not seek to support it. It was accepted before us, having regard in particular to the judgment of the Court of Justice in *Skandia America Corp (USA), filial Sverige v Skatteverket* (Case C-7/13) (2014) ECLI:EU:C:2014:2225, [2014] All ER (D) 125 (Sep), which was issued after the FTT had released its decision in this case, that for VAT purposes the acquirer of IMSL's business was the single taxable person, namely the VMG VAT group, and not VMMSL itself. The relevant tests had to be applied in relation to what the group as a whole had done, and not any individual group member.

19. The *Skandia* case demonstrates the extent of the single taxable person fiction in a group context. There the question was whether a supply of services from a US company to a branch of the same company in Sweden, which was a member of a Swedish VAT group, was a taxable transaction. The Court held that it was, essentially because the effect of the grouping provisions was that the supply was to a separate single taxable person, namely the group of which the branch was a member, and not to the branch itself. The US company and its branch could not be considered to be a single taxable person. The Court said (at [28] – [30]):

> "28. … it is common ground that Skandia Sverige is a member of a VAT group, created on the basis of Article 11 of the VAT Directive

> and therefore forms with the other members a single taxable person. For VAT purposes, that VAT group was allocated a registration number by the competent national authority.
>
> 29. In this connection, treatment as a single taxable person precludes the members of the group from continuing to submit VAT declarations separately and from continuing to be identified, within and outside their group, as individual taxable persons, since the single taxable person alone is authorised to submit such declarations (judgment in *Ampliscientifica and Amplin*, C-162/07, EU:C:2008:301, paragraph 19). It follows that, in such a situation, the supplies of services made by a third party to a member of a VAT group must be considered, for VAT purposes, to have been made not to that member but to the actual VAT group to which that member belongs.
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> 30. Therefore, for VAT purposes, the services supplied by a company such as SAC to its branch which, such as Skandia Sverige, belongs to a VAT group, are considered not to be supplied to that branch but must be regarded as being supplied to the VAT group."

20. In this appeal, therefore, the issues have narrowed down. It is accepted that if VMMSL were a stand-alone company all the conditions for the sale of the business by IMSL being a TOGC, including that VMMSL was carrying on the same kind of business as IMSL, would be satisfied. The only question is whether, when the transaction is regarded as a sale by IMSL to the single taxable person, the VMG VAT group, that group fails to satisfy the same kind of business test.

21. That was not a question addressed by the FTT in its decision. The FTT made an error of law in treating the relevant transferee as VMMSL rather than the VMG VAT group, and in not considering the application of the TOGC provisions in that context. The decision of the FTT must therefore be set aside. Having heard argument on the remaining question, which is a question of law, we shall re-make the decision.

Discussion

22. Looking at the circumstances from the point of view of the VMG VAT group, the difference between the two cases is that, whereas VMMSL as a stand-alone company would be making supplies of the banking engine services to third parties, in the circumstances here the VMG VAT group is to be treated as carrying on the VMMSL business as part of its overall business of the provision of retail banking services, and the product of the banking engine services provided internally by VMMSL to the group was incorporated into the broader retail banking services supplied by the VMG VAT group to its third party customers. The principal question is whether that factor means that the VMG VAT group was not carrying on the same kind of business as that formerly carried on by IMSL. At the same time, there is the related question whether the same kind of business requirement in article 5 of the SPO is compatible with EU law or is to be disapplied.

Case law of the ECJ

23. The requirement that the transferee carry on the same kind of business as that of the transferor is an express requirement of article 5 of the SPO, but not of Article 19 of the Principal VAT Directive. In construing article 5, the principle is that domestic provisions should be construed, so far as possible, with the governing EU law: see *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135, [1992] 1 CMLR 305, ECJ. It is accordingly to the case law of the Court of Justice that we turn first.

24. The precursor to Article 19 of the Principal VAT Directive (Article 5(8) of the Sixth VAT Directive) fell to be considered by the ECJ in *Zita Modes*. In that case there had been a sale by Zita Modes of a ready-to-wear clothing business to another company, Milady, which operated a perfumery. The questions raised by the national court in Luxembourg included whether the no-supply rule applied to any transfer of a totality of assets or only to those where the transferee pursues the same type of economic activity as the transferor.

25. The Court began, at [30], by identifying the two parts of Article 5(8); the first part setting out the general provision enabling member states to provide for a no-supply rule, the second permitting member states to exclude from the application of the rule transfers in favour of "a transferee who is not a taxable person or who acts as a taxable person only in relation to part of his activities", if necessary to prevent distortion of competition. That, the Court held, was exhaustive of the circumstances in which the no-supply rule might be limited. The Court said (at [31]):

> "It follows that a Member State which makes use of the option granted in the first sentence of Art.5(8) of the Sixth Directive must apply the no-supply rule to any transfer of a totality of assets or part thereof and may not therefore restrict the application of the rule to certain transfers only, save under the conditions laid down in the second sentence of the same paragraph."

26. That, we consider, disposes of the argument of Mr Singh that there are no restrictions in the first paragraph of Article 19 on the circumstances in which member states can decide whether there is a TOGC. It also disposes of Mr Singh's submission, which we found surprising, that the reference in the second paragraph of Article 19 to a recipient who is not wholly liable to tax refers to the effect of the application of the no-supply rule itself. It is clear that this reference is to a person who is wholly or partly exempt or wholly or partly outside the scope of VAT. It is equally clear that the circumstances in which member states which make provision for a no-supply rule can restrict the application of that rule are limited to those in the second paragraph of Article 19, which also includes the ability to adopt any measures needed to prevent tax evasion or avoidance through the use of Article 19. A general requirement that the transferee use the assets transferred in carrying on the same kind of business as the transferor cannot therefore restrict what would otherwise be the scope of the no-supply rule according to EU law.

27. The Court in *Zita Modes* examined the scope of the no-supply rule. It explained, at [34], the need, in general, for an autonomous and uniform interpretation

throughout the Community of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope, and that the interpretation must take into account the context of the provision and the purpose of the legislation in question. The interpretation given to the rule by individual member states cannot therefore be decisive. Thus, although we were taken to certain extracts of published HMRC guidance, including VAT Notice 700/9, December 2012, in particular paras 4.2 and 4.3, and also to certain information concerning the position taken by the tax authority of another member state, the Republic of Ireland, those examples cannot detract from the autonomous Community-wide interpretation that must be applied.

28. The Court in *Zita Modes* considered, first, the objective characteristics of a transfer of a totality of assets. It held, at [40], that this expression had to be interpreted as covering the transfer of a business or an independent part of an undertaking including tangible elements and, as the case may be, intangible elements which, together, constitute an undertaking or a part of an undertaking capable of carrying on an independent economic activity, but that it did not cover the simple transfer of assets, such as the sale of a stock of products. The Court accordingly drew a clear distinction between the transfer of all or part of a business or undertaking capable of independent operation as such, and a mere transfer of assets.

29. It was not enough, however, to consider the transfer alone, or the business viewed from solely the perspective of the activities of the transferor. The Court acknowledged, at [42], that Article 5(8) (and, we interpose, Article 19) contains no express requirement as to the use by the transferee of the assets transferred. It also held, at [43], that there could be no requirement that the transferee should be the successor to the business of the transferor, as Article 5(8) treated the transferee as the successor. That was not therefore a condition; it was the consequence of the fact that the rule provided that no supply had taken place. But it held, at [44], that by reference to a transferee only certain transfers were included within the meaning of a transfer of a totality of assets. The Court said:

> "However, it is apparent from the purpose of Art.5(8) of the Sixth Directive and from the interpretation of the concept of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof which flows from it, as set out in para. [40] of this judgment, that the transfers referred to in that provision are those in which the transferee intends to operate the business or the part of the undertaking transferred and not simply to immediately liquidate the activity concerned and sell the stock, if any."

30. On the other hand, the Court held, at [45], that there was no requirement that the transferee should pursue prior to the transfer the same type of activity as the transferor.

31. The principles established by *Zita Modes* were followed by the Court of Justice in *Finanzamt Lüdenscheid v Schriever* (Case C-444/10) [2012] STC 633. In that case the questions before the Court were whether there was a transfer of a totality of assets in a case where stock and fittings of a retail outlet were transferred, but there was only

a lease of the premises to the purchaser, and whether it was relevant in that regard whether the premises had been leased on the basis of a long-term contract, or for an indeterminate term subject to termination by either party at short notice.

32. The Court held that in those circumstances there is a transfer of a totality of assets, or a part thereof, provided that the assets transferred are sufficient for the transferee to be able to carry on an independent economic activity on a lasting basis. It noted, at [32], that a determination of whether a transaction is covered by the concept of a transfer of a totality of assets required an overall assessment of the factual circumstances at issue, and that particular importance was to be attached to the nature of the economic activity which was sought to be continued. In following the judgment of the Court in *Zita Modes* as regards the position of the transferee, the Court in *Schriever*, at [38], noted that, having regard to the requirement that the transferee intend to operate the business, the intentions of the transferee can, or in certain cases must, be taken into account in an overall assessment of the circumstances of a transaction, provided that they are supported by objective evidence.

33. It was common ground that the transfer could not be regarded as a mere sale of stock, and the fact that the transferee continued to operate the shop for nearly two years confirmed that its intention was not to liquidate the activity concerned immediately. Accordingly, the fact that the business premises were only leased, and not sold, did not constitute an obstacle to the continuation of the seller's activity by the purchaser. Furthermore, whilst the duration of a lease and its termination provisions were relevant factors in the overall assessment of the transaction, the ability to terminate a lease at short notice did not decisively support an inference that the transferee intended immediately to liquidate the business.

34. In making these findings, the Court in *Schriever* emphasised, first, at [30], the need for arbitrary distinctions to be avoided, where those are not required by the wording or purpose of Article 5(8) of the Sixth Directive, and secondly, at [44], the principle of fiscal neutrality which would not be respected if the terms and duration of the lease contract could determine the position.

35. The principles set out in *Zita Modes* and *Schriever* were followed by the Court in *Staatssecretaris van Financien v X BV* (Case C-651/11) [2013] STC 1893. It was held in that case that the requirement for the assets transferred to be sufficient to allow an independent economic activity to be carried on meant that the transfer of shares in a company could not be regarded as equivalent to a transfer of a totality of assets or part thereof, unless the holding was part of an independent unit which allowed an independent economic activity to be carried on. The mere disposal of shares, unaccompanied by the transfer of assets, did not allow the transferee to carry on an independent economic activity as the transferor's successor.

36. We consider that the following principles can be extracted from this case law:

(1) In order to be a transfer of a totality of assets, or part thereof, the assets transferred must together constitute an undertaking capable of carrying on an independent economic activity.

(2) This is to be distinguished from a mere transfer of assets.

(3) The nature of the transaction must be ascertained from an overall assessment of the factual circumstances, which includes the intentions of the transferee, as determined by objective evidence, and the nature of the economic activity sought to be continued.

(4) The transferee must intend to operate the business, or the part of the undertaking, transferred and not simply to liquidate the activity concerned immediately and sell the stock, if any.

(5) Although succession to the business is not a condition, but a consequence of the application of the no-supply rule, the nature of the transaction must be such as to allow the transferee to continue the independent economic activity previously carried on by the seller.

(6) Arbitrary distinctions are to be avoided, where those distinctions do not apply by virtue of the wording or purpose of Articles 19 and 29, and the principle of fiscal neutrality must be respected.

37. It is necessary therefore to have regard to all the circumstances in determining whether the transaction is a mere transfer of assets, or of an undertaking which can carry on an independent economic activity. That must be considered both from the perspective of the transferor, and what is transferred, and from the perspective of the transferee, who must intend to operate the business as a continuation of the independent economic activity previously carried on by the transferor.

38. In focusing as well on the intentions of the transferee, the Court in *Zita Modes* was making clear that those intentions could mean that something that would, from the transferor's perspective, and on an objective assessment of the assets transferred, be the transfer of an undertaking capable of carrying on an independent economic activity, would not satisfy that test if the transferee instead intended to liquidate the activity. Such an intention would mean that what had been transferred for the purpose of Article 19 would merely be a transfer of assets. That that was the focus of the Court's attention is clear from the reference made by the Court, at [48], to the interpretation of the concept of transfer which it set out at [40]; that interpretation drew the distinction between the mere transfer of assets and a transfer of assets constituting an undertaking having the relevant characteristics.

39. On the other hand, we do not consider that the Court intended its reference to liquidation of the activity and the sale of any stock to be exhaustive of the factual circumstances that could militate against a conclusion that there had been a transfer within the meaning of Article 19. There may be other circumstances, short of liquidation and sale, in which a court or tribunal might decide that the transferee's intentions led to the conclusion that what had been transferred was not an undertaking, but merely assets. It is not sufficient, therefore, simply to show the

absence of an intention to liquidate and sell. All the circumstances must be taken into account.

"Same kind of business" test

40. It follows from our analysis of the EU case law that we do not consider that the inclusion, in the UK's domestic provisions which take advantage of Articles 19 and 29 of the Principal VAT Directive, of a test which looks to the intentions of the transferee in respect of the assets transferred is incompatible with EU law. It is clear that the question whether there has been a transfer of a totality of assets or part thereof, according to the interpretation of that term consistent with the language and purpose of Article 19, must be addressed by having regard to all the circumstances, and with reference to the perspective both of the transferor and of the transferee.

41. That is not, as Mr Pleming, for IMSL, argued, to place too great an emphasis on the word "the" in the English translation of the language used by the ECJ in *Zita Modes*, at [44]: "… the transferee intends to operate the business …" (our emphasis). Mr Pleming submitted that a proper reading of that part of the ECJ's judgment would be to place greater emphasis on the word "operate", and he referred us to the original French language version of the judgment where the Court's finding in this respect is expressed thus: "*… le bénéficiaire a pour intention d'exploiter le fonds de commerce ou la partie d'entreprise ainsi transmis …*". However, we do not consider the analysis should be made on the basis of a linguistic construction of the Court's judgment.

42. It is true that the FTT, at [31], considered the reference to "the" business to be the decisive factor in determining that the "same kind of business" test was compatible with EU law, but in our view that is far from the only factor pointing in that direction. The whole tenor of the judgment in *Zita Modes*, coupled with the approach in *Schriever* and in *X BV*, is that what is required is a transfer of a business, and not merely a transfer of assets, and that the intention of the transferee to carry on the business is one of the factors that goes to establish whether that condition is met. We agree therefore with the VAT Tribunal (Chairman: Dr Avery Jones) in *Winterthur Swiss Insurance Company* (No 19411, 5 January 2006), which regarded the "same kind of business" condition as inherent in the ECJ's judgment in *Zita Modes* (*Winterthur*, at [16]).

43. On the other hand, any condition set by the domestic provision can go no further than the meaning given, under EU law, to Article 19 itself. The domestic provision must be construed in accordance with that interpretation, which takes account of EU law, including principles such as the principle of neutrality. The requirement, in Article 5(1)(a)(i) of the SPO, that the assets transferred are to be used by the transferee in carrying on the same kind of business cannot have an autonomous UK domestic meaning, and cannot be construed as giving rise to any restriction which would go beyond the limits of the EU law interpretation. Domestic case law in different contexts is unlikely therefore to be of any assistance; accordingly, although we were referred to *Kenmir Ltd v Frizzell and others* [1968] 1 WLR 329, a case on whether a written agreement amounted to the transfer of a business under the

Contracts of Employment Act 1963, that did not assist us in the determination of this case.

Application to the facts

44. Leaving aside the effect of the VAT group rules, it is accepted that VMMSL is, as a matter of fact (and ignoring any deeming provisions of s 43 VATA), carrying on the same business as that formerly carried on by IMSL. The question is whether the fiction created by the group rules, that of the single taxable person carrying on that business, in combination with the other businesses of the group, means that the VMG VAT group is not to be treated as using the assets transferred in carrying on the same kind of business.

45. An immediate point to make is that the mere fact that the business transferred is to be carried on, not as a stand-alone business, but as part of the existing business of the group cannot make a difference. That is clear from the terms of Article 5(1)(a)(i) itself.

46. Mr Singh invited us to focus on the supplies that were made by the group to its third party customers. He argued that because those supplies were of retail banking services, and retail banking was not the same kind of business as that previously operated by IMSL, there could be no TOGC. The only supplies of banking engine services that were made were those by VMMSL to VMBL. But those were the very supplies that fell to be disregarded under s 43 VATA. Although VMMSL was carrying on the same business as IMSL had been carrying on before the transfer, it was doing so internally to the group; the absence of separate external supplies of the banking engine services had the result that the group was not carrying on the same kind of business.

47. The rationale for Mr Singh's argument is that, having regard to the nature of the external supplies, which were of retail banking, all that the single taxable person, in the form of the VMG VAT group, was doing was consuming the assets transferred by VMMSL. By focusing on the supplies to third parties, it could be seen that the group was not carrying on the same kind of business as IMSL, and that in essence the transaction amounted to no more than a transfer of assets.

48. We do not accept Mr Singh's submissions. As Mr Singh accepted in the course of his argument, the banking engine services provided internally within the group were an integral element of the retail banking services provided by the group. The activities of VMMSL contributed directly to the economic activity of the group as a whole. It would be wrong in principle to seek to identify the nature of the group's activity as a whole by reference solely to the external supplies it makes, and then to compare that activity with the transferred business to determine whether it is the same or different. That, in our view, would be to fall into the trap of seeking to apply labels to activities rather that to discern the economic substance from a consideration of all the circumstances.

49. By virtue of the single taxable person fiction, as applied by s 43(1) VATA, the group is to be treated as carrying on all the businesses carried on by group companies. That fiction does not, however, change the nature of those businesses. They remain separate businesses as a matter of fact. The fiction does not extend to treating the group as carrying on a different, amalgamated, business in which the separate businesses of the group lose their individual identity. That is clear, in our view, from the opinions of the House of Lords in *Customs and Excise Commissioners v Thorn Materials Supply Ltd and another* [1998] STC 725, in particular that of Lord Nolan, at p 733, where his Lordship referred to the representative member of the group being treated "as if it were carrying on all the businesses of the other [group] members as well as its own". We accept, in this respect, Mr Pleming's submission that this is the case whether or not those individual businesses themselves make supplies outside the group. The treatment of such supplies is dealt with separately by s 43(1)(b).

50. Nor can the fact that, by virtue of s 43(1), VMMSL's supplies within the group are to be disregarded affect the position. Although the VAT effects of those supplies are to be disregarded, the activities of VMMSL and the intra-group transactions it makes are not. That, we consider, is also clear from what Lord Nolan said in *Thorn Materials* at p 732:

> "That leaves open the question of what is meant by the requirement in s 29(1) that a supply by one member of a group to another must be disregarded. I accept Mr Prosser's [counsel for Thorn] submission that it does not mean that the separate existence of the appellants and [another group company] is to be denied or that the sale agreement and the prepayment are to be treated as not having taken place …"

Consequently, the intentions and activities of VMMSL, objectively ascertained, form part of the overall factual matrix which must be considered in determining whether the group as a whole, as the transferee for this purpose, intended to use the assets transferred in carrying on the business, or whether there was no more than a transfer of assets.

51. In our judgment, there is nothing in the group rules that can prevent the transfer of IMSL's business to VMMSL from being a TOGC. The transfer was of the whole undertaking of IMSL in relation to the banking engine services. VMMSL is accepted as having had the requisite intention to carry on that business, and not to liquidate the activity or do anything else that could lead to the conclusion that this was no more than a transfer of assets. VMMSL provided the banking engine services to VMBL, which incorporated the product of those services into its own retail banking services that it supplied to third party customers. The effect of VMMSL being within the VMG VAT group is that it is the group, as the single taxable person, that is treated as the transferee, and it is the group that is treated as carrying on each of the businesses of the group members, but none of the statutory disregards, nor the description that can be applied to the external supplies made by the group as a whole, can alter the fact that the group, in combination with its other businesses, continued to use the assets transferred in the same kind of business as that formerly carried on by IMSL.

52. Accordingly, we find that the transfer by IMSL of the assets of its business to VMMSL satisfied the conditions of article 5(1) of the SPO, and that those supplies are accordingly to be treated as neither a supply of goods nor a supply of services.

Fiscal neutrality

53. In view of our decision on the application of the no-supply rules in article 5(1) of the SPO, it is not necessary for us to consider the further ground on which IMSL sought to appeal, namely that if we had decided that article 5 did not apply, that would give rise to discrimination against business transfers into VAT groups when compared with such transfers into single entities organised in divisions, and as such would amount to a breach of the principle of fiscal neutrality.

54. For the reasons we have set out, when discussing the EU case law, the interpretation according to that law of Article 19 of the Principal VAT Directive takes into account the need to respect the principle of fiscal neutrality. Properly construed, therefore, the application of the provisions should leave no room for any breach of that principle.

Reference to Court of Justice

55. Although Mr Pleming submitted that EU law clearly favoured IMSL's arguments, he urged upon us that we should consider making a reference to the Court of Justice should we be minded to reject those arguments. Mr Singh told us that HMRC was neutral as to the matter of a reference.

56. In the event, having considered the matter with the benefit of the submissions made to us, we regard the EU law as clear, and we have been able with complete confidence to reach our decision. We see no reason, therefore, to make a reference to the Court of Justice in this case.

Decision

57. For the reasons we have given, we allow this appeal and set aside the decision of the FTT. We decide that the transfer by IMSL of the assets of its business to VMMSL satisfied the conditions of article 5(1) of the SPO, and that those supplies are accordingly to be treated as neither a supply of goods nor a supply of services.

Costs

58. Any application for costs should be made within 14 days after the date of release of this decision. As any order will be for detailed assessment of costs, if not agreed, there is no need for a schedule of costs to accompany the application.

MR JUSTICE BARLING

UPPER TRIBUNAL JUDGE ROGER BERNER

RELEASE DATE: 7 July 2015