TC02224

Appeal number: LON/2008/2433

VAT – INPUT TAX – was professional independent trustee of pension schemes entitled to deduct VAT on services of third party advisers relating to schemes? – held yes – are amounts paid by schemes in relation to advisers' services consideration for supplies of services by trustee? – held yes – do principles of legitimate expectation, fiscal neutrality and equal treatment lead to different result? – held no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JIB GROUP LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE GREG SINFIELD
JOHN LAPTHORNE

Sitting in public in London on 6 June 2012

Mr Craig Connal QC, solicitor advocate, of Pinsent Masons LLP, for the Appellant

Mr Owain Thomas, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Independent Trustee Services Limited ("ITSL") is a professional trustee company that acts as an independent trustee of several pension schemes where the employers have become insolvent. ITSL instructed third party professional advisers such as actuaries, solicitors, accountants and financial managers ("the Advisers") to provide advice in relation to the Schemes. The Advisers' fees were paid directly from the Schemes' funds. ITSL claimed repayments of VAT of £2,867,087.80 charged by the Advisers. The Respondents ("HMRC") refused ITSL's claims. The question that arises in this appeal is whether ITSL is entitled to recover VAT charged by the Advisers instructed by ITSL in its capacity as an independent trustee of pension schemes.

2. The appeal is brought in the name of JIB Group Limited as the representative member of a VAT group of which ITSL is a member. Section 43(1) VAT Act 1994 ("VATA") provides that any business carried on by a member of a VAT group is treated as carried on by the representative member and any supplies of goods or services by or to a member of a VAT group are treated as supplied by or to the representative member. Accordingly, the representative member of a VAT group is, in the ordinary course of events, the person affected by the disputed decision of HMRC and the person who has standing to bring the appeal (see *Davis Advertising Service Ltd v Customs and Excise* [1973] VATTR 16). For the sake of clarity, however, we refer to ITSL in this decision.

3. There were originally two appeals by ITSL but, as they raised the same issues, they have been consolidated into one. This appeal is a lead case under Rule 18 of the Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009. The issue in the lead appeal and all the related cases is whether the VAT incurred on third party costs can be recovered by statutorily independent trustees. Although the appeal was made under section 83(c) VATA (now section 83(1)(c)) which relates to "the amount of any input tax which may be credited to a person" and the lead case and related cases were stated to concern VAT recovery, at the hearing, both parties asked the Tribunal to make a decision in principle on whether, in the event that ITSL is entitled to recover the VAT charged by the Advisers, ITSL would have any liability to account for an amount of output tax.

Facts

4. The material facts in this appeal were agreed. We were provided with a statement of facts not in dispute, a bundle of correspondence and other documentation and a witness statement of Mr Richard Boniface, operations director of ITSL. Mr Boniface gave oral evidence and was asked some questions to clarify points in his witness statement by Mr Owain Thomas, who appeared for HMRC. On the basis of the evidence, we find the facts to be as set out below.

5. ITSL is a professional trustee company. It carries on a business of providing independent professional trustee services for company pension schemes, primarily where the company has gone into liquidation. ITSL is usually the sole corporate trustee of such schemes although sometimes the former trustees of a pension scheme will continue in that role for a short time after ITSL has been appointed.

6. ITSL is currently the independent pension trustee for around forty pension schemes ("the Schemes"). ITSL may be appointed to act as a pension trustee in a variety of circumstances. Some of ITSL's appointments as trustee are made by the Pensions Regulator under section 23 of the Pensions Act 1995. Section 23 provides that, where an insolvency practitioner becomes responsible for an employer in relation to a pension scheme, the Pensions Regulator may by order appoint an independent trustee. This appeal relates only to VAT charged by the Advisers instructed by ITSL as an independent trustee of the Schemes.

7. Once appointed as an independent trustee, ITSL:

(1) carries out due diligence to ensure that it understands the history and development of the Scheme and its rules, and to identify (and put right) any problems;

(2) takes over the operations of the Scheme (such as dealing with the Advisers and regulatory authorities, determining appropriate corporate governance strategies for the Scheme, complying with any regulatory requirements and reviewing investment strategies); and

(3) ensures that the Scheme is effectively administered and managed in the best interest of the members and beneficiaries.

8. ITSL has independent in-house professionals to manage many of the more common events that a Scheme may experience. Where appropriate, however, ITSL instructs the Advisers on behalf of the Scheme. In particular, an independent trustee may not act as auditor or actuary and so must appoint an external adviser to carry out those functions. Although not prohibited from doing so, ITSL also instructs the Advisers to provide legal advice in order to avoid any suggestion of a conflict of interest. ITSL supervises the duties and conduct of the Advisers to ensure that the relevant legal and regulatory requirements are fulfilled in relation to the Scheme.

9. The Advisers submit invoices for their fees. In most cases, the invoices are addressed to the relevant Scheme "c/o" (care of) ITSL. The Advisers' fees are paid either directly from the relevant Scheme's bank account (where the ITSL controls the bank account) or by Scheme administrator (where ITSL does not control the bank account). The Advisers charge VAT, where applicable, which is shown on the invoices.

10. Section 25(6) of the Pensions Act 1995, as amended, states that the order under section 23 may provide for any fees and expenses of the independent trustee to be paid either by the employer or out of the scheme's resources or by a combination of the two. The orders in the case of ITSL did so provide. VAT invoices for trustee services supplied by ITSL as trustee to the Schemes were typically addressed to the

relevant Scheme care of ITSL. Section 25(6) of the Pensions Act 1995, in its original and amended forms, is discussed further below.

Relevant legislation

11. Section 22 of the Pensions Act 1995 applies where an insolvency practitioner is appointed in relation to a company which is the employer in relation to a pension scheme. Where section 22 applies to a scheme, the Pensions Regulator may appoint an independent trustee in relation to the scheme under section 23. Section 25(2) provides that any power vested in the trustees of the scheme and exercisable at their discretion may be exercisable only by the independent trustee. A trustee of a scheme (and any connected or associated person) is ineligible to act as an auditor or actuary of the scheme.

12. Section 25(6) of the Pensions Act 1995 as originally enacted provided:

> "(6) A trustee appointed under section 23(1)(b) is entitled to be paid out of the scheme's resources his reasonable fees for acting in that capacity and any expenses reasonably incurred by him in doing so, and to be so paid in priority to all other claims falling to be met out of the scheme's resources".

13. With effect from 6 April 2005, section 25(6) was replaced by section 25(6)-(8) which provide as follows:

> "(6) An order under section 23(1) may provide for any fees and expenses of the trustee appointed under the order to be paid–
>
> (a) by the employer,
>
> (b) out of the resources of the scheme, or
>
> (c) partly by the employer and partly out of those resources.
>
> (7) Such an order may also provide that an amount equal to the amount (if any) paid out of the resources of the scheme by virtue of subsection (6)(b) or (c) is to be treated for all purposes as a debt due from the employer to the trustees of the scheme.
>
> (8) Where, by virtue of subsection (6)(b) or (c), an order makes provision for any fees or expenses of the trustee appointed under the order to be paid out of the resources of the scheme, the trustee is entitled to be so paid in priority to all other claims falling to be met out of the scheme's resources."

14. It was not suggested to us that the amendments to section 25(6) of the Pensions Act 1995 changed the VAT treatment of supplies of services to or by ITSL. It seems to us that, from the point of view of the trustee, section 25, in both its original and amended forms, treats the trustee's fees and expenses in the same way. Section 25(7) makes clear that the employer may have a liability to pay the fees and expenses borne

by the scheme. In the case of ITSL, payments were made out of the Schemes' resources and not by the employers.

15. With effect from 1 January 2007, Council Directive (EC) 2006/112/EC of 28 November 2006 on the common system of VAT ("the VAT Directive") replaced the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of Member States relating to turnover taxes - common system of value added tax: uniform basis of assessment, 77/388/EEC ("the Sixth VAT Directive"). ITSL's claim for repayment of VAT relates to supplies under both Directives but, as there are no material differences in the wording of the relevant provisions of the two Directives, we refer only to the VAT Directive in this decision.

16. Article 168 of the VAT Directive describes the scope of the right to deduct VAT as follows:

> "In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person."

17. The phrase "taxed transactions" is not defined but Article 2(1)(c) of the VAT Directive defines transactions subject to VAT to include "the supply of services for consideration within the territory of a Member State by a taxable person acting as such". There was no dispute that all of ITSL's supplies were chargeable to VAT and so no question of any apportionment of VAT incurred between recoverable and irrecoverable input tax arises.

18. A "taxable person" is defined by Article 9 of the VAT Directive as "any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity". Article 10 provides that the condition in Article 9 that an economic activity be conducted independently excludes "employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by other legal ties creating the relationship of employer and employee".

19. Article 73 of the VAT Directive provides that, in respect of the supply of goods or services, "the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party". Article 79 provides that the taxable amount shall not include:

> "(c) amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account.

> The taxable person must furnish proof of the actual amount of the expenditure referred to in point (c) of the first paragraph and may not deduct any VAT which may have been charged."

20. The provisions of the VAT Directive in relation to deduction of VAT are implemented in UK legislation by sections 24 – 26 VATA and regulations made under them. Neither party suggested that the UK legislation departed from the VAT Directive or placed any specific reliance upon it over the terms of the VAT Directive and so we do not set it out here.

Summary of submissions

21. We discuss the parties' submissions more fully below but, in summary, ITSL's primary submission was that ITSL is entitled to deduct VAT paid on fees for services supplied by the Advisers because ITSL incurred the fees in the course of its business. ITSL relied on the decision of the VAT and Duties Tribunal in *Capital Cranfield Trustees Limited v HMRC* [2008] UKVAT V20532 ("*Capital Cranfield*") and invited us to follow it. In that case, the VAT and Duties Tribunal held that the supplies of professional advisers were made to the trustee company in its capacity as a taxable person and it was entitled to deduct, as input tax, the VAT charged on the advisers' fees. HMRC submitted that the VAT charged on the Advisers' services is not input tax of ITSL because the services were supplied to the Schemes. HMRC submitted that the Tribunal in *Capital Cranfield* erred in law in allowing the appeal and this Tribunal should not follow the decision. HMRC further submitted that, even if the Advisers' services are supplied to ITSL, the VAT charged on such services is not deductible by ITSL because the services are not used for the purposes of taxable supplies by ITSL. If the VAT on the Advisers' fees is input tax of ITSL then HMRC submitted that the principle of fiscal neutrality requires that ITSL must account for VAT on a supply of those services to the Schemes.

22. Further or as an alternative to its primary argument, ITSL submitted that the refusal of its claim for input tax recovery breaches the principles of fiscal neutrality, equal treatment and ITSL's legitimate expectation to recover the VAT. ITSL contended that it should be able to deduct the VAT in the same way as the employers in relation to the Schemes had been able to do before they became insolvent. HMRC submitted that the principle of fiscal neutrality would only be breached if ITSL were able to deduct the VAT on the Advisers' fees without having a corresponding liability to account for output tax on amounts that it received in reimbursement of those fees. HMRC did not accept that the Tribunal has jurisdiction to determine questions of public law such as legitimate expectation.

Issues to be decided

23. ITSL's primary submission is that it is entitled to deduct VAT charged on the services supplied by the Advisers under the provisions of the VAT Directive. It seems to us that the principles of fiscal neutrality and equal treatment (which, in this context, amount to the same thing) are not rules of primary law creating an entitlement to deduct input tax but principles of interpretation which ITSL may pray

in aid (see the comments of the Court of Justice of the European Union ("CJEU") in *Finanzamt Frankfurt am Main V-Hochst v Deutsche Bank AG* (Case C-44/11), 19 July 2012, at [45]). The first issue to be decided is, therefore, simply: is ITSL entitled to deduct VAT charged on the services supplied by the Advisers? This raises the subsidiary issue of whether the Advisers' services are used by ITSL for the purposes of (ie are cost components of) its taxed transactions.

24. The identification of the taxed transactions of ITSL, which the Advisers' services are cost components of, will also be a relevant factor in considering whether ITSL must charge and account for VAT on the amounts paid by the Schemes in relation to the Advisers' services. The second issue to be decided is: are the amounts paid by the Schemes in relation to the Advisers' services consideration for supplies of services by ITSL or are they repayment of expenditure incurred in the name and on behalf of the Schemes?

25. If we conclude ITSL is not entitled, under the VAT Directive, to deduct the VAT charged by the Advisers, we must consider whether ITSL is nevertheless entitled to repayment of the amounts equal to the VAT charged on the ground of legitimate expectation. Before we can consider whether Notice 700/17 or other guidance issued by HMRC created a legitimate expectation on the part of ITSL, we must determine whether the Tribunal has jurisdiction to consider issues of legitimate expectation.

26. We asked the parties at the hearing whether any of the employers remained registered for VAT during the insolvency pending winding up. The parties did not know in relation to the Schemes. We suggested that one possible analysis was that, despite what was said in paragraph 2.9 of Notice 700/17 (that an employer who ceases trading also ceases to be an employer and is no longer entitled to deduct input tax on the management of the pension scheme) the employer remained entitled to recover the VAT relating to the costs of managing the scheme. We suggested that the decision of the CJEU in *I/S Fini H v Skatteministeriet* (Case C-32/03) [2005] STC 903 supported such an analysis in appropriate cases. In *Fini*, a restaurant business ceased trading but was unable to terminate its lease and so continued to incur VAT on the rent for its former premises for a further five years. The business continued to claim repayments of the VAT on the rent which the tax authority eventually refused. The CJEU confirmed that the business was entitled to deduct the VAT on the amounts thus paid provided that there was a direct and immediate link between the payments and the former commercial activity. Applying the CJEU's reasoning in *Fini*, it seemed to us that the fact that the employer had ceased trading or ceased to employ the beneficiaries of the scheme did not necessarily mean that the employer was not entitled to recover input tax which related to its former business activities. HMRC said that there were practical problems with repaying the input tax to an insolvent employer and ITSL, for obvious reasons, did not seek to rely on *Fini*. In view of the position taken by the parties, we do not consider the consequences of applying *Fini* further and do not base our decision on it.

Is ITSL entitled to deduct VAT charged on the Advisers' services?

27. ITSL's primary submission was that it is entitled to deduct the VAT charged by the Advisers because it contracts with the Advisers, authorises their work and is liable to pay their fees. ITSL uses the Advisers' services for the purposes of its trustee business and is entitled to deduct the VAT. Lord Millett in the well known case of *HMC&E v Redrow Group plc* [1999] STC 161 (HL) ("*Redrow*") set out how to identify the recipient of a supply of services for the purposes of input tax deduction. He held, at page 171, that the correct approach was found in two fundamental features of a supply of services, stating:

> "The first is that anything done for a consideration which is not a supply of goods constitutes a supply of services. This makes it unnecessary to define the services in question. The second is that unless the services are rendered for a consideration they cannot constitute the subject matter of a supply. In fact, of course, there can be no question of deducting input tax unless the taxpayer has incurred a liability to pay it as part of the consideration payable by him for a supply of goods or services.
>
> In my opinion, these two factors compel the conclusion that one should start with the taxpayer's claim to deduct tax. He must identify the payment of which the tax to be deducted formed part; if the goods or services are to be paid for by someone else he has no claim to deduction. Once the taxpayer has identified the payment the question to be asked is: did he obtain anything - anything at all - used or to be used for the purposes of his business in return for that payment? This will normally consist of the supply of goods or services to the taxpayer. But it may equally well consist of the right to have goods delivered or services rendered to a third party. The grant of such a right is itself a supply of services."

28. In the later case of *WHA Ltd v CCE* [2004] STC 1081 (CA), Neuberger LJ, having considered *Redrow* in detail, observed at [53]:

> "Although it is plainly dangerous to generalise, it seems to me that to justify a claim for input tax in principle, it would normally be sufficient for the person presented with the relevant invoice to establish that he had authorised and paid for the work the subject of the invoice, and that he received a genuine benefit in the course of his business from the carrying out of the work."

29. We apply Lord Millett's approach to the question in this case. In doing so, we bear in mind the exhortation of the CJEU in *HMRC v Loyalty Management (UK) Limited and Baxi Group Limited* (Cases C-53/09 and C-56/09) [2010] STC 2651 at [39] and [42] to consider the economic realities in identifying the person to whom goods and services are supplied.

30. There are two steps in Lord Millett's approach. The first step is to identify the payment which included the VAT that the taxable person seeks to deduct. The second step is to determine whether the payment was for goods or services obtained by the taxable person and used or to be used for the purposes of his business.

31. In relation to the first step, there is no difficulty in identifying the payments in respect of which ITSL seeks to deduct VAT: they are the Advisers' fees. Lord Millet observed that there can be no question of deducting input tax unless the taxpayer has incurred a liability to pay it. In our view, who actually made the payment is not conclusive in determining whether a person has the right to deduct VAT. The issue is whether ITSL was liable to pay the Advisers' fees.

32. The Advisers' fees were not paid by ITSL from its own resources but directly from the relevant Schemes' bank accounts (where ITSL controlled the account) or indirectly via the Scheme administrator (where it did not). The evidence of Mr Boniface was that ITSL contracts with the Advisers, authorises their work and is liable to pay their fees. Mr Connal, for ITSL, submitted that, in the event that a Scheme became insolvent, ITSL would remain liable for any outstanding fees due to the Adviser. Mr Thomas, for HMRC, did not dispute that ITSL had a theoretical liability to pay the Advisers' fees in the event that a Scheme could not do so but submitted that ITSL would know what assets the Scheme had and would not instruct Advisers where there was any chance that ITSL would be left with any liability for the fees.

33. The Tribunal in *Capital Cranfield*, at [33], held that "section 25(6) [of the Pensions Act 1995] refers to expenses reasonably incurred 'by him' and thereby makes it clear that it is the trustee who incurs the expenses." We agree but it does not seem to us that the words of section 25(6), in its original or amended forms, conclusively answer the question whether the Advisers' fees are expenses of the independent trustee in its capacity as a provider of trustee services to the Schemes or as trustee of the Schemes ie as the Schemes themselves. What section 25(6) provides is that the independent trustee, ITSL here, is entitled to be reimbursed expenses that it has incurred as trustee.

34. In determining whether ITSL has incurred the Advisers' fees, we consider that we should look to the contractual position. The evidence before us was that, in relation to the services in respect of which VAT is claimed, ITSL instructs the Advisers and undertakes to pay their fees. ITSL does so as trustee of the particular Scheme. We conclude that, in that capacity, ITSL is liable to pay the fees, including the VAT which ITSL seeks to deduct. We accept that ITSL would be unlikely to instruct any Adviser to carry out work if the relevant Scheme did not have the means to pay the Adviser's fees. In our opinion, however, that does not mean that ITSL does not have a liability to pay the Adviser's fees. On the basis of the evidence as to the contractual position, we conclude that ITSL was liable to pay the Adviser's fees.

35. The next issue is: was ITSL a taxable person? There was no dispute that ITSL was and is a taxable person, registered for VAT, in relation to its business of providing independent professional trustee services. HMRC submitted that the fact

that ITSL is a taxable person and incurred a liability to pay for the Advisers' services does not resolve the issue because ITSL incurred that liability in its capacity as trustee of the Schemes. HMRC submitted that ITSL as a limited company carrying on a professional trustee business and ITSL as trustee of a Scheme are different taxable persons for VAT purposes. Where a pension fund makes taxable supplies, HMRC's practice is to register the fund in the name of the trustees. This is the only administratively workable alternative to registering the beneficiaries of the fund. Where the trustee is registered for VAT and where it is also the trustee of other funds, HMRC register each separately.

36. Article 9 of the VAT Directive defines taxable person as any person who, independently, carries out any economic activity. Article 9 does not provide that a person is a different taxable person in respect of each economic activity that the person undertakes but HMRC sought support from the word "independently", submitting that ITSL as trustee of a Scheme was not independent of the Scheme. Article 10 of the VAT Directive provides that "independently" in Article 9 excludes a relationship of employee and employer but the CJEU has shown that it must interpreted more broadly than that. We were referred to *Staatssecretaris Van Financien v Heerma* (Case C-23/98) [2001] STC 1437. That case concerned whether a person who let a cattle-shed to the partnership of which he was a member, was to be regarded as a separate taxable person in relation to that activity. The CJEU held at [17] that Mr Heerma, who was the manager of the partnership, acted independently in letting immovable property to the partnership. We consider that the situation of ITSL and the Schemes is analogous to that of Mr Heerma and the partnership. We conclude that ITSL in relation to its professional trustee business is a separate taxable person from ITSL as trustee of a Scheme. We also conclude, on the basis of *Heerma*, that, notwithstanding that ITSL is the sole trustee in every case, each Scheme is a separate taxable person.

37. We now turn to consider whether ITSL incurred the liability to pay the Advisers' fees for the services (which we have held that it did) in its capacity as a provider of independent professional trustee services or as trustee of the Schemes. The analysis is complicated by the fact that ITSL has multiple tax personalities. HMRC accept that ITSL is right to charge VAT to the Schemes by issuing VAT invoices to itself as trustee of the relevant Scheme. If the Advisers are regarded as in the same position as ITSL, when it acts as a professional trustee, then they should invoice ITSL as trustee of the relevant Scheme. The evidence is that, in most cases, this is what happens. Invoicing does not, however, determine who is the recipient of a supply. On the basis of the evidence before us, our view is that it is part of ITSL's function as an independent trustee to appoint and supervise the Advisers. ITSL is not merely a purchasing agent for the Schemes in relation to the Advisers' services but does so in order to enable it to perform its duties and fulfil its responsibilities as an independent trustee. The Schemes benefit from the advice of the Advisers but, as in the case of the house buyer in *Redrow*, the fact that a person receives a benefit or even the greater benefit does not prevent the person who has incurred the VAT being able to deduct it if it has obtained some benefit and subject to that being consistent with economic reality. For those reasons, we find that ITSL incurred the liability to pay

the Advisers' fees in its capacity as a provider of independent professional trustee services.

38. In conclusion on this point, we find that ITSL, which is a taxable person, was liable to pay the Advisers' fees and that the Advisers' services were supplied to ITSL for the purposes of its business of providing independent professional trustee services. We do not consider that this conclusion is inconsistent with the economic realities. We decide that ITSL is, therefore, entitled to deduct the VAT charged by the Advisers, in so far as the Advisers' services are used by ITSL for the purposes of its taxed transactions (and subject to the rules in the VAT Directive as implemented by the VATA).

Is ITSL required to account for VAT on amounts paid by the Schemes in relation to the Advisers' services?

39. Although not the subject of the decisions appealed, the parties asked us to consider whether ITSL must account for VAT on the amounts paid by the Schemes in relation to the Advisers' services. We agreed to do so because it was relevant to the VAT liability position of ITSL and it did not involve consideration of any further facts.

40. HMRC submitted that, if ITSL was the recipient of the Advisers' services, the Advisers' fees should be characterised as disbursements incurred by ITSL on behalf of the Schemes rather than cost components of any supply by ITSL. This submission was made in the context of ITSL's right to deduct but it seems to us appropriate to deal with it here as it would also lead to the conclusion that the amounts were not consideration for any supply by ITSL. The rules in relation to disbursements in the VAT Directive are quite restrictive and we consider this is because supply and consideration are to be interpreted broadly. Article 79 of the Directive provides that, in order to be treated as a disbursement, expenditure must be incurred in the name and on behalf of the customer and entered in the taxable person's books in a suspense account. There was little evidence before us on this point: the Advisers mostly invoiced the Scheme c/o ITSL but there was no suspense account (and no need for one as the amounts were paid by the Schemes). We have found that ITSL was liable to pay the Advisers fees if the Scheme did not do so. That supports the view that the fees were not disbursements. Further, section 25(6) of the Pensions Act 1995 provides that the trustee is entitled to be paid expenses reasonably incurred which suggests, as the Tribunal found in *Capital Cranfield*, that the fees were incurred by ITSL itself, which was then reimbursed, rather than by ITSL as agent of the Scheme. On balance, we conclude that the Advisers' fees were not disbursements for VAT purposes.

41. HMRC submitted that if ITSL was entitled to deduct the VAT on the services supplied by the Advisers then it should be required to account for VAT on the free onward supply of services under the VAT (Supply of Services) Order 1993 (SI 1993/1507). Article 6 of the 1993 Order provides that no deemed supply is made if the services are used, or made available for use, for a consideration. This is because an actual supply will have been made and VAT will be chargeable by reference to the

consideration for the supply. HMRC also submitted that, if ITSL was entitled to deduct VAT charged by the Advisers, the amounts paid by the Schemes to the Advisers could be regarded as consideration for an onward supply of the Advisers' services on which ITSL was liable to account for VAT. In summary, HMRC submitted that, whether or not there is consideration for the onward supply of the Advisers' services, ITSL is liable to account for VAT.

42. ITSL submitted that it contracts for and receives the Advisers' services in the same way as the employers. The guidance published by HMRC in Notice 700/17 Funded Pension Schemes (March 2002) and in their online Guidance Manual at VIT45200 states that VAT incurred by the employer in the day-to-day management of the scheme is the employer's input tax and that the employer does not need to charge output tax if it is reimbursed for costs incurred on management of the scheme. ITSL submitted that the fact that the fees are paid out of the Schemes' resources does not create any obligation on ITSL to account for VAT for the same reason that the employer, when solvent, was not required to account for VAT on payments reimbursing such fees. ITSL steps into the shoes of the employer. ITSL also contended that the Advisers' services were consumed by ITSL, as trustee, and not onward-supplied to the Schemes and so there was no supply by ITSL for which the amounts paid out of the Schemes' resources could be regarded as consideration.

43. We have already cited the passage from *Redrow* in which Lord Millett summarised the VAT definition of services as anything done for a consideration which is not a supply of goods (see now Articles 2(c) and 24 of the VAT Directive). The issue is whether the amounts paid by the Schemes in relation to the Advisers' services were consideration for anything done by ITSL. That something done could be an onward supply of the advisers' services or could be a supply of trustee services but, in either case, VAT would be chargeable. We have already found that ITSL instructed the Advisers and incurred the fees as an independent trustee. Such activity constitutes a supply of services if done for consideration and is a deemed supply if done otherwise than for consideration by virtue of the VAT (Supply of Services) Order 1993.

44. Article 73 of the VAT Directive provides that everything obtained or to be obtained by a supplier in return for a supply is consideration. In this case, ITSL's entitlement to be paid the Advisers' fees arises under Section 25(6) of the Pensions Act 1995. We consider that the nature of the payment was absolutely clear under the section, as originally enacted, which provided that the trustee is entitled to be paid (emphasis supplied) "his reasonable fees *for acting in that capacity* and any expenses reasonably incurred by him *in doing so*". The words "for acting" do not appear in the amended section 25(6) but it was not suggested by either party that the amendments changed the VAT analysis. In our view, it is clear from the language of the section and its purpose that the payments of ITSL's fees and expenses by the Schemes are consideration for ITSL acting in its capacity as a provider of independent professional trustee services. In conclusion, we decide that ITSL must account for VAT on the amounts paid by the Schemes in relation to the Advisers' fees. If we are wrong and the payments by the Schemes are not consideration for ITSL supplying trustee

services then we consider that ITSL must account for VAT on the onward supply of the Advisers' services under the VAT (Supply of Services) Order 1993.

Issues of legitimate expectation, fiscal neutrality and equal treatment

45. In view of our decision that ITSL was entitled to deduct the VAT charged on the Advisers' services, it is no longer necessary to consider whether ITSL had a legitimate expectation, on which it was entitled to rely, that it would be able to deduct the VAT charged by the Advisers as a result of the guidance published by HMRC in Notice 700/17 and the online Guidance Manual. In case we are wrong, however, we deal with the point briefly below. There is also the issue of fiscal neutrality and equal treatment which remains in relation to the question of whether ITSL is required to account for VAT on the amounts paid by the Schemes in relation to the Advisers' fees.

46. The first issue is whether the Tribunal has jurisdiction to consider questions of legitimate expectation. ITSL relied on the observations of Sales J in *Oxfam v HMRC* [2010] STC 686 at [63] – [76] and the decision of the Tribunal in *Abdul Noor v Revenue & Customs* [2011] UKFTT 349 (TC) at [16] – [21], that this Tribunal has sufficient jurisdiction to deal with the issue of legitimate expectation. Like this appeal, both cases concerned whether or not the taxpayer was entitled to deduct input tax. HMRC did not accept that *Oxfam* was binding authority as, although the appeal concerned input tax, the issue was different: it turned on whether the supplies were business or non-business. HMRC contended that the issue in ITSL's case was simply whether VAT was or was not deductible and that did not permit any exercise of discretion. We do not accept HMRC's submission on this point. We did not receive detailed submissions on the jurisdiction point but, for the purpose of considering the legitimate expectation issue, we accept without deciding the point that we have jurisdiction to address public law issues relating to the amount of input tax that is deductible on the basis set out by Sales J in *Oxfam*, namely that such jurisdiction is provided by the language of section 83(c) VATA.

47. ITSL submitted that that refusal of its claim for input tax recovery would breach the principles of fiscal neutrality, equal treatment and ITSL's legitimate expectation to recovery of the VAT. ITSL contended that it should be able to deduct the VAT in the same way as the employers in relation to the Schemes had been able to do before they became insolvent. ITSL submitted that HMRC were seeking to apply a different treatment to VAT incurred in relation to the administration of a pension scheme by an employer and VAT incurred for the same purpose by ITSL. Where the employer is solvent, a distinction is drawn between investment and administration of a pension scheme. The input tax incurred on administration is treated as incurred for the purposes of the employer's business and recovered through the employer's VAT returns. Even where the employer obtains a reimbursement from the scheme of the costs of the services, there is no obligation on the employer to charge or account for output tax. ITSL relied on HMRC's published guidance and in particular paragraph 2.10 of Notice 700/17 which deals with the position where an employer has ceased business and states that

> "If you cease trading, and therefore cease to be an employer, you no longer have any entitlement to input tax on management of the pension scheme. Where, however, the trustees are themselves VAT registered on account of business activities carried out by the pension scheme they may treat the tax incurred on services connected with the continuing management of the scheme as their input tax, subject to the normal rules. This means that where the trustees are required to restrict recovery of input tax because they make exempt supplies not all the tax on the management services may be recovered …"

48. ITSL contended that the guidance clearly states that where the employer ceases to be in business, the trustees (if VAT registered) may treat the VAT charged on services connected with the management of the scheme as their input tax. That input tax is then recoverable to the extent the services are received by a business of the trustees that makes taxable supplies. ITSL submitted that this is the only logical conclusion as where the employer becomes insolvent then the role of the employer is taken on by the independent trustee. ITSL stated that its analysis results in the VAT on the services relating to the management of the scheme becoming input tax of the independent trustee. In other words, the input tax recovery position of the employer (effectively) passes to the trustees who, if VAT registered, can recover input VAT charged to them on management services. Any other treatment, submitted ITSL, produces an unfair distinction between the taxation of solvent and insolvent pension schemes.

49. We consider that the reference to the trustee being registered in paragraph 2.10 of Notice 700/17 refers to the registration of the Scheme through the trustee and "subject to the normal rules" refers to the need to take account of a split between exempt and taxable supplies by the scheme. In our view, the HMRC guidance does not state that that a VAT registered trustee inherits the employer's right to deduct VAT in the event that the employer becomes insolvent or that the trustee has any right to deduct VAT relating to the management of the scheme beyond the ability of the pension scheme to treat such VAT as deductible in accordance with the normal rules. We conclude that ITSL did not have any legitimate expectation that it was entitled to deduct the VAT charged by the Advisers.

50. ITSL also contended that if it is required to charge and account for VAT on the amounts paid out of the Schemes' resources in respect of the Advisers' fees then the consequence is that the Schemes where the employer has become insolvent will be worse off than those with a solvent employer by an amount equal to the VAT on the fees. ITSL submitted that a contrary conclusion would infringe the principles of fiscal neutrality and of equal treatment as held by the CJEC in *Marks and Spencer plc v HMRC* (Case C-309/06) [2008] STC 1408 which stated at [51]:

> "… the general principle of equal treatment requires that similar situations are not treated differently unless differentiation is objectively justified".

51. We do not accept ITSL's submission that any requirement to account for VAT on the amounts paid by the Schemes in relation to the Advisers' fees would infringe

the principles of fiscal neutrality and of equal treatment. It is correct that this means that the Schemes are therefore in a worse position than schemes where the employers are solvent and fully taxable. It is also true that schemes where the employers are solvent but wholly or partially exempt incur irrecoverable VAT which solvent and fully taxable can recover. The additional burden arises as a result of the operation of the normal VAT rules relating to deduction of VAT. In our view, the different treatment arises from the fact that the solvent employers and the Schemes carry on different businesses which, unsurprisingly, have different VAT consequences.

Decision

52. For the reasons given above, our decision is that ITSL is entitled to deduct the VAT charged by the Advisers and, accordingly, the appeal is allowed. The result may be something of a Pyrrhic victory for ITSL, however, as we also find that ITSL must account for VAT on the amounts paid by the Schemes in relation to the Advisers' fees.

53. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

GREG SINFIELD
TRIBUNAL JUDGE

RELEASE DATE: 29 August 2012