



TC04296

Appeal number: TC/2014/01373

VAT – input tax – supply of services in relation to the raising of equity finance by the appellant – Airtours Holidays Transport Limited v Commissioner for HM Revenue & Customs [2014] EWCA Civ 1033 considered – whether the appellant established that it was the recipient of the services – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FINDS YOU LTD

Appellant

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

The Tribunal determined the appeal on 16 February 2015 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009.

DECISION

Background

1. This appeal concerns a claim to input tax credit for the purposes of value added
5 tax in the sum of £2,004. The appeal was first listed for an oral hearing in
Birmingham on 22 October 2014. All parties attended on that date but due to
circumstances beyond anyone's control the hearing did not proceed. At the invitation
of both parties and given the modest amount in issue I agreed to determine the appeal
on paper without a further hearing. Both parties were given an opportunity to make
10 further written submissions and did so.

2. In determining this appeal I have had regard to the bundle of documents
provided by the Respondents which included the Notice of Appeal, Statement of
Case, witness statements from both parties and associated documentation. I also had a
copy of the Respondents' skeleton argument dated 6 October 2014, written
15 submissions from the Respondents dated 7 November 2014 and a supplementary
witness statement from the Appellant dated 24 November 2014.

3. In the light of the evidence before me I make the following findings of fact.

Findings of Fact

4. Mr Paul Heaven is a Chartered Accountant who acts for the Appellant through
20 his companies Paul Heaven Limited and Blue Sky Corporate Finance Limited.

5. The Appellant is a computer software services company. It has designed and
hosts a web-based media service at Findyou.com. This is an online notice board for
linking buyers and sellers of goods and services. I understand that it is targeted at the
retail automotive sector with plans to expand to other sectors.

25 6. In 2013 the Appellant was seeking to raise £300,000 of equity finance. There
were a large number of parties involved in the transaction as follows:

(1) A fund controlled by Birmingham City Council which wanted to invest in
the Appellant.

30 (2) Finance Birmingham, which was an independent fund management
company acting for Birmingham City Council.

(3) Five individual managers of Finance Birmingham who each wanted to
invest in the Appellant in their own names.

(4) Some 37 private individuals who wanted to invest in the Appellant.

35 (5) The existing 14 shareholders which included a pension fund and a venture
capital fund.

(6) The Appellant itself.

7. Freeth Cartwright LLP Solicitors acted as a legal adviser in relation to the
transaction. Mr Heaven's evidence, which was not challenged and which I accept, is

that it is typical in such circumstances, where the sum being raised is relatively modest, for legal advisers to act in the interests of all parties. It is also typical for the legal costs to be borne by the company raising the finance, in this case the Appellant. In a larger corporate finance deal the various parties involved will instruct their own legal advisers. In the present case none of the other parties appointed legal advisers for the purposes of negotiating the investment.

8. The purpose of the transaction as far as the Appellant was concerned was to raise finance. As far as the intending investors were concerned, the purpose of the transaction was to make an investment in the Appellant.

9. On 21 June 2013 Freeth Cartwright sent an invoice to Birmingham City Council. The invoice was addressed as follows:

*“Birmingham City Council
Payable by Findsyoun Limited
Attention of Guy Walker
Council House
Victoria Square
Birmingham”*

10. The invoice was for fees of £10,020 plus VAT of £2,004. The fees were described as follows:

“OUR PROFESSIONAL FEES

In connection with the investment by Birmingham City Council in Findsyoun Limited”

11. The invoice was paid by the Appellant, which reclaimed the VAT on the invoice in its VAT return for period 08/13. No other party has sought to reclaim the VAT on this invoice.

12. The evidence before me did not include any terms of engagement for Freeth Cartwright. Nor did it identify who had instructed Freeth Cartwright. The evidence did include a copy of an Investment Agreement between the various parties identified above and others, although that copy was undated and unsigned. I shall assume in the absence of any suggestion to the contrary that the Investment Agreement was executed by those parties in the form available to me.

13. The Investment Agreement provided for the various parties to subscribe for shares in the Appellant on the detailed terms set out in the Investment Agreement. It also amounted to a shareholder agreement governing the relationship between the Appellant and its shareholders in the future. Birmingham City Council invested a sum of £148,500, and Reyker Nominees Limited invested a sum of £150,000. I assume that Reyker Nominees Limited effectively represented the private individuals who were investing in the Appellant. The balance of £1,500 was invested by the managers of Finance Birmingham.

14. The Investment Agreement comprised some 73 pages and was drafted by Freeth Cartwright. They also drafted amended Articles of Association for the Appellant.

15. Clause 19.1.4 of the Investment Agreement provided as follows:

5 *“The Company [ie the Appellant] shall reimburse the Investors at Completion all legal costs and expenses they have incurred in respect of or in relation to the negotiation and implementation of this agreement and the Articles.”*

16. The Investment Agreement defined “the Investors” as Birmingham City Council, Reyker Nominees and the individual managers from Finance Birmingham.

10 17. Mr Heaven’s evidence was also that the 37 private investors intended to obtain tax relief on their investment under the Seed Enterprise Investment Scheme (“SEIS”). Such relief would not be available and would be of no interest to Birmingham City Council. It turned out that the documents drafted by Freeth Cartwright did not satisfy certain conditions for SEIS. Freeth Cartwright have been in negotiations with HMRC to correct the documents so as to make relief available. ,

15 18. Again, Mr Heaven’s evidence in this regard was not contradicted and I accept it. I set out below the significance of this evidence in relation to the issue I must decide.

Decision

19. Section 24(1) Value Added Tax Act 1994 (“VATA 1994”) defines input tax in relation to a taxable person as “VAT on the supply to him of any goods or services ...
20 *being ... goods or services used or to be used for the purposes of any business carried on by him”.*

20. The Appellant’s case is essentially that the legal services of Freeth Cartwright were provided for the benefit of the Appellant in raising finance and were paid for by the Appellant.

25 21. The Respondents contend that the Appellant has not correctly stated the legal test of input tax credit. It is necessary for the supply of services to be made to the taxable person seeking input tax credit. They contend that the supply was made to Birmingham City Council.

30 22. It is clear from section 24(1) that the Appellant would only be entitled to an input tax credit if Freeth Cartwright supplied their services to the Appellant. The burden is on the Appellant to establish that is the case.

35 23. Transactions involving three or more parties often lead to a difficult analysis in terms of what is being supplied and to whom. A very similar issue to the present was considered by the Court of Appeal in *Airtours Holidays Transport Limited v Commissioner for HM Revenue & Customs [2014] EWCA Civ 1033*. It concerned the professional fees of PricewaterhouseCoopers in relation to a refinancing package that Airtours was negotiating with various lending banks. There was a tri-partite agreement between Airtours, PwC and the lending banks.

24. In *Airtours* the First-tier Tribunal held that *Airtours* had received supplies from PwC that were used for the purposes of its business and therefore it was entitled to input tax credit.

5 25. The Upper Tribunal disagreed. It concluded that the substance of the transactions was a supply of services by PwC to the lending banks which used those services for the purposes of their own businesses, notwithstanding that *Airtours* had contracted to pay the fees of PwC.

10 26. It is clear that cases such as the present appeal are to be decided on their own facts. However at [37] of her judgment in *Airtours*, Gloster LJ summarised the relevant legal principles. Gloster LJ was in a minority in relation to her conclusion on the facts but the majority (Vos LJ and Moore-Bick LJ) adopted these principles. The following sub-paragraphs of [37] are particularly relevant for present purposes:

15 “ (ii) *Decisions about the application of the VAT system are highly dependent upon the factual situations involved. Thus a small modification of the facts can render the legal solution in one case inapplicable to another: see e.g. per Lord Reed in LMUK(SC) at [68] and in WHA (SC) at [26].*

...

20 (iv) *The terms of any contract between the parties, whilst an important factor to be taken into account in deciding whether a supply of services has been made, are not necessarily determinative of whether as a matter of "economic reality" taxable supplies are being made as between any particular participants in the arrangements. However, the contractual position is generally the most useful starting point for the VAT analysis: see per Lord Reed in WHA (SC) at [27]. That may be particularly so where certain contractual terms do not wholly reflect the economic and commercial reality of the transactions: see per the CJEU in Newey at [43]-[44].*

30 (v) *There may, as a matter of analysis, be two or more distinct supplies within the same transaction: see per Lord Hope at 412F-413A and Lord Millett at 418B-419H in Redrow; per Lord Millett in CCE v Plantiflor Ltd [2002] UKHL 33; [2002] 1 WLR 2287 at [67]; per Chadwick LJ in the Court of Appeal in LMUK [2007] EWCA Civ 165 at [38] and [43]; and per Lord Hope in LMUK(SC) at [103]-[108]. Moreover, as Lord Millett said in Plantiflor [50]: "a single course of conduct by one party may constitute two or more supplies to different persons."*

35 ...

(vi) *However, the mere fact that the taxpayer has paid for the service does not necessarily mean that it has been supplied to him..."*

27. At [38] Gloster LJ set out the broad issue to be determined as follows:

5 “ *The real issue in this case is whether, on the primary facts as found by the FTT, and which in essence were not disputed, the arrangements as between the Engaging Institutions, PwC and the appellant as a matter of law involved the supply of services to the appellant or merely third-party consideration provided by the appellant for services rendered by PwC to the Engaging Institutions alone.*”

28. At [77] Vos LJ said as follows:

10 “ *I have no doubt that this debate demonstrates that the most important elements of the analysis are to ascertain, by reference to the economic realities, the nature of the transaction and what, if anything, the taxable person is receiving in exchange for the consideration he has paid.*”

29. In relation to the contractual terms, Vos LJ said this at [82]:

15 “ *... Thus it is necessary first, as the correct starting point, to consider the contract. The UT did not wish to construe the contract in a "legalistic fashion", but it seems to me that to know what it means it is necessary first to construe it correctly. That does not mean that the correct test is answered solely by reference to the correct construction of the contract, but it is hard to know what the economic realities are without knowing what the parties agreed.*”

30. At [99] Moore-Bick LJ said this:

20 “ *...The question, as Vos L.J. has pointed out, is not whether the Group needed the report to be produced or whether it obtained a benefit as a result of its production, but whether in producing it PwC were providing a service to the Group for which the Group paid...*”

25 31. I was also referred to decisions of the VAT Tribunal in *Telent plc (2006) Decision 19967* and *Mono Global Ltd (2004) Decision 18559*. Both cases were decided by reference to their own facts. It is also fair to say that the facts of Airtours are different to the present facts. However the applicable principles to be applied are those which were set out by the Court of Appeal in Airtours and which are binding on this Tribunal.

30 32. The fact that the invoice was paid by the Appellant does not in itself determine the issue of who was the recipient of Freeth Cartwright’s services. The Investment Agreement provided that in any event the Appellant was to be responsible for the investors’ legal costs. Those investors included Birmingham City Council.

35 33. Mr Heaven submitted that it was clear that Freeth Cartwright were not only acting for Birmingham City Council. He based that submission on the typical arrangements for raising modest amounts of equity finance. He also relied on the fact that Freeth Cartwright negotiated with HMRC to correct the documentation so that the private investors could benefit from SEIS.

34. Mr Heaven's evidence was also to the effect that Freeth Cartwright carried out their work on a contingency fee basis, in the sense that if for any reason the investment did not take place then no fee would have been payable. As such he submitted it was important for them to keep all parties happy, including the Appellant.

5 35. The Tribunal is entitled to the best evidence reasonably available. I take into account that the input tax involved in this appeal is modest and that the parties both wish to avoid excessive costs in dealing with the appeal. However it is clear from Airtours that the essential starting point in any analysis is the contractual arrangement. I do not have any engagement letter or written terms and conditions in relation to
10 Freeth Cartwright's work. There is no evidence as to who instructed Freeth Cartwright or on what basis, either in the contemporary documentation or a short witness statement from Freeth Cartwright.

15 36. In the absence of sufficient evidence as to the terms of Freeth Cartwright's engagement, or the basis upon which they drafted the documentation and negotiated with HMRC, I am unable to say that they were supplying their services to anyone other than Birmingham City Council. The Appellant has not satisfied the burden of showing that Freeth Cartwright were supplying services to the Appellant as well as Birmingham City Council. For the reasons given by the Court of Appeal in Airtours, it is not sufficient for the Appellant simply to show that it "needed" the
20 documentation to be drafted to the satisfaction of all parties if it was to benefit from the equity injection.

37. In all the circumstances I must dismiss this appeal.

38. 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
25 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.

30

JONATHAN CANNAN

TRIBUNAL JUDGE

35

RELEASE DATE: 24 February 2015