



**TC04487**

**Appeal number: TC/2014/03279**

*VAT– input tax-appellant contracted and paid for services of solicitors and accountants-advice given mainly to others -did appellant obtain anything at all to be used for the purposes of its business-no-appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DANESMOOR LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE BARBARA KING  
ROLAND PRESHO**

**Sitting in public at North Shields on 12 January 2015**

**Mark Hetherington, accountant of UNW for the Appellant**

**Richard Chapman, of counsel, for the Respondents**

## DECISION

### The Issue

5 1. This appeal concerns VAT on invoices from KPMG, accountants, and from Dickinson Dees, solicitors, as follows:

2. From KPMG

date	costs	VAT
11 July 2012	£30,000	£6,000
18 April 2013	£24,500	£4,900

3. From Dickinson Dees

date	costs	disbursements	VAT
17 July 2012	£2,914		£582.80
28 September 2012	£11,750	£24	£2,354.80
20 December 2012	£6,050	£1	£1,210.20
28 February 2013	£8,272.50	£9	£1,654.70
11 March 2013	£3,280		£656.00

10

4. The total VAT on these invoices comes to £17,358.50 and the appellant company, Danesmoor Limited, say they are entitled to claim credit for this as input tax.

15 5. HMRC say that the VAT on these invoices is not recoverable as input tax by Danesmoor Limited as there has not been a supply of services to Danesmoor Limited for the purposes of section 24(1) VATA1994.

### The Law.

6. Sections 24(1) of the Value Added Tax Act 1994 provides that

20 (1) "Subject to the following provisions of this Section, "input tax" in relation to a taxable person, means the following tax, that is to say-

(a) VAT on the supply to him of any goods or services ...

25 being (in each case) goods or services used or to be used for the purposes of any business carried on by him.

7. Section 26(2) provides that supplies within this subsection are ...taxable supplies..... made or to be made by the taxable person in the course or furtherance of his business.

5 8. In order for an input tax claim to be valid, the claim must be made by the person to whom the supply was made.

9. There are thus two parts which must be satisfied before a claim to input tax can be allowed. The first part involves “to whom” were the services rendered and the second is “for what purpose”.

10 10. The test as set out in *Redrow (HL)* [1999] 1 W.L.R 408 is “Was something being done for him [the taxable person] for which, in the course or furtherance of a business carried on by him, he has had to pay a consideration which has attracted VAT?”

### **Background**

15 11. The principal activity of Danesmoor Limited was as a sales agent in the United Kingdom for foreign manufacturers of kitchen furniture.

12. In 2012 Danesmoor Limited engaged in a corporate restructuring exercise ‘Project Bakery’ which resulted in the removal of minority shareholders in Danesmoor Limited.

20 13. The shareholders of Danesmoor Limited before the restructuring were:- Mark Stephenson (Managing Director of Danesmoor), Philip Andrew Elenor (Operations Director of Danesmoor), Rebecca Stephenson (sister of Mark Stephenson) and three trusts for the benefit of the wife and children of Mark Stephenson and the children of Rebecca Stephenson. The trustees were G M Trustees Limited and Steven Andrew Ward for two of the trusts and the third had Paxis Trustees Limited as sole Trustee.

25 14. The restructuring involved Mark Stephenson incorporating a ‘Newco’ with nominal share capital which acquired 100% of the share capital of Danesmoor Limited. Newco acquired the shares held by Mark Stephenson by way of share for share exchange and all other shareholders received cash and/or loan notes. Danesmoor Limited became a wholly owned subsidiary of a new holding company.

30 15. The main written evidence before the Tribunal consisted of engagement letters from KPMG and Dickinson Dees, invoices with some evidence of how these invoices were arrived at and some letters by KPMG to HMRC. Mr Hetherington of UNW, accountants, conducted the appeal on behalf of the appellant and we had sight of correspondence between UNW and HMRC. At the hearing we had skeleton  
35 arguments on behalf of both appellant and respondent. There were no witness statements or oral evidence.

16. The written information included the following:-

## KPMG

17. The Letter of Engagement from KPMG is dated 21 February 2012. It is addressed to “The Directors of Danesmoor Limited c/o Ian Cowen” and headed “Engagement Letter – Project Bakery”. The terms included the following:-

- 5 (1) You have advised us that the Board of Danesmoor Limited are considering a proposal for a new holding company (“Newco”) to be introduced into the group which will acquire 100% of Danesmoor Limited (“Danesmoor” or the “Company”). The purpose of the transaction is to enable certain shareholders to exit whilst other will exchange their current shares in Danesmoor for Newco shares.
- 10 (2) The services we are to provide as tax advisers will comprise the following:
- 15 (a) Providing advice to the company, and/or Newco on behalf of the shareholders, on the taxation implications arising from the Proposed Transaction including whether any income tax charges may arise under the employment related securities legislation.
- (b) A review of the employee shareholders’ taxation position including the availability of entrepreneur’s relief.
- 20 (c) Advising on the form of consideration offered in the transaction and the tax treatment.
- (d) In the event that loan notes are issued as part of the consideration, commenting on the loan note documentation to ensure that tax implications are understood.
- 25 (e) Preparation of applications to HMRC for advance clearance (in accordance with section 701 Income tax Act 2007 and section 138 Taxation of capital Gains Act 1992) in respect of the proposed Transaction. Subsequent liaison with HMRC with regard to any additional information requested.
- 30 (f) Setting out any tax reporting requirements for the company, Newco and its shareholders following completion of the proposed transaction.
- (g) Liaising with the company’s other advisers, including bankers, brokers and lawyers, including reviewing documents from a tax perspective.
- 35 (3) Please note that our advice under this engagement will be restricted to the tax implications of any particular transaction and that nothing provided by us should be interpreted as advice on the wider merits of any such transaction.
- (4) The fee for the services set out in this letter are said to be in the region of £7,000 to £10,000 plus outlays and VAT.
- 40 (5) Reference is made to “General Terms of Business and Additional Terms”. These are not attached but clause 7 is recited.

Clause 7- We confirm here that our work is performed for you alone and we set out various restrictions on the extent to which you may share with others the produce of our work or refer to our name. We draw your attention also to clauses 13 to 16 of the Additional Terms: Tax services that set out the basis on which you may choose to share with others the produce of our tax work where you are a SEC Registered Audit Client or where the engagement involves US tax advice.”

(6) Confirmation of agreement with the terms as set out in this letter is requested from the recipient of the letter.

18. The first invoice from KPMG is dated 11 July 2012 is addressed to “The Directors of Danesmoor Limited c/o Ian Cowen” and is for £30,000 for “Professional fee for tax advisory services in connection with Project Bakery, as agreed.” There are no disbursements.

19. It is accompanied by a list of items 1-18 in a ‘workstream’ for costs up to 29 June 2012. The gross cost of the work done under these items comes to £34,891. This total is reduced to the £30,000 which appears on the invoice.

20. Items 1-4 come under the heading ‘Initial discussions’. Item 1 concerns discussion with directors of Danesmoor Limited concerning potential share buybacks and exploring other structures for removing minority shareholders. Item 2 is an advice letter following the earlier discussion. Item 3 is a meeting with directors of Danesmoor to discuss the tax implications for each of the shareholders and the company and item 4 is the ‘preparation of summary explaining UK Capital Gains Tax treatment for the various Danesmoor shareholders.’

21. Items 5-11 come under the heading ‘Initial Clearance letter.’ Items 11-13 ‘Follow up to clearance letter’ have a gross cost of £8,149 but the handwritten figure of £4,000 is written next to this which may be an indication of how the total for the invoice was reduced.

22. Items 14-17 are under the heading ‘Shareholder advice letters’ and item 18 relates to internal administration such as the new engagement letter.

23. The Invoice dated 18 April 2013 from KPMG is also addressed to “The Directors of Danesmoor limited c/o Ian Cowen” and is for £24,500 for “Professional fee for tax services in connection with Project Bakery.”

24. There are 20 items listed in an accompanying ‘workstream’ which starts on 25 March 2013 and comes to a total of £28,142. It is marked that £24,500 has been agreed.

25. Items 1-2 concern funding arrangements, 3-5 concern loan notes for one shareholder, 6-9 concerns specific shareholders, items 10 – 12 concerns stamp duty advice. Items 13 -15 reviews the legal documentation. Item 16 concerns specific

advice to one shareholder. Items 17-19 concern the personal matters for two specific shareholder and item 20 is further internal administrative matters.

### **Dickinson Dees**

26. The Letter of Engagement from Dickinson Dees is dated 1 June 2012 and  
5 marked 'For the attention of Mr Ian Cowen' Danesmoor Limited. The first paragraph reads

“Thank you for instructing Dickinson Dees LLP in relation to the proposed purchase by a newly incorporated company ('Newco') of the entire issued share capital of Danesmoor Limited (“the Company”)”

10

27. The letter refers to a schedule setting out the main aspects of the work to be carried out by Dickinson Dees but that schedule was not attached and was not available to the Tribunal. The Tribunal was asked to look in detail at the detailed 'Transaction Listings' of 'work in progress' attached to each invoice.

15 28. Paragraph 5 of that letter is headed 'Transfer of retainer' and contains the following

Once Newco has been established, we will transfer this retainer from the Company to Newco and although thereafter, Newco will be responsible for our fees, the company will remain liable, should Newco  
20 be unable for any reason to meet those fees.

29. The first invoice dated 17 July 2012 from Dickinson Dees is addressed to Danesmoor Limited and is for £2914 plus VAT for a period ended 13 July 2012, the day that the 'Newco' was incorporated.

30. Work in progress postings included the following:-

25                   5 March 2012   check cookery bible : draft tax clearance.  
                      16 May 2012   .....consider tax clearance.....checking fsa re offer to shareholders  
                      17 May 2012   re fsma exemption - check 2005 order  
                      21 May 2012   draft shareholder 'offer' letter  
30                   June 2012       update everyone  
                      July 2012       ref AE -consider KPMG tax advice

31. The four subsequent invoices all post date the incorporation of the Newco. There are 'work in progress postings' attached to the invoices dated 28 September 2012 and 20 December 2012. These appear to refer to advice given to trusts and  
35 shareholders. There is some reference to 'leaver' provisions. There are no 'work in progress postings' attached to the invoices of 28 February 2013 and 11 March 2013.

## Arguments

32. We were referred, by both parties, to several cases which were all included in a bundle of authorities. These included *Redrow* and *Airtours Holidays Transport Limited v The Commissioners for Her Majesty's Revenue and Customs* [2014] EWCA Civ 1033.

33. The case of *Redrow* was decided by the House of Lords in 1999. The decision reiterated the basic principle of VAT that the supply on which the taxable person seeks to deduct input tax has to have been used or is to be used for the purposes of the business. They found that the relevant test was whether the supply was received in connection with the business activities of the taxable person.

34. The taxpayer needs to identify the payment, of which the tax to be deducted formed part. The question to be asked is then “did the tax payer obtain anything—anything at all—used or to be used for the purposes of his business in return for that payment. It may 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.

35. *Airtours* was heard by the Court of Appeal in 2014. Paragraph 37 of that decision listed the legal principles which must be considered when looking at questions of VAT. The consideration of economic realities is a fundamental criteria, decisions re VAT are highly dependent upon the factual situation, regard must be had to all the circumstances, the terms of the contract are not necessarily determinative of the economic reality and there may be two or more distinct supplies.

36. The Court of Appeal did not reach a unanimous decision in *Airtours*. The dissenting judgment found that there were two separate supplies and would have allowed the appeal but the majority found that the services of the accountants were clearly supplied to the engaging institutions and that the accountants did not supply anything to *Airtours* ‘for use in its business.’

37. In this appeal Mr Hetherington, on behalf of Danesmoor, argues that Danesmoor Limited engaged the services of KPMG and Dickenson Dees, the letters of engagement were addressed to the financial director of Danesmoor Limited and Danesmoor Limited paid for all the services which were subsequently supplied. He accepted that some of the advice was given to individual shareholders but in many cases he thought that the individual shareholders would not have seen the advice given by KPMG or Dickinson Dees. He argues that all of the advice was part of the ‘general overheads’ of Danesmoor Limited and that there was a direct and immediate link between the costs of the restructure and the on-going overall economic activities of Danesmoor Limited. The cases of *AB SKF* (C-29/08) and *Eon Asset Management* (C-118/11) were referred to, to support this contention.

38. Mr Chapman on behalf of HMRC argued that, whilst there could be said to have been minimal advice to Danesmoor Limited by KPMG when it was discussing ‘other structures for removing minority shareholders’ once the decision was made to proceed with the restructuring by way of a ‘Newco’, virtually all the tax advice was given to

the specific shareholders and no service was then supplied to the board of Danesmoor Limited itself.

### **Discussion and Findings**

5 39. The most useful starting point for the analysis of VAT is the contractual situation between the parties. However the mere fact that the taxpayer has paid for the services does not mean that it has been supplied to him.

40. The letter of engagement by KPMG indicates that it will give advice to Danesmoor Limited and/or Newco but we find that the ensuing workstream shows very little advice to the board of Danesmoor Limited.

10 41. In the clearance letter dated 2 March 2012 it was clear that the directors and the shareholders of Danesmoor Limited had already made the decisions about how they proposed to undertake the restructuring exercise. They were not therefore obtaining advice from KPMG on whether to go ahead with this project.

15 42. We find that the economic reality in this case was that Danesmoor Limited had decided, before the engagement of either KPMG or Dickinson Dees that it wanted to undertake a restructuring exercise. It was not seeking advice on how to restructure but advice on tax implications and legal services connected with the implementation of the restructuring. The advice was in connection with tax implications for all those shareholders who were involved. We find that the main point of the clearance letter of  
20 2 March 2012 was to get clearance from HMRC that the exchange of shares in Danesmoor Limited for shares in Newco would not trigger a chargeable gain for Mark Stephenson. He was, in effect, the only shareholder who was going to have a share for share exchange. The only other party to the share for share exchange was the 'Newco.' Clearance was also sought for loan notes, the terms for which were to be  
25 negotiated between 'Newco' and the minority shareholders. Danesmoor Limited was not a party to these negotiations. Also mentioned were income tax matters which would affect individual shareholders but there were no corporation tax clearances matters.

30 43. The parties who would end up with potential tax payments in this case were the sellers and buyers of the shares and possibly those involved in loan notes.

35 44. We find that the letters written by KPMG dated 2 March 2012 and 20 April 2012 gives information to HMRC and explains to HMRC courses of action which have been considered by Danesmoor Limited but which are not now going to be followed. This information is given as a means of obtaining clearance required for the shareholders. It is therefore a service to the shareholders but we find cannot be said to be a service to Danesmoor Limited 'in the course or furtherance of a business being carried on by it.'

40 45. We found that the fact that only letters addressed to Ian Cowen from KPMG were produced to the Tribunal did not indicate that individual shareholders did not see, or take account of advice provided by KPMG. Mark Stephenson was the main

shareholder who needed tax advice in connection with Project Bakery. He was managing director of Danesmoor Limited and we find that any letters addressed to Ian Cowen as Financial director of Danesmoor Limited are highly likely to have been seen by Mark Stephenson. He then had close family links with other shareholders and we find it inconceivable that he did not mention to all the relevant shareholders or their trustees that they were going to be offered tax advice for which they did not have to pay.

46. The letter of engagement by Dickinson Dees, dated 1 June 2012, indicates that they consider that they have been retained by Danesmoor Limited and that Danesmoor Limited will be responsible for the payment of the fees for Dickinson Dees until such time as 'Newco' is set up. Dickinson Dees state that they will then transfer the retainer to 'Newco' but hold that Danesmoor Limited remains responsible for the payment of its fees, if for any reason Newco is unable to meet those fees.

47. The first invoice from Dickinson Dees is for work done prior to the formation of 'Newco' but includes advice on the draft tax clearance letter and advice on the offer which will be made in due course by 'Newco' to the shareholders of Danesmoor Limited. Danesmoor Limited has agreed to be responsible for the fees of Dickinson Dees up to this point. We find that the reason for the issue of an invoice up to this date is not to signify a change in 'the taxable person to whom the supply of service is being made', but a change in the body which might become responsible for payment of the fees.

48. We find that Danesmoor Limited agreed to pay for any services which might be rendered to the shareholders, but KPMG and Dickinson Dees did not have an obligation to provide services to the shareholders. Some of the shareholders had separate legal representation in respect of some matters and if they had opted to obtain all their tax advice from other sources Danesmoor Limited could not have insisted that KPMG and Dickinson Dees be used. We find therefore that it is not the case that KPMG and Dickinson Dees are supplying services both to the individual shareholders and to Danesmoor Limited when advice is given to the former. There are not two or more distinct supplies within the same transaction in this case.

49. In effect the payment by Danesmoor Limited for the tax advice and legal services given to the shareholders was an added inducement to persuade them to sell their shares in accordance with the proposal being put forward. Additional cash might have been just as persuasive.

50. We noted that the two invoices from KPMG came to a total of £54,500 which far exceeded the estimate of £7,000 to £10,000 in their letter of engagement. We noted it also included the payment of completion of tax returns for two directors. We find that this cannot be said to be in connection with the business of Danesmoor Limited.

51. Overall we find that the services provided by KPMG and Dickinson Dees fails the 'to whom test' because the services are, in the main, provided to the shareholders.

Some of the legal services were supplied to the ‘Newco’ to ensure that the sale and purchase of shares was carried out legally.

52. Having found that the services fail the ‘to whom test’ we find that the input VAT cannot be reclaimed by Danesmoor Limited and the appeal fails.

5 53. Had we found that there was a supply of services to Danesmoor Limited, we would, in any event, have gone on to find that the supply failed the ‘purpose test.’ We were not satisfied that the services, as set out in the invoices mentioned in paragraphs 2 and 3 above were provided in the course of, or for the furtherance of, the business of Danesmoor Limited.

10 54. 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  
15 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

20

**BARBARA KING  
TRIBUNAL JUDGE**

**RELEASE DATE: 15 June 2015**