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PRESS SUMMARY

Airtours Holidays Transport Limited (Appellant) v Commissioners for Her Majesty's Revenue and Customs (Respondent) [2016] UKSC 21
On appeal from [2014] EWCA Civ 1033

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Carnwath, Lord Hodge

BACKGROUND TO THE APPEAL

In October 2002, Airtours Holidays Transport Ltd (“Airtours”) was in serious financial difficulties. It was suggested to Airtours that it should commission an accountants’ report to satisfy the 80 or so banks and other financial institutions (“the Institutions”) from which it had borrowed money that its proposed restructuring and refinancing proposals were viable. The Institutions were agreeable to this. Subsequently, pursuant to a decision in which both the Institutions and Airtours were involved, PwC were appointed to produce a report (“the Report”).

The original terms of PwC’s appointment were set out in a letter dated 5 November 2002 addressed to “the Engaging Institutions” (“the Letter”) and attached terms and conditions (together, “the Contract”). The Contract provided that Airtours was to pay PwC’s fees for producing the Report and related work, and Airtours duly did so in due course. Airtours also paid PwC VAT in the form of output tax on those payments.

Airtours then sought to deduct that VAT as input tax in its VAT returns for the relevant periods. HMRC challenged Airtours’ ability to do so. While HMRC accepted that the Contract was of commercial benefit to Airtours, they contended that Airtours was not entitled to deduct the VAT on PwC’s fees as input tax because PwC’s services under the Contract were not “supplied to” Airtours.

Airtours appealed to the First-tier Tribunal, who found for Airtours. The Upper Tribunal allowed HMRC’s appeal. The Court of Appeal dismissed Airtours’ appeal. Airtours now appeals to the Supreme Court.

JUDGMENT

The Supreme Court dismisses Airtours’ appeal by a majority of 3 to 2. Lord Neuberger gives the leading judgment, with which Lord Mance and Lord Hodge agree. Lord Carnwath and Lord Clarke both give dissenting judgments.

REASONS FOR THE JUDGMENT

In order for the VAT charged by PwC and paid by Airtours to be reclaimable as input tax, it must be “VAT on the supply to [Airtours] of any goods or services” [19]. The issue of whether there has been a supply of services by PwC to Airtours gives rise to two principal questions [20].

The first is whether PwC agreed, under the terms of the Contract, to supply services, and in particular to provide the Report [21]. HMRC accept that, if the answer to that question is yes, the appeal must be allowed.

PwC's commitment to provide the services described in the Contract was a contractual commitment to the "Engaging Institutions", and not to Airtours [23], for the following reasons:

- (i) the Letter is addressed "To the Engaging Institutions", and not to Airtours [24];
- (ii) paragraph 1 of the Letter provides that the Institutions had retained PwC; there is no suggestion that Airtours had done so [24];
- (iii) paragraph 4 of the Letter provides that any reports are "for the sole use of [those] institutions" [24];
- (iv) paragraph 8 of the Letter states that the Report is to be provided to the Institutions and Airtours is only to be provided with a copy, which can be redacted [25];
- (v) paragraphs 9 and 10 of the Letter recognise a duty of care on the part of PwC to the Institutions, but does not acknowledge one to Airtours; further, paragraph 11 excludes any duty of care or liability to "any other party" [26].

While Airtours did countersign the Letter, it had to do so in order to be bound by certain provisions, such as those relating to the payment of PwC's fees [28]. The fact that Airtours, rather than the Institutions, was to pay PwC for the services, can be fairly said to raise a prima facie expectation that PwC would owe a duty to Airtours to provide those services. However, the Institutions wanted the services; there is no indication Airtours would have still paid for those services had that not been the case [35]. The same can be said of Airtours' argument that its interest in having a report produced for the Institutions indicates there was a supply of services to it [37].

The second question arises from Airtours' argument that, in any event, in order to succeed on this appeal, it does not have to show that it had a contractual right to require the services under the Contract to be provided to the Institutions by PwC to succeed. Rather, Airtours argues that the facts that (i) it had a substantial commercial interest in the services being provided by PwC and (ii) it not merely countersigned the Contract but thereby agreed to pay PwC for the services, justify the conclusion that the services were "supplied" to Airtours, as well as the Institutions [43].

Airtours relies on Lord Millett's statement in *Commissioners of Customs and Excise v Redrow Group Plc* [1999] 1 WLR 408 that the question to be asked is whether the taxpayer obtained "anything – anything at all – used or to be used for the purposes of his business", but this has to be read in the light of later cases [44-45]. As subsequent authority has clarified, that statement should be interpreted consistently with the established approach of focusing on economic realities as the fundamental criterion for the application of VAT [45].

It is clear from domestic and European Court of Justice judgments that, where the person who pays the supplier is not entitled under the contractual document to receive any services from the supplier, then, unless the documentation does not reflect the economic reality, the payer has no right to reclaim by way of input tax the VAT in respect of the payment to the supplier [50].

Lord Clarke and Lord Carnwath each give judgments dissenting on the analysis of both the Contract and the commercial reality of the relationship between Airtours and PwC. Lord Clarke concludes that, in this case, PwC was making two distinct supplies, one to Airtours, and another to the Institutions [64-5]. Lord Carnwath considers that it is inappropriate to resolve the appeal on a narrow legalistic approach to construction of the Contract, particularly where the distinction between services to Airtours and services to the Institutions is unlikely to have been seen as of any practical significance to the parties [81]. He further considers that the argument that Airtours, having paid a £200,000 retainer to PwC, did not have an enforceable right, is an impossible one to accept, either as a matter of contractual construction or as a matter of economic reality [84].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>