Appeal number: FTC/46/2009
NCN [2010]UKUT 404 (TCC)

INPUT TAX – tripartite agreement entered into by the Respondent, a number of financial institutions and PricewaterhouseCoopers whose fee was to be paid for by the Respondent – whether input tax of the Respondent – no – appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

AIRTOURS HOLIDAYS TRANSPORT LIMITED **Respondent**

TRIBUNAL: JOHN F AVERY JONES CBE
CHARLES HELLIER
(JUDGES OF THE UPPER TRIBUNAL)

Sitting in public at 45 Bedford Square, London WC1 on 4 and 5 March 2010

Elisa Holmes, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Andrew Hitchmough and Jonathan Bremner, counsel, instructed by PricewaterhouseCoopers Legal LLP, for the Respondent

DECISION

1. The Commissioners of HM Revenue and Customs ("HMRC") appeal against the decision of the First-tier Tribunal (Mr Richard Barlow and Ms Rayna Dean) in *Airtours Holiday Transport Limited (formerly My Travel Group) v HMRC* [2009] UKFTT 256 (TC) which allowed the appeal by Airtours Holiday Transport Limited ("Airtours") against HMRC's refusal to allow deduction of input tax. HMRC was represented by Miss Elisa Holmes (who stood in at short notice for Miss Rebecca Haynes who was ill and could not attend on the first day of the hearing, and Miss Holmes appeared on the second day booked; we are grateful to her for doing this at short notice so that the hearing date could be maintained, and we are also grateful to Miss Haynes for her skeleton argument), and Airtours were represented by Mr Andrew Hitchmough and Mr Jonathan Bremner.

2. The dispute relates to the deduction of input tax on the fees of PricewaterhouseCoopers ("PwC") paid by Airtours under a tripartite agreement ("the Agreement") between Airtours, PwC and a number of financial institutions in connection with Airtours' financial position in September 2002. The background to the Agreement was that Airtours was at the time in financial difficulties, owing between £2bn to £2.5bn to about 80 banks and was due to renew its revolving credit facility in December 2002. The most critical period was October and November 2002 when it was not clear whether the business would survive. PwC and KPMG were approached by the financial institutions that had lent money to Airtours to submit proposals for advisory work required to provide an insight into what was happening at Airtours. PwC was chosen as Airtours considered that KPMG had a conflict of interest as auditors to First Choice Holidays & Flights Limited, the purchase of which by Airtours had been blocked by the European Competition Commission in 1999.

The facts

3. The Agreement is in the form of a letter of 5 November 2002 from PwC addressed "To the Engaging Institutions") and headed "Silver Group plc [code for Airtours] and its subsidiaries ('the Group')" which contains the following terms:

> "*Introduction*
>
> 1. This letter ('the Letter of Engagement') confirms that we, PricewaterhouseCoopers ('PwC') have been retained by the institutions as defined in paragraph [this is blank but 4 is clearly intended] to provide the services ('the Services') set out below.
>
> 2. This Letter of Engagement outlines the Services to be provided, the fees to be paid in respect of the Services, and the terms applicable to the provision of the Services.
>
> …
>
> 4. Our report and letters are for the sole use of the Institutions who have expressly agreed to this Letter of Engagement ('the Engaging Institutions') by countersigning below. They must not be distributed to any third parties without our written consent. We confirm that we are prepared to agree to provide copies of the information and advice produced under this engagement (save as detailed at paragraph 11

below) to each of the Engaging Institutions (as formed as at the date that this Letter of Engagement is signed) and are also prepared to assume a duty of case to each of them but only on the basis that they each individually agree to the terms of this Letter of Engagement as party to it.

…

6. To enable the institutions to develop views on the Group's current financial position and financing needs, you have requested that we assist in providing information to the institutions providing facilities to the Group.

7. Our work is to be conducted in a number of phases. The first phase of it is to assist the institutions providing banking, bonding and other facilities to the Group to gain a more detailed understanding of the present financial position of the Group. During this phase our role is to obtain and comment on this information to enable the institutions to better consider the Group's likely requests for facility extensions….

8. Information and advice produced from this engagement is to be addressed to the Engaging Institutions with a copy to the directors of the Group, with the exception of any part of the report prepared exclusively or confidentially for the Engaging Institutions.

9. We have a duty of care to the Engaging Institutions as described in paragraph 4 relating to the contents of the Phase 1 report…

10. You accept that the aggregate limit referred to in paragraph 9 of our Terms and Conditions applies to our liability to the Group and the Engaging Institutions and any other party to whom we later agree to assume a duty of care taken together.

11. We do not accept any duty of care or liability to any other party, including any party that acquires from the Institutions financial exposure to the Group subsequent to the date of our report….

Scope of our Services

12. You have requested us to undertake a review of the Group as set out below. Our work is required by the Institutions in considering the level of facilities to the Group.

…

15. Our work is to be based primarily on internal management information and representations made to us by management, which we will not verify or corroborate. We are not required to carry out an audit for the purposes of our work….

…

Fees

22. The Group will be responsible for our fees, expenses and disbursements incurred in carrying out our work…

…

Terms and Conditions

26. The attached terms and conditions ('the Terms and Conditions') have been agreed between the parties and set out the duties of each party in respect of the Services."

The Terms and Conditions provide that among other matters:

> "(i) the Group will indemnify us against claims brought by any third party. For the avoidance of doubt, the reference to 'you' in clause 10 of the Terms and Conditions (and only in that clause) refers to the Group and not the Engaging Institutions;
>
> …
>
> (iii) The Letter of Engagement and the Terms and Conditions are together referred to as the Contract, and evidence the entire agreement between the parties. For the avoidance of doubt, the Engaging Institutions and the Group both agree to all the terms contained in the Contract."

4. The Agreement has a page headed "Confirmation and terms of engagement—Engaging Institutions" stating:

> "We confirm that the foregoing properly sets out the arrangements agreed between us, and we agree to the terms contained in this Letter of Engagement and the attached Terms and Conditions. We also understand that PwC will have unrestricted access to the Group's books and records and the full co-operation of its directors and senior management who will keep you informed of any matters arising which they consider are relevant to your work. If appropriate, you may instruct other professional parties to assist you and discuss with them the affairs of the Group. We confirm that the Group has authorised the Engaging Institutions to disclose to you all relevant matters concerning the Group's affairs and its bank accounts."

There is another page headed "Confirmation and terms of engagement—the Group" which is identical except that in place of "We also understand that PwC will have unrestricted access…" it says "We also confirm that PwC will have unrestricted assess…" and in place of "We confirm that the Group has authorised the Engaging Institutions to disclose…" it says "We authorise the Engaging Institutions to disclose…"

An Appendix sets out the scope of the Services in Phase 1 under the following headings each of which is then expanded upon:

> "1 Current trading position; 2. Current Case position and outlook; 3. Existing Group financial exposure; 4. Historical cash utilisation to September 2002; 5. Review of accounting policies and accounting issues; 6. Budget for year to 30 September 2003; 7. CAA [Civil Aviation Authority]; 9. Any other matters which come to our attention during the course of our work insofar as it relates to any intention of the Group to dispose of any of the Group's activities; 9. Your outline of the activities to be conducted in subsequent phases."

5. The Terms and Conditions are a printed form which deal with such matters as confidentiality, PwC's liability and the governing law. They contain the following definition: "'you' and 'yours' refers to the entity or entities on whose behalf the attached Letter of Engagement was acknowledged and accepted." Clause 10 (referred to in paragraph 26(i) of the Letter of Engagement) reads:

> "You [the Group] agree to indemnify us to the fullest extent permitted by law against all liabilities, losses, claims, demands and expenses arising out of or in connection with your [the Group's] breach of any of the terms of the Contract (regardless of whether such breach is later remedied)…."

6. The evidence of witnesses before the First-tier Tribunal that it accepted was that Airtours had an input into the Agreement by influencing the appointment of PwC, as mentioned above, and by agreeing the scope of the work for which they were paying.

7. There are a number of subsequent agreements dealing with later phases but the Agreement is typical of these.

The law

8. Section 24 of the VAT Act 1994 provides:

> "(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;…
>
> being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him."

The decision of the First-tier Tribunal

9. The reasons for the decision of the First-tier Tribunal are contained in the following part of the decision:

> "31. We have already held that "you" in the Engagement Letters and the Terms and Conditions refer to the appellant, albeit as well as to the banks and the other institutions and by signing the documents the appellant [Airtours] became a party to the contract which those documents created. The appellant thereby authorised PwC to do the work and made a binding promise to pay for the work. The authorisation was given effect by the payment of the £200,000 retainer fee provided for by clause 25 of the Engagement Letter and which was payable "on the commencement of our work". Authorisation for the work was continually renewed by payments of the weekly invoices and the subsequent Engagement Letters which extended the scope of the work in some cases.
>
> 32. The confirmation and terms of engagement signed by the appellant on the first and subsequent Engagement Letters is both specific and sufficient to establish that they were a party to a contract with PwC and that is further re-enforced by the Terms and Conditions and the form of the Engagement Letters themselves.
>
> 33. That the contract thereby established involved supplies of services to the appellant seems to us, and we hold it to be the case, to be quite clear. The contract amounts to an agreement for work involving a supply to the appellant in at least the following specific respects.

> 34. Clause 8 of the Engagement Letter promises that the appellant will receive a copy of a report which will first have been discussed with its management (clause 19).
>
> 35. Clause 12 shows that the appellant had requested the review. It might be said that the fact that that clause also refers to the review having been required by the Institutions means it was a supply to those Institutions rather than to the appellant but we do not agree. The appellant was under no legal obligation to provide such a review to the Institutions and the reference to the Institutions requiring it merely acknowledges that the appellant needed, for practical reasons, a review that it could place before the Institutions. Such a review could have been obtained by the appellant without the Institutions being a party to its preparation but such a review would have carried less (possibly very little) weight with the Institutions. Practicalities therefore required that the Institutions should be involved in the process but nonetheless it was the appellant who needed the review and authorised the work that gave rise to the review. The fact that the appellant was under no legal obligation to provide the review or report to the Institutions does not mean that, even though it had been agreed the Institutions would be parties to the contract for its preparation, the supply ceased to be a supply to the appellant. The work of PwC was needed by the appellant and it is our holding that the appellant authorised it and secured it for its own purposes. It was not obtained purely for the purposes of the Institutions. That is clear from the terms of the contract itself.
>
> 36. That the appellant needed the work by PwC and its results is fully confirmed by the oral evidence of the witnesses for the appellant. We have already recorded that we accept that evidence was entirely truthful. In particular Mr McMahon in his witness statement (which stood as his evidence in chief and in respect of which he was not challenged on this point) said this: "… My Travel were keen to have an adviser reviewing the plans for the business and to provide confirmation to the Steering Committee that, based on the information available at the time, the agreed actions were reasonable. When determining who to appoint to provide this assistance it was necessary to appoint an adviser that was acceptable to the Steering Committee and My Travel and I note that My Travel had a role in the decision making process as to who was going to be appointed".
>
> 37. Having held that there was a supply to the appellant we need only add that it is very obvious that the appellant needed and used that supply for its business purposes. It could have been required for no other purpose."

10. In short, the First-tier Tribunal construed the Agreement as providing that Airtours wanted PwC's services for the purposes of its own business so that it could place the report before the Institutions. The Institutions were a party to the Agreement because otherwise the PwC report would have carried less weight. We read the First-tier Tribunal as saying that the services provided to Airtours were the services supplied by PwC rather than a *Redrow*-type service of the right to have PwC's services supplied to the Engaging Institutions because they say at [27]:

> "…As to proposition (vi) [The fact that someone else also received a service as part of the same transaction as that received by the party making the deduction does not prevent deduction] it might be said that Lord Hope, by saying that the third party also received "a" service rather than "the service" (at the end of the passage quoted above), meant that the deduction by Redrow only arose because it received a different service to that of the householder. We have no reason to think he did mean that and Chadwick LJ in *Loyalty Management* and Neuberger LJ in *WHA* both accepted that the same service might be supplied to both the deducting party and the third party without that affecting the right to deduct."

and because at [35], quoted above, they say that the work was secured for its own purpose and not to discharge an obligation to another as was the case in *WHA*. Accordingly the First-tier Tribunal was saying that PwC's services were supplied to Airtours and it did not matter whether they were also supplied to the Engaging Institutions.

Contentions of the parties

11. Miss Holmes (and Miss Haynes' skeleton) contends:

(1) The Agreement read as a whole provides for PwC to supply services to the Engaging Institutions and not to Airtours.

(2) "You" in the Agreement did not include Airtours, but even if it did it would not affect the conclusion that PwC's services were not supplied to Airtours.

(3) In *Redrow* there were two supplies: the right supplied to Redrow, and the estate agents' service supplied to the prospective purchaser. Here there was no supply of the same service to both Airtours and the Institutions, as the First-tier Tribunal considered Lord Hope was saying arose in *Redrow*.

12. Mr Hitchmough and Mr Bremner contend:

(1) "You" in the Agreement included Airtours who approved the scope of the work and authorised the work.

(2) Receipt of the copy of PwC's report was a benefit to Airtours.

(3) The benefits to Airtours of having the PwC report were that it required it to place before the Institutions, and received a third party review of its strategic plans.

(4) The First-tier Tribunal decided that Airtours was the recipient of PwC's services; it did not matter that the Institutions were also the recipients of it.

(5) Airtours in any event obtained the continuation of the revolving credit facility until 31 December 2003.

Discussion

13. The most important authority is clearly *Customs and Excise Commissioners v Redrow* [1999] STC 161 in which Redrow, a housebuilder agreed to pay the estate agent's fees for the sale of the existing house for a prospective purchaser ("X") of a Redrow house. The contractual arrangement was that Redrow only paid the agent's fees if X actually bought the Redrow house; if he did not he was responsible for the estate agent's fees. The circumstances in which it paid the fees was therefore that there was a simultaneous exchange of contracts and completion of the sale of X's existing house to the purchaser found by the estate agent and for the purchase by X of the house from Redrow. The contractual arrangements were summarised by Lord Millett as follows:

> "The mechanics of the scheme are as follows. (1) The sales staff at each Redrow development site recruit one or more local agents into the scheme. (2) If a prospective purchaser is interested in taking advantage of the scheme, Redrow instructs an agent of its choice to value the prospective purchaser's home. (3) An asking price for the house is agreed. This takes into account the agent's valuation and the expectations of the prospective purchaser. Unless Redrow considers the asking price to be a realistic one it will not proceed with the transaction. If Redrow decides to proceed it instructs the agent to put the house on the market. (4) While the prospective purchaser's house is on the market, Redrow's sales staff keep in close contact with the agent to ensure that maximum effort is being made to sell it. (5) The prospective purchaser must obtain Redrow's consent to any change in the terms of the sale of his house. He cannot, for example, unilaterally instruct a second agent to market his house jointly with the agent selected by Redrow, because this would alter the rate of commission payable to the scheme agent from the sole agency rate agreed with Redrow to the higher joint agency rate. (6) When the prospective purchaser has agreed to sell his own home subject to contract, he reserves a Redrow home (also subject to contract). (7) The subsequent exchanges of contract and completions between (i) the prospective purchaser and his purchaser, and (ii) Redrow and the prospective purchaser are co-ordinated in the usual way. (8) Upon exchange of contracts for the sale of the prospective purchaser's own home and his purchase of a Redrow home, the agent sends an invoice to Redrow for the commission payable upon completion. (9) Once legal completion of the sale of the Redrow home has taken place, Redrow pays the estate agent's fees in full. (10) If the prospective purchaser finds a buyer through the scheme, but does not complete the purchase of a Redrow home, Redrow has no liability to pay the estate agent. To cover this eventuality, Redrow advises the agent to enter into a separate agreement for his fees with the prospective purchaser."

14. Lord Millett's speech concluded:

> "The commissioners begin by describing the services in question as the ordinary services of an estate agent instructed to market and sell his client's house. They then ask: to whom were those services supplied? Inevitably they answer: to the householder. They concede that Redrow derived a benefit from the services supplied by the agent and was

accordingly prepared to pay for them; but they insist that this is irrelevant. The question is: to whom did the agent supply his services, not who derived a benefit from them?

But this approach begs the question to be decided. The way in which the commissioners describe the services dictates the answer. But it is equally possible to begin with the services which Redrow instructed the agents to perform. This would lead to a different definition of the services in question. They would not be the ordinary services of an agent instructed to market and sell his client's house, but the services of an agent instructed to market and sell a third party's house. The fact is that the nature of the services and the identity of the person to whom they are supplied cannot be determined independently of each other, for each defines the other. Where, then, should one begin?

The solution lies in two features of the tax to which I have already referred. 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 Redrow 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.

In the present case, Redrow did not merely derive a benefit from the services which the agents supplied to the householders and for which it paid. It chose the agents and instructed them. In return for the payment of their fees it obtained a contractual right to have the householders' homes valued and marketed, to monitor the agents' performance and maintain pressure for a quick sale, and to override any alteration in the agents' instructions which the householders might be minded to give. Everything which the agents did was done at Redrow's request and in accordance with its instructions and, in the events which happened, at its expense. The doing of those acts constituted a supply of services to Redrow.

The tribunal had the second of the two factors to which I have referred in mind when it said that it was necessary to await events and see to whom the agent makes the supply; it is only if Redrow becomes liable to pay the agent's fees that his services are supplied to it. The commissioners criticised this reasoning, submitting that the destination

of a supply must be ascertainable when it is made; it cannot be held in suspense to await subsequent events. But this assumes that the services rendered to the householder and those rendered to Redrow are the same. They are not. The services rendered to the householder are the ordinary services of an estate agent in the valuation and marketing of his house. If the householder sells his home but fails to complete the purchase of a Redrow home, he may become liable for the agents' fees. He is not, however, entitled to deduct input tax in respect of the fees because, although the services in question were supplied to him, they were not used or to be used for the purpose of any business carried on or to be carried on by him.

The services obtained by Redrow are different. They consist of the right to have the householder's home valued and marketed in accordance with Redrow's instructions. Unless the householder sells his home and completes the purchase of a Redrow home, however, Redrow is not liable for the agents' fees and pays no input tax, so there is nothing in respect of which a claim to deduction may be made. What must await events is not the identity of the party to whom the services are rendered, for different services are rendered to each; but which of the parties is liable to pay for the services rendered to him and so bear the burden of the tax in respect of which a claim to deduction may arise.

Conclusion

It is sufficient that Redrow obtained something of value in return for the payment of the agents' fees in those cases where it became liable to pay them, and that what it obtained was obtained for the purposes of Redrow's business. Both those conditions are satisfied in the present case. It is not necessary that there should be 'a direct and immediate link' between the services supplied by the agent and the sale of a particular Redrow home, although if it were necessary then this condition too would be satisfied on the facts of the present case. From Redrow's standpoint, which is what matters, the agents' fees incurred in the sale of a prospective purchaser's own home are not part of Redrow's general overhead costs but a necessary cost of and exclusively attributable to the sale of a Redrow home to that same purchaser. If the sale of the Redrow home were an exempt supply and not merely zero-rated, the agents' fees would not be deductible for the reasons given by the Court of Justice in BLP Group plc v Customs and Excise Comrs."

15. Lord Hope agreed for the following reasons:

"Clearly the estate agents were supplying services to the prospective purchasers, as they were engaged in the marketing and sale of the existing homes which belonged to the prospective purchasers and not to Redrow. But Redrow was prepared to undertake to pay for these services in order to facilitate the sale of its homes to the prospective purchasers. The estate agents received their instructions from Redrow and, so long as the prospective purchasers completed with Redrow, it was Redrow who paid for the services which were supplied. I do not see how the transactions between Redrow and the estate agents can be

> described other than as the supply of services for a consideration to Redrow. The agents were doing what Redrow instructed them to do, for which they charged a fee which was paid by Redrow.
>
> The word 'services' is given such a wide meaning for the purposes of VAT that it is capable of embracing everything which a taxable person does in the course or furtherance of a business carried on by him which is done for a consideration. The name or description which one might apply to the service is immaterial, because the concept does not call for that kind of analysis. The service is that which is done in return for the consideration. As one moves down the chain of supply, each taxable person receives a service when another taxable person does something for him in the course or furtherance of a business carried on by that other person for which he takes a consideration in return. Questions such as who benefits from the service or who is the consumer of it are not helpful. The answers are likely to differ according to the interest which various people may have in the transaction. The matter has to be looked at from the standpoint of the person who is claiming the deduction by way of input tax. Was something being done for him 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? The fact that someone else, in this case, the prospective purchaser, also received a service as part of the same transaction does not deprive the person who instructed the service and who has had to pay for it of the benefit of the deduction."

16. As Lord Millett points out, the supply to a person "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." The estate agents were supplying normal estate agency services to X. They were also making a supply to Redrow of something of value which was to be used by Redrow for the purpose of its own business. The right was "a contractual right to have the householders' homes valued and marketed, to monitor the agents' performance and maintain pressure for a quick sale, and to override any alteration in the agents' instructions which the householders might be minded to give." Contrary to the First-tier Tribunal's interpretation recorded at paragraph 10 above we consider that Lord Hope was necessarily making a distinction between the service that Redrow received (the right) and the service that the householder received (estate agency services). The principle is that where the person contracted for a service primarily for the benefit of a third party and paid for it, the question to be asked was "Was something being done for him 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?" (Lord Hope); or "did he obtain anything—anything at all—used or to be used for the purposes of his business in return for that payment?" (Lord Millett), which is also expressed as "something of value" in his conclusion. These questions are aimed at deciding whether the payer received something to be used for the purpose of its own business even though the main service was supplied for the benefit of a third party.

17. The Court of Appeal decision *WHA Limited v Customs and Excise Commissioners* [2004] STC 1081 is an example of the application of the same principle. WHA was a

claims handling company engaged by an insurance company which contracted with garages to repair vehicles for drivers insured by the insurance company. WHA paid the garage and was reimbursed by the insurance company out of which it received a fee. We do not read this case as supporting the First-tier Tribunal's interpretation recorded at paragraph 10 above that the same service can be supplied to two different people. Neuberger LJ said at [37]:

> In these circumstances, it appears to me that, unless there is some reason for reaching a contrary conclusion, there is indeed a "supply of services" by the garage to WHA when the garage carries out repair work to a vehicle under a policy. Given the very wide definition of "services" in s5(2)(b), it is hard to resist the conclusion that, if something is supplied to WHA, it can be described as "services": WHA receives a benefit from the carrying out of the repairs (namely satisfaction of an obligation to Viscount and the ability to earn the £17.60) and it is work which WHA will have authorised to be done. The fact that there is another beneficiary of the work, who may even fairly be said to be the primary beneficiary, namely the owner of the vehicle, should not, at least of itself, prevent the arrangement operating as a supply of "services" to WHA.

He cannot be saying that WHA receives the service of repair work to the vehicle; he is saying that "something is supplied to WHA" which can be described as "services." The "something" was used by WHA for the purpose of its business of claims handling for which it received a fee.

18. These are all cases in which the person successfully claiming the input tax deduction both contracted for and paid for (payment being necessary for there to be a supply of services for VAT purposes) the service. This can be contrasted with the different contractual situation in the VAT and Duties Tribunal decision of *Telent plc v HMRC* (2007) VAT Decision 19967 which concerned a supply in similar circumstances to this case. Banks lending to Marconi plc instructed Clifford Chance to advise them on a corporate restructuring, and separately Marconi agreed with the banks that it would pay Clifford Chance's fees, which it did by direct payment. There Marconi could not claim the input tax deduction; there was no contract between Marconi and Clifford Chance. The Tribunal concluded:

> "64 ... The force of Marconi's argument rests on the fact that it paid Clifford Chance directly. But the fact that it paid Clifford Chance directly rather than indirectly does not of itself alter the relationship between Clifford Chance and Marconi. This is because there is no contract or directly equivalent relationship in place that could be altered by the fact whether or not Marconi paid Clifford Chance directly rather than through the joint co-ordinating banks. What difference would it have made to the supplies made by Clifford Chance in this case if Marconi had paid the joint co-ordinating banks, and the banks had then paid Clifford Chance? The tribunal can see none. The essential link between the fact of payment and any counter-consideration is missing. Further, while the tribunal did not accept the argument on the facts, this position would not be assisted by the argument put forward that Clifford Chance would have stopped work if Marconi did not pay. That argument, even if accepted, was predicated

> on the assumption that Marconi would then have stopped paying both the joint co-ordinating banks and Clifford Chance, and not simply that there might be a threat of work stopping if Marconi did not pay Clifford Chance direct. To use the term again, Marconi was not a paymaster of Clifford Chance."

19. Because of the existence of a tripartite contract the problem in *Telent* that there was no direct contractual relationship does not apply. We consider that the crucial factor is whether, as in the *Redrow* line of cases, Airtours received something *from PwC* in exchange for the payment. We emphasise that it must receive something from PwC because it obviously received a commercial benefit by entering into the Agreement, which was the hope that PwC's advice would result in the Engaging Institutions continue to provide finance to it, otherwise it would not have agreed to pay for PwC's services. But since the question is to whom PwC supplied their services, one cannot take into account any benefit flowing from the Engaging Institutions to Airtours, and nor do we consider that it is possible to argue that the continued finance was the (indirect) benefit to Airtours of PwC's services because the Agreement was made for the purpose of determining whether there would be any continued finance. To answer the question whether something was done for Airtours by PwC, or whether it received something of value from PwC we turn to the Agreement read in the context of the oral evidence that the First-tier Tribunal accepted. In particular, the question is whether the Agreement provides (a) that Airtours is contracting for PwC's services to be supplied to it to be used for the purpose of its business, as the First-tier Tribunal decided; or (b) that the Engaging Institutions are contracting for PwC's services for themselves on terms that Airtours pays for them without Airtours receiving any benefit from PwC to be used for the purpose of its business, as HMRC contends; or (c) that Airtours is contracting for the right to have PwC's services supplied to the Engaging Institutions to be used for the purpose of its business on the lines of *Redrow*?

20. In the context of a tripartite agreement it is more difficult to determine who was contracting with whom and for what. The First-tier Tribunal carried out an extensive analysis of the meaning of "you" in the Letter of Engagement, apparently on the basis that this was an important part of HMRC's argument (see [15] of the decision). As [35] of the decision demonstrates they considered that the "you" in clause 12 meant that it was Airtours that engaged PwC. We do not consider that one should construe the Letter of Engagement in a legalistic fashion in the context of a tripartite agreement particularly one in the form of a letter, particularly as the drafting is not always clear; for example the words at the end of clause 4 seem to be unnecessary since if an institution is a party to the Letter of Engagement it is an Engaging Institution and so the words "but only on the basis that they each individually agree to the terms of this Letter of Engagement as party to it" seem not to add anything. Certainly some reference to "you", for example clause 10 are intended to include the Engaging Institutions and Airtours because both are referred to and the limit of liability is to them taken together. The reference in clause 12 is less clear: "You have requested us to undertake a review of the Group…" The more natural reading in the context is that the Engaging Institutions, to whom the Letter is addressed, have made the request, but it is also possible that Airtours has as well, in the sense that it must have agreed to the

scope of the work for which it is paying. Rather than an analysis of "you" we prefer to look at the substance of what was agreed including that the initial approach to PwC (and also KPMG) was made by the Institutions, that the Letter of Engagement is addressed "To the Engaging Institutions" and that the Agreement includes the following:

> "PwC have been retained by the institutions" (clause 1); "Our report and letters are for the sole use of the Institutions who have expressly agreed to this Letter of Engagement ('the Engaging Institutions') by countersigning below" (clause 4); "To enable the institutions to develop views on the Group's current financial position and financing needs, you have requested that we assist in providing information to the institutions providing facilities to the Group" (clause 6); "The first phase of it is to assist the institutions providing banking, bonding and other facilities to the Group to gain a more detailed understanding of the present financial position of the Group. During this phase our role is to obtain and comment on this information to enable the institutions to better consider the Group's likely requests for facility extensions" (clause 7); "Information and advice produced from this engagement is to be addressed to the Engaging Institutions with a copy to the directors of the Group" (clause 8); "You have requested us to undertake a review of the Group as set out below. Our work is required by the Institutions in considering the level of facilities to the Group" (clause 12).

The flavour of all of these is that PwC are doing something that the Engaging Institutions want for the purposes of their own businesses in order to decide whether to continue to support Airtours, as paragraph 12 expressly states. The oral evidence accepted by the tribunal does not in our view detract from this conclusion. In other words, in substance the Engaging Institutions are contracting with PwC for PwC's services. Airtours is a party to the Agreement not to obtain any services from PwC for use in its business but to contract to pay PwC for supplying them to the Engaging Institutions.

21. So far as concerns what is received and whether it was to be used for the purpose of its business, the issue is whether in accordance with the three rival interpretations of the Agreement (a) Airtours receives the benefit of PwC's services; (b) receives no substantial benefit from PwC (other than a copy of the report); or (c) receives the right to have PwC's services supplied to the Engaging Institutions which is something of value to be used for the purpose of its business. In support of interpretation (a) is that Airtours were entitled to have a copy of the report. In support of (b) is that only the Engaging Institutions received anything from PwC; if Airtours received anything it was from the Engaging Institutions in the form of continued finance. In support of (c) Mr Hitchmough contended that PwC's review of Airtours' strategic plan gave Airtours reassurance; that it assisted in maintaining its CAA licence; that the "entity priority model" (which is a computer simulation which determines the allocation of funds in the event of an insolvency) aided Airtours in its negotiations with the banks and in court proceeding in relation to the bondholders; that the work was invaluable in achieving the successful completion of the restructuring; and that the revolving credit facility was continued until 31 December 2003. But these are all matters that can be

identified with the benefit of hindsight. They are not benefits for which Airtours contracted under the Agreement. It was just as possible that PwC's advice might have been wholly contrary to Airtours' interests, depending on what their work discovered, as is foreseen by the exclusion in paragraph 8 of matters "exclusively or confidentially for the Engaging Institutions."

22. Having the work done did not discharge any business obligation of Airtours, or provide it with something to be used in its business. We do not consider that Airtours received any *Redrow*-type benefit in accordance with interpretation (c). Unlike Redrow (which used the estate agent's services supplied to X because that enabled Redrow to sell a new house to X simultaneously with the sale of X's house), and unlike WHA (which used the garage's services by obtaining "satisfaction of an obligation to Viscount and the ability to earn the £17.60"), there was no business use made by Airtours of having PwC's services supplied to the Engaging Institutions. It did not start by needing PwC's report to place before the Institutions; the Institutions started by wanting the report for themselves, as the Agreement states. The benefit to Airtours was that PwC's report might lead to continued finance from the Institutions for which Airtours was willing (or was forced) to pay. The choice between interpretations (a) and (b) is whether in reality Airtours received PwC's services to be used for the purpose of its business, or received nothing from PwC's services because they were supplied to the engaging Institutions to be used for the purpose of their business. In substance we decide it was (b) because, as the Agreement makes clear, the Engaging Institutions needed PwC's services for the purposes of their own businesses and the fact that Airtours received a copy of the report was more of a courtesy than the receipt of the supply of PwC's services. We consider that the substance is that the Engaging Institutions (and not Airtours) were contracting with PwC for the provision of services, and that PwC supplied those services to the Engaging Institutions (and not to Airtours) and that interpretation (b) is the correct one. In deciding otherwise the First-tier Tribunal made an error law.

23. The First-tier Tribunal was also wrong in law in its construction of the Agreement that Airtours "authorised PwC to do the work" by paying for it. It was the Engaging Institutions that first approached PwC, and contracted for the work and therefore authorised it. Nor do we agree with the Tribunal's conclusion that it is clear from the terms of the Agreement that "The work of PwC was needed by [Airtours] and it is our holding that [Airtours] authorised it and secured it for its own purposes." We consider that the terms of the Agreement, particularly the ones summarised in paragraph 20 above, all point in the opposite direction, that it was the Engaging Institutions that wanted PwC's report for the purpose of their own business. This is not affected by the fact that Airtours had an input into the Agreement by influencing the appointment of PwC, and by agreeing the scope of the work for which they were paying.

24. We therefore consider that the arrangement which encompasses the formal agreement should therefore be construed as one in which the Engaging Institutions contracted with PwC to supply services which they needed for the purposes of their own businesses, and Airtours contracted with PwC to pay its fees, rather than one in

which Airtours received something of value *from PwC* to be used for the purpose of its business in return for its payment.

25. We should mention that earlier HMRC had asked for this appeal to be stayed until the decision of the ECJ in *HMRC v Loyalty Management UK Limited*, Case C-53/09, but they withdrew the request after it was strongly opposed by Mr Hitchmough. The ECJ decided the case immediately after we had heard the appeal but neither party has asked to make representations about the decision. We have not therefore taken it into account.

26. Accordingly we allow the appeal. We direct Airtours to pay HMRC's costs of the appeal to be the subject of detailed assessment on the standard basis by a costs judge of the High Court if they are not agreed.

JOHN F AVERY JONES

CHARLES HELLIER

JUDGES OF THE UPPER TRIBUNAL

Release date: 8 November 2010