[2015] UKFTT 0161 (TC)

TC04358

Appeal number: withheld

VAT – partnership dispute – continuing partners separately instruct solicitors in dispute with outgoing partner – whether VAT on legal bills recoverable by partnership – held - no as supply not 'to' the partnership

FIRST-TIER TRIBUNAL
TAX CHAMBER

A PARTNERSHIP **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public on 16 February 2015

The appellants

Mr Priest, HMRC officer, for the Respondents

DECISION

1. This was an appeal by a partnership currently comprising two partners. They requested, and HMRC did not object to, anonymisation of the decision. The case revolves around a dispute between the partners and the continuing partners did not wish the dispute to be public knowledge. I was content to order that the decision would be published in redacted form: it did not seem right that the goodwill of the continuing partnership should be affected by the public resolution of its tax affairs. As the partnership could be identified by the names of the continuing and previous partners and the location of the Tribunal hearing, I have redacted all of this information.

The facts

The witnesses

2. Mr B and Mr C were present in the hearing. They were the two continuing partners and comprised the appellant partnership. Both had been partners at the time of the dispute. Both had provided witness statements.

3. Mr A was a member of the partnership at the time in dispute but has since retired and now lives on another continent. He had provided a witness statement but did not attend the hearing; the appellants requested that his witness statement be admitted into evidence. HMRC opposed this. While I had no documentary proof, Mr C stated that Mr A had had a serious heart operation two months before and although he had made a good recovery, he was still recuperating and flying to the UK was not thought to be a good idea. Mr Priest did not dispute these facts but wanted the witness statement excluded because he would be deprived of the opportunity of questioning Mr A about some of the opinions he expressed in it. The facts were, he said, were not really in dispute.

4. I admitted the witness statement into evidence on the basis that Mr A's health amounted to a good explanation as to why he had not come to the hearing and in any event it did not appear that much, if any, factual evidence in the statement was in dispute. I informed Mr Priest that he was free to make submissions on how much weight I should attach to the statement. (In the event, Mr Priest chose to make no submissions on it).

5. I largely accepted the evidence of all the partners, which was consistent and credible. Although Mr Priest asked a few questions, largely the evidence was unchallenged. I set out below my findings of fact and, where the facts were in dispute, the reasons for the findings I make.

The partnership dispute

6. There was little dispute over the facts. The partnership had been founded long before any of the current partners had joined it. At the time of the matter in dispute, the partnership comprised four partners, Messrs. A, B, C and D, all of whom had been partners for many years. The partnership deed, to which they were all parties, provided that a partner had to retire at a certain age and on retirement he would receive an amount equal to his share of the partnership capital. The retiring partner was *not* entitled to any payment in respect of the partnership's goodwill.

7. Mr D was approaching the specified retirement age; before he retired he consulted solicitors who wrote letters to Messrs. A, B and C. The solicitors alleged bad faith against Mr A and Mr B and required the dissolution of the partnership. Messrs B and C said to me that in their opinion Mr D's motive for this was that on a dissolution *all* the assets of the partnership – including the goodwill – would be realised and the proceeds divided up between the partners: whether or not this was Mr D's motive is irrelevant to this appeal and I do not refer to it again.

8. The alleged bad faith was that, some years before, just after a previous partner (Mr E) had retired, Messrs A, B and D had agreed that they would attempt to sell the business of the partnership. No one had done very much about this and no serious offer had been received for the partnership. Mr D alleged this failure to actively pursue a sale was bad faith on the part of Messrs A and B. Mr C was not a party to the agreement as he had not wished to sell the business of the partnership and allegations of bad faith were not made against him by Mr D.

9. On receipt of the solicitors' letters, Messrs A and B had consulted the same firm of solicitors. Mr C chose to instruct a different firm of solicitors to Messrs A and B. He was in a different position to Messrs A and B as no allegation of bad faith was made against him by Mr D. He also considered, he told me, that separate representation strengthened the case against Mr D and dissolution of the partnership.

10. Messrs A and B received advice from their solicitor; Mr C received advice from his solicitor. I accept the evidence, which was unchallenged, that the two firms of solicitors liaised closely over the matter. Eventually the dispute went to arbitration, with Messrs A, B and C opposing dissolution and Mr D seeking dissolution. The matter settled: the action for dissolution was dropped, the partnership was not dissolved, Mr D ceased to be a partner, and it was agreed he would receive a share in the value of the goodwill if the business of the partnership was sold before Mr A's due date for retirement.

11. Mr A retired early and the due date of his retirement is also now past: the business of the partnership has not been sold. Messrs A, B and C continued in partnership after Mr D retired; Messrs B and C continued in partnership after Mr A retired.

The legal bills

12. The dispute with HMRC is over the legal bills. The firm of solicitors which acted for Messrs A and B addressed their invoices to Messrs A and B jointly, showing each of their names and home addresses on the front of the invoice. The narrative was headed with the name of the partnership, but it was clear that 'the partnership' was the 'matter' with which the solicitors were dealing. The partnership was not described as the client. Messrs A and B were described as the clients. This was made crystal clear in the engagement letter which was addressed to Messrs A and B and said:

> "we regard both of you as our clients and accept no responsibility to any other person or organisation in relation to the advice given".

13. It was clear from the engagement letter that the firm was advising Messrs A and B on a partnership dispute which had arisen within the partnership of which they were members. The invoices were paid by Mr A and Mr B personally.

14. Similarly, the firm of solicitors which advised Mr C, a different firm to the firm advising Mr A and Mr B, wrote to Mr C at his home address. The engagement letter said 'The work to be carried out by us will involve advising you regarding your partnership difficulties….". Mr C paid his solicitor personally.

15. After the dispute was resolved, as outlined above, Mr D retired from the partnership and Messrs A, B and C continued in partnership together. Messrs A, B and C, now the only remaining partners, agreed in a partners' meeting that the expenses of defending the action for dissolution of the partnership should be treated as a partnership expense. So the partnership reimbursed Messrs A, B and C the amount of the invoices which each had paid and the partnership reclaimed from HMRC the VAT paid on the invoices from the two firms of solicitors.

16. Following a compliance visit, HMRC disallowed the input tax on the invoices from the two firms of solicitors.

17. Some issues of fact were in dispute.

Who were the clients of the solicitors?

18. All parties accepted that the invoices from the solicitor who acted for Messrs A and B addressed his invoices to Mr A and Mr B at their home addresses. Nevertheless, as the appellants pointed out, the heading on the invoices was the name of the partnership. Mr C suggested this was evidence that the solicitors considered that the partnership was its client.

19. I do not accept that. The evidence, recited above, shows that the solicitors' firm instructed by Mr A and Mr B considered that only Mr A and Mr B were its clients. It was obvious that the solicitors were not and could not be advising the whole partnership at the time in question as they were advising on a matter in which some of the partners had opposing interests (Mr D wanted the partnership dissolved and the others did not).

20. The appellant's case was that the solicitors' firm was advising a partnership that was about to come into existence, the partnership between Messrs A, B and C. But even that is not correct. The engagement letter was restricted to Messrs A and B and there was no suggestion that the solicitors had ever even purported to act for Mr C. Clearly they had not. Mr C was separately represented.

21. The same applies to the firm of solicitors who acted for Mr C. Mr C was their client; their client was not and could not have been the partnership between Messrs A, B, C and D which existed at the time; and as a matter of fact the firm of solicitors who acted for Mr C did *not* act for Mr A and Mr B, who were separately represented, so the future partnership of Messrs A, B and C was not its client either.

22. So the clients of one of the firm of solicitors was Messrs A and B, and the client of the other firm of solicitors was Mr C.

23. As a matter of law (s 5 Partnership Act 1890) each partner had the power to enter into contracts on behalf of the partnership. Mr C suggested that therefore he had engaged his firm of solicitors on behalf of the (future) partnership between

Messrs A, B and C; and that Messrs A and B had engaged their firm of solicitors on behalf of the same future partnership.

24. As I have already stated, it would have been impossible for either firm of solicitors to have acted for the partnership that was in business at that time as the interests of some of the partners were opposed to the interest of another (Mr D wanted dissolution and Messrs A, B and C did not). Also it does not seem to me that any of the individuals concerned had power under s 5 of the Partnership Act to enter into contracts on behalf of the partnership Messrs A, B, and C as it did not at that time exist. But putting aside even these cavils, it is clear that neither Messrs A & B, nor Mr C, even purported to engage the solicitors on behalf of the current or future partnership. They engaged the solicitors in their personal capacity: the engagement letter made it clear that each firm was acting for the named clients and no one else. If any of the partners had purported to exercise a power under S 5 of the Partnership Act, the letter of engagement would have stated that the partnership was the client. Instead, as I have said, the solicitors were quite explicit that (in the case of the first firm) they were only acting for Messrs A and B, and (in the case of the second firm) that they were only acting for Mr C.

25. The partnership between Messrs A, B and C was not the client of either firm of solicitors.

The law

26. Section 26 of the Value Added Tax Act 1994 ("VATA") provides:

> "The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period…as is allowable by or under regulations as being attributable to supplies within subsection (2) below."

27. Supplies within subsection (2) below are (so far as this appeal is concerned) 'taxable supplies'. So the VAT which the appellants seek to reclaim must be 'input tax' and it must be attributable to the supplies of services which the appellants render as accountants.

28. 'Input tax' is defined in s 24 VATA as:

> "… 'input tax', in relation to a taxable person, means the following, that is to say –
>
> (a) VAT on the supply to him of any goods or services;
>
> (b) [inapplicable]
>
> (c) [inapplicable]
>
> being … goods or services used or to be used for the purpose of any business carried on or to be carried on by him."

29. The VAT Regulations 1995/2518 Regulation 29(2), which apply to claims for input tax, require:

> "At the time of claiming deduction of input tax ….a person shall, if the claim is in respect of –

> (a) a supply from another taxable person, hold the document which is required to be provided under regulation 13….
>
> provided that where the Commissioners so direct, either generally or in relation to particular cases, or classes of cases, a claimant shall hold or provide such other evidence of the charge to VAT as the Commissioners may direct."

30. The document required to be provided under Regulation 13 is a VAT invoice. By Regulation 14(1)(e) the VAT invoice must include the name and address of the person to whom the goods or services are supplied.

31. The appellants seek to reclaim VAT on the invoices from the two firms of solicitors as set out above. To do this they must show that the VAT on those invoices is 'input tax'. S 24 requires them to show that it represents VAT on the 'supply to' the appellants of the legal services and the VAT regulations 13 & 14 require the appellants to hold invoices which are addressed to the appellants.

32. In addition the appellants must show that the services rendered by the solicitors are attributable to the business of the appellants.

33. I will deal with these issues in this order:

- To whom were the services of the solicitors supplied?
- To whom were the invoices addressed?
- Was the expense attributable to the business of the appellants?

To whom were the services of the solicitors provided?

34. It was clear that the services of neither firm of solicitors were provided to the partnership as it was comprised up to the moment the dispute was settled. That partnership comprised Messrs A, B, C and D. The services were clearly not provided to this partnership as the services were to defend Messrs A, B, and C against an action against them by Mr D.

35. The appellants did not seek to persuade me that the services were provided to the then partnership; on the contrary their case was that the solicitors' services were provided to what was at the time a partnership that had yet to come into existence: the future (but later realised) partnership between just Messrs A, B and C.

Airtours Holidays Transport Ltd [2014] EWCA Civ 1033

36. HMRC relied on the case of *Airtours* as demonstrating that the services were not supplied to the partnership of Messrs A, B and C.

37. In that case, a company (in financial difficulties and owing banks large sums of money) entered into a tripartite contract under which a professional services firm agreed to supply the service of reviewing the company's restructuring plan and to provide a report to creditor banks. The creditor banks were the other, third, party to this tripartite contract. The company was liable to pay the contract fee.

38. The conclusion of the Upper Tribunal which was upheld by two of the three judges in the Court of Appeal was that the company gained no benefit from the contract (see [87] and [98]); according to majority judges, the professional services firm did not even owe a duty to the company to provide the report to the bank. The Court of Appeal therefore ruled that the services were not supplied to the company.

39. If the Court of Appeal was right about the findings of facts, then their decision is consistent with the earlier House of Lords' authority in *Redrow* [1999] UKHL 4. *Redrow* indicates that for a supply to be 'to' a person, that person must both benefit from the supply *and* be liable to pay for it.

40. In *Airtours,* the Court of Appeal's decision was that the company got no benefit from the contract; so it did not matter that it was liable to pay for the services.

41. So I am unable to agree with Mr Priest that this case indicates that it is irrelevant whether or not the partnership of Messrs A, B and C benefited from the solicitors' services. *Redrow* and *Airtours* indicates that benefit is relevant: but *Redrow* shows that it is not the only issue. The partnership would have to show that they were a party to the contract as well as receiving a benefit from it: they would have to show liability to pay for the solicitors' services.

42. I note in passing that Airtours has been given leave to appeal to the Supreme Court. I do not consider that surprising because it seems likely that the company, contrary to what the Upper Tribunal and Court of Appeal said, did benefit from the professional services: having the report prepared was presumably the first step in trying to prevent the banks foreclosing on it. Nevertheless, in the meantime, the decision in *Airtours* is binding on this Tribunal but its relevance is limited because the conclusion of the Court was that the company did not benefit from the services.

43. So on the basis of *Airtours* and *Redrow* it is not enough for the appellants to show that the partnership of Messrs A,B and C benefited from the solicitors' services. The case of *Redrow* requires the partnership to show that the partnership was a party to the contract and in particular that it was liable to pay for the services.

44. The appellants will say that the partnership did pay for the supplies because it reimbursed Messrs A, B and C for the solicitors' fees. But that is not the question. The question is whether the partnership was *liable* to pay and I find as a matter of law, it was not. This is because Messrs A & B were the client of one of the firm of solicitors and Mr C was the client of the other firm of solicitors. So (if unpaid) the first firm could have sued Messrs A and B for payment; and the second firm (if unpaid) could have sued Mr C for payment. But the neither firm could have sued the partnership for payment.

45. For these reasons, I find that the services were not supplied to the ongoing partnership of Messrs A, B and C.

Hartridge T/A Hartridge Consultancy (VTD 15553) (1998)

46. The appellant considered that the *Hartridge* case strongly supported their position. That case bears a lot of similarity to the appeal here. Mr Hartridge was a partner who became embroiled in a partnership dispute with his partners. He sought to dissolve the partnership while his partners sought to expel him from it. The matter

was resolved at arbitration from which the outcome was that Mr Hartridge ceased to be a partner but was entitled to (and did) continue to work for a substantial number of the partnership clients. In other words, he continued in business as a sole trader having taken a chunk of the partnership's goodwill with him.

47. The question was whether he could recover VAT on the legal fees incurred by him during the course of the dispute and arbitration. The question for the Tribunal was whether the legal fees were an expense of the business, bearing in mind the expenses related to services supplied to Mr Hartridge *before* he commenced trading as a sole trader.

48. This case is therefore relevant to the question of whether the legal fees were a business expense of the 'new' business which followed a change in/dissolution of a partnership: but it is irrelevant to the question of *to whom* the services were supplied. That was simply not an issue in the *Hartridge* case. In *Hartridge,* the services were clearly supplied to Mr Hartridge. It was Mr Hartridge who was both the sole trader and the client of the solicitors.

49. The facts in this appeal (on this issue) are quite different. One set of solicitors supplied their services to Messrs A and B; the other to Mr C. But the continuing business was carried on by a partnership of Messrs A, B and C. The services of neither firm of solicitors were supplied to the partnership of Messrs A, B and C. They were only supplied to certain persons within that partnership.

50. Messrs A, B and C, it seems to me, could have instructed a single firm of solicitors to represent all three them. They did not choose to do so. Mr C told me it was tactically advantageous to be separately represented. There is also the possibility that the solicitors may have considered that the interests of Mr C differed sufficiently from the interests of Messrs A and B (the only two against whom the allegation of bad faith was made) such that it was inappropriate to represent all three of them. I do not know and it does not matter. As a matter of fact, for whatever reason, a single firm of solicitors did not represent all three of them. Had that happened this appeal would have been much closer to that in the *Hartridge* case.

51. But it did not happen and it is not possible to say that the services of either firm of solicitors were supplied to the partnership.

52. The appellant suggests that that is an odd conclusion for the Tribunal to reach. They would have won on this point if a single firm of solicitors had represented all three of them, but they have lost on it because Mr C instructed a different firm to that instructed by Messrs A and B. Yet, overall, all three partners did have the benefit of the legal advice from both firms as (I was told) they worked together to defeat the action for dissolution. Why should it make such a difference to VAT recovery the fact that that advice was provided by two firms rather than one?

53. While I can sympathise with the appellants, nevertheless I think that is the conclusion to which I am driven by the law. Recovery of VAT is limited to VAT on supplies "to" the taxpayer seeking repayment. The taxpayer is the partnership, but the services of the solicitors were not supplied to the partnership. The appeal must be dismissed on this ground.

To whom were invoices addressed?

54. As the conclusion that the supply was not made "to" the partnership is enough to dispose of the appeal, I do not strictly need to consider the second and third issues raised in §33 above. Nevertheless, in case this goes further, I will consider them.

55. From the facts found at §§12 and 14 above, it is clear that the first firm of solicitors addressed its invoices to Messrs A and B, and the second to Mr C. Therefore, the appellants' claim fails on this ground too. The appellants do not hold invoices sufficient for regulation 13 because they do not hold the required document with the name and address of the partnership. The invoices were address either to one or two of the partners, but not to all three of the partners. Again this was not an issue in the *Hartridge* case.

56. There is an exception in Regulation 29(2) set out above at §29 which gives HMRC the power to waive the requirement for an invoice. However, HMRC have not exercised that power in this case and indeed are unable to exercise it as nothing in Reg 29(2) would permit HMRC to authorise deduction of something that was not 'input tax'.

57. So the failure to hold the necessary VAT invoice is a second reason why the appellants' claim must fail.

Were the expenses business expenses?

58. In case this goes further, I also deal with the other question which is whether the expenses were business expenses in the VAT sense, or at least would have been business expenses if the legal services had been provided to Messrs A, B and C together (rather than one supply to Messrs A and B, and a separate supply to Mr C). So for the rest of this decision, I am suspending reality and considering the position if there had been a single supply to Messrs A, B and C of legal services to defend against the action for dissolution of the partnership.

59. To recover input tax, a taxpayer must show that the expense is attributable to supplies made during the course of its business or to that business' overheads in making taxable supplies. As I have already said, the VAT Act 1994 provides:

> "**24 input tax and output tax**
>
> (1) …'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…goods or services used or to be used for the purpose of any business carried on or to be carried on by him."

60. UK VAT law must be read (if at all possible) to be consistent with EU law. EU case law requires input tax to be 'attributable' to supplies made by the taxpayer, by which they mean it must have a 'direct and immediate' link to the taxpayer's business.

61. The legal expenses in this case could clearly not be directly attributable to any particular taxable supply made by the partnership: if it was an expense at all, it was

an overhead expense. Overhead VAT is recoverable if it has a direct and immediate link to the taxpayer's business overall (see *Midland Bank* C-98/98).

62. While it did not use the same terminology, the Tribunal in *Hartridge* clearly thought that the expenses of a partnership dispute were directly and immediately linked to the future sole traders' business because the expenses were of benefit to the business by attaining a client base.

63. Mr Priest considered that the partners had principally benefited from the legal services, as they preserved the trading partnership. Any benefit to the business of the partnership was, in his view, incidental. He relied on *Airtours* and *Becker* for his views.

64. Mr Priest's view was that following *Airtours* it was not enough to show that the taxpayer benefited from the services. However, while it is difficult to follow the reasoning of the majority in *Airtours,* the basis of their decision seems to be, as I have said, that the appellant did not receive any benefit from the contract at all (eg see [87].) So I do not agree that *Airtours* supports HMRC's views on this.

65. Mr Priest also referred me to the *Becker* case C-104/12. Mr Becker, as sole trader, and the company of which he was the sole shareholder were treated as a single taxable person under the law Germany. In effect, they were 'grouped' for VAT purposes. Nevertheless, it was clear from the CJEU's decision (eg [33]) that the tax was reclaimed on behalf of the company.

66. Mr Becker was accused of illegally making payments to obtain confidential information which was used to secure contracts for his company. The company instructed lawyers to defend him. The lawyers invoiced the company. Mr Becker, as representative member of the 'group', but on behalf of the company, deducted the VAT.

67. The CJEU ruled that the legal services did not have a direct and immediate link to the company's business. The Court said the test was objective although the reason for the services being required was relevant: [29]. The CJEU also said:

> "[29]…Where it is clear that a transaction has not been performed for the purposes of the taxable activities of a taxable person, that transaction cannot be considered as having a direct and immediate link with those activities….."

68. So the Court held that legal services rendered to Mr Becker to defend him against a criminal sanction did not have a direct and immediate link with the company's business; it was not enough that there was a link of causation in that Mr Becker (allegedly) undertook criminal activity in order to further the company's business (see [31].) In other words, because the services were supplied primarily to defend Mr Becker in a personal capacity, they were not attributable to the business of the company even though the company derived a secondary benefit from them.

69. As I understand it, Mr Priest's point is that although the partnership comprising Messrs A, B and C benefited from the successful legal action against Mr D, in that the partnership retained the goodwill of the earlier partnership, the legal services were rendered to the partners primarily in their personal capacity and only secondarily to the benefit the business.

70. I agree with the appellants that, while the principles in *Becker* apply in this case, the facts are so very different that it can't be presumed that the application of the principles would lead to the same outcome. In particular, it seems to me that the purpose of the legal proceedings in this case, subjectively and objectively, was to preserve the partnership by defeating the action for dissolution and retaining the goodwill in the business in the partnership. That enabled the partnership to continue in existence and continue trading (albeit the constitution of the partnership was reduced to three partners). It seems to me that, had the services been supplied to the partnership, the legal services would have been primarily supplied for the purposes of the business activities of the partnership and would have had a direct and immediate link to the business of the partnership. In that sense the case is analogous to *Hartridge* and I see nothing in *Becker* to suggest that *Hartridge* was wrongly decided.

71. Mr Priest's view was that the expenses were only indirectly to the benefit of the partnership: the prime beneficiaries were the partners themselves who got to preserve the business partnership. The appellants disagreed, stating that it was something of a moot point whether they personally benefited from the continuation of the partnership. Had it been dissolved and the goodwill sold, they would have received a payment which reflected the value of the goodwill whereas under the terms of the partnership their payment on retirement would not include an amount reflecting partnership. They agreed that a dissolution was more likely to lead to the disintegration of the business, with each partner (and some senior staff) taking chunks of the firm's client portfolio. Setting up as sole traders, they said, might not have been financially detrimental although they did accept that the release of staff from restraint of trade clauses might have led to financial loss.

72. I do not consider it matters whether or not preventing dissolution was financially advantageous to the remaining partners or not: I am not satisfied that it was shown that the partners did not derive benefit from the solicitors' services. But the point is irrelevant: in this part of the decision I am in the hypothetical world of assuming that the services were supplied *to* the partnership. On that assumption, the interest of the partners as business partners, and the interests of the partnership, were identical. The partnership is the partners. It is not possible to say that the 'real' benefit was to the partners as business partners, and not to the partnership. The partnership is the partners acting as partners. The partners' interests in preserving the business of the partnership are indistinguishable from the partnership's interest in preserving the business.

73. So on this point, had the legal expenses been incurred on behalf of the partnership, I would have followed *Hartridge* and found that they were directly and immediately linked to the business of the partnership. However, this part of the decision proceeded on the assumption that the supply was "to" the partnership. I have already found that it was not, so, while the appellants have won on this point, they have still lost the appeal.

74. I note in passing that the appellant referred me to two direct tax cases (*Southern v Borax Consolidated* and *Morgan v Tate & Lyle*) on expenses – the principles are different for VAT which is based on European law and I derived no assistance from them.

Timing

75. One caveat to the conclusion that the expense was attributable to the business of the partnership concerns the issue of timing. The legal expenses were necessarily incurred *before* the partnership of Messrs A, B, and C came into existence. The expense was incurred during the lifetime of the pre-existing partnership of Messrs A, B, C and D.

76. The appellants' considered that it was pre-registration input tax and should be allowed under Regulation 111 of the VAT Regulations. This allows pre-registration input tax to be recovered in certain circumstances and in particular if the services were not supplied more than 6 months before registration.

77. The difficulty for the appellants is that VAT Regulation 111(1)(a) presupposes that the taxable person (ie the partnership) existed prior to its registration. The partnership of Messrs A, B and C did not exist until Mr D retired, which was after the expenses were incurred. VAT Regulation 111(1)(b) does not make that assumption but only applies to pre-incorporation input tax of a company.

78. I do not need to resolve this issue as I have dismissed the appeal on another ground; but I mention it in case it goes further.

The correctness of the assessments

79. The partnership reclaimed the VAT on the solicitors' invoices. HMRC then (correctly as I have found) assessed the partnership to recover that VAT on the basis that the partnership was not entitled to be reimbursed the VAT.

80. But HMRC issued two assessments, one recovering the VAT in period 07/11 (when the input tax claim was submitted) and the other recovering the VAT in period 04/12 (the period in which it was paid). They did this because they considered that the Court of Appeal had issues conflicting decisions on the question of the right period of assessment: *Croydon Hotel* [1996] STC 1105 and *DFS Leisure* [2004] STC 559

81. HMRC accept, of course, that only one of the assessments can be correct.

82. In *Croydon Hotel*, the Court of Appeal ruled that the correct period of assessment was the period in which the input tax had been reclaimed; in *DFS* the Court of Appeal ruled that the correct period of assessment was the period in which the input tax claim was paid by HMRC. In fact, the Court in *DFS* approved what was said in *Croydon* (see [53-54] of *DFS*): in neither case was the issue whether the period of assessment should be the period in which the reclaim was made or the period in which it was paid. The issue in *Croydon* was whether time ran for an assessment to recover wrongly credited VAT from the date (effectively) of the invoice or the date the appellant reclaimed the VAT; and in *DFS* whether a CJEU judgment re-started the clock on assessments to recover wrongly credited VAT.

83. In this case, there was no suggestion either assessment was out of time. Neither *Croydon* nor *DFS* is authority that an assessment must be made only in the period of reclaim or period of payment of the reclaim. Neither is authority that either assessment is actually wrong: but it is clear HMRC are only entitled to assess the

same amount once. Only one of the assessments must be paid: I do not see that it matters which one.

Conclusion

84. The appeal is dismissed because the VAT which the appellants seek to recover is not input tax belonging to the partnership. It was not incurred on a supply made 'to' the partnership and the partnership does not hold invoices addressed to it.

85. While the appellants clearly thought that their choice to instruct separate solicitors to represent them, rather than all three of them instructing solicitors jointly, should not make a difference to the VAT recovery position, I find that in law it does.

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.

Barbara Mosedale

TRIBUNAL JUDGE
RELEASE DATE: 31 March 2015