[2017] UKFTT 625 (TC)

TC06061

Appeal number: TC/2016/04267

VALUE ADDED TAX – tax avoidance scheme promoter - input tax on barristers fees where only future outputs contingent success fees – effect of transfer of business as going concern where no application to keep VAT number – right of transferee to deduct input tax on fees where services provided partly before transfer but invoices issued after – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE NT ADVISORS PARTNERSHIP **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Fox Court, London EC1 on 6 June 2017

Keith Gordon (instructed by Jefferies Essex LLP) for the Appellant

Sebastian Purnell, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal by the partners of the NT Advisors partnership ("the appellant") against a decision of the Respondents ("HMRC") to deny the appellant credit for input tax of £34,775.01 shown in its VAT return for the prescribed accounting period ending on 31 July 2015 ("07/15").

2. The input tax concerned was charged by three barristers in Pump Court Tax Chambers for advice etc given by them in connection with three cases. The cases all concerned tax avoidance schemes promoted by a number of entities all of which have the words "NT Advisors" in their name and in this decision where I refer simply to NT Advisors this should be taken to mean all or any of the entities.

3. Many readers of this decision will be familiar with the name NT Advisors, not least because the Press Office of HMRC has been assiduous in publicising HMRC victories in the Tribunals and Courts in relation to schemes promoted by them. The most recent of these releases, dated 26 September 2016, was headed "HMRC protects more than £900 million through 10th win against NT Advisors".

4. The decision referred to there was the decision of the Court of Appeal in *Chappell v HMRC* [2016] EWCA Civ 809 ("*Chappell*"). At least one of the invoices in this case related to that case, and at the start of the hearing I informed the parties that I was the author of two articles that appeared in the British Tax Review about this case[1]. Neither party raised any objection to my hearing the case.

Evidence

5. I had a bundle of documents containing three parts: the "Tribunal Documents" including the Notice of Appeal and HMRC's Statement of Case; a witness statement made by Mr Matthew Jenner; and "relevant documents and correspondence", including notably the invoices concerned and a Business Purchase Agreement in which the appellant was the purchaser.

6. In his witness statement Mr Jenner did not explain who he was or in what capacity he was making the statement. The application by the appellant to register for VAT shows that its principal place of business was at the address given by Mr Jenner in his witness statement, its contact details included an email address which included Mr Jenner's name and that Mr Jenner was the first named applicant and gave his capacity as partner.

7. The business purchase agreement shows that the situation is a bit more complex. In that the seller is NT Advisors 2009 LLP ("2009 LLP") a limited liability partnership registered in England, and the purchaser is Matthew Jenner as the trustee

[1] The articles were "Ancient and Modern: Addington's 1803 Tax System Meets 21st Century Avoidance Schemes in *Chappell v HMRC*" BTR No 1 2015 (Special Issue in Honour of John Tiley), p 52 and "*Chappell v HMRC*: the swan really has sung its last: the Court of Appeal considers the deductibility of annual payments" BTR No 1 2017, p 27.

of the Matthew Leslie Jenner NT Trust and Matthew Jenner as the trustee of the John Anthony Mehigan NT Trust. Mr Jenner then is both of the partners of the appellant, (which is not an LLP, but a partnership formed under the Partnership Act 1890) but in different capacities, a fact which seems to explain why only one partner is shown on the VAT registration application form.

8. Mr Jenner was also one of two members of 2009 LLP (the other was Mr Mehigan): Mr Jenner's membership terminated on 6 March 2015 (the date of the business purchase agreement).

9. Mr Jenner's witness statement stood as his evidence in chief. He was cross-examined on it by Mr Purnell and re-examined by Mr Gordon. Some aspects of Mr Gordon's re-examination were objected to by Mr Purnell, but I permitted his questions on the basis that they were elucidating his earlier evidence in chief and allowed Mr Purnell to cross-examine Mr Jenner again on those points.

Facts

10. From the evidence in the bundle I set out the matters which were not in dispute and find them as fact.

The business of 2009 LLP

11. 2009 LLP carried on a business as the promoter of tax avoidance schemes.

12. 2009 LLP was registered for VAT. The VAT returns of 2009 LLP for recent periods had disclosed few if any outputs but had included inputs concerning the ongoing expenses incurred in litigation, and payments of excess of input tax over output tax, if any, had been made to it. However as at 6 March 2015 2009 LLP owed VAT of £1,030,652.

The payments to the barristers

13. The services of the barristers to which the invoices in this case relate were supplied over periods as set out in the table and were paid as shown in the table:

No	Barrister	Period of services	Date Paid	Amount £
1	David Ewart QC	2/3/15 to 24/3/15	16/4/2015	86,687
2	David Ewart QC	2/3/15 to 24/3/15	16/4/2015	22,521
3	David Ewart QC	2/3/15 to 24/3/15	30/7/2015	19,791
4	David Ewart QC	11/12/14	30/4/2015	15,500

5	David Ewart QC	12/2/15 to 15/4/15	30/7/2015	3,078
6	David Ewart QC	21/7/15	30/7/15	21
7	Zizhen Yang	4/3/13 to 24/3/15	16/4/15	17,479
8	Zizhen Yang	4/3/13 to 24/3/15	24/4/15	4,541
9	Zizhen Yang	4/3/13 to 24/3/15	30/7/15	3,979
10	Charles Bradley	16/2/15	30/7/15	275

14. The fees and expenses payable to Mr Ewart QC on invoices 1, 2, 3 and 5 and the fees payable to Ms Yang on invoices 7, 8 and 9 were for work done by them in relation to a scheme called "Stony Heating". This was the NT Advisors name for a scheme which was litigated before the Upper Tribunal (Nugee J and Judge Howard Nowlan) on 23 and 24 March 2015 and reported as *Steven Price & ors v HMRC* [2015] UKUT 0164 (TCC). The work done by Mr Ewart QC and Ms Yang was in relation to the Upper Tribunal hearing.

15. The fees payable to Mr Ewart QC on invoice 4 and to Mr Bradley on invoice 10 was for work done by them in relation to a scheme called "Blue Box". This was the NT Advisors name for a scheme which was litigated before the First-tier Tribunal (Judge Kevin Poole and Mrs Shahwar Sadeque) on 2, 3 and 4 December 2013 and reported as *William Ferguson v HMRC* [2014] UKFTT 433 (TC). The work done by Mr Ewart and Mr Bradley was in relation to an appeal to the Upper Tribunal.

16. The fees payable to Mr Ewart QC on invoice 6 related to transcription expenses for an oral permission hearing before the Court of Appeal in *Chappell*.

The format of the invoices

17. The document that relates to each of the items 1 to 10 in the table is in common form. It has the words "Pump Court Tax Chambers" in the top right and each is headed "Professional fees of [the relevant barrister]". The relevant barrister's own VAT registration number is shown and it is that barrister to whom cheques are to be made payable.

18. Every invoice is addressed to "NT Advisors LLP" with the address Suite 17, 30 Worthing Road, Horsham RH12 1SL. Invoices 3, 9 and 10 show "Mr Matthew Jenner" before "NT Advisors LLP"

19. "Your ref" on each invoice is "Matthew Jenner/Anthony Mehigan".

20. Each document describes itself as a "Receipt & VAT Invoice", shows a date and tax point [the date shown in the "Date paid" column in the table in §13] and an invoice number together with the VAT charged and the rate of VAT.

21. NT Advisors LLP has been the name of two different LLPs. is an LLP which existed throughout the period from 4 March 2013. An LLP incorporated on 1 April 2009 as NT Advisors 2009 LLP changed its name on 27 April 2009 to NT Advisors LLP. The records in the bundle also show that on 27 April 2009 an LLP called NT Advisors LLP changed its name to NT Advisors 2009 LLP.

22. The records in the bundle also show that there is a company called NT Advisors Limited which before 27 April 2009 was called NT Advisors 2010 Ltd. Its business is "tax consultancy".

The Business Purchase Agreement

23. By an agreement dated 6 March 2015, a Business Purchase Agreement ("BPA") was made by 2009 LLP as seller and the appellant as buyer. The BPA recited as background that (among other things):

(1) 2009 LLP had carried on business under the trade name "NT Advisors"

(2) the partners [*sic*] of 2009 LLP no longer wished to personally fund the business

(3) 2009 LLP had received upfront non-contingent fees and a limited amount in success fees from customers under the Customer Contracts (a defined term in the BPA) but those amounts were not included in the sale

(4) the prospect of any further success fees was remote

(5) the value of goodwill was minimal.

24. The BPA also recited as background that the seller had agreed to sell and transfer and the buyer had agreed to purchase the Business (defined term) together with the Assets (defined term) as a going concern.

25. The agreement itself shows as being sold and bought the goodwill, data and a licence, book debts and the benefit, subject to the burden, of the Business Contracts (defined term), but this was subject to anything expressly provided for in the BPA.

26. The things expressly excluded from the BPA included the Excluded Liabilities, the Excluded Assets, any other assets not listed, any Tax for which the seller is liable and the Trade Name. [All words and phrases in title case are defined terms].

27. The important defined terms here are Excluded Liabilities and Excluded Assets. The former means:

(1) The Excluded Contract Liabilities, which is defined to mean any liabilities of the seller relating to breach of contract or duty attributable to the seller or any product or service delivered by the seller

(2) All liabilities and obligations relating to the Business or Assets outstanding on or accrued or referable to the period up to the time of completion (9am on 6 March 2015)

(3) All liabilities and obligations arising by virtue of the sale and purchase recorded by the BPA including any and all liabilities in respect of NIC, PAYE, VAT (defined term) or other Taxation (defined term) attributable to the seller relating to the period ending at completion.

(4) All loans owing by the seller

(5) Any other creditors except trade debts and accrued charges owing at the date of sale.

28. The Excluded Assets are all cash on hand and money in bank accounts etc of which the seller was beneficial owner immediately before the completion.

29. "Tax" and "Taxation" (see §§26 and 27(3)) mean (relevantly) all forms of taxation. "VAT" means value added tax chargeable under the Value Added Tax Act 1994 ("VATA").

30. The BPA further states, under the heading "Risk and Liabilities", that any non-contingent fees and receipts referable to the period up to completion remained with the seller and all profits and receipts of the Business referable only to the time from the completion belonged to the buyer.

31. Under the heading "The Business Contracts" the BPA says that with effect from 6 am on 6 March 2015, 2009 LLP was to assign or procure the assignment to the appellant of all Business Contracts (thus including the contracts with customers of the schemes and the contracts or engagement with the barristers) if they are capable of assignment without third party consent.

32. If any such contracts could not be assigned or novated without third party consent 2009 LLP was to use all reasonable endeavours to obtain any such consents.

33. In the event that either such consent is refused or not obtained, or where any contracts were incapable of assignment or novation or any other form of transfer, 2009 LLP was to continue its corporate existence and to hold the contracts as trustee for the appellant. And in that event the appellant was to perform all assumed obligations of 2009 LLP under the contract as either sub-contractor or agent of 2009 LLP.

34. Under the heading "Value Added Tax" it was declared that the seller and buyer intended that article ("art.") 5 of the Value Added Tax (Special Provisions) Order 1995 ("SPO") should apply to the sale of the assets and that s 49 VATA should apply, but that there was to be no joint application under regulation 6(1)(d) of the Value Added Tax ("VAT") Regulations 1995.

VAT registration

35. The appellant applied to register for VAT in online form VAT 1 on 19 April 2015. It asked for its prescribed accounting periods to be the three months ending February, May, August and November.

36. Its business activities were described as "Tax advisors" and its "Business Activity Description" was "Tax consultancy".

37. Under the heading "TOGC/COLE" it put a tick in the box "TOGC or COLE" with date of transfer 6 March 2015, and identifying the VAT number of the "previous owners" by giving the number for 2009 LLP. To the implicit question "Keep Previous VAT Number" it entered "No". A box with the rubric "Accept TOGC/COLE Terms ands Conditions" was left blank.

38. Under the heading "Voluntary Registration" the "No" box is completed. Under "Registration value of Supplies" the implicit question "VAT Repayment expected" shows "Yes", and the estimate of turnover in the next 12 months is shown as £100,000.

39. On 1 June 2015 Mrs Taylor-Murray of the VAT Registration Service Penalties Team wrote to the appellant, the letter being headed "Failure to Notify Penalty – Special Reduction Allowed". The letter informed the appellant that its registration application had been received more than 30 days after the date on which it was obliged to notify HMRC of the change. The "change" referred to seems to be the change in proprietors of the business as a result of the transfer of a business as a going concern ("TOGC").

40. The letter went on to say that "due to the special circumstances surrounding the nature of the failure and the strong and direct connection between [the appellant] and [2009 LLP] we will not be charging a penalty on this occasion."

41. It then added that paragraph 14 Schedule 41 ("Schedule 41") Finance Act 2008 allows HMRC to reduce a penalty because of "special circumstances", and that a special reduction was unlikely to be appropriate if "you repeat this failure in the future".

42. I interpolate here to say that I find this letter extraordinary for the reasons which I set out in Appendix 1, as the letter is not directly relevant to the issues in the case.

The VAT returns and the correspondence with HMRC

43. The appellant's first VAT return was for the extended period 6 March 2015 to 31 July 2015 and was filed on 31 August 2015. This showed VAT on outputs of £0 and VAT on inputs of £34,775.01, and total value of purchases £173,875.

44. There is in the bundle an email chain which starts on 21 September in which Mr Jenner responded to Angela Seymour, an officer of HMRC, and which shows that he had been told that the appellant's repayment would not be made at that time and he

was promising to "sort the information requested". He also asked Ms Seymour if she has obtained background information from a colleague, Mr Brookman, who had authorised repayments for 2009 LLP.

45. On 17 November Mr Jenner sent Ms Seymour the VAT receipts for the barristers' fees and the BPA.

46. On 18 November Ms Seymour said she could not allow any of the invoices [*sic*] to be reclaimed under the VAT registration for the appellant as they were made out to NT Advisors LLP and so could not be a cost component of any current or future supplies by the appellant.

47. Still on 18 November Mr Jenner replied and explained that the services in the invoices are to clients of the appellant as it has acquired the business of "NT Advisors LLP". He asked, possibly rhetorically, whether HMRC's position meant than any future income from the contracts was not therefore taxable in the hands of the appellant.

The HMRC decision

48. On 20 November Ms Seymour responded to say that a basic principle of input tax recovery is that the supply has to be made to the entity claiming the VAT. If letters of engagement or contracts between the barristers and NT Advisors LLP had been novated to the appellant she wanted to see the documentation. She declined to accept Mr Jenner's characterisation of the consequences of HMRC's stance for future income of the appellant.

49. Also on 20 November, Mr Jenner asked if NT Advisors LLP can reclaim the VAT. Miss Seymour agreed that they could if the legal fees related to the taxable supplies made or to be made by NT Advisors LLP.

50. But in any event she was disallowing the input tax claimed by the appellant.

51. On 25 November 2015 Ms Seymour wrote to the appellant to say that she believed there were inaccuracies in the return and that as a result no credit would be given for the input tax. She added that where there are inaccuracies "we may charge a penalty. However, on this occasion, no penalty is due."

52. I interpolate here to say that no explanation was given for this apparent contravention of the mandatory requirement in Schedule 24 FA 2007 to assess a penalty if there are inaccuracies, nor for why despite the statement that no penalty was due, Ms Seymour enclosed with the letter three factsheets about penalties and asked the appellant to confirm that they had read the important factsheet about the Human Rights Act and penalties.

53. The letter explained what the appellant could do if they disagreed with the decision. The possible actions were to provide the reasons why the decision was wrong, or, if preferred HMRC would arrange for a review, or alternatively the appellant could appeal directly to the Tribunal.

54. On 2 December 2015 Mr Jenner registered his disagreement with Ms Seymour's decision in the light of the BPA.

55. On 7 December Ms Seymour noted the disagreement. She referred to the fact that the seller under the BPA was 2009 LLP not NT Advisors LLP, a different entity from the one referred to by Mr Jenner in their correspondence. She also said that even if the invoices were to 2009 LLP there was no assignment or novation of the contracts for supply of legal services (although she had seen the BPA as she refers to it in the same email).

56. Mr Jenner replied on 8 December to say that NT Advisors LLP was the old name of 2009 LLP and that Pump Court Tax Chambers had not updated their records for the change of name. He also said that the BPA did not, as Ms Seymour suggested, create a sub-contracting or agency relationship but one where the LLP is acting as bare trustee for the appellant. He asked for an independent review.

The review

57. On 13 April 2016 Mr Henry of HMRC Local Compliance wrote to Mr Jenner apologising for the lack of action on the review requested and saying that he had forwarded the request for a review.

58. On 7 June 2016 Mrs Briers from HMRC Dispute Resolution wrote to Mr Jenner with further apologies, saying no caseworker had yet been allocated and asking for a agreement to an extension of 45 days from the date of the letter, that is to 21 July 2016, and adding that if Mr Jenner did not agree to the extension then the decision would be treated as upheld under s 83F(8) VATA.

59. On 20 June 2016 Mr Jenner, writing as "authorised signatory on behalf of" the appellant expressed astonishment that a caseworker had not been allocated but agreed to the extension, though he reiterated a request to be able to make representations to the reviewing officer.

60. On 28 June Mrs Watson contacted Mr Jenner seeking his further representations within 14 days but adding that any significant new information may need to be passed to Ms Seymour for her consideration in the first instance.

61. On 12 July 2016 Mr Jenner made representations to Mrs Watson. He reiterated the points he made to Ms Seymour on 7 December with further elucidation of his argument on bare trusteeship. He also expressed more astonishment that Ms Seymour would apparently be involved in what was supposed to be an independent review.

62. The review conclusions letter was dated 20 July 2016[2]. It upheld Ms Seymour's decision. I do not relate everything the letter says as it forms the basis for much of

[2] I find it difficult to read s 83F(6) and (8) VATA as allowing an extension to be agreed *after* the expiry of 45 days from the date HMRC received the appellant's acceptance of the offer of a review, a period that expired on 22 February. It does not matter in this case because the conclusion is the same as what the deemed conclusion would have been had it been notified as soon as the 45 days had expired. I note

HMRC's submissions in the appeal, but note that the letter says that the appellant failed to meet the specific conditions for input tax that the supply was made to it or that the supply "made up the cost components of the precursor [*sic* – predecessor?] business of your partnership business."

63. On 1 August 2016 Mr Jenner said that he had obtained revised invoice copies addressed to 2009 LLP from Pump Court Tax Chambers and asked whether the invoices now met the requirements of regulation 13.

64. Notice of Appeal was made on 9 August 2016.

65. On 22 August 2016 Ms Seymour agreed that the invoices addressed to 2009 LLP did meet the requirements of regulation 13.

Further findings of fact

66. From Mr Jenner's witness statement and from his oral evidence I find the following additional facts.

67. The NT Advisors business model was this.

(1) Under the terms of business with customers, the relevant entity, 2009 LLP, undertook to execute the tax avoidance scheme purchased and to arrange for the conduct of litigation to defend the schemes up to the highest level of court or tribunal possible.

(2) In return, scheme customers would pay a fixed fee at the outset and there would be a success fee if the scheme worked, payable only when a favourable decision was final.

(3) A success fee was also payable if a scheme succeed by default, in particular if HMRC had not made an amendment to a return on time and a valid discovery assessment, and this even if the scheme failed on its merits.

(4) It was a necessary part of the business to instruct counsel to advise on schemes and on litigation strategy and to conduct litigation until the final determination of any appeal.

68. The barristers were all instructed in respect of the schemes in 2012 and 2013. Members of Pump Court Tax Chambers had previously been instructed by 2009 LLP before 27 April 2009 when its name was NT Advisors LLP. There are no documents before the Tribunal that set out the terms of any engagement with the barristers and which entity engaged the barristers.

69. The barristers were instructed in the matters covered by the invoices by NT Advisors, in the personal form of Mr Jenner, and the instructions were by phone or email. In doing so Mr Jenner was acting on behalf of 2009 LLP.

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also that HMRC does not seem to have offered a review and the appellant does not seem to have accepted a review: rather, they asked for one. In *NT-ADA Ltd v HMRC* (an NT Advisors entity) the First-tier Tribunal (Judge John Brooks) held that in those circumstances there was no valid review. No one took any point on this at the hearing.

70. No other documents such as separate fee notes were provided by the barristers to NT Advisors.

71. There is no information from Pump Court Tax Chambers as to the way invoices were addressed or how their records were updated, nor was there any information from any source to show from what date NT Advisors began to use the services of the barristers apart from Mr Jenner's evidence that it was before 27 March 2009.

72. The BPA was executed on 6 March 2015. It was drafted by Mr Jenner from a standard sale and purchase agreement that had been used in another commercial deal, which had been drafted by lawyers.

73. The barristers concerned provided legal services in periods before and after the time and date of the BPA (6 am on 6 March 2015).

74. Repayment of input VAT almost all of which was in respect of barristers fees had been made to 2009 LLP without HMRC seeking to set the tax off under s 130 FA 2008 against the VAT then owing (which as mentioned as at 6 March 2015 was £1,030,652).

75. The input tax paid by the appellant had not been and would not be claimed by 2009 LLP.

76. In 2017 at the request of the appellant the barristers supplied to the appellant revised invoices identical in every particular to the originals except that they were addressed to 2009 LLP.

77. Mr Jenner's witness statement also contains a large number of passages in which he gives his own understanding of the effect of documents etc in particular the BPA. Mr Jenner's views on the construction of that document and his other opinions expressed in the statement are not relevant, as it is my task to decide what the BPA's effect is on the issues I have to decide.

Law

78. The relevant parts of Directive EC/2006/112 also known as the Principal VAT Directive or "PVD" and relevant to deduction are:

> "**Article 62**
>
> For the purposes of the Directive:
>
> …
>
> (2) VAT shall become 'chargeable' when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.
>
> **Article 167**
>
> A right of deduction shall arise at the time the deductible tax becomes chargeable.

Article 168

In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

…"

79. The relevant parts of VATA relating to input tax are:

"**24 Input tax and output tax**

(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 … services;

…

being … services used or to be used for the purpose of any business carried on or to be carried on by him.

(2) Subject to the following provisions of this section, "output tax", in relation to a taxable person, means VAT on supplies which he makes …

(6) Regulations may provide—

(a) for VAT on the supply of … services to a taxable person … to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents or other information as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases;

25 Payment by reference to accounting periods and credit for input tax against output tax

(1) A taxable person shall—

(a) in respect of supplies made by him, and

…

account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

(3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections

(4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a "VAT credit".

(4) The whole or any part of the credit may, subject to and in accordance with regulations, be held over to be credited in and for a subsequent period; and the regulations may allow for it to be so held over either on the taxable person's own application or in accordance with general or special directions given by the Commissioners from time to time.

…

(6) A deduction under subsection (2) above and payment of a VAT credit shall not be made or paid except on a claim made in such manner and at such time as may be determined by or under regulations; and, in the case of a person who has made no taxable supplies in the period concerned or any previous period, payment of a VAT credit shall be made subject to such conditions (if any) as the Commissioners think fit to impose, including conditions as to repayment in specified circumstances.

26 Input tax allowable under section 25

(1) 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 (that is input tax on supplies … in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—

(a) taxable supplies;

…"

80. And the relevant parts of the VAT Regulations (SI 1995/2518) are:

"**13 Obligation to provide a VAT invoice**

(1) Save as otherwise provided in these Regulations, where a registered person—

(a) makes a taxable supply in the United Kingdom to a taxable person, or

…

he shall provide such persons as are mentioned above with a VAT invoice ….

(5) … the documents specified in paragraph[ ] (1) … above shall be provided within 30 days of the time when the supply is treated as taking place under section 6 of the Act, or within such longer period as the Commissioners may allow in general or special directions.

(7) Both the supplier and the customer shall ensure the authenticity of the origin, the integrity of the content and the legibility of an invoice for such time as the invoice is required to be preserved.

(8) In this regulation—

(a) "authenticity of the origin" of an invoice means the assurance of either the identity of the supplier of the underlying goods or services or the issuer of that invoice;

(b) "integrity of the content" of an invoice means that the content required by regulation 14 has not been altered.

92 Supplies of services by barristers and advocates

Services supplied by a barrister … acting in that capacity, shall be treated as taking place at whichever is the earliest of the following times—

(a) when the fee in respect of those services is received by the barrister …,

(b) when the barrister or advocate issues a VAT invoice in respect of them, or

(c) the day when the barrister or advocate ceases to practise as such."

81. For transfers of business as a going concern, the PVD provides:

"**Article 19**

In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and that the person to whom the goods are transferred is to be treated as the successor to the transferor.

Member States may, in cases where the recipient is not wholly liable to tax, take the measures necessary to prevent distortion of competition. They may also adopt any measures needed to prevent tax evasion or avoidance through the use of this Article."

82. And for such transfers VATA provides:

"**49 Transfers of going concerns**

(1) Where a business, or part of a business, carried on by a taxable person is transferred to another person as a going concern, then—

(a) for the purpose of determining whether the transferee is liable to be registered under this Act he shall be treated as having carried on the business or part of the business before as well as after the transfer and supplies by the transferor shall be treated accordingly; ...

...

(2) Without prejudice to subsection (1) above, the Commissioners may by regulations make provision for securing continuity in the

application of this Act in cases where a business, or part of a business, carried on by a taxable person is transferred to another person as a going concern and the transferee is registered under this Act in substitution for the transferor.

…

(3) Regulations under subsection (2) above may, in particular, provide—

(a) for liabilities and duties under this Act … of the transferor … to become, to such extent as may be provided by the regulations, liabilities and duties of the transferee; and

(b) for any right of either of them to repayment or credit in respect of VAT to be satisfied by making a repayment or allowing a credit to the other;

but no such provision as is mentioned in paragraph (a) or (b) of this subsection shall have effect in relation to any transferor and transferee unless an application in that behalf has been made by them under the regulations.

…"

83. The relevant regulation made under s 49 VATA is regulation 6 of the VAT Regulations:

"**6 Transfer of a going concern**

(1) Where—

(a) a business or part of a business is transferred as a going concern,

(b) the registration under Schedule 1 … to the Act of the transferor has not already been cancelled,

(c) on the transfer of the business or part of it the registration of the transferor under … Schedule [1] is to be cancelled and either the transferee becomes liable to be registered under … Schedule [1] or the Commissioners agree to register him under paragraph 9 of Schedule 1 to the Act, and

(d) an application is made in the form specified in a notice published by the Commissioners by or on behalf of both the transferor and the transferee of that business or the part transferred,

the Commissioners may as from the date of the said transfer cancel the registration under Schedule 1 … to the Act of the transferor and register the transferee under Schedule 1 … to the Act as appropriate with the registration number previously allocated to the transferor.

(2) An application under paragraph (1) above shall constitute notification for the purposes of paragraph 11 of Schedule 1 … to the Act.

(3) Where the transferee of a business or part of a business has under paragraph (1) above been registered under Schedule 1 … to the Act in

substitution for the transferor of it, and with the transferor's registration number--

(a) any liability of the transferor existing at the date of the transfer to make a return or to account for or pay VAT under regulation 25 or 40 shall become the liability of the transferee,

(b) any right of the transferor, whether or not existing at the date of the transfer, to credit for, or to repayment of, input tax shall become the right of the transferee,...

(c) any right of either the transferor, whether or not existing at the date of the transfer, or the transferee to payment by the Commissioners under section 25(3) of the Act shall be satisfied by payment to either of them.

…

(4) In addition to the provisions set out in paragraph (3) above, where the transferee of a business or part of a business has been registered in substitution for, and with the registration number of, the transferor during a prescribed accounting period subsequent to that in which the transfer took place but with effect from the date of the transfer, and any—

(a) return has been made,

(b) VAT has been accounted for and paid, or

(c) right to credit for input tax has been claimed,

either by or in the name of the transferee or the transferor, it shall be treated as having been done by the transferee."

84. But it also to be noted that in the case of a TOGC, regulation 5 of the SPO (SI 1995/1268) provides:

5 (1) Subject to paragraph (2) below, there shall be treated as neither a supply of goods nor a supply of services the following supplies by a person of assets of his business—

(a) their supply to a person to whom he transfers his business as a going concern where—

(i) the assets are to be used by the transferee in carrying on the same kind of business, whether or not as part of any existing business, as that carried on by the transferor, and

(ii) in a case where the transferor is a taxable person, the transferee is already, or immediately becomes as a result of the transfer, a taxable person …"

85. And as to set off Finance Act 2008 includes:

"**133 Set-off etc where right to be paid a sum has been transferred**

(1) This section applies where there has been a transfer from one person ("the original creditor") to another person ("the current creditor") of a right to be paid a sum ("the transferred sum") by the Commissioners.

(2) The Commissioners—

(a) must set the transferred sum against a sum payable to them by the original creditor if they would have had an obligation to do so under or by virtue of an enactment had the original creditor retained the right, and

(b) may do so if they would have had a power to do so under or by virtue of an enactment or under a rule of law had the original creditor retained the right.

(3) Subsection (2) applies whether the sum payable by the original creditor to the Commissioners first became payable before or after the transfer (but not if it only became payable after the Commissioners discharged their obligation to pay the transferred sum to the current creditor).

(4) The following are discharged to the extent of any set-off under this section—

(a) the obligations of the Commissioners in relation to the current creditor, and

(b) the obligations of the original creditor.

(5) An obligation under or by virtue of an enactment (other than this section) to set the transferred sum against a sum payable to the Commissioners by a person other than the original creditor has effect subject to the obligation under subsection (2)(a) and to any exercise of the power under subsection (2)(b).

(6) A power under or by virtue of an enactment (other than this section) or under a rule of law to set the transferred sum against a sum payable to the Commissioners by a person other than the original creditor has effect subject to the obligation under subsection (2)(a).

(7) In determining the sum (if any) to be paid, the Commissioners may make any reduction that they could have made if the original creditor had retained the right to be paid the transferred sum (in addition to any other reduction that they are entitled to make), including a reduction arising from any defence to a claim for the sum.

(8) In this section—

(a) references to the transfer of a right are to its transfer by assignment, assignation or any other means, ...

(b) references to a sum that is payable by or to a person are to a sum that is to be paid, repaid or credited by or to that person and references to the payment of the sum (however expressed) are to be interpreted accordingly, and

(c) where a right in relation to a sum has been transferred more than once, references to the original creditor are to the person from whom the right was first transferred (except in subsection (1)).

(9) Where the right to be paid the transferred sum is dependent on the making of a claim--

(a) subsection (2) does not apply unless a claim in respect of the transferred sum has been made, and

(b) the references in subsections (2) and (7) to the obligations or powers that the Commissioners would have had if the original creditor had retained the right are references to those that they would have had if the original creditor had also made the claim in respect of the transferred sum."

The appellant's submissions

86. The appellant is entitled to credit for the input tax (and hence a repayment) because input tax was paid by it in prescribed accounting periods ending after 6 March 2015 (when it was registered), was paid when the barristers' fees were paid and those services were made in the course or furtherance of a taxable business being carried on by the appellant.

87. This follows from s 25(2) VATA because the taxable supplies of the barristers were made to the appellant in the prescribed accounting period 07/15 (in accordance with regulation 92).

88. This analysis is not affected by the fact that some of the barristers' services were actually provided in 2013, 2014 and 2015 (before 6 March) to 2009 LLP before the TOGC to the appellant. Any contrary argument would lead to input tax becoming irrecoverable in TOGC cases.

89. As to the effect of a TOGC, the decision of the Court of Appeal in *Midland Co-operative Society Ltd v HMRC* [2008] EWCA Civ 305 ("*Midland Co-op*") shows that a claim against HMRC under s 80 VATA may be assigned, and does not suggest that any different outcome should apply to a right to a credit under s 25. *Cross v HMRC* [2014] UKFTT 907 (TC) supports this view.

90. As a result to the extent that the LLP initially had a right to the input tax credit, any such right is treated as having been transferred unless the BPA provides to the contrary which it does not.

91. The *Midland Co-op* principle applies whether or not an application is made under regulation 6 of the VAT Regulations to keep the same VAT number.

HMRC's submissions

92. The appellant was not liable to make the payments of which the VAT in issue formed part. This is because the barristers were instructed by and did provide legal services to a different entity (either 2009 LLP or NT Advisors LLP), so what the appellant paid was by way of third party consideration. Some of the services were supplied in 2013 and 2014 well before the formation of the appellant and the BPA.

93. The right to claim credit of input tax is not a right to claim it outright but a right to deduct it from outputs tax in a given period (s 25(2) VAT), so it is not possible to assign the bare right to input tax without the corollary assignment of the "output tax position".

94. Section 49 VATA and regulation 6 VAT Regulations provide for the transfer of VAT liability but no application was made in this case. Thus the appellant explicitly arranged that it would not be liable for 2009 LLP's outstanding output tax but it also meant that it could not reclaim input tax properly attributable to 2009 LLP.

95. The appellant did not incur the VAT for the purposes of its business, as there was no direct and immediate link between the input tax and any economic activity undertaken by the appellant. It was not making taxable supplies and at the time the input tax was incurred and did not have any intention of making any.

96. In support of these propositions HMRC cite *Commissioners of Customs v Redrow Group plc* [1998] 1 WLR 408; *WHA Ltd and another v HMRC* [2013] UKSC 24; *Airtours Transport Ltd v HMRC* [2016] UKSC 21 ("*Airtours*") and *BAA Ltd v HMRC* [2013] EWCA Civ 112. They also refer to regulation 92, and to regulation 111(1)(a) of the VAT Regulations in relation to deduction of services supplied before registration.

97. Thus, they say, appellant has no right to deduct.

98. Without prejudice to the previous arguments, if the Tribunal were to find for the appellant, HMRC is entitled to set off any sum sought against the output tax owed by 2009 LLP by virtue of s 133 FA 2008 or s 81(3) VATA.

The appellant's response to HMRC arguments

99. The appellant took issue with a number of propositions set out in HMRC's Statement of Case.

100. They considered HMRC were requiring them to prove that the services provided by the barristers relate to the appellant's business. In the appellant's view Mr Jenner's evidence shows that the appellant carried on the "legacy" business from 6 March 2015 previously carried on by 2009 LLP, and the supplies made by the barristers were attributable to taxable supplies being made by the appellant (the provision of services in anticipation of earning success fees).

101. The appellant denies that the appellant paid "third party consideration": it acquired the business of 2009 LP as a TOGC and assumed responsibility of 2009 LLP's obligations to its suppliers. Some services were in any case provided to the appellant. A TOGC is an example where, to quote *Airtours*, "characterisation [of the contracts] is vitiated by relevant facts" and "economic reality" (and see *Aldridge v CCE* [2004] VATTD 18864 ("*Aldridge*")).

102. HMRC's reliance of the words "to him" in s 24 VATA is wholly unsustainable in the light of *Midland Co-op*.

103. The argument that there can be no valid transfer of a right to recover input tax without the corresponding transfer of the obligation to account for output tax is wholly misconceived. The appellant acquired both but was entitled to allow 2009 LLP to retain historic VAT obligations.

104. Finally, HMRC's reference to s 133 FA 2008 is also misconceived because the Tribunal has no jurisdiction to consider the point.

Discussion: Set-off

105. I deal with the alternative argument about set-off first.

106. I agree with Mr Gordon that s 133 FA 2008 is a collection or debt management matter which is not within the jurisdiction of this Tribunal: certainly HMRC have not pointed me to any legislation which provides for an appeal against, or other application to be made in relation to, any decision of HMRC under the section to this Tribunal. It is also not a matter which is confined to VAT but applies to any case where HMRC is to pay a sum.

107. If the appellant succeeds in its appeal then of course HMRC are at perfect liberty to apply s 133 FA 2008 and the appellant would be able to use any forum that might be available for disputing the HMRC action, but that dispute would not be before this Tribunal. I do not therefore express any opinion on whether either of the provisions in question would apply to the facts of this case.

108. I do wonder, though, why HMRC even mentioned the point in a Statement of Case for this Tribunal and in its counsel's skeleton argument. Perhaps it was to dissuade the appellant from bringing the case to the Tribunal as any victory would be pyrrhic. It is also to be noted that s 133 FA 2008 would only be relevant in this case if it was possible to transfer the right to credit and repayment of the input tax, something which HMRC denies is possible.

Discussion: credit for input tax

109. Before turning to the arguments presented by the parties in their skeletons I mention one matter which was not raised by HMRC.

110. HMRC seemed to suggest at one point in the hearing that the transfer was not a normal commercial transaction but was done without the regulation 6 VAT Regulations application in order to isolate the input tax on the barristers fees from being set against any output tax or set off against any outstanding liabilities. Mr Gordon objected that HMRC were alleging what amounted to a sham and that had not been pleaded.

111. I do not intend giving any view on what the purpose of the BPA and TOGC in the form they took was. Mr Jenner gave an explanation for the establishment of the appellant and the carrying out of the BPA (connected to his impending bankruptcy) but I am not making any finding as to what Mr Jenner's purposes or motive in entering into the BPA was. Neither sham nor *Halifax* abuse or even the *Ramsay* approach was pleaded by HMRC nor any reason why the alleged uncommerciality of the transaction was relevant.

112. Turning to the main issue I start by considering what the deductibility position would have been absent the BPA. I do this because HMRC's position in respect of 2009 LLP has not been clear and because if it is established that 2009 LLP would not

have had a right to deduct then *a fortiori* the appellant would not have, and if 2009 LLP would have had the right then it is likely, subject to considering the effect of the BPA, that the appellant would have as well.

113. In my view a very important fact to consider in this case is the appellant's business model, findings about which I have made in §67. This business model has a "tail" which, it can be seen from the decisions of Tribunals and Courts in the three cases relevant in this appeal as well as many others, may last for very many years. The tail, which includes the payment of barristers' fees, reflects the fact that 2009 LLP was under an obligation to incur them at the point when the services are provided at each stage of the litigation.

114. It is also inherent in the model that success fees may never be paid, and the efforts of counsel will be in vain because Tribunals and Courts may disagree with their arguments.

115. This type of model, with upfront fees, major costs in the short term (executing the schemes) and a long tail of smaller costs is not a usual one for commerce but is by no means unprecedented. There is a strong similarity with retailers and others who provide a warranty for their goods and with certain types of insurance.

116. What then if anything would prevent 2009 LLP from obtaining a deduction of the input tax it would have suffered had the invoices been issued in a world without the BPA?

117. I note that HMRC accepted that the revised invoices showing 2009 LLP met the requirements of regulation 13 of the VAT Regulations, and no point was taken in the hearing by HMRC about the validity of the revised invoices (apart from the addressee not being the appellant).

118. There would seem to be no dispute that the services of the barristers were provided for the purposes of 2009 LLP and absent the BPA would have been so provided after 5 March 2015. But for s 24 VATA to apply what is required is that the services are "used or to be used for the purpose of any business carried on or to be carried on by" the taxable person. This has however to be considered in the light of EU case law interpreting article 168 of the PVD: that says that "in so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct" the input tax.

119. In correspondence Ms Seymour referred to the question whether the barristers' fees formed a "cost component" of any outputs that 2009 LLP might make in the future. "Cost components" is not a phrase invented by Ms Seymour, but is used in judgments of the Court of Justice of the European Union ("CJEU" – an abbreviation which included where necessary the European Court of Justice) and opinions of Advocates-General, most notably recently in Case C-126/14 *'Sveda' UAB v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos, third party: Klaipėdos apskrities valstybinė mokesčių inspekcija* EU:C:2015:712 [2015]

STC 447 ("*Sveda*") and in A-G Kokott's opinion in Case C-132/16 *Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' - Sofia v 'Iberdrola Inmobiliaria Real Estate Investments' EOOD* where she clarifies her opinion and the CJEU judgment in *Sveda*.

120. To talk of items forming cost components of outputs is to say that there is a direct and immediate link with either specific outputs or outputs generally (see A-G opinion in *Sveda* at eg [33]).

121. What outputs (if any) of 2009 LLP do the barristers fees have a direct and immediate link to? There are two candidates: the non-contingent upfront fees and the success fees. Mr Purnell spent some time probing Mr Jenner about the likelihood of success fees accruing to the appellant. In the hypothetical world of treating 2009 LLP as continuing to carry on its business the point is equally relevant.

122. The background to Mr Purnell's questions is to be found in §23(4) relating to the recital in the BPA that the prospect of success fees is remote, as well as the entry in the VAT1 registration document for the appellant which showed expected turnover in the 12 months from registration as £100,000.

123. Mr Jenner admitted that the £100,000 figure was not realistic for the first 12 months, but said that there was still a prospect for success fees and he referred to the *de Silva* case where the firm might get £750,000 should the Supreme Court find against HMRC[3].

124. I accept his evidence on this and therefore I consider that the barristers' fees would be deductible in 2009 LLP's VAT returns had it made one for its prescribed accounting period or periods covering the invoices for the barristers' fees.

125. But even if there were no more success fees and no prospect of them at the time of the invoices I consider that, for two reasons, to deny deductibility would be to take too narrow a view of the current CJEU jurisprudence on input tax as set out in *Sveda*.

126. One CJEU case which does indeed cover costs incurred after the taxable transactions concerned is C-98/98 *Midland Bank plc v CCE* ("*Midland Bank*"), where at [29] to [31] the Court said:

> "29 It should be borne in mind that, according to the fundamental principle which underlies the VAT system, and which follows from Article 2 of the First and Sixth Directives, VAT applies to each transaction by way of production or distribution after deduction of the VAT directly borne by the various cost components (see, to this effect, Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 16).
>
> 30 It follows from that principle as well as from the rule enshrined in paragraph 19 of the judgment in *BLP Group,* cited above, according to which, in order to give rise to the right to deduct, the goods or services

[3] *R (on the application of de Silva and another) v HMRC* was heard by the Supreme Court on 22 June 2017, but no judgment had been released as at the time of drafting this decision.

> acquired must have a direct and immediate link with the taxable transactions, that the right to deduct the VAT charged on such goods or services presupposes that the expenditure incurred in obtaining them was part of the cost components of the taxable transactions. Such expenditure must therefore be part of the costs of the output transactions which utilise the goods and services acquired. That is why those cost components must *generally* have arisen before the taxable person carried out the taxable transactions to which they relate. [My emphasis]
>
> 31 It follows that, contrary to what the Midland claims, there is in general no direct and immediate link in the sense intended in the *BLP Group* judgment, cited above, between an output transaction and services used by a taxable person as a consequence of and following completion of the said transaction. Although the expenditure incurred in order to obtain the aforementioned services is the consequence of the output transaction, the fact remains that it is not generally part of the cost components of the output transaction, which Article 2 of the First Directive none the less requires. Such services do not therefore have any direct and immediate link with the output transaction. On the other hand, the costs of those services are part of the taxable person's general costs and are, as such, components of the price of an undertaking's products. Such services therefore do have a direct and immediate link with the taxable person's business as a whole, so that the right to deduct VAT falls within Article 17(5) of the Sixth Directive and the VAT is, according to that provision, *deductible only in part.*" [My emphasis]

127. The words I have emphasised need a little explaining. The Midland Bank group, like other financial institutions, was partially exempt. In such cases costs that cannot be attributed wholly to a taxable transaction or to an exempt transaction fall into the "pot" of residual costs which are apportioned. What the case establishes is that the costs in issue were not, in general, capable of being cost components of a specific transaction (so that they would be deductible in full) but only cost components of the group's transactions as a whole so that an apportionment would be required and full deductibility not achieved.

128. In this case there are no exempt transactions. Thus in my view the barristers fees either fall to be deductible because they fall into the special case where they would form costs components of the fees for the particular schemes the barristers advised about (and in my view the business model used is one where there are special, not general (see *Midland Bank* at [30]), considerations) or they would be part of the general costs and so cost components of the price of 2009 LLP's products. *Sveda* (eg at [28]) shows that references to "price" should not be taken too literally.

129. The second reason why to deny deductibility would be to take too narrow a view of the CJEU jurisprudence is also referred to in *Midland Bank*. At [19] the Court says:

> "However, as the Court has also held, entitlement to deduct, once it has arisen, is retained even if the economic activity envisaged does not

> give rise to taxed transactions or the taxable person has been unable to use the goods or services which gave rise to a deduction in the context of taxable transactions by reason of circumstances beyond his control (Case C-110/94 *INZO* v *Belgian State* [1996] ECR I-857, paragraphs 20 and 21; *Ghent Coal Terminal,* cited above, paragraph 20, and C-396/98 *Schloßstraße* [2000] ECR I-4279, paragraph 42)."

130. That is the case here. If there are no success fees it is because of the decisions of Courts or Tribunals, such decisions being most certainly beyond the control of NT Advisors.

131. So even if there was no direct and immediate link with the upfront fees there would be with the success fees.

132. Thus I do not think it would be in the spirit of art. 167 of the PVD or of s 24 VATA to deny any relief for the barristers' fees. And I note that s 24 does not rule out a connection with past output transactions: "carried on or to be carried on" does not prevent an attribution to business activities that have already been carried out and the outputs from them that have already been received.

133. I make these points without regard to the fact that HMRC did make repayments to 2009 LLP. There was no evidence given about when these were made or what the input tax related to. I note though that Mr Jenner was anxious to put Ms Seymour in touch with a Mr Brookman who had made those repayments.

134. If it were a live question I would hold that 2009 LLP would have had a right to credit for the input tax on the barristers' fees.

The BPA and the TOGC

135. This then brings me to the BPA and the TOGC. Given what I say in §134 and the section of this decision that precedes that paragraph, I need to consider whether the transfer from 2009 LLP to the appellant makes any difference. A great deal of the argument in the skeletons and at the hearing revolved around construction of the BPA and the effect of the TOGC rules.

136. To be more precise it was the failure of the appellant and 2009 LLP to buy in to the rules in regulation 6 of the VAT Regulations that was the subject of much HMRC comment. The only TOGC rules that did apply to the parties are s 49(1) VATA which was of no relevance as there seems to have been no turnover of 2009 LLP in the 12 months to 6 April 2015 and regulation 5 SPO which treats the transfer of the assets as being neither supply of goods nor services and so causes no VAT to arise on the actual transfer of assets.

137. Mr Jenner was asked why no joint application to transfer the VAT number of 2009 LLP to the appellant was made. The subtext here is that the effect of a joint election would be to transfer to the appellant liability to pay the outstanding VAT of 2009 LLP of over £1 million. Mr Jenner confirmed he knew that this was the case, but denied it was the reason for the parties not making the application.

138. The next contested issue on the BPA and TOGC was what actually was transferred to the appellant. It seems without doubt that the benefit and burden of the Business Contracts was transferred. That term is defined as including the Customer Contracts. It follows from the definition of that term that the right to any success fees not yet paid was transferred. In connection with this transfer I find that Mr Jenner may well have exaggerated or even invented the figure shown on the VAT registration form and may have done so deliberately knowing that a figure under the VAT threshold would lead to his application being questioned at the very least, but that does not detract from the fact that there was a transfer of the right to success fees, if any. As goodwill (however valueless) and data were transferred as well it seems to me that there was indeed a TOGC.

139. Also transferred were the Supplier Contracts. This term is defined to include "contracts, engagements entered into on or before the effective time by or on behalf of [2009 LLP] for the supply of … services to [2009 LLP] in connection with and in the ordinary course of the business". This I find includes the engagements with each of the barristers. One of the burdens of the supplier contracts is the liability to pay the suppliers when invoices are presented. That must also include the liability to pay the VAT element in any invoice which is a tax invoice.

140. Clause 2.2(e) excludes from the agreement "any Tax for which the Seller is liable, whether or not then due". This was an important strand of HMRC's submissions. Excluded liabilities in clause 2.2(a) include any liabilities in respect of NIC, PAYE and VAT. Mr Purnell argued that these references, to tax and VAT for which the Seller is liable or which is a liability attributable to the Seller, include the VAT charged on supplier's invoices. I reject that construction. 2009 LLP was not "liable" for the tax charged on the invoices: the only VAT it was liable for was the amount of VAT on its outputs net of any input tax which it shows on its returns. The reference in the same sentence to PAYE and NIC shows that the excluded tax liabilities are ones which 2009 LLP had to account to HMRC for.

141. In my view the BPA effected the transfer to the appellant of the right to success fees from all schemes in which 2009 LLP was involved and the liability to pay suppliers, including the three barristers, which in turn included the liability to pay the VAT on the invoices issued by those suppliers.

142. It follows that just as the barristers services were cost components of the outputs of 2009 LLP and so, if the BPA had not taken place, the input tax on them would, I have held, have been deductible by 2009 LLP, any invoices paid by the appellant for those services are, in principle, deductible by the appellant as the services are cost components of the appellant's outputs (the success fees) or of its predecessor's outputs (the upfront fees) received as part of the business which the appellant acquired..

143. HMRC still has a few arrows in its quiver to be considered. Mr Purnell made the point that it seemed of the three cases for which the barristers had provided services only Blue Box was capable in 2015 of generating success fees still. The argument that arises from that observation is that there is only a direct and immediate

link between the Blue Box fees and any outputs. It seems to me that *Chappell* might also reasonably have been seen as still being able to lead to success fees in March 2015. Indeed the Court of Appeal found in NT Advisors' favour on a technical issue[4] in that case but not on the *Ramsay* argument which scuppered the appellant's prospect of success fees.

144. I do not think that this matters for the reasons given in §§125 to 132 in particular.

145. Mr Gordon admitted that one arrow in HMRC's quiver and a potential stumbling block for him (to mix metaphors) was the requirement in s 24(1)(a) VATA that "input tax" in relation to a person is "VAT on the supply *to him* of any goods or services". In support of the view that on a transfer of business and an assignment of a right to receive services s 24(1)(a) does not prevent "to him" including "to a person from whom the *right has been acquired*", Mr Gordon cites *Midland Co-op* where in relation to a right within s 80(1) VATA which also referred to a liability in HMRC to pay "him", Arden LJ held that a deduction was due to a person in whom "he" had vested the right, unless there was a clear statutory provision preventing that.

146. Although this case does not concern s 80 I agree with Mr Gordon that the reasoning in *Midland Co-op* is of general application to all situations where a right or liability has been assigned or novated. To hold otherwise would be to make irrational distinctions in TOGCs and other cases of assignment etc. *Midland Co-op* also shows that the existence of specific stand-in-shoes provisions in art. 6 of the VAT Regulations does not mean that they do not apply in other cases of TOGCs where regulation 6 does not apply.

147. The points made by HMRC relating to third party consideration and the extracts from the cases cited on this fall away once it is found that the appellant had acquired the obligation to pay the barristers.

148. Mr Gordon's fallback argument was that the BPA constituted 2009 LLP a bare trustee for the appellant in a situation where the liability to pay could not be assigned or novated. I had no evidence to show whether or not the barristers would have consented to a novation had that been relevant, but whatever the position, if it were necessary to rely on the "bare trustee" point, I agree with the appellant that *Aldridge* is clear authority that scotches any suggestion that the fact that it was 2009 LLP which instructed the barristers and it was to 2009 LLP that the invoices were (eventually) addressed makes any difference and prevents deductibility.

149. *Aldridge,* a decision of the Vat & Duties Tribunal, is not binding on me. But I follow it, as a decision of a sister, predecessor, Tribunal and of an experienced and knowledgeable chairman (Mr Edward Sadler) who was a Special Commissioner and who became a judge of both this and the Upper Tribunal because it is a decision which not only is not obviously wrong but is consistent in all respects with the decision of the Court of Appeal in *Midland Co-op* which obviously is binding on me.

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[4] Wrongly in my view, but that is irrelevant (see my 2017 BTR article for the grisly detail).

150. *Aldridge* stresses the economic reality in a case where a firm of solicitors entered into a lease using a nominee company as the named party. HMRC prayed in aid paragraph 8 Schedule 10 VATA, which for some reason they referred to in their Statement of Case here, but it was not mentioned in Mr Purnell's skeleton. Mr Sadler showed that paragraph 8 was irrelevant in *Aldridge* as it is irrelevant to this case. As a matter of economic reality the appellant succeeded to 2009 LLP's business, its assets and its liabilities (apart from the excluded assets and liabilities which are not relevant here and which do not relate to the transferred business). It is pedantry to point to the specific addressee of invoices as somehow denying deductibility to the appellant.

151. Transfers of business are commonplace. They may be simple as this was, or they may be extremely complicated involving billions in both assets and liabilities and in assets and liabilities governed by many jurisdictions, as in a transfer of long-term insurance business under Part 7 Financial Services and Markets Act 2000. What they all have in common is provisions which cater for the fact that assets and liabilities cannot always be assigned or novated on the stroke of the time of the transfer. They all then provide for the transferor to deal with the assets and liabilities on behalf of the transferee, whether that is on an agency, sub-contracting or bare trust or nominee basis. The economic reality is that it is the transferee whose business it is from the date of the transfer and VAT liability and credits should and do reflect that.

152. If it is necessary, which I do not think it is, I would agree with the appellant's bare trust argument.

153. Both parties referred to regulation 92 of the VAT Regulations which applies only to barristers and, in Scotland, advocates. I do not think it is particularly important in this case, but it does provide that, whatever the economic reality, the services of the barristers are deemed to be provided to the appellant. It points up the problem for HMRC that there would be a fairly obvious lack of fiscal neutrality if neither the person to whom services were actually provided nor the person deemed to have received those services could deduct them. In this case it is very difficult to see how in fact 2009 LLP could have deducted the input tax on the fees if it had ceased to carry on any business after 5 March 2015. But the decision I have given does not rely on regulation 92.

Decision

154. It is understandable that HMRC should think that this particular appellant, and the people behind it, should be bound by the maxim, first expressed in Aeschylus' *Agamemnon,* that:

> "By the sword you did your work and by the sword you die".

often cast as "he who lives by the sword shall die by the sword". In other words, NT Advisors so relies on a literal interpretation of tax statutes in their schemes that they should themselves be governed by a "hyper-literal" construction (see the formulation of this adjective by Graham Aaronson QC in *DMWSHNZ Ltd v HMRC* [2013] UKFTT 37 (TC) at [35]). I see no reason to stick, and no grounds for sticking, to a hyper-literal construction just because it is NT Advisors' own tax liability which is in issue.

155. The appeal is allowed.

156. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 11 AUGUST 2017

APPENDIX 1 THE EXTRAORDINARY PENALTY LETTER

A1 Firstly the only obligation listed in the Table in paragraph 1 of Schedule 41 that would seem to apply given the terms of the letter is paragraph 7 Schedule 1 VATA. This paragraph requires a person liable to be registered by virtue of paragraph 1(2) Schedule 1 VATA to notify within 30 days of a TOGC. But paragraph 1(2) applies in two particular circumstances – one is that the value the transferee's supplies deemed to have been made by him in the 12 months to the date of the TOGC exceeded the then VAT registration threshold or there are reasonable grounds for believing that the value of supplies for the 30 days following the TOGC will exceed that figure. Neither was conceivably the case here.

A2 But assuming that the obligation to notify within 30 days had been incurred, and was not complied with until 19 April 2015, the potential lost revenue is, according to paragraph 7(6) and (7)(b) Schedule 41, the amount of VAT for which the appellant was liable for the period from 5 to 19 April 2015. That amount could not have been known to Mrs Taylor-Murray on 1 June as no VAT return had been filed, but it was in fact £0. In those circumstances it might be arguable, though somewhat casuistically, that there was a liability to a penalty but it was to a penalty of £0.

A3 And the application to any case of paragraph 14 (special reduction) which HMRC have purported to allow is dependent first on there being a penalty under paragraph 1 Schedule 41 to which the person is liable and which has been imposed by assessment. But here HMRC say no penalty is to be charged. They can only say that if the person is not liable for a penalty at all, as if they are liable HMRC "shall", not "may", assess the penalty. If as suggested in the previous paragraph there is a liability to a penalty of £0, that cannot be reduced by paragraph 14. All in all the letter exhibits muddled thinking at the most charitable.

A4 Finally it warns that a special reduction may not be made if the failure is repeated. It is unlikely though not impossible that a person may be the transferee in another TOGC, but even if it is there is no reason why a previous failure to notify should not means that there cannot be special circumstances in relation to a second (or third) one.