[2019] UKFTT 684 (TC)

TC07457

Appeal number: TC/2016/06507

VAT – services supplied by a matchmaking business – whether within Article 59(c) Principal VAT Directive as services of consultants and provision of information.

FIRST-TIER TRIBUNAL
TAX CHAMBER

GRAY & FARRAR INTERNATIONAL LLP **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
JANET WILKINS

Sitting in public at Taylor House EC2A on 9, 10 and 11 September 2019

David Milne QC and Barbara Belgrano instructed by Mishcon de Reya LLP for the Appellant

Sarabjit Singh QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant ("G&F") runs a well-established, exclusive matchmaking business. It provides its services to clients in many jurisdictions. It argues that its services fall within the description in Article 59(c) ("para(c)") of the Principal VAT Directive (and paragraph 16(2)(d) schedule 4A VAT Act 1994) as being, in the words of para (c):

> "the services of consultants, engineers, consultancy firms, lawyers, accountants and other similar services, as well as data processing and the provision of information",

and, as a result that when it supplies its services to non-taxable persons who reside outside the EU, its supply is to be treated as made outside the EU and is thus outside the scope of VAT.

2. If the services fall within para(c) and are supplied to such persons, HMRC do not dispute that they are outside the scope of VAT, but they contend that they do not fall within para(c).

3. HMRC made a formal decision to this effect on 30 August 2016 and made assessments on G&F on the basis of that decision for periods between 2012 and 2016. G&F appeals against that decision and those assessments. There was no issue about quantum. The only issue before us was whether G&F's services fell within para(c).

The interpretation of para (c).

(i) Uncontentious matters.

4. The words of para (c) are essentially identical to those of the third indent of Article 9(2)(e) of the Sixth Directive and fall to be interpreted in the same way.

5. The first part of para (c) - "the services of consultants ... and other similar services" - was considered, in relation to whether veterinary services fell within those words, by the CJEU in March 1997 in *Maatschap MJM Linthorst* (Case C-167/95) [1997] STC 1287 ("*Linthorst")*, and, in relation to whether the services of an arbitrator fell within them, in September 1997, in *Von Hoffman v Finland* (Case C-145/96) [1997] STC 1321 ("*Hoffman")*. In *Commission v Germany* (Case C-401/06) the Court summarised the conclusions in those cases which are uncontentious in this appeal:

> "[30]…Consequently, when interpreting Article 9 of the Sixth Directive, Article 9(1) in no way takes precedence over Article 9(2). In every situation, the question which arises is whether it is covered by one of the instances mentioned in Article 9(2). If not, it falls within the scope of Article 9(1) (see, inter alia, *Dudda*, paragraph 21, and *SPI*, paragraph 16).

> "[31] In that regard, it must be stated that the third indent of Article 9(2)(e) of the Sixth Directive refers not to professions, such as those of lawyers, consultants, accountants or engineers, but to services. The Community legislature has used the professions mentioned in that provision as a means of defining the categories of services to which it refers (see *von Hoffmann*, paragraph 15). The expression 'other similar services' refers not to some common feature of the disparate activities mentioned in the third indent of Article 9(2)(e) of the Sixth Directive but to services similar to those of each of those activities, viewed separately. A service must thus be regarded as similar to those of one of the activities mentioned in that provision when they both serve the same purpose (see, to that effect, Case C-167/95 *Linthorst, Pouwels en Scheres* [1997] ECR I-1195, paragraphs 19 to 22, and *von Hoffmann*, paragraphs 20 and 21)."

In other words, for the purposes of this appeal, the question is whether the appellant's services were, or were similar to, the services provided by consultants or consultancy firms, or fell within "data processing and the provision of information".

6. It is also uncontentious that, when addressing the question, the services provided by the Appellant must be compared with services "principally and habitually" provided by a consultant (see [22] *Linthorst* [16]), and that such similarity is achieved when both types of service serve the same purpose.

7. There was also broad agreement (subject to an issue about liberal professions to which we shall return) that the services that consultants 'principally and habitually supply' consist of the giving of "advice based on a high degree of expertise" (Proudman J at [80] in *American Express v Revenue & Customs Commissioners* [2010] EWHC 120 Ch ("*Amex*")) or "specialist and expert advice by someone with extensive experience/qualifications on the subject" ([68] *Gabbitas Educational Consultants Ltd v HMRC* [2009] UKFTT 325 (TC).

8. Although this was not common ground, we note here that it seems to us that advice given by a person with relevant experience which falls within the domain of that experience is specialist or expert advice. As a result it seems to us that Proudman J's formulation in *Amex* encapsulates the test more concisely, and that there is no need to ask whether the advice itself was in some way specialist or expert.

9. The authorities show that if a service goes beyond, or has material elements which go beyond, the principal and habitual activities of a consultant, such as the provision of management, decision-making (see *Banque Bruxelles Lambert SA v Belgium* (Case-8/03) [2004] STC 1643 at [46]) or administration, the supply of the service is not that of a consultant within para(c) (*Amex* [80]).

10. Finally HMRC did not challenge the approach to para (c) adopted by the VAT tribunal in *Amex* (at [72] of the VAT Tribunal Decision) and approved on appeal by Proudman J at [72] in the High Court judgment, that in order for a supply (including a composite supply) to come within that paragraph it did not have to be shown that it fell within one only of the categories; all that had to be shown was that it fell within one or

more of the activities, and thus, for example, a service which comprised both the kinds of services provided by engineers and those provided by accountants would fall within para (c).

(ii) Areas of dispute

(a) liberal professions

11. In *Linthorst* the Advocate General (at [21] of his opinion) said that the activities listed in para(c) seemed to him to be "too heterogeneous and lacking in common elements" to permit the identification of a recognisable class. He said that it had been suggested that para(c) intended to establish a genus or class corresponding to the activities of the traditional notion of liberal professions (which he regarded [21] as represented by "social and intellectual prestige" based generally on high intellectual attainment and strict regulation of ethical and professional behaviour), but given the breadth of modern consultancy work that would "strain considerably the language of the indent"; he considered that "no common element other than the unsatisfactory notion of liberal professions" could be identified. He concluded at [22] that "other similar services" must be "interpreted as only covering those services which are similar - in terms of the concrete aspects of those services actually provided - to any one of the ... expressly listed services."

12. The Court did not appear to agree with the Advocate General's conclusions as to the "unsatisfactory notion" of liberal professions as being the common feature of the listed services, although for different reasons it did concur with his conclusion in relation to the limited meaning of "other similar services", for it said:

> "20. It should be noted that the only common feature of the disparate activities mentioned is that they all come within heading of liberal professions. Yet ... if the Community legislature had intended that all activities carried on in an independent manner to be covered by that provision, it would have defined them in general terms."

13. In the first sentence of this paragraph the Court appears to be differing from the Advocate General because it finds a common feature - that of liberal professions. In the second sentence it holds that that common feature - which it appears to equate with activities carried on in an independent manner - does not act so as to give "other similar services" a generic meaning. Although its reason for that conclusion is the choice of drafting rather than the heterogeneity cited by the Advocate General, the conclusion is that only services similar to services of one or other of the listed professions qualify as "other similar services".

14. Mr Singh argues that the first sentence of [20] in *Linthorst* limits the scope of the services within para(c) because, by describing the common feature of the service providers as liberal professions, the Court construed those listed providers as limited to those which were liberal professions. Mr Singh says that is a real limitation because in *Christiane Urbing-Adam v Administration de L'enregistrement et domain* (C-267/99) [2003] BTC 5240 ("*Christiane")* at [41] the Court defined liberal professions thus:

"activities which involve a marked intellectual character, require a high-level qualification and are usually subject to clear and strict professional regulation".

15. This argument was accepted by the VAT tribunal in *The Indian Palmist* (2003) VAT Decision 18397. There the tribunal, having said at [20] that it was less clear that the activities listed were in fact liberal professions, nevertheless concluded (without setting out its reasoning) that a "consultant" must fall within that term and that the *Christiane* definition should apply.

16. In *Gabbitas* the tribunal addressed the argument at [63 -67]. There HMRC had relied upon the first sentence of paragraph [20] *Linthorst* (quoted above). The tribunal said: that the issue was not key in *Linthorst*, that the second sentence of paragraph [20] "played down" the first and that the definition given in *Christiane* had been given in the different context of Annex F 2 of the Directive. It concluded that the Court had not restricted the ambit of the listed providers to those of liberal professions. Mr Singh contested this finding.

17. It seems to us that there are four reasons for concluding that the meaning of the listed providers is not to be taken as limited to those which are liberal professions in the sense defined in *Christiane*, but that the Court considered that each of the specified classes of activity was limited to those which were carried on in an "independent" manner.

18. First, *Christiane* was decided in 2001 after both *Linthorst* and *Hoffman* so it is unlikely that the definition given in that case was in the mind of the court in *Linthorst* or *Hoffman*. Whilst the Advocate General in *Linthorst* gave a description of the basis for the social prestige accorded to the "traditional" liberal professions, his description, although similar in parts, was not identical to that of liberal profession in *Chistiane*.

19. *Christiane* was not concerned with para (c) and neither that provision nor *Hoffman* nor *Linthorst* were referred to in the judgement. The case concerned the meaning of liberal professions in Annex F 2 of the then Directive. This described certain services to which reduced rates of VAT could be applied in the following terms:

"services provided by authors, artists, performers, writers and other members of liberal professions ..."

The Court cannot have intended its definition to affect the breadth of para (c).

20. Second, the second sentence of [20] *Linthorst* appears to us to equate liberal professions with activities carried out in an independent manner[1]. That equation with such services also appears in [21]:

"Moreover, if the legislature had intended that provision to cover medical services generally, as an activity typically carried out in an independent manner, it would have included it in the list ..."

[1] The tribunal in *Vision Express* VAT decisions 16848 concluded that independence was not a necessary characteristic based on its consideration of *Hoffman* but does not appear to have been referred to *Lindhorst.*

that suggests that the Court did not regard the matters the Advocate General had said were features of "traditional" liberal professions as important features of the communality.

21. Third, the Court's own acknowledgement in the first sentence of [21] of the "disparate" listed activities, the legislative notion of activities of both consultants and consultancy bureaux (without any mention of their regulation), and the Advocate General's reference to "traditional" liberal professions (rather than simply liberal professions) in [22], seem to us to indicate that the meaning to be accorded to the Court's use of the phrase "liberal profession" is capable of being understood as being wide enough to embrace the listed activities rather than limiting the listed activities by reference to liberal professions.

22. Fourth, the description in the first sentence [20] *Linthorst* of the listed services was not necessary for its conclusion or its reasoning. It came to the conclusion that the vets were not consultants, not because veterinary surgery was not a liberal profession, but because vets habitually did more than give advice.

23. It does not seem to us therefore that the purpose of paragraph [20] was to enunciate any limitation on the meaning of the listed suppliers. Rather it was to say that even if there was a common feature of those suppliers it was not the intention of the legislation that merely because a supplier possessed such common features a supply by it would fall within "other similar services".

24. Finally we note that, as the first section of the quote above from paragraph [31] of *Germany* makes clear, what falls within para(c) would not be the services provided by a member of the liberal profession falling within one of the categories (if that were the test) but the services such a person would principally and habitually supply. It is not the status of the supplier which governs the application of para(c) but the nature of the supply. Even if the listed suppliers were limited to those in liberal professions as defined in *Christiane*, the question would be whether the services at issue would be such as would be supplied by a person who was a member of the liberal professions listed, not whether they were in fact supplied by such a person.

25. We conclude that services will fall within para(c) if they are services of the sort which are primarily and habitually supplied by one or more of the specifically listed suppliers and that "consultants" are not limited to persons who are members of the liberal professions but to persons who are in ordinary usage "consultants" and typically act in an independent manner[2] – that is to say are not dependent on, or integrated with, their client.

(b) data processing and the provision of information.

[2] See also *Sumitomo* UKFTT 121 (TC) where the tribunal at [45] said that it preferred HMRC's submission that an essential characteristic of the services supplied under para(c) was that they were given in an independent manner.

26. HMRC argue that this is a single composite phrase. They say that the provision of information cannot be isolated in the phrase "data-processing and provision of information".

27. In this argument they rely upon the words of paragraph 16(2)(d) schedule 4A VAT Act which differ - albeit only marginally - from those in para(c). Paragraph 16(2)(d) provides:

> "services of consultants, engineers, consultancy bureaux, lawyers, accountants, and similar services, data processing and provision of information, other than services relating to land."

28. Para (c) provides – with the words missing from paragraph 16(2)(d) underlined:

> "the services of consultants, engineers, consultancy firms, lawyers, accountants and other similar services, as well as data processing and the provision of information;"

29. (In the predecessor to para(c), Article 9(2)(e) of the Sixth Directive, third indent, the word "bureaux" rather than "firms" was used; that may explain its use in para 16(2)(d) but not the other differences between that and para(c).)

30. HMRC argue that the position of the comma in paragraph 16(2)(d) (which we take to mean that which occurs after "services" rather than the extra comma after "accountants")) and the relationship between the provision of information and data processing leads to their conclusion. In addition they draw support from the decision of the VAT tribunal in *Fairpay Ltd v HMRC* [2008] STI 394 VAT Decisions 20455 in which they say the tribunal accepted this conjunctive interpretation.

31. We do not agree for the following reasons.

32. First, it is not clear to us that this was the interpretation adopted by the tribunal in *Fairpay*. The decision records at [24] the submission made by HMRC to that effect, but at [31] the tribunal says it had to ask itself whether the services "fell within the concept of "the supply of information"", without adding anything about data-processing.

33. Second, it seems to us that there is a possible difference in meaning between the words in paragraph 16(2)(d) and those in the Directive. In relation to the words in paragraph 16(2)(d):

> "services of consultants, ... accountants, and similar services, data-processing and provision of information"

we can understand a construction under which "data-processing and provision of information" should be construed as one activity. But the words of the Directive are different:

> "…accountants, and other similar services, as well as data-processing and the provision of information";

34. It seems to us that in the Directive the use of "as well as" introduces a new list, and the use of the definite article before “provision of information” separates that activity from data-processing. If the Directive envisages two unjoined (although potentially overlapping) activities, paragraph 16(2)(d) must be interpreted consistently.

35. Third, it appears that Proudman J took (albeit tacitly) the same view in *Amex* where, at [82], she said:

> “it was also submitted that the services fell within "supplying of information"”

and in *Banque Bruxelles* the CJEU used language of similar import at [46] in its triple use of the word "services":

> "... the Belgian Government, which accepts that consultancy services, data-processing services and information processing services ...".

36. We conclude that in this regard paragraph (c) specifies two activities: one the processing of data for a customer, and the other the provision of information to a customer; and whereas the transmission of the results of processing data will necessarily involve the provision of information, the provision of information need not involve data processing.

Findings of fact.

37. We heard oral evidence from Virginia Sweetingham who was the founder of G&F and from Claire Sweetingham, her daughter. Each had given witness statements to which there were a number of exhibits.

38. Virginia Sweetingham launched G&F in 2005 after having run two other matchmaking businesses in the previous eight years or so. After 2010 her day-to-day involvement in the business diminished.

39. Virginia Sweetingham explained, and we accept, that a principal at the core of the business of G&F was to take away some of the risks associated with dating by being an active intermediary. A face to face meeting with a client enabled verification: it made it more difficult for a person to present himself or herself differently as someone might do on an unmediated dating site; it enabled a better match. To this was added, where appropriate, advice to a client on how to modify his or her behaviour – providing a helping hand. We accept that this approach to the business of G&F applied during the years after she ceased to be fully involved in the business.

40. After some years in various aspects of human resources, Claire Sweetingham joined her mother in G&F at its inception. Claire and Virginia worked side by side in the early years of G&F and Claire took over in 2010; she is the current managing partner.

41. G&F’s advertisements describe it being a matchmaking service. It attracts potential clients through advertisements and word of mouth. A person seeking G&F’s services will generally e-mail or telephone. After a potential client’s approach there will usually be a short telephone conversation in which the extent and nature of G&F’s

services and terms will be discussed and there may be some intimation of the prospective client's needs. Some clients are not accepted by G&F: that might be the case where their geographical needs or other requirements are outside the area in which it operates.

42. G&F now offers three levels of service: Club, Custom and Bespoke; between 2012 and 2016 it offered only two: Club and Bespoke. For the Club service G&F agreed that over a 12 month period of active membership it would provide a minimum of eight introductions from G&F's client base. An introduction for these purposes occurs when each party, informed of the characteristics of the other, agrees to his or her telephone number being given to the other. Active membership can be paused while a relationship is ongoing or for other reasons such as holidays or work commitments. The fee for the Club service is £15,000 plus VAT. The Custom and Bespoke services were more expensive (£25,000 to £140,000) and encompassed searching for prospective matches outside G&F's client base, or where a client had particular geographical or other preferences. Claire Sweetingham thought that some 15% of G&F's clients required the making of a search outside its client base.

43. G&F's terms and conditions are brief. Apart from matters of confidentiality the only express commitment by G&F is to provide the minimum of eight introductions which they consider suitable for the client's requirements within the 12 months of active membership.

44. At about the time a client signs up to G&F's terms and conditions, the client will be interviewed. These interviews normally take 1 ½ to 2 hours and take place face-to-face or by Skype. After the interview (and perhaps after another meeting) G&F prepare a "brief" describing the client and the characteristics of the person he or she is seeking. These may include attributes such as sex, race, religion, location, wealth, age and appearance and also less tangible aspects such as characteristics and character. The brief is sent to the client for approval.

45. G&F conducts some vetting of clients (since they are potential introductions to other clients) from publically available data (such as the client's online presence) and, mainly in relation to Bespoke clients' potential matches, with its network of contacts.

46. After the brief has been agreed G&F identify possible matches generally from its existing client base or, in the case of the more tailored services, search for and identify possible matches by approaching its network of contacts or placing appropriate advertisements. When a match is identified each party is given a description of the other and some explanation of why the other might be a good match, and if both are content telephone numbers are given out.

47. Thereafter G&F made follow-up telephone calls often once or twice a week to the client, seeking feedback from each of their clients following an introduction: information as to whether the client had spoken to the counterparty and agreed a date, and on each client's impressions after the first and any subsequent dates. The feedback might give rise to amendments to the brief; if the date is successful or a relationship develops the client may put future introductions on hold; otherwise further

introductions may be suggested. In the telephone calls, advice or coaching may be given to the client.

Who did what?

48. Since 2010 Claire Sweetingham has undertaken the majority of interviews with clients, the balance being undertaken by a second interviewer (described to us as the "relief interviewer"). Claire Sweetingham told us that she would undertake about 65% of all interviews and the second interviewer about 35%. She said however that the variability of the practice made the estimation of percentages difficult and we found (as she broadly accepted) that her estimation of figures was not particularly consistent or accurate. We took her 65:35 split to be indicative but not precise.

49. The second interviewer from 2012 was successively Rebecca, Olivia and Millie. These people did not have the same extensive experience as Claire Sweetingham. Before going solo they would have a training period of some five or six months in which they would interview jointly with, or under the supervision of, Claire Sweetingham and discuss with her the way to probe and assess clients.

50. Claire Sweetingham told us that if a client was interviewed by the second interviewer she would nevertheless have some (non-e-mail) contact with the client before the brief was created and that this interview would inform the brief. Her interview might be before or after the main interview.

51. Save in relation to those clients who opted for the most expensive service (who dealt exclusively with Claire Sweetingham), the later contact telephone calls to clients were normally conducted by the liaison team. This consisted of some four assistants (the number varied over that period) who had varied backgrounds and did not have extensive expertise in all the aspects of G&F's business.

52. Claire Sweetingham told us that she was responsible for the drafting of the brief before it was sent to the client. In some cases she said it would be written by the second interviewer but in accordance with her instructions.

53. She said that the brief would not simply record the wishes expressed by the client: sometimes a client would rely upon G&F to identify the type of person who would be a good match; sometimes she would identify requirements which the client had not articulated or realised. There were clients who articulated clear fixed requirements but she said that there would be aspects of personality which could be teased out during the interview process which would be relevant to the brief: a client did not always know what he or she wanted even if they thought they did. There might be a need to manage expectations.

54. We accept that Claire Sweetingham’s experience enabled her to identify, by reading between the lines, from intuition, from body language and from general approach, personality traits which were relevant to the selection of a suitable partner, and that such traits were, if accepted by the client, encapsulated in the brief and reflected in the introductions offered; we think is likely, however, that a large part of the client's

brief was usually either provided directly by the client or was obtained from ordinary factual enquiry.

55. The matching of one client to another (or of clients to headhunted possible matches) was not done by a computer program or by any sort of algorithm. Claire Sweetingham was adamant that she alone was responsible for the selection of introductions. The liaison team would tell her for which clients introductions were needed, she would devise a shortlist using the Salesforce system which would, inter alia, identify other clients within the target age range and sex, and she would look at the client's record, reports and the files on any previous introductions to find a new one. This process said she said took ½ to 1 ½ hours per client.

56. The matching process required Claire Sweetingham to recall the relevant characteristics of each of the potential matches in the age range concerned. This meant being able to recall the relevant personal details of some 400 "active" clients – that is to say clients who had not put their membership on hold. Our own ability to retain such information differed between us but we were persuaded that it would have been possible for Claire Sweetingham to have had a memory sufficient for this task.

57. Although the client liaison team generally communicated possible introductions to clients, sought feedback on how meetings and relationships (if formed) were going, and provided some coaching, counselling and support, G&F's offices were open plan and Claire Sweetingham could be brought into such conversations (or would ask to be brought into them) when needed and would also make follow up calls.

58. Mr Singh argued that Claire Sweetingham did not have time to conduct the scale of activities she said she undertook, and that as a consequence it must have been the case that some of the members of the liaison team and the second interviewers provided some of these services.

59. We approach this issue by looking at her activities against the background of her estimate of 800 clients of which 400 were active, that is to say that they were ready to consider further introductions.

60. At this point we should note that Claire Sweetingham's evidence as to averages and numbers was not polished. She was reluctant to offer figures and hesitant in estimating any average. She sometimes changed the figures she had volunteered earlier: for example, having accepted at one point that G&F had on average over the relevant period some 400 active clients, later essayed that it might have been 300. We did not consider that she intended to mislead but for the reasons which follow consider that there were aspects of contact with clients which must have been undertaken principally otherwise than by her. Claire Sweetingham also estimated that in an average month they might interview 25 to 30 new clients with a maximum of 60 to 65. Taking the average of 25 to 30, that means between 300 and 360 interviews over a year, which is not inconsistent with her later estimate. We conclude that the number was around 320.

61. Claire Sweetingham said that she worked for about 60 hours per week; that is some 3,000, perhaps 3,200 hours per annum. That meant that if she did nothing in relation to

the administration of the business, she had on average 8 hours per annum to spend on each client if there were 400 active clients and 10 if there were 320.

62. Against that we set the estimates she gave for the time spent on the tasks she enumerated which fell to her:

(1) Introductions: each active client was entitled to 8 introductions a year. If each introduction took ½ to 1 ½ hours that meant that the time spent matching would be:

(8 divided by 2 -since each match gave rise to 2 introductions except in cases where G&F searched for matches outside its client base) x (½ to 1½ hours) = between 2 and 6 hours per client per annum. So on average 8 hours for clients whose matches were headhunted and 4 hours for most clients

(2) Creating a brief. Claire Sweetingham said this took between ½ hour and 45 minutes per client.

(3) Interviewing. She said that each of the 65% or so of the main interviews which she conducted took between 1 ½ and 2 hours, and that she spent about half an hour in follow-up interviews when the main interview was conducted by the second interviewer. This meant that she spent on average about 1 ¼ hours spent on interviewing per client (although each client would have about 2 hours of G&F time spent interviewing him or her).

(4) Follow up. Claire Sweetingham suggested that on average she spent 10 minutes per client per week. That would be more than 8 hours per client per year. We thought that the calls asking for and giving feedback after an introductory date would generally be longer than the later regular keeping in touch calls. Allowing 20 minutes per call for 8 new feedback calls in a year and 10 minutes for keeping in touch calls, this would consume some 6 hours per client per year.

63. Thus on her estimates the time she spent on each client would be between around 14 hours per year – which is more than the 8 to 10 hours she had available.

64. Mr Singh approached the issue on an annual basis, putting to Claire Sweetingham that, on her estimates, she spent at least :

(1) 1,600 hours on introduction matching,

(2) 150 hours creating briefs;

(3) 300 hours on interviews; and

(4) 3,300 hours in follow up.

65. That was 5,350 hours compared with an available 3,200.

66. Given her hesitancy over time estimates and numbers (and the broad brush nature of the calculations above), we conclude that her estimates of the time she spent in different activities were excessive, but were not inconsistent with her evidence that she conducted the majority of the interviews, supervised the brief and that she alone did the

matching for introductions. We accept that evidence but we conclude that her role in the post-introduction liaison was much less than she portrayed.

67. We conclude that the liaison team provided the majority of the hand holding contact with clients on or after the provision of the details of a possible match, but that when things went wrong Claire Sweetingham became more involved. This conclusion was also consistent with

(1) an email in which she said: "Your main contact will clearly be me as I handpick all of the introductions…then you will have administrative support in one of my client liaisons (there are 4 in total) should you need it…";

(2) evidence that the liaison team members built up relationships with clients: for example, Rebecca wrote to a client saying she was "thrilled to be working with you" (although we accept that Claire said that this would be under her supervision); and

(3) Claire Sweetingham's oral evidence in which she said that the liaison team would be a little like a client having his own collection of secretaries or PAs to support them with the service.

Discussion.

68. There was no suggestion that what G&F supplied was not a single composite service, and in our view it was clearly such. The question whether that single composite service falls within para (c) may be answered by looking at the principal components of that supply and asking whether they all fall within that provision. That was the approach adopted by the ECJ in *Linthorst* where the supply - which was in that case plainly a single composite supply of veterinary services - was held not to qualify even though the services included activities within the concept of consultants [22]; and it was the approach in *Amex* where the activities of Amex did not qualify because they went beyond the habitual activities of a consultant [80].

69. It seems to us that in considering the components of a supply a provision of goods or services which is ancillary to a principal component should be treated as subsumed into that component. Thus if an engineer provides a written specification for a bridge, the provision of refreshments at a meeting to discuss it does not mean that the service goes beyond the advice principally and habitually supplied by engineers; but the provision of therapeutic intervention goes beyond and is not ancillary to the giving of advice by a vet. This was the approach applied by the tribunal in *Gabbitas* where it said, at [69] that services falling within its definition of consultancy :

"could extend beyond the provision of advice as in *Card Protection Plan* by asking whether there was a principal service to which the other aspects are ancillary".

70. Mr Singh says that the service provided by G&F is that of matchmaking and that is not consultancy. He said that matchmaking would be perceived as the core from the point of view of the consumer and advice, support and the provision of information

were part of that function. But it seems to us that labelling the service supplied does not by itself answer the question which is before us, namely, whether the nature of what is done consists of a service, or services, falling only within one or more of the headings of para(c).

71. Mr Singh argued that what G&F were providing was the possibility of entering into a long term happy relationship: that he said was what the Appellant was selling. We accept that that dream was what the typical client would want, but we see a difference between what is provided and the reason the service is wanted. A school provides education, not the hope of a good job.

72. In determining the nature of what is done the perspective must be from that of the typical consumer, for the issue is what he or she receives not how it is supplied. We accept Mr Singh's formulation of that perspective as being from the point of view of a client seeking a person with a view to a long-term relationship, and so we ask what was supplied in pursuance of that purpose.

73. There was plainly the provision of information: the name, some details and the telephone number of particular person(s), but that on its own did not satisfy the customer's purpose: to do that the information had to come with G&F's advice or opinion that the particular person had been verified and might be compatible - and that was express or implied in the provision of that information. That advice was part of what was provided when the details of a prospective match were given out.

74. On receipt of further information from one of the clients after a date G&F might refine the brief and that might fructify in a better recommendation - one which was more likely to result in a long-term relationship - to accompany the next set of a person's details. But the service received was not the refinement of the brief but the more sculpted advice which accompanied the later suggestion for an introduction.

75. Mr Singh argues that G&F's activities went far beyond the provision of advice and information because they involved all the other elements that go into the service of matchmaking. Those activities he said included ascertaining and executing the needs of the client, reading the non verbal clues, reading body language, and the inexplicable magic of applying knowledge based on intuition and experience to identify people who may be compatible.

76. It seemed to us that the way in which G&F provides or creates the advice is not part of what it is providing. Although it uses intuition and experience to give advice it is not supplying the activity of using intuition and experience, rather it is merely using that as a tool to formulate the advice and to decide on the information it gives to the client. The knowledge and calculations of the engineer, her questioning of the client as to the required capacity of the bridge and the text book research of the lawyer are used to make the supply to their respective clients but are not what they supply.

77. G&F may also provide advice in the formulation of the brief for a client. If a client is told "you are the sort of person who needs someone like this" that is part of the

service of finding a person with whom the client can have a long-term relationship and is advice provided to the client.

78. In the regular telephone calls G&F seek information from the client and may provide a 'listening ear' which may enhance future advice. In addition it may provide coaching or counselling. The seeking of information is not part of what the client receives but the other elements are. Coaching and counselling are behavioural advice.

79. It seems to us that this information and this advice are all that a client receives and therefore are the constituents of the supply by G&F. Mr Singh suggested that the role of the advice given to clients was more limited than the witnesses suggested; we suspect that in some cases he may be right but that does not matter because in those cases where the advice was of lesser significance the provision of information about a potential match was correspondingly larger.

80. The information provision falls within para (c); the next question is whether that advice was expert advice, that is to say based on a high degree of experience (see paragraphs [7 and 8] above and *Amex)* .

81. In this context Mr Singh accepts that, although her experience of certain cultures is limited, Claire Sweetingham had extensive experience in matchmaking, but he says (a) that the advice supplied was not wholly specialist and expert, and (b) that the advice provided by other members of the team (whether the members of the liaison team or the second interviewer) was not provided by experts.

82. In relation to (a) he says that the advice supplied was no more than could have been given by a concerned friend: it was common sense, not specialist and expert. But, as we have said at [8] above, it seems to us that advice given by an expert within her sphere of competence is expert advice, and the advice she gave was within her expertise as a matchmaker.

83. Mr Singh puts the argument another way. He says that a consultant habitually provides advice on a reasoned, evidence based, intellectual basis. Such advice may be explained and does not rely on intuition or the reading of emotions. By contrast a matchmaker applies a form of inexplicable magic. But it seems to us that the manner in which the advice is derived is not relevant and advice given by an expert within her domain of expertise satisfies both limbs of the test.

84. We spent some time discussing (b) which we found a difficult issue. Whilst we regarded the role of the liaison team as an integral part of the composite matchmaking service provided by G&F, we debated whether the non-expert post date coaching and counselling activities of the liaison team for a client were merely incidental to the provision of information and expert advice (the advice of Claire Sweetingham) or were ancillary to those supplies, that is to say that they helped in the client's use of the information and advice or served those supplies. In this context we took account of our conclusions about the time spent by the liaison team talking to a client and noted:

(1) Mr Singh's comment that from the perspective of the client it was not as if a client needed the additional input in finding a partner.

(2) that the Terms and Conditions made no mention of it. But in her email to a new client Claire Sweetingham explains it – see above.

(3) that Virginia Sweetingham had said in her witness statement that the support and advice given as a relationship grew was an integral part of the service which the client paid for. Clients would want her advice on how to handle issues as and when they arose during a relationship. She said that the counselling was part of the facilitating of a match becoming a happy long term relationship.

(4) that Menzies, the Appellant's advisers, wrote to HMRC saying "advising on how to achieve the desired relationship is a key part…";

(5) a Newsweek article which indicated that the introductions were "followed up with phone calls and advice"

(6) that Virginia Sweetingham said that counselling could come a bit later if the client rings and there is a problem, but at the beginning the client was looking to G&F to understand them and find out enough information. She would talk to clients about how they approached the first meeting and how they might look at themselves. This she said was not formal counselling because that was where the person being counselled was open to guidance; a client could be initially unreceptive;

(7) That Claire Sweetingham said the process involved 4 steps of which the 4th was further consultation and feedback (and advice if so required). She said "We may assist in arranging the initial meeting…deliver the feedback received to the client…advise on the next steps". They advised on changes in behaviour during initial meetings with prospective partners to encourage long term relationships. They helped clients to evaluate feedback they gave and received

85. The continuing contact differentiated G&F's service from that of an online dating website where no support was given. We concluded that the provision of continuing contact with a client was an important and material feature of G&F's service from the perspective of a client who wanted a happy long term relationship. It was not merely incidental to the other parts of the supply.

86. We next asked ourselves whether this element of what G&F provided was merely ancillary to the provision of the contact details and the advice implicit in them. But in the end we had the misfortune to disagree about this question.

87. Mrs Wilkins considered that the telephone calls with the liaison team prompted the use of the information and the advice provided by Claire Sweetingham. The feedback the liaison team gave was to enable the advice and information to be better used; the feedback received was no more than the collection of information and the onward transmission of feedback from one party to the other was the provision of information. The support, help and comfort simply helped the information and expert advice to be used. Further the support provided by the liaison team was provided under the oversight of Claire Sweetingham (since they all worked in the same open plan office) and so should properly be regarded as ancillary to the expert advice she provided.

88. On this basis Mrs Wilkins concluded that the material elements of the supply consisted only of the provision of information and expert advice, and the supply fell within para (c).

89. In Mr Hellier's opinion the liaison team, in the support part of its regular contact with the client, provided in effect a form of ready made *confidante* for the client with whom he or she could discuss a relationship and his or her hopes and concerns for it or for other relationships. It enabled him or her to obtain the kind of support one might obtain from a friend – a listening ear or sounding board - and informal advice. (Although he accepts that if things became more serious Claire Sweetingham would step in to provide her expertise).

90. Whilst he considered that the actions of the liaison team promoted and helped the making of a successful relationship, he was not persuaded that the support provided by the liaison team assisted the provision of information about a potential partner or served the supply of Claire Sweetingham's advice that a particular person might be suitable. It was support in the developing of a relationship – support in addition to the use of the information and expert advice received - and was not shown to be sufficiently inconsequential to say that it was just part of those elements.

91. On this basis he concludes that the service provided went beyond the provision of information and expert advice and did not fall within para (c)

Conclusions

92. Where a tribunal consisting of two members is not unanimous, regulation 8 of the First tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 SI 2008/2835 gives a casting vote to the presiding member. Mr Hellier exercised that vote in favour of dismissing the appeal.

93. The appeal is dismissed.

CHARLES HELLIER
TRIBUNAL JUDGE

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