TC02059

Appeal number: TC/2011/02759
TC/2011/01590

VAT – Doctors providing medical examinations and reports on applicants seeking Australian immigration visas – Reports sent directly to the Department of Immigration and Multicultural Affairs in Australia – Whether doctors carried out "services of consultants" or "other similar services" – Whether applicant or Department of Immigration and Multicultural Affairs was the recipient of these services – Appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) Dr NIGEL STANLEY
(2) Dr DAVID TALLENT **Appellants**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
Dr CAROLINE SMALL

Sitting in public at 45 Bedford Square, London WC1 on 30 April 2012

Dr Nigel Stanley and Dr David Tallent in person

Edward Brown, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Dr Nigel Stanley appeals against an assessment made under s 80(4A) and s 78A of the Value Added Tax Act 1994 ("VATA") on 9 February 2011 to recover VAT of £15,713 together with statutory interest of £439.33 that had been repaid to him in relation to the VAT accounting periods ended 31 August 2007 to 31 August 2009.

2. Dr David Tallent also appeals an assessment made under s 80(4A) and s 78A VATA to recover VAT and statutory interest. In his case the amount of VAT that HMRC seek to recover, by an assessment dated 14 February 2011, is £22,567 together with statutory interest of £490.09. This relates to VAT that had been repaid to Dr Tallent in respect of the accounting periods ended 31 October 2007 to 31 January 2010.

3. Both appeals concern the correct VAT treatment for medical examinations of applicants for Australian visas by doctors, appointed to a panel for this purpose by the Australian Government, and the supply of reports of the findings of the medical examinations by the panel doctors directly to the Australian Government's Department of Immigration and Multicultural Affairs ("DIMA"). Although Dr Stanley and Dr Tallent were appointed as United Kingdom panel doctors by the Australian and the New Zealand Governments, and Dr Stanley was also appointed as a panel radiographer by both Governments, it is the only the medical examinations undertaken and reports made in relation to the Australian visas with which these appeals are concerned.

4. In accordance with directions agreed by the parties, which were endorsed by the Tribunal (Judge Mosedale) on 19 December 2011, we heard these appeals together. Dr Stanley and Dr Tallent appeared before us in person with HMRC being represented by Mr Edward Brown of counsel. In addition to their oral submissions we had the benefit of clear and helpful written submissions provided by the parties. These were most appreciated.

Facts

5. Having heard from Dr Stanley and Dr Tallent and read the documents provided by the parties it was apparent that the facts which led to the issue of the assessments were not disputed.

Background

6. A potential immigrant to Australia (an "applicant") may be requested by DIMA to undergo a medical examination as part of his or her application for an Australian visa. If so, he or she is provided with a Form 26, "Medical examination for an Australian visa" (the "Form") which is be completed partly by the applicant and partly by the doctor who carries out the examination.

7. In order to make an appointment for a medical examination, as instructed on the Form, it is necessary for an applicant to contact his or her "closest panel doctor" and "must attend the same doctor during the course of [the] health assessment".

8. The Form also, states that the applicant is responsible for the costs of the medical examination and that once completed and given to the doctor, who is required to send the form directly to DIMA, "the Commonwealth of Australia becomes the owner of the personal information on the form".

9. Parts A and B of the Form, which an applicant is required to complete before attending the medical examination, contain questions about his or her personal details and medical history. Part C of the form, the "Applicant's declaration", is to be completed and signed by an applicant "in the presence of the examining doctor" after Parts A and B have been completed. It contains the following declaration:

> I understand that the Commonwealth of Australia becomes the owner of the information on this form and that the doctor is required to send the form to the department.

Before completing Part D of the form, providing details of the physical examination, the examining doctor must first ensure that the applicant has provided the information required in Parts A and B before completing and signing the declaration in Part C. The doctor is instructed not to give the Form and report to the applicant (although a copies can be provided) but send these directly to DIMA.

10. Dr Tallent describes the information supplied to DIMA in the medical report as comprising of the findings of the clinical examination of a visa applicant and a professionally taken medical history (as opposed to a history obtained passively by means of a questionnaire). This requires the professional judgement of an experienced physician who, during the course of the examination, determines the significance or otherwise of aspects of an applicant's details and whether further detailed elucidation or further reports (eg from a GP or Specialist) are required.

11. The role and obligations of a panel doctor are set out in the "Instructions for medical and radiological examination of Australian visa applicants" (the "Instructions") published by the Australian Government.

12. It is clear from paragraph 1.1 of the Instructions that the Australian Health Operations Centre ("HOC") processes offshore medical results, assists panel members and is where medical results are referred when a review by a Medical Officer of the Commonwealth of Australia ("MOC") is required. MOCs determine whether applicants meet the health criteria based on reports by panel doctors, panel radiologists and specialists.

13. Paragraph 5 of the Instructions explains that panel members include panel doctors who undertake medical examinations, and panel radiologists who undertake radiological examinations and that the Australian Government appoints individuals not medical clinics as panel doctors.

14. The "Conditions of appointment" which are set out at paragraph 6 of the Instructions state as follows:

> Panel members are not employees of the Australian Government. They do not represent the Australian Government and no contractual arrangement exists. Panel doctors are required to comply with all conditions of appointment issued to them by the Australian Government, including those expressed in these instructions. These instructions may be reissued or amended periodically and panel members will be advised when this occurs.
>
> Visa applicants attend the panel doctor of their choice. The Australian Government cannot accept any responsibility for any loss of business or patronage at a clinic, whether as a result of changes to the migration program, applicants' choices, suspension or removal from the panel, or any other reason. Panel members are not to receive or accept service or incentive fees of any kind from third parties, such as migration agents or referral agencies.

15. To avoid any conflict of interest or the perception of such a conflict because "panel members provide a service on behalf of the Australian Government", paragraph 6.3 of the Instructions provides, inter alia, that a panel doctor "should not be an applicant's treating doctor." However, a panel doctor is required, under paragraph 13 of the Instructions, to advise an applicant of any abnormal findings or inform him or his usual doctor if found to be seriously ill and in need of urgent treatment which is in accordance with the general "duty of care" owed by a doctor to those he examines.

16. It is clear from paragraph 9 of the Instructions that the medical examination "should be thorough and complete, based on taking a history, examining the applicant and completing the form." The HOC anticipates that the physical examination of "young healthy individuals with no significant medical history to take at least 15 minutes" and for an "elderly person, or someone with a complex medical history, the examination is likely to take 30-60 minutes." If an abnormality is detected or declared paragraph 15 of the Instructions require a panel doctor to provide "sufficient detail of the nature, severity and possible prognosis of the medical condition" so that DIMA is able to "clearly appreciate the applicant's state of health and relevant significance of the condition."

17. Paragraph 10 of the Instructions, "Setting fees for Australian immigration health examinations", states that:

> Panel members outside Australia are not contracted to, or paid by, the Australian Government for providing immigration health examinations. Panel members are to charge visa applicants directly for examinations undertaken, and it is the responsibility of the applicant to pay the fee.
>
> The Australian Government does not prescribe a fee structure and considers that panel members must be remunerated appropriately. Fees should be consistent with local fees and charges for similar services.

> Fee structures well above or below local market rates are not acceptable and will be investigated by HOC.
>
> Applicants should be advised of standard examination fees in advance, including mailing/courier costs. Fee schedules should be displayed in the reception area and/or provided to applicants for review prior to their appointment. Standard fees and courier charges should be paid prior to the examination. Fully itemised receipts must be issued for each appointment listing separate charges for an examination, blood test(s), and referral(s) and mailing courier costs.

18. Following the medical examination and completion of the Form paragraphs 15 and 16 of the Instructions directs as follows:

> [15] Recommendations
>
> When an abnormality is detected or declared panel members must provide sufficient detail on the nature, severity and possible prognosis of the medical condition, so that the MOC is able to clearly appreciate the applicant's state of health and the relative significance of the medical condition. Comment on how each medical condition affects, or is likely to affect, the applicant's normal daily functioning, level of independence and fitness for work. At the completion of the examination, panel doctors are asked to provide and 'A' or 'B' grading. …
>
> [16] Where to send completed forms
>
> Panel members must never give the original forms, films, reports or specimens back to an applicant or their representative during the health examination(s) to send to [DIMA].
>
> When an applicant completes the form and gives it to a panel clinic, the information becomes the property of the Commonwealth of Australia. The original forms 23/160, test results and x-ray films must be sent directly to the processing centre from the processing clinic.
>
> Upon request panel members can provide an applicant with copies of any forms, diagnostic reports or test results without permission from [DIMA].

19. In the event of an incomplete health examination a panel doctor is required, by paragraph 17 of the Instructions, to complete the Form to cover what has been completed to date, state the reason for not completing the medical examination and return the form to DIMA "if the completed medical would have been sent to HOC and courier fees have been paid by the applicant. By ensuring applicants pay courier costs up-front, panel members avoid courier costs for incomplete medicals."

20. Although the work undertaken by such panel doctors was originally treated as an exempt supply (under Group 7 Schedule 9 VATA) following the decision of the European Court of Justice ("ECJ"), in *Peter D'Ambrumenil and Dispute Resolution Services Limited v Commissioners of Custom and Excise* [2003] EUECJ c-307/01, it was recognised that the medical examinations and reports to enable DIMA to decide whether to grant a visa to an applicant were subject to VAT as standard rated supplies.

Dr Nigel Stanley

21. Dr Stanley registered for VAT on 1 May 2007 and charged VAT on fees for undertaking medical examinations as a panel doctor. This work accounted for some 80% of his practice.

22. On 25 June 2007 he received an email from the Australian High Commission which stated that the work undertaken by panel doctors was an exempt supply for VAT purposes. Attached to that email was a letter, dated 22 May 2007, from HMRC that had been sent to a panel doctor, whose details had been redacted, which stated:

> Provided the supplies will be used by the governments concerned [Australian and New Zealand], which appear to be the situation, then the supplies will be covered by paragraph 3 of schedule 5 [VATA] and therefore take place in the relevant countries concerned. As these countries are outside the European Community, no VAT should be charged.

23. Following receipt of this information Dr Stanley sought advice from his accountant who on 10 July 2007 wrote to HMRC seeking confirmation that as Dr Stanley reported to the immigration authorities in the relevant countries his services were outside the scope of United Kingdom VAT. The reply, dated 17 July, from HMRC stated that although the Australian and New Zealand immigration authorities were the recipients of the information the applicant was the "customer" and therefore the standard rate of VAT was applicable.

24. However, over the next two years Dr Stanley became aware that not all panel doctors were charging VAT and was advised by solicitors, Dickenson Dees LLP, that VAT was not applicable on the services he supplied. On 11 September 2009 Dickenson Dees submitted a voluntary disclosure to HMRC on behalf of Dr Stanley to reclaim VAT of £22,957 comprising of £15,733 VAT charged to applicants for Australian visas with the balance for applicants for visas for New Zealand.

25. On 28 January 2010, having considered the voluntary disclosure, HMRC replied to Dickenson Dees concluding that the supplies in respect of potential immigrants to Australia were outside the scope of VAT as these were supplied to the Australian Government in Australia but that as the supplies were made to potential immigrants to New Zealand in the United Kingdom these were properly subject to VAT. Accordingly Dr Stanley received a refund of £15,733 on 23 March 2010 in respect of the VAT paid by applicants for medical examinations in connection with Australian visas. He received a further payment on 31 March 2010 of £439.33 which was statutory interest "for departmental delay."

26. On 26 January 2011 HMRC, after having taken further policy and legal advice, wrote to Dr Stanley's solicitors advising that it was now considered that they had made an error in accepting the voluntary disclosures in relation to the medical examinations and reports undertaken for Australian visas which they now considered should have been treated as having been supplied to the applicants in the United Kingdom and subject to VAT as was the case with the New Zealand applicants.

27. On 9 February 2011 HMRC issued an assessment to recover the repayment which had been made to Dr Stanley. The assessment was upheld following a review and on 7 April 2011 Dr Stanley appealed to the Tribunal.

Dr David Tallent

28. Dr Tallent registered for VAT with effect from 1 August 2007. Like Dr Stanley, through information circulated to all panel doctors, Dr Tallent was made aware of HMRC's letter of 22 May 2007 which indicated that the services supplied by panel doctors were outside the scope of VAT (see paragraph 22, above). However, as the letter had not been specifically addressed to him, Dr Tallent sought advice from HMRC and was informed that the letter was incorrect and VAT should be charged to applicants for medical examinations and reports sent to DIMA.

29. In 2009 Dr Tallent was contacted by Dickenson Dees LLP who assured him that agreement had been reached with HMRC that both Australian and New Zealand medical examinations were outside the scope of VAT and that their doctor clients were no longer charging VAT for these services. In view of this advice Dr Tallent contacted HMRC and, following email correspondence, was advised on 13 November 2009, in an email from Hugh Haward, a Tax Policy Advisor with HMRC that:

> From a VAT perspective, the Australian Government is receiving the supply of the medical report, and not the private individual. For place of supply purposes the supply of the medical report is a VATA 1994 Schedule 5 paragraph 3 supply and will be supplied where the customer belongs and is outside the scope of VAT.

It was noted that applications for New Zealand visas were supplied to the individual applicant and therefore were standard rated for VAT purposes.

30. By this time the individual solicitors from Dickenson Dees who had contacted Dr Tallent had moved from that firm to McGrigors solicitors. Following the advice from HMRC, Dr Tallent instructed McGrigors in respect of the VAT liability on the medical examinations for applicants for New Zealand immigration visas.

31. On 30 April 2010 McGrigors submitted, on behalf of Dr Tallent, a voluntary disclosure in the sum of £36,342.02 of which £22,567 related to the VAT charged on the provision of medical examinations and reports in relation to applicants for Australian visas with the balance being VAT charged to applicants for New Zealand visas. Although HMRC rejected the claim so far as the New Zealand visa applicants were concerned a repayment was made to Dr Tallent in respect of the Australian visa medical examinations on 14 July 2010 and a further payment of statutory interests of £490.09 was made to him on 28 October 2010.

32. However, on 25 January 2011, having revisited the decision and received advice from their Policy/Solicitors Office, HMRC wrote to Dr Tallent to advise that the VAT treatment of these supplies was believed to be "in error" asking for a repayment of the £22,567 and £490.09 statutory interest.

33. On 14 February 2011 an assessment was by HMRC to recover these amounts. Dr Tallent appealed against this assessment to the Tribunal on 21 February 2011.

Discussion

Issues

34. The following issues arise as a result of the recovery assessments:

(1) whether the services provided by Dr Stanley and Dr Tennant were supplied in the United Kingdom;

(2) whether the applicant or DIMA was the recipient of supply; and

(3) whether, irrespective of the correct legal treatment it is possible there was a legitimate expectation that HMRC should be bound by its written advice, in particular its guidance in Notice 741.

Place of supply

35. The place in which a supply of services takes place is relevant to these appeals as s 1(1) VATA which provides that VAT shall be charged on "the supply of goods and services in the United Kingdom." At the relevant time the place of supply was governed by s 7(10) VATA. This provided that:

> A supply of services shall be treated as made–
>
> (a) in the United Kingdom if the supplier belongs in the United Kingdom; and
>
> (b) in another country (and not the United Kingdom) if the supplier belongs in that other country.

36. However, paragraph 16 of the Value Added Tax (Place of Supply of Services) Order 1992, made under s 7(11) VATA provided that:

> Where a supply consists of any services of a description specified in any of paragraphs 1 to 8 of Schedule 5 to [VATA] and the recipient of that supply–
>
> (a) belongs in a country, other than the Isle of Man, which is not a member state; …
>
> it shall be treated as made where the recipient belongs.

37. Paragraph 3 of schedule 5 VATA is relevant to these appeals. It specifies:

> Services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services; data processing and provision of information (but excluding from this head any services relating to land).

This implements, in identical terms, Article 56(1)(c) of Directive 2006/112/EC (the Principal VAT Directive) which itself is in identical terms to the third indent of Article 9(2)(e) of Directive 77/388/EEC (the Sixth Directive).

38. As Proudman J said in *American Express Services Europe Ltd v HMRC* [2010] STC 1023 ("*American Express*") at [74]:

> "The ECJ has provided guidance on the application of the third indent [of the Sixth Directive]. In *von Hoffmann v. Finanzant Trier* [1997] STC 1321 it was said that the professions there mentioned were used as a means of defining the categories of services to which it refers. It is the services which are relevant, not the label applied to the professionals."

She continued:

> [75] "The right approach (see *von Hoffmann* at paragraphs 16 and 20-21) is to ask whether the services under consideration,
>
> "fall within the category of those principally and habitually carried out as part of the professions listed…"
>
> [76] The services listed are disparate activities and the only common feature of the first five is that they all come under the heading of "the liberal professions": see *Maatschaap MJM Linthorst v. Inspecteur der Belastingdienst* [1997] STC 1287. However the third indent was not intended to cover the activities of all liberal professions, or to cover "all activities carried on in an independent manner": see *Linthorst* at paragraph 20. Thus the services of veterinary surgeons and arbitrators do not fall within the third indent, even as "similar services". Nor do the services of estate agents and architects, who are expressly mentioned in Art 9(2)(a).
>
> [77] Although the words "and similar services" in the third indent broadens the scope of the included services, that scope is limited. In *von Hoffmann* [[1997] STC 1321] (at paragraphs 20-21) the ECJ said,
>
> "…the expression 'other similar services' does not refer to some common feature of the disparate activities mentioned in art 9(2)(e), third indent, of the Sixth Directive, but to similar services to each of those activities, viewed separately…
>
> A service must be regarded as similar to those of one of the activities mentioned… when they both serve the same purpose."
>
> [78] It is not enough that the services should be of an intellectual nature, drawing on expertise, or have something in common with the listed categories. It is necessary to have close regard to the specific provisions of the third indent. I do not accept Mr Cordara's submission that the third indent should be construed in the widest possible way as a single gateway of intellectual services from the liberal professions.

39. It is clear from the judgment of the ECJ in *Maatschap MJM Linthorst, KGP Pouwels and J Scheres cs v Inspecteur der Belastingdienst/Ondernemingen Roermond* [1997] ("*Linthorst*") at [21] that paragraph 3 of schedule 5 VATA does not include services provided by the medical profession generally. As such, despite its use in the United Kingdom for suitably qualified medical professionals, the use of the term "consultants" in the paragraph cannot be a reference to medical consultants.

40. It is therefore necessary to consider whether the provision of medical examinations and reports by Dr Stanley and Dr Tallent fall within the category of those principally and habitually carried out as part of the professions listed in paragraph 3 of schedule 5 VATA.

41. Dr Stanley and Dr Tallent contend that the services they provide are those of "consultants" or "other similar services" or the "provision of information" which fall within paragraph 3 of schedule 5 VATA making it necessary to ascertain the recipient of that supply in order to determine the liability to VAT. However, Mr Brown, for HMRC, submits that the basic rule, as set out in s 7 VATA, applies and, as Dr Stanley and Dr Tallent "belong" in the United Kingdom, their services were properly chargeable to VAT.

42. In *Linthorst* the ECJ rejected a claim that veterinary services fell within the services of "consultants" or "other similar services" even though they did sometimes involve advisory or consultancy aspects as "that fact is not enough to bring the principal and habitual activities of the profession of veterinary surgeons within the concepts of 'consultants' … or to cause them to be regarded as 'similar'" (see *Linthorst* at [22]). In its judgment in that case (at [14]) the ECJ set out the principal function of a veterinary surgeon, which is:

> "… to make a scientific assessment of animals' health, take preventive medical action, effect diagnoses and provide therapeutic treatment for sick animals."

We accept Mr Brown's submission that with the substitution of "human" for "animal", this could describe the principal and habitual functions of a doctor.

43. Dr Stanley referred us to *American Express* where at Proudman J said, at [80]:

> A consultant gives advice based on a high degree of expertise. It seems to me that Amex Europe's activities went well beyond the habitual activity of a consultant (or consultancy bureau) in giving expert advice to a client. Plainly Amex Europe did provide advice to local business units. However the description of Amex Europe as 'an intelligent client', ascertaining and executing the needs of the local business units in accordance with group policy, was in my judgment properly characterised by the Tribunal as a management function going much further than consultancy activities. Consultants give advice, they do not make decisions. The Tribunal was right to give weight to the fact that Amex Europe either gave approval to lease and other transactions conducted by local business units or participated in the approval process when the approval of AETRSCo was also required. These were executive not consultancy functions. 'Management' is a concept of Community Law and (as Advocate-General Jacobs said in *Customs & Excise Commissioners v. Zoological Society of London* [2002] STC 521 at paragraph 32) is characterised by the taking of decisions rather than the mere implementation of policy.

He contrasted his own services for DIMA with those offered by Amex in *American Express* emphasising that the decision on whether to grant an applicant met the health

criteria for a visa was not his but that of the MOCs and that as a panel doctor he only gave advice and information to the MOCs which was based on a high degree of expertise and he should therefore be regarded as a consultant.

44. Dr Tallent's submissions in relation to paragraph 3 of schedule 5 VATA relied on HMRC's guidance contained in Notice 741(2008), 'Place of supply of services'. However, while in certain circumstances it may be possible for this to create a legitimate expectation upon which a taxpayer may be able to rely, such guidance merely expresses HMRC's view of the law and not what it is which is to be derived from the legislation as interpreted by the courts.

45. Having regard to the nature of the services provided by Dr Stanley and Dr Tallent, namely the provision of a medical report based on the findings of a clinical examination and a professionally taken history of an applicant requiring the professional judgement of an experienced physician and the "recommendations" required by paragraph 15 of the Instructions (set out at paragraph 18, above), we are of the view that these are of a type principally and habitually provided by a doctor not a consultant and cannot be regarded as "similar" to services provided by a consultant or the provision of information.

46. As such we consider that they do not fall within paragraph 3 of schedule 5 VATA and therefore, and in accordance with s 7 VATA, find that these services were provided in the United Kingdom and were properly subject to VAT.

47. Given our finding on this issue it is unnecessary to go further but as we have had the benefit of hearing arguments on them it may be helpful if we deal with the other two issues.

Recipient of supplies

48. If we had found that the services supplied by Dr Stanley and Dr Tallent did fall within paragraph 3 of schedule 5 VATA it would be necessary to determine whether these had been supplied to either a visa applicant or to DIMA.

49. Dr Stanley contends that as he undertook the medical examinations of applicants for, and sent the reports to DIMA it, and not the applicant is the recipient of his services. He points to the declaration on the Form (set out at paragraph 9, above) which states that "the Commonwealth of Australia becomes the owner of the information on this form and that the doctor is required to send the form to the department."

50. He also refers to the Instructions which, at paragraph 16 (set out at paragraph 18, above) prohibits the panel doctors from giving the original Form, films, reports or specimens to the applicant as these also become the property of the Commonwealth of Australia. While he accepts that an applicant does have a choice of doctor this is limited to those on the panel which is appointed by Australian Government.

51. Relying on *Auto Lease Holland BV v Bundesamt für Finanzen* [2003] EUECJ C-185/01 Dr Stanley contends that as the Australian Government take physical possession of the report (as did the lessee of the car to whom the fuel was supplied in *Auto Lease*) DIMA and not the applicant was the beneficiary and recipient of the supply. He dismisses the contractual arrangements contending that the statements in paragraph 6 of the Instructions (set out at paragraph 14, above) merely imply that the panel doctors do not have an executive role in deciding whether or not an applicant meets the health requirements of DIMA. He refers to paragraph 6.3 (see paragraph 15, above) which states that the panel doctors "provide a service on behalf of the Australian Government" and that an applicant only attends a medical examination at the request of DIMA.

52. Dr Tallent also contends that DIMA and not the applicant was the recipient of the report albeit under a tri-partite agreement between the panel doctor, DIMA and the applicant. He referred us to *HMRC v Airtours* [2011] STC 239 submitting that like Airtours which had been required, under a tri-partite agreement with its lenders and accountants, to pay for services to be provided by the accountants to its lenders to provide them with an insight into its financial position, the medical examination and report although paid for by an applicant was in fact supplied to DIMA.

53. In support of this argument Dr Tallent emphasised the contractual obligation for medical reports to be sent to DIMA. He also mentioned that the applicant would not have attended a medical examination had he not applied to DIMA in the first place.

54. Mr Brown referred us to *HMRC v Redrow Group Ltd* [1999] STC 161 ("*Redrow*") as authority for the proposition that the normal position is that the recipient of the supply will be the person who contracts and pays for it. However, we note that *Redrow* concerned the recovery of input tax instructed and that the House of Lords did conclude that the supply could include the grant of the right to have services rendered to a third party.

55. Mr Brown also took us to *HMRC v Loyalty Management and Baxi Group Ltd* [2010] STC 2651 ("*Loyalty Management*") in which the ECJ emphasised (at [39]) that consideration of economic realities is a fundamental criterion for the application of the common system of VAT and that this needs to be considered when determining the nature of a supply and by whom and to whom a supply is made. He cited the decision of the Tribunal (Judge Berner and Dr Small) in In *Reed Employment Ltd v HMRC* [2011] UKFTT 200 (TC) where it was said, at [72]:

> "… the contracts between the various parties are necessarily a starting point, but may not be determinative of the nature of the supply or the consideration that has been given for it. That may depend on an objective analysis of all the facts, having regard to the economic purpose of the transactions. The search is for the economic reality, which may or may not be determined by the contractual arrangements between the parties."

56. Therefore, in order to determine the economic reality of the supply as required by *Loyalty Management* we first consider the contractual arrangements between the parties.

57. We have already noted (in paragraph 11, above) that the role and obligations of a panel doctor are set out in the Instructions. Paragraph 6 of these makes it clear that panel members "are not employees of the Australian Government. They do not represent the Australian Government and no contractual arrangement exists".

58. However, a contractual arrangement does exist between an applicant and a panel doctor. The panel doctor provides a service, a medical examination for the applicant who is responsible for the payment of the fee which is set by the panel doctor not DIMA. This is clear from both the Form (which without the "Applicant's declaration" would not "become" the property of the Commonwealth of Australia) and paragraph 10 of the Instructions (set out at paragraph 17, above) which confirms that "Panel members outside Australia are not contracted to, or paid by, the Australian Government for providing immigration health examinations."

59. We also note that under paragraph 6.3 of the Instructions panel doctors provide a service "on behalf of" and not "for" the Australian Government.

60. Therefore, unlike the situation in *Airtours* there is not a tri-partite agreement which involves DIMA but a bi-partite agreement between the applicant and the panel doctor concerned under which the applicant selects the panel doctor to undertake the medical examination and complete the report. The applicant pays for this and although the report is sent to DIMA it is done on the instructions of the applicant to facilitate his or her visa application. This leads us to the inevitable conclusion that the economic reality of the situation is that it is the applicant, who instructs and pays the panel doctors and who also benefits from the services provided, and not DIMA who is the recipient of these services.

Legitimate Expectation

61. Both Dr Stanley and Dr Tallent referred us to the guidance provided by HMRC in Notice 741 (May 2008) in particular paragraph 13.5 which refers to the categories contained in paragraph 3 of schedule 5 VATA. Dr Tallent also refers to the advice he was given by HMRC that the medical examination and reports fell within paragraph 3 of schedule 5 VATA and that there were provided to DIMA not the applicant. It is contended that they should be able to rely on this guidance and advice and that they have a legitimate expectation that is will be applied by HMRC even if it is not strictly in accordance with the letter of the law.

62. Following the decision of Sales J in *Oxfam v HMRC* [2010] STC 686 the Tribunal has adopted contrasting approaches when considering whether it has jurisdiction to consider the issue of legitimate expectation eg accepting the jurisdiction in *Noor v HMRC* [2011] UKFTT 349 (TC) and rejecting it *St Mary Magdalene College in the University of Cambridge v HMRC* [2011] UKFTT 680 (TC).

63. However, as it is clear from the decision of the Court of Appeal in *R v Secretary of State for Education ex p Begbie* [2000] 1 WLR 1115 that detrimental reliance is an essential part of any claim for legitimate expectation, it is not necessary for us to consider the jurisdiction to the Tribunal in this case as neither Dr Stanley nor Dr Tallent relied on the advice and guidance of HMRC to his detriment. Any VAT on the services provided which was repaid by way of voluntary disclosure was paid by the applicants and accounted for to HMRC, also the amount sought by the recovery assessments do not include any period between the erroneous acceptance of the voluntary disclosure and the correction of the error

64. Therefore, irrespective of whether or not we have jurisdiction to consider this point, in the absence of detrimental reliance a legitimate expectation claim cannot succeed

Conclusion

65. In conclusion we find that the medical examinations and reports on applicants for Australian visas undertaken by Dr Stanley and Dr Tallent were services of a type principally and habitually supplied by doctors and not consultants and were not or "similar" to services provided by consultants and do not fall within paragraph 3 of schedule 5 VATA.

66. These were therefore supplied in the United Kingdom where the provider of the "belongs" in accordance with s 7 VATA.

67. Even if we had found that the services were within paragraph 3 of schedule 5 VATA and fell to be determined by reference to the recipient of the services we find that this was the applicant in the United Kingdom and not DIMA.

68. Therefore these services were properly subject to VAT. As this had been repaid to them in error HMRC were entitled to issue assessments to recover these erroneous payments and interest under s 80(4A) and 78A VATA.

69. Also, in the absence of evidence of detrimental reliance on advice and guidance from HMRC any claim based on the legitimate expectation cannot succeed.

70. The appeals are therefore dismissed.

Right to apply for permission to appeal

71. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 21 May 2012