



Neutral Citation: [2024] UKFTT 00843 (TC)

Case Number: TC09292

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House Tribunal Centre

Appeal reference: TC/2022/13121

VAT – Notices of Assessment – legal fees – input tax – whether ‘direct and immediate link’ to appellant’s taxable supplies – no – appeal dismissed

Citation of authority – cases of principle

Heard on: 13 August 2024

Judgment date: 19 September 2024

Before

**TRIBUNAL JUDGE RUDOLF KC
MICHAEL BELL**

Between

VISUAL INVESTMENTS INTERNATIONAL LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ms Rebecca Sheldon, counsel, instructed by Croner-i Limited

For the Respondents: Mr Mohammed Ali Imam and Ms Fariha Hanif, litigators of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. The Appellant is Visual Investments International Limited ('Visual'). The Respondents are the Commissioners for His Majesty's Revenue and Customs ('HMRC').
2. This is a timely appeal to the First-tier Tribunal ('the Tribunal') by Visual under section 83 (1) (p) (i) of the Value Added Tax Act 1994 ('VATA') against HMRC's decision to issue five notices of VAT assessment ('the assessments') under section 73, increasing Visual's liability to tax, on 12 and 13 July 2022.
3. The assessments were for (a) the VAT periods 12/18 to 09/20 in the sum of £41,027 (b) the period 12/20 in the sum of £6,495.30 (c) the period 03/21 disallowing input tax claimed in the sum of £5,632.93 (d) the period 06/21 disallowing input tax in the sum of £1,627.64 and (e) the period 06/21 in the sum of £39.03.
4. The appeal against the assessments relate to HMRC's refusal to accept that the input tax deducted (a) had a direct and immediate link to Visual's taxable supplies and (b) Visual solely received the legal services that were invoiced by Withers LLP.
5. Visual submits that there was both a direct and immediate link to its taxable supplies and it was the sole recipient of the legal services in question. HMRC maintains its objections.

PREAMBLE

6. Before the hearing we received a 281-page bundle containing the relevant documentation including the Notice of Appeal and HMRC's Statement of Case. There were also witness statements from Officer Harvey, a VAT Tax officer at HMRC, and Mr Simon Burgess, a director of Visual (and the son of the late Mr Kenneth Burgess). Additionally, that bundle had the applicable legislation and several authorities (which were supplemented by further cases provided to us). The Tribunal was also sent two letters of engagement issued by Withers LLP for their provision of legal services. The first is at the relevant time insofar as the VAT periods are concerned but that is light on detail. The second, whilst after the relevant VAT periods, does make reference to "continuing" to act for Mr Simon and Mr Kenneth Burgess, Visual and Broadcasting Investment Group Limited ('BIG') at the relevant times. Finally, there were helpful skeleton arguments on both sides.
7. Due to Mr Simon Burgess being abroad (and the Tribunal having received, and granted, an application for the hearing to become a hybrid one), we, with the consent of both parties, heard openings on both sides followed by Officer Harvey and then Mr Simon Burgess. Both witnesses were cross-examined.
8. We are grateful to Ms Sheldon and Mr Imam leading Ms Hanif for the efficient and focussed way they presented their respective cases.

THE BACKGROUND

9. In this case we had the advantage of decisions of the High Court in (1) *BROADCASTING INVESTMENT GROUP LIMITED* (2) *VISUAL INVESTMENTS INTERNATIONAL LIMITED* (3) *KENNETH BURGESS v (1) ADAM SMITH (2) DAN FINCH & Ors* [2020] EWHC 2501 (Ch) and the Court of Appeal in (1) *Broadcasting Investment Group Limited*, (2) *Visual Investments International Limited*, (3) *Mr Kenneth Burgess - and - (1) Mr Adam Smith, (2) Mr Dan Finch* [2021] EWCA Civ 912 ('BIG & Ors') thereafter.
10. In both sets of proceedings Withers LLP represented the Claimants.

11. We gratefully take the background of the litigation that led to the legal fees being paid to Withers LLP from the decision of the Court of Appeal in *BIG and Ors.* Asplin LJ, with whom Coulson and Arnold LJ agreed, explained the appeal was being heard in:

2. ... the context of an application by the Respondent, Mr Adam Smith, to strike out certain claims made against him by the Appellant, Broadcasting Investment Group Limited (“BIG”), Visual Investment International Limited (“VIL”) and Mr Kenneth Burgess (together referred to as the “Claimants”) pursuant to CPR 3.4, or alternatively, for reverse summary judgment under CPR 24.2. Mr Burgess is the majority shareholder of VIL which in turn owns 51% of the issued share capital of BIG.

3. In summary, the Claimants seek to enforce an alleged oral agreement made in October 2012 between BIG, Mr Burgess, Mr Smith and the second defendant, Mr Dan Finch, amongst others, for the transfer of shares in two broadcasting technology companies to a joint venture vehicle, the fifth defendant, Streaming Investments PLC (“SS Plc”) in which Mr Smith, Mr Finch, BIG and one other investor became shareholders (the “Agreement”). SS Plc is in creditors’ voluntary liquidation and took no part either in the hearing before the judge or in the appeals before us.

...

8. I take the relevant background to this matter from the judgment. Reference should be made to the judgment itself for a full explanation of the facts. The account contained in the judgment was taken, in turn, from the Amended Particulars of Claim, the contents of which were treated as factually correct for the purposes of the applications before the deputy judge. It was made clear in the judgment that were the claims to proceed, many of the allegations in the pleading would be contested. The position remains the same before us.

9. The background is complicated but is necessary to understand the issues before us. Mr Burgess says that he was introduced to Mr Smith in February 2012. Mr Smith was associated with a company named Simplestream Ltd (“SS Ltd”). Its directors were Mr Smith and Mr Finch. It is said that Mr Smith told Mr Burgess that SS Ltd could develop software which Mr Burgess required but that the company required investment. As a result, Mr Burgess and/or VIL were invited to invest in SS Ltd. Mr Burgess told Mr Smith that he/VIL would not themselves invest in SS Ltd but that outside investors, being a Mr Goddard and a Mr Macpherson and companies associated with them, would be introduced.

10. SS Ltd was owned as to 80% by a Ms Cynthia Franklin and as to 20% by Mr Smith. Another company, TV Player Ltd (“TVP”), was said to be owned as to 75% by Ms Franklin, as to 20% by Mr Smith and as to 5% by Mr Finch. Mr Burgess says that in August 2012, Mr Smith told him about a dispute between himself and Ms Franklin which had been resolved by an agreement providing for the transfer of all Ms Franklin's shares in SS Ltd and TVP to Mr Smith, giving Mr Smith total, or nearly total, control of the two companies.

11. It is pleaded that in about October 2012 Mr Burgess and Mr Smith agreed that BIG, as the vehicle of VIL and ViomniTV Limited (an investment vehicle of Mr Goddard and Mr McPherson, “Vii”), should be entitled to 39% of the equity in a company to be called Simplestream Group on the basis that it would become the holding company for SS Ltd and TVP. BIG was incorporated on 15 October 2012 and its shares were held as to 51% by VIL (which in turn was controlled by Mr Burgess)

and as to 49% by *Skoosh Investments Ltd* (“*Skoosh*”) (at one time, the *Fourth Defendant*), another *Goddard/Macpherson* investment vehicle.

12. As we shall see, these proceedings were eventually compromised for £500,000.

THE LAW

13. There was no real dispute as to the central principles to be applied. Whilst we were referred to several authorities including first instance Tribunal decisions, we have sought to distil those cases where principle can be ascertained as opposed to decisions on a given (and inevitably different) set of facts producing an outcome.

14. In *WHA Ltd v HMRC* [2013] UKSC 24, [2013] STC 943 (*‘WHA’*), Lord Reed said at [26]:

Decisions about the application of the VAT system are highly dependent on the factual situations involved. A small modification of the facts can render the legal solution in one case inapplicable to another.

The legislation

15. The relevant applicable legislation is found in sections 24-26 VATA. They set out the circumstances in which VAT which has been paid by a taxpayer for goods or services (‘input tax’) maybe offset against their VAT tax liability upon their sales which they must account to HMRC for (‘output tax’).

16. Section 24 states (in material part):

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 goods or services; and

...

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

17. Section 25 states (in material part):

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*

(b) *in respect of the acquisition by him from other member States of any goods*

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.

18. Section 26 states (in material part):

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 and importations 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;*

(b) *supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom;*

(c) *such other supplies outside the United Kingdom and such exempt supplies as the Treasury may by order specify for the purposes of this subsection.*

The authorities

(1) ‘Direct and immediate link’

19. It is agreed that for input tax to be deducted from output tax the test remains that there must be a direct and immediate link to the taxpayer’s taxable supplies. That test is found in *BLP Group PLC v Customs and Excise Commissioners* [1996] 1 WLR 174, [1995] STC 424 (*‘BLP’*) where the European Court of Justice, on a reference from the High Court, said:

19. Paragraph 5 lays down the rules applicable to the right to deduct VAT where the VAT relates to goods or services used by the taxable person ‘both for transactions covered by paragraphs 2 and 3, in respect of which value added tax is deductible, and for transactions in respect of which value added tax is not deductible’. The use in that provision of the words ‘for transactions’ shows that to give the right to deduct under para. 2, the goods or services in question must have a direct and immediate link with the taxable transactions, and that the ultimate aim pursued by the taxable person is irrelevant in this respect.

20. In *Royal Opera House Covent Garden Foundation v Revenue and Customs Commissioners* [2021] EWCA Civ 910 (at paragraph 18) (*‘ROH’*) the Court of Appeal set out what ‘direct and immediate link’ meant by reference to *University of Cambridge v HMRC* (Case C-316/18) [2019] 4 WLR 126. They recited what Lord Hodge said in *Frank A Smart & Son Ltd v HMRC* [2019] UKSC 39, [2019] 1 WLR 4849 (*‘Frank A Smart’*) at [65(ii)] that a direct and immediate link exists:

if the acquired goods and services are part of the cost components of that person's taxable transactions which utilise those goods and services.

21. Ms Sheldon drew our attention to *Sofology Limited v HMRC* [2022] UKFTT 0153 (TC) (*‘Sofology’*). We accept Ms Sheldon’s submission that, although a decision at first instance, the Tribunal set out the correct approach to be taken, having closely analysed the learning from the senior courts, as expressions of principle. We do not accept HMRC’s argument that the facts of that case make what was said about the principles of little use to us.

22. We adopt what was said in *Sofology* with gratitude, with the addition of what was said by Lord Hodge in *Frank A Smart*, as to the meaning of ‘direct and immediate link’.

23. In *Sofology* the Tribunal stated (at paragraph 175) having set out what was said in *WHA*:

(1) the answer to the question of whether or not a direct and immediate link exists between a cost and a supply “is to be objectively ascertained from the facts and circumstances of the transactions, not by investigating the subjective intentions of the taxable person” – see ROH at paragraph [17]. This means that, although the test is multi-factorial in nature, and it is appropriate to take into account, as one of those factors, the purpose of the taxable person, that purpose is to be identified objectively from the facts and circumstances and not by reference to the subjective intentions of the taxable person;

(2) similarly, in determining whether a cost has a direct and immediate link with a supply, it is not appropriate to look at the ultimate aim of the taxable person when incurring the relevant cost or whether or not the cost is reflected in the price charged by the taxable person for the relevant supply – see BLP at paragraphs [19] to [21] and [24] and DaP at paragraphs [20] to [24];

(3) in addition, the fact that a supply would not have been made by the taxable person but for a cost incurred by the taxable person is not sufficient to create a direct and immediate link between the cost and the supply. The relevant test is not a “but for” test – see Southern at paragraphs [32] to [37] and DaP at paragraphs [34] to [36];

(4) the fact that there is a “close economic link” or a “necessary economic link” between a cost incurred by a taxable person and a supply made by the taxable person is not sufficient to create a direct and immediate link between the cost and the supply – see ROH at paragraphs [80] et seq. Although there are decisions such as Sveda and ANL where the phrases “close economic link” or “necessary economic link” have been used in the course of describing a direct and immediate link between a cost incurred by the taxable person and a supply made by the taxable person, those decisions were dealing with circumstances where there was a more immediate non-economic activity between the incurring of the cost by the taxable person and the supply made by the taxable person- the gratuitous provision of a path in Sveda and the provision of free vouchers in ANL – and the relevant court used those phrases to explain why the intermediate non-economic activity did not prevent the direct and immediate link between the cost and the supplies from arising. Those cases are therefore highly fact-specific and “do not herald a new and broader test for determining the existence of a direct and immediate link” – see ROH at paragraphs [81] to [83];

(5) the above means that, even if a cost which is incurred by the taxable person is essential in economic terms to a supply made by the taxable person, there may still not be a direct and immediate link between the two – see ROH at paragraphs [84] to [88]. For example, whilst, in Mayflower, there was a direct and immediate link between the cost of buying in productions and the supplies of programmes (because the former provided the content for the latter), no such direct and immediate link existed in ROH between, on the one hand, the cost of the productions, and, on the other hand, the catering services despite the economically-interconnected nature of those supplies. This was because the production costs were not used to make the supplies of catering but were instead used solely for putting on the productions – see the decision of the Upper Tribunal in *The Commissioners of Her Majesty’s Revenue and Customs v Royal Opera House Covent Garden Foundation* [2020] STC 1170 (“ROH UT”) at paragraphs [106] to [109], cited with approval by the Court of Appeal in ROH at paragraphs [33] and [88];

(6) as long as there is a direct and immediate link between a cost incurred by the taxable person and an exempt supply by the taxable person, the right to deduct input tax on that cost will be restricted and that will be the case even if, in addition to that direct and immediate link, there is also a direct and immediate link between that cost and a taxable supply by the taxable person and the direct and immediate link between the cost and the taxable supply is more direct and immediate than the direct and immediate link between that cost and the exempt supply – see the opinion of Advocate General Jacob in *Abbey National* at paragraph [35] and *DaP* at paragraph [30]; and

(7) finally, although it is of no relevance on the basis of the facts in the present appeal, there are circumstances in which a direct and immediate link between a cost and a supply made as part of a chain of supplies can be broken by an exempt supply made earlier in that chain – see *Sveda* at paragraphs [32] to [34], *RAC* at paragraph [43] and *ROH* at paragraph [91].”

24. As we have said, we were referred to several further decisions of the (predecessor) Tribunal at first instance, which were the application of principle to the facts, by HMRC. These were *Anwar* [1994] Lexis Citation 1136, *Customs and Excise Commissioners v Rosner* [1994] BVC 31 and *The Plessey Company Ltd* [1996] BVC 2074 (*‘Plessey’*). All (notwithstanding the date of the report in *Plessey* which was a decision from 1994) pre-date the learning in *BLP* onwards. Whilst of interest, we derive no assistance from them.

25. It has always been the case, absent a necessary reason to the contrary, the Tribunal will likely to be only assisted by citation of cases involving principle. The inevitable presence in a bundle and reference in pleadings to a multiplicity of first instance decisions involves additional work for everyone for no gain. They invariably increase the length of any hearing if they are referred to. And if not referred to it simply emphasises their lack of utility. They can also distract from the issues in the individual case before the Tribunal.

26. In *R v Erskine* [2010] 1 WLR 183 Lord Judge CJ said in the context of criminal appeals (at [75]) which we see no reason to not equally apply to hearings before the Tribunal given the terms of the overriding objective:

... adapting the well known aphorism of Viscount Falkland in 1641: if it is not necessary to refer to a previous decision of the court, it is necessary not to refer to it. Similarly, if it is not necessary to include a previous decision in the bundle of authorities, it is necessary to exclude it.

(2) ‘Recipient of the services’

27. In *Genius Holding BV v Staatssecretaris van Financiën* (Case 342/87) [1991] BVC 52 (*‘Genius’*) the European Court of Justice said:

19. The answer to the first question should therefore be that the right to deduct provided for in the sixth Council directive of 17 May 1977 does not apply to tax which is due solely because it is mentioned on the invoice.

The Burden and standard of proof

28. As there is no challenge to the validity of the assessments in the way they were raised, it is further accepted that it is for Visual to discharge the assessments, on the balance of probabilities.

29. These are the principles we will apply to our findings of fact in this case.

FINDINGS OF FACT

30. These are our necessary findings of fact for our decision based upon the evidence we heard, and the documents presented to us.

31. As we have stated, we heard from two witnesses. Both were honest witnesses doing their best to assist the Tribunal. From time-to-time, understandably, opinions about the issues in question were given as they were tied up to answers concerning fact. As is accepted by the parties, these do not assist as the findings on those issues are a matter for us.

32. As we were not provided with any documentation prior to the engagement letter and invoices from Withers LLP we pick matters up with the letter of engagement dated 8 August 2018. This is sent to 'Simon and Ken' and requires their signatures at the bottom to retain Withers LLP's services. The first line reads: *Thank you for instructing us to act in the potential action against Adam Smith and related parties surrounding Simplestream Limited.*

33. Moving forward, by an invoice dated 31 July 2020 where Withers LLP billed £7,714 including VAT of £1,269. By an invoice dated 31 August 2020 Withers LLP further billed £26,364 including VAT of £4,394. By an invoice dated 31 October 2020 further billed £15,292.80 including VAT of £2,332.30. All three invoices were addressed to an address in SE5 in London and directed to:

Mr S J Burgess and Mr K T Burgess

c/o Visual Investments International Limited

34. The invoices included as their subject matter:

Shareholder dispute relating to the fraudulent removal of assets from Streaming Investment PLC (formerly known as Simplestream Group PLC)

35. On 5 February 2021 Visual applied to HMRC for a repayment of VAT in the sum of £6,624.66. In an email dated 19 March 2021 Visual's then agent said:

I attach the workings for the VAT QE 31.12.20 and 5 highest value purchases for your kind records.

Please note that our client has paid £9000 in QE 30.09.20 towards the two legal fees dated 31 July 2020 (£7714) and 31 August 2020 (£26364) and we have claimed £1500 (1/6 of £9000) as input VAT and the remaining VAT £4163 (£1269+£4394-£1500) is claimed in QE 31.12.20.

Our clients' main business activities is to invest in start-up businesses and to provide consultancy services to help them to reach their full potential and hence maximise their investment values.

Our clients are intending to make taxable supplies as soon as their legal disputes are settled in court later this year.

The reason for the repayment is that our clients have paid professional fees to protect their investments and the repayments should finish end of this year when the case is settled in court. (emphasis added)

36. Although we have only been provided with those three invoices, we are content, as HMRC were, to accept that there were a number of invoices from other firms instructed prior to Withers LLP.

37. HMRC replied to that the same day. By email they asked (in material part):

Please could you let me have some further details of the dispute so help me determine whether the input tax can be claimed as these legal services were for the propose of the

business – there is some guidance on this subject in the VAT Input Tax Manual:- <https://www.gov.uk/hmrc-internal-manuals/vat-input-tax/vit13600>. Once I have received this, I will need to refer to one of our VAT Consultants and if further information is required, I will send you details of what is required.

38. On 9 April 2021 Visual provided further information to HMRC from its then agents including:

...

I believe the input tax can be claimed as these legal services were for the purpose of the business because the company is making a claim against the directors of Simplestream Limited and TV Player Limited, companies that Visual Investments International Limited (VIIL) has invested in.

VIIL has suffered loss, in that it has been denied the value of their shares in these two companies together with the dividend payments to which it would have been entitled pursuant to such ownership. The value of VIIL's shares in those two companies would have been around £28m.

I also have copy of a 9-pages letter from the lawyers which summarises the whole legal action should you wish to read it and understand the whole history but these are strictly confidential and not to be duplicated or copied to other parties without the agreement of Visual Investments International Limited (VIIL).

The business is being funded by the founder and director, Mr Ken Burgess and lately his son, Simon Burgess who is also a director and running his own successful business.

... (emphasis added)

39. On 12 April 2021 HMRC replied (in material part):

I will need to submit the case to one of our VAT Consultants to review so if you could let me have any information that you would like him / her to consider, please could you let me have this at your earliest convenience.

40. On 15 April 2021 Visual's then agent responded (in material part):

Our client's nature of business is provision of management consultancy which is a taxable business activity and SIC code is 70229.

Although the purpose of investing in other companies is with a view of future capital gain but our client's business is not merely a holding company, receiving and paying dividends. It has other business activities such as provision of management consultancy services. The role of the directors are active and they hold directorships in companies that they invest in and oversee their operations. However, the cause of the legal dispute is [here certain allegations were made which do not need to be set out] our client's shareholdings in both Simplestream Limited and TV Player Limited.

Due to the complexity and large number of different companies and individuals involved in the legal dispute, the director, Mr Ken Burgess has devoted all his time in this court case and spent a huge amount of time and money to provide numerous information to the lawyers and meet with them.

However, the business would be restarted upon receipt of the money arising out of the settlement and VIIL could continue to charge taxable management charges to its other associated companies and subsidiaries.

Company Law states that directors are responsible for safeguarding the assets of the company and hence for taking reasonable steps for the prevention and detection of fraud and other irregularities.

As you can see from the invoices, legal services are obtained to deal with dispute relating to the fraudulent removal of assets from Streaming Investment Plc (formerly Simplestream Group Plc) which our client indirectly owns 39% through its subsidiary, Broadcasting Investment Group Limited.

There is clearly a direct connection between the substance of the legal action and the taxable activities of the business.

41. On 19 April 2021 HMRC asked for further details of the legal dispute. In response on 12 May 2021 Visual's then agents provided copies of the lawyer's confidential 9 page letter referred to above. This was destroyed by HMRC at Visual's request, and we have not been provided with any further copies. The covering email stated (in material part):

2. The director of VIIL, Mr K Burgess has provided and invoiced consultancy services to SSG from April 2013 to September 2013 but the amount is remained (sic) unpaid. SSG was put into voluntary liquidation on 20 August 2015 by the two directors after Mr Burgess was unlawfully removed as director on 31 July 2014. VIIL's legal claim is to stop SSG from being dissolved as the directors know SSG was structured to hold valuable assets including SS.

3. In relation to the directors working for other companies, the directors of VIIL are not taking salaries but charge consultancy fees instead.

4. Our client is only claiming input tax in relation to their own entity as they own all the other claimant companies.

42. After a further exchange of correspondence, on 19 May 2021 HMRC asked:

Was Broadcasting Investment Groups (BIG) ever registered as a joint venture for VAT purposes and if you are concluding that either the sole Director of BIG as an individual or BIG as a joint venture are the ones who have suffered a loss, why is input tax being claimed back via Visual Investment International Limited (VSIL)?

43. Visual's then agent replied on 7 June 2021 confirming that BIG was never registered as a joint venture for VAT and providing further reasons as to why Visual was claiming the input tax back. Those reasons included:

BIG was set up by VIIL to encompass a number of existing and new start-up companies / investments and new technology research and development projects. Some of these projects were exclusively designed, developed and owned by Visual Investments International limited (VIIL) and several had been jointly developed by VIIL ...

44. On 2 July 2021 HMRC replied having discussed the matter internally. They emailed Visual's then agents who replied on 20 July 2021. We have combined the email and the replies (in red):

Two of the factors that we have to consider when determining whether a business is able to claim back input tax is who has incurred this and was this the business that is most closely connected to the supply made where input tax is being reclaimed on.

Unquestionably VIIL incurs all costs until BIG was in a position to OPERATE as a separate stand alone company as opposed toeing (sic) a developing product of VIIL waiting to be formally launched.

Based on the information you have provided; at this stage we consider that Broadcasting Investments Group Limited (BIG) is the most closely connected and you have advised that BIG is not VAT registered. The legal dispute appears to be between BIG and two directors of companies called Simplestream Ltd and Simplestream Group plc.

The main action is still waiting to proceed post VIII's successful award in winning the appeal due for settlement by Smith & Co on the 7th of July which they have paid. VIII will now return to the main action against directors and shareholders of Simplestream etc.

We appreciate that BIG and Visual Investments International Ltd (VIII) are linked but they are not part of a VAT group but are more closely aligned to BIG being a subsidiary of VIII. There is some guidance on when VAT may be recovered by holding companies at this link which may be helpful -<https://www.gov.uk/hmrc-internal-manuals/vat-input-tax/vit40600>

All BIG's legal costs, expenses, manpower and operational costs have been undertaken by VIII other than Livetime2 Limited (LT2) which BIG has a percentage of its shareholding and VIII the balance. However, all LT2 operational costs including VAT were the responsibility of LT2 as it was registered for VAT and was an operational company with its own offices and staff. ...

Based on the information currently provided, we don't consider that VIII would be able to claim back the VAT charged as a result of the ongoing legal fees as BIG is the most closely linked business to the VAT that has been charged.

While accepting that VIII were one of the applicants, you will need to show what legal costs were incurred by them separately before we could consider recovery.

VIII's legal costs to date commenced in 2015. ... Legal costs to date exceed some £600,000 pounds all paid by VIII using three legal practices: ... currently Withers LLP from 2018 to current. ... All costs from ... Withers LLP, were and are, all to VIII. BIG still remains a shell company pending the outcome of current legal actions.

45. There then continued exchanges of correspondence which included changes of officers at HMRC due to promotion and illness.

46. On 15 November 2021 HMRC expressed its position to Visual. They said (in material part):

HMRC's position, following consultation with the VAT Technical Team is that the input tax claimed on the continuing professional fees in cannot be claimed in full by VII Ltd, in that VII Ltd are not the only entity involved in the ongoing litigations. Several third parties (BIG, Messrs. Burgess, for example) are involved with VII Ltd merely making third party payments. Whoever, and however payments are made does not over-ride the basic principle of to whom the supply was actually made.

For example, all the professional fees in VAT period 12/20 (the originally queried return) were made to S J Burgess and K T Burgess c/o VII Ltd and relate to – quote – “Shareholder dispute relating to the fraudulent removal of assets from Streaming Investment PLC” (Note : I am not sure where Streaming Investment PLC fit into the overall picture)

The entities are not a VAT group so VII Ltd have no right to input tax deduction for any services supplied to any other entity, no matter how closely associated they are. That input tax would be is proper to BIG, Messrs. Burgess etc.

If they can show any invoices that actually relate to them, and them only, then an input tax claim be allowable. However, any VAT on payments on behalf any associates is not VII Ltd's to claim.

As far as period 12/20 is concerned HMRC does not consider that any of the input tax on professional fees is claimable. However this obviously has implications for other VAT periods which will need to be addressed /bottomed out. Are input tax restrictions / cancellations appropriate for other VAT periods?

47. On 7 December 2021 Visual's current representatives took over the tax enquiry. On 31 March 2022 a detailed submission was made to HMRC. After detailing some of the delays in the enquiry, they said:

The legal dispute clearly involves VIII and a subsidiary entity called BIG which is almost 100% owned by VIII. This is indicative that legal dispute is focussed on VIII and its wider business interests.

The legal matter relates to VIII which should be the main consideration as to which entity is the beneficiary of the legal services.

The supply of legal services is made to VIII.

HMRC appear to have stated that the beneficiaries of the input tax are BIG and Mr Burgess personally and that some apportionment of the input tax may be necessary but we categorically dispute this preliminary finding as VIII is the beneficiary of the supply.

The company has engaged the services of Withers LLP for its own purposes, the solicitors are contractually obliged to provide legal services to VIII.

The input tax is relevant to the company and is not a personal cost of the director.

The company has paid the invoices from Withers LLP which is indicative of a supply made to VIII.

We do not consider that the input tax can be considered third party input tax where the company is paying the costs of another entity but the input tax is relevant to a different business. This is illogical and does not make commercial sense.

VIII has invested significant sums into its operating companies and it does not make commercial sense for the company to pay another party's costs. Why would VIII put itself in the position of paying Withers LLP for the provision of legal services and be unable to legally recover the input tax from the purchase invoices issued to VIII.

The company has engaged Withers LLP for its own business objectives and the description or wording on the invoices should not be determinative in the potential disallowance of the input tax.

Therefore, we consider the input tax claimed for legal fees is a direct cost of VIII and the input tax has been incurred in furtherance of its future taxable business activities.

The input tax has a direct and immediate link to the onward supply of inter-group management charges which are taxable for VAT purposes.

HMRC have referenced VAT Input Tax Manual 22000 but this manual reference is it input tax: intention to make taxable supplies. This manual explains that the input tax is recoverable where supplies are made at a future date and that the correct approach is to treat the intended supplies the same as actual supplies.

The guidance confirms that preparatory works by a business are in themselves a business activity and as such the normal right to recover input tax must follow.

We consider that applicable guidance regarding input tax recovery only serves to strengthen our client's position.

To reiterate, the input tax has been incurred for the purposes of future taxable supplies and there is not any justification for the denial of this input tax.

For the avoidance of any doubt our client has never suggested or confirmed that the supplies were made to any business other than Visual Investments International Limited.

...

48. On 27 April 2022 HMRC replied saying simply:

...

VIII and the other entities are not part of a VAT group and it is not considered that this is legal advice supplied to VIII. They are simply paying for it on behalf of an associate who is a member of a commercial group, not VAT group. The payments are being made on behalf of a separate entity and HMRC cannot ignore the invoices as they show the actual nature of the supply and who it is to. The fact that VIII actually make the payments is not an over-riding factor.

...

49. The offer of an independent review was made, and indication given by Visual that this would be taken up upon receipt of the assessments.

50. On 14 June 2021 Officer Harvey took over the enquiry replacing a colleague due to illness. Her involvement has therefore been limited although she was the officer who ultimately disallowed the input tax after the specialist advice from HMRC's VAT consultant and issuing the assessments. However, given her late involvement most of her evidence was simply setting out the correspondence between the parties.

51. The assessments were sent by Officer Harvey dated 12 and 13 July 2022 in the sums set out at paragraph [3] above.

52. On 12 August 2022 Visual formally requested an independent review of HMRC's decision to disallow input tax. This included a detailed submission for the purposes of the review. That included the following:

Legal dispute and input tax deductibility

The crux of the disagreement with HMRC is whether VIII can recover input tax relevant to legal services from Withers LLP. This is a complex legal issue and potentially misunderstood by HMRC. This letter aims to simplify matters, as significant detail has been provided We have included key documents within our submissions to aid your understanding.

The legal matter is relevant to the protection of investments made by VIII. We understand that the legal dispute will be settled out of court subject to the agreement of a settlement offer between the parties. We understand that the settlement funds will be used to develop and recommence the business activities of VIII. The resolution of this protracted legal matter will give the business certainty and the company officers can move forward with the business.

Therefore, the company will generate taxable supplies as a direct result of the reaching agreement in the legal matter for which input tax has been claimed. The legal matter and thus the input tax is clearly linked to the company and there is a direct and immediate link to future taxable supplies.

The legal dispute clearly involves VILL and a subsidiary entity called BIG which is almost 100% owned by VILL. This is indicative that legal dispute is focussed on VILL and its wider business interests.

The legal matter relates to VILL which should be the main consideration as to which entity is the beneficiary of the legal services.

The supply of legal services is made to VILL.

HMRC appear to have stated that the beneficiaries of the input tax are BIG and Mr Burgess personally and that apportionment of the input tax may be necessary but we categorically dispute this preliminary finding, as VILL is the beneficiary of the supply. It is not immediately clear how an apportionment could be applied. However, if an apportionment is deemed to be necessary, that is indicative that HMRC agree that the legal matter is in part relevant to VILL. There is a complex structure of companies and shareholdings which would make an apportionment difficult to determine. However, it is our position that VILL is solely the beneficiary of the input tax and the entity most intricately linked to the legal dispute. (emphasis added)

53. On 22 September 2022 the independent review upheld HMRC's decision. In doing so the officer considered whether:

1. the supplies of legal services were made to you
2. the legal services relate directly to your taxable supplies

54. He concluded in relation to 1:

In relation to who the legal services were supplied to, I note, it is accepted that you are making the payments relating to the legal expenses. The court judgment clearly lists you as an appellant along with BIG and company director, Kenneth Burgess. In the published judgment I also note that counsel for the appellants was instructed by Withers LLP. In my view, this infers that Withers LLP are acting for all appellants, of which you are one of three. The invoices I have seen from Withers LLP are addressed to Mr S J Burgess and Mr K T Burgess c/o you. Whilst I recognise it is difficult to ascertain who specifically is the recipient of the legal services, as the person/companies involved are linked, I am content you are at least receiving part of the services in question. However, I am not content you are the sole recipient of the services. (emphasis added)

55. As to 2:

I have noted the explanations provided by you and your representatives, I have viewed the court judgment and a sample of the invoices in question, and I am not content the supplies in question directly relate to your potential taxable supplies.

Although, it has been argued the funds potentially gained as a result of the legal action will be used to develop and recommence your business activities and will give the business certainty, allowing it to move forward, I have not seen any evidence that the legal action has a direct link to taxable supplies.

It has been noted that your taxable activity is management consultancy, despite it being mentioned that Mr K Burgess provided consultancy services to the companies involved

in the legal dispute back in 2013, I am not content it has been shown the outcome of the legal action will directly allow ongoing taxable supplies to take place.

In the review request your representatives state “the legal matter is relevant to the protection of investments made by VIII”.

From the published judgment, the invoices and explanations like this, I am satisfied the main purpose of the legal action is to protect the appellants’ investments and shareholdings. I appreciate you are one of these appellants, however, I am not content protecting investment and shareholdings directly relates to the making of taxable supplies.

It is my view that the legal action relates more to your interest in investments/shareholdings than your management consultancy activity. (emphasis added)

56. Visual remained aggrieved by this and appealed to the Tribunal.

57. Mr Simon Burgess told us that Visual had been incorporated on 18 January 1980 and its business is to invest in start-up businesses and provision of consultancy services and BIG was established to act as a joint venture vehicle for a low-cost broadcasting business. Although there was some confusion as to how much of BIG Visual owned, he confirmed that it was 51%. Visual charged fees to the companies to which it provided consultancy services. In this case we accept such consultancy services had been provided by Visual through Mr Kenneth Burgess to Simplestream Group early on in the relationship although he accepted no paperwork had been produced to support that. The legal claim and litigation meant Mr Kenneth Burgess devoted his time to that. When asked how the litigation related to services Visual proposed to carry out Mr Simon Burgess said it was extensive. He told us the intention was to create value through time and money investment in new technology. The success of Simplestream had a direct relationship to the value of Visual. Mr Simon Burgess confirmed that had the shares been transferred as envisaged the intention was to realise the value and exit accordingly. In other words, we find, what was wanted was to obtain valuable shares and sell on for profit. Mr Simon Burgess told us the ultimate and the real gain to the exchequer was a liquidity event, in other words the exiting from the equity. As he said in cross-examination:

The equity was the critical part.

58. We find the litigation was commenced for the reasons given by the Court of Appeal as set out at paragraph [11] above; taken as they are, from the pleadings settled on the instructions of the Claimants in the case. Mr Simon Burgess told us the litigation consisted of a claim on behalf of Visual, as well as his father Mr Keneth Burgess and a subsidiary of Visual, BIG to enforce an oral agreement made in or around October 2012. Pursuant to the terms of the oral agreement there was an obligation to transfer shares in two valuable trading companies, Simplestream Limited and TVPlayer Limited, to a new holding company Simplestream PLC (‘SSPLC’). BIG was to be allotted 39% of the shares in SSPLC. Mr Simon Burgess confirmed that the intended benefit of the litigation was primarily for Visual because the Claimants were seeking to obtain the transfer of valuable shares into SSPLC, which would have had the effect of making those companies ultimate subsidiaries of Visual. The Claimants had expert evidence at the time the litigation was begun valuing the shares at some £28 million. The instructions given to Withers LLP came from Mr Kenneth Burgess a director of Visual.

59. The litigation was designed to force the transfer of the valuable shares to SSPLC of which BIG was to be a substantial owner. BIG provided no services involving taxable

supplies, albeit it was majority owned by Visual, which was owned by Mr Kenneth Burgess. Mr Simon Burgess told us, and we accept that BIG was simply a vehicle but as far as an actively trading as a company it was very limited. Any ambitions to evolve were cut short by the non-transfer of the shares.

60. At the time the costs were incurred, once the litigation was over, and the shares were obtained, it was the intention of Visual to continue providing taxable supplies via management consultancy.

61. However, for a multiplicity of reasons including the sad death of Mr Kenneth Burgess, the case settled in late 2023 whereby the Claimants would receive £500,000 over 30 months. Visual could not then provide taxable supplies in the shape of management consultancy.

62. Withers LLP were engaged by Simon and Kenneth Burgess in 2018 to advise on a potential action; which action then became a claim with three Claimants.

63. Mr Simon Burgess personally funded the cost of the litigation on behalf of Visual on the understanding he would be paid back out of any award of settlement. He is owed more than the £500,000 settlement monies, but it is for Visual to decide whether to pay him back the monies he provided for funding the litigation. Mr Simon Burgess said that the settlement represented a pragmatic decision due to the decreasing value of the shares

DISCUSSION AND ANALYSIS

64. We have set out the facts at some length. In doing so we can state our conclusions more briefly.

(1) Direct and immediate link

65. Ms Sheldon submitted that the evidence showed there was a direct and immediate link between the legal services provided and their cost to Visual and Visual's taxable supplies of management consultancy. The litigation was launched to protect the business interests of Visual which included management consultancy. Mr Kenneth Burgess had, before the litigation, given such services to Simplestream and the intention was after the litigation such services would continue. Even if management consultancy was a secondary service, it could, and did, have a direct and immediate link to the legal services provided. However, the business model was that equity and income go hand in hand and it is artificial to try to divorce them.

66. Mr Imam submitted that the taxable supplies from management consultancy was simply too remote to the purpose of the litigation which was the protection of Visual's investment. As a result, there was no direct and immediate link, or to use the expression in section 26 VATA, the costs of the litigation were not "attributable" to the taxable supplies. Mr Simon Burgess confirmed that the true purpose of the litigation was to be able to realise the equity value by the obtaining of the shares which had not been transferred. The subjective intention to provide the services in the future was not documented and not relevant to objectively deciding what the purpose of the litigation was.

67. The only relevant taxable supplies that Visual made in the past (and intended to make in the future after the fees were incurred) were the services of management consultancy. The question we must answer is whether Visual have shown on the balance of probabilities, the fees for the litigation have a direct and immediate link to those services.

68. In our judgment the evidence clearly establishes that this is not the case.

69. We follow the approach set out in *Sofology* insofar as the steps are relevant to the facts of this case, applying the definition from *Frank A Smart*. Whether there is a direct and immediate link between a cost and supply "is to be objectively ascertained from the facts and

circumstances of the transactions, not by investigating the subjective intentions of the taxable person”. Such will be so “if the acquired goods and services are part of the cost components of that person's taxable transactions which utilise those goods and services.”

70. Here considering the purpose of Visual’s part in the litigation it is quite clear that this was to force the transfer of the shares to SSPLC of which BIG was a 39% shareholder which the Claimants believed they were entitled to. Objectively, analysed, that purpose, is evidenced by Mr Simon Burgess telling us that this would enable realisation of value by selling the equity. That much is clear from the pleadings in the litigation and the evidence in the case overall.

71. It is crisply summarised by reference to how the services in the invoices from Withers LLP were described:

Shareholder dispute relating to the fraudulent removal of assets from Streaming Investment PLC (formerly known as Simplestream Group PLC)

72. It is also consistent, for example, with Visual’s response to HMRC on 5 February 2021, which we set out at paragraph [35] above and 9 April 2021 (see paragraph [38] above), when considering the purpose of the litigation. As can be seen, the attempt to link the taxable supplies of management consultancy to the costs of the litigation only emerged rather later.

73. In any event, the fact that Visual intended to recommence management consultancy was not a direct and immediate link to the cost in question here. It is not appropriate to consider the subjective intention of Visual, or aim, as to what they intended to do post-litigation, but doing so, in our judgment, would not assist Visual. In our judgment, the intention to provide taxable supplies of management consultancy might at best be a by-product of the litigation launched (if such services were ever made, which in fact we know they were not). Objectively speaking, such potential taxable supplies are not directly and immediately linked to the cost of legal advice. Equally, in those circumstances, any ‘close economic link’ there could be said to would be insufficient to create a direct and immediate link. The litigation was a choice made by Visual and Mr Kenneth Burgess in order to secure a large profit by selling up as soon they could.

74. We accept Ms Sheldon’s submission that a secondary service involving taxable supplies creating a liability to account for output tax can still be in principle directly and immediately linked to a cost of goods or services involving ‘input tax’, but reject it on the facts, as it is not the case here for the reasons we have given. The business model may well have involved both equity and income, but that does not mean that the costs of the litigation had the required direct and immediate link to the taxable supplies as a consideration of Lord Hodges’ definition in *Frank A Smart* shows.

75. Applying that, it cannot be said the legal services supplied to Visual are “part of the cost components of that person's taxable transactions which utilise those goods and services.” In fact, no relevant taxable supplies were being made at the time the costs were incurred.

76. That is sufficient to dispose of this appeal.

(2) Recipient of legal services

77. It is not necessary to address this given our conclusions above. However, in case we are wrong about that, we briefly consider this, albeit in less detail than we otherwise would.

78. Ms Sheldon submits that the benefit of the litigation was only attributable to Visual and that Mr Simon Burgess was paying on behalf of Visual, which explained why the invoices were addressed in the way that they were. The letter of engagement, addressed in the same way, took matters no further. How Visual pays its loans is a matter for it.

79. Mr Imam submits that there was no evidence that Visual solely received the legal services that were provided. The fact that Mr Simon Burgess paid on behalf of Visual is not a determining factor. The letter of engagement took matters no further. The evidence, such as it is, points to BIG being the true recipient of the majority of the legal services as the litigation was to force the shares to be transferred to a company it, not Visual, held a large shareholding in.

80. In our judgment we agree with the position HMRC took during the enquiry and in the independent review. Withers LLP (and their predecessors) provided services to all three Claimants. The fact that Mr Simon Burgess was providing the money to Visual to defray the invoices which may, or may not, be paid back to him does not take the issue any further. Equally, the fact that Visual may have been intended to be the ultimate beneficiary of the litigation does not in itself answer the question about who was provided with the legal services. Certainly, Mr Simon and Mr Kenneth Burgess originally instructed Withers LLP. The first letter of engagement makes that clear. The second letter was of assistance in the sense it confirmed that Withers LLP was “continuing” to provide services to Mr Simon and Mr Kenneth Burgess, Visual and BIG. The invoices are addressed to Mr Simon and Mr Kenneth Burgess “c/o” Visual. However, who was picking up the bill and what the invoice says are factors to take into account but as *Genius* makes clear that an invoice *solely* says of itself will not be sufficient. Equally who originally instructed Withers LLP does not answer the question of who received their services.

81. We find this straightforward. In our judgment, Visual were not the sole recipient of the legal services. There were three Claimants. All three received legal services. Withers LLP are recorded as representing all three Claimants in the High Court and the Court of Appeal. The settlement of £500,000 was to ‘the Claimants’ which included, but was not limited to, Visual.

82. Had it been necessary to decide this we would have found on the material before us, that Visual equally received the services with the other Claimants and so an apportionment of one third deduction against output tax would have been appropriate.

83. However, it is academic considering our conclusions on the issue of whether there is a direct and immediate link.

CONCLUSION

84. For those reasons the appeal against the assessments is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

85. 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.

**NATHANIEL RUDOLF KC
TRIBUNAL JUDGE**

Release date: 19th SEPTEMBER 2024