Appeal reference: MAN/2009/0219

VAT – disbursements – whether fees paid for medical records and medico-legal reports by solicitors acting for clients in personal injury and medical negligence claims disbursements and thus outside scope of VAT or are not disbursements and liable to VAT – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BARRATT, GOFF AND TOMLINSON	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**
-and	
THE LAW SOCIETY	**Intervenor**

Tribunal: **David Demack (Judge)**

Sitting in public in Manchester on 1 and 2 December 2010

Mr. James Henderson of counsel for the Appellant

Mr. James Puzey of counsel for the Respondents

Written submissions were submitted by Mr David Milne QC and Mr Oliver Connolly for the Intervenor

DECISION

1. This is an appeal by Messrs Barratt, Goff and Tomlinson ("Barratts"), a firm of solicitors specialising in personal injury and clinical negligence claims on behalf of claimants, against a decision on review of the Commissioners given on 4 February 2009. The decision upheld an earlier one that fees charged by medical professionals for providing medical records and medico-legal reports for litigation purposes were part of a VAT-inclusive supply of legal services, and were not disbursements for VAT purposes. The original decision letter was followed by assessments totalling £76,894, which are also (with the exception of £1,237) the subject of the appeal.

2. Fees paid for the provision of medical records to a solicitor by a health authority, or another person in possession of them, if a disbursement, are outside the scope of VAT. If such records are provided under the Data Protection Act 1998, as Barratts claim to be the position in the instant case, the fees are in any event outside the scope of VAT. If not a disbursement, the fees form part of a standard rated supply of legal services.

3. The question of whether the expenditure incurred is liable to VAT has diminished in importance since 2007 as a result of an amendment to Item 1(a) of Group 7 of Schedule 9 to the Value Added Tax Act 1994 ("the Act"). That amendment provided that only those services "consisting in the provision of medical care" were to be exempt from VAT. Consequently, the majority of the experts providing reports are now VAT-registered, so that the cost of their reports will be subject to VAT in any event.

4. By way of background to the appeal, I should explain that during a routine control visit on 18 and 19 June 2008 Barratts raised with the visiting officer a query about the VAT treatment of costs it incurred in obtaining general practitioner and hospital records and medical expert reports, saying that it had received conflicting advice from the Association of Personal Injury Lawyers. In answer, the officer explained that the treatment of costs depended on whether they satisfied the conditions for treatment as disbursements included in paragraph 25.1.1. of the Commissioners' Notice 700.

5. In paragraph 25.1.1. the Commissioners set out their practice to determine whether a payment qualifies as a disbursement. There are 8 qualifying requirements, all of which must be satisfied. They are:

i) You acted as agent of your client when you paid the third party;

ii) Your client actually received and used the goods or services provided by the third party (this condition usually prevents the agent's own travelling and subsistence expenses, telephone bills, postage, and other costs being treated as disbursements for VAT purposes);

iii) Your client was responsible for paying the third party (examples include estate duty and stamp duty payable by your client on a contract to be made by the client);

iv) Your client authorised you to make the payment on their behalf;

v) Your client knew that the goods or services you paid for would be provided by a third party;

vi) Your outlay will be separately itemised when you invoice your client;

vii) You recover only the exact amount which you paid to the third party; and

viii) The goods or services, which you paid for, are clearly additional to the supplies which you make to your client on your own account

Of those requirements the Commissioners rely on the first and last for their objection to Barratts treating the payments as disbursements (see Statement of Case para 10.2).

6. After consideration by their policy unit, by letter of 22 August 2008 the Commissioners informed Barratts that, due to the fact that it perused the records and reports as an integral part of the legal services it provided, the conditions contained in para 25.1.1. of Notice were not satisfied, and the costs it incurred could not be treated as disbursements; they were liable to VAT.

7. The decision of 22 August 2008 was subsequently confirmed in the review decision under appeal, following which Barratts lodged its appeal. Its amended grounds of appeal are as follows:

> "Medical reports and medical records are obtained on behalf of the injured party in the course of personal injury litigation. The expenses of these are borne by the injured party and they can therefore be treated as disbursements for VAT purposes. Barratts does not supply the records and reports to the injured party and reimbursement of Barratts by the injured party forms no part of the consideration given by the injured party for the supply of services by Barratts to the injured party and no consideration is given by Barratts for the reports and records."

8. Somewhat unusually in proceedings before the tax tribunal, the solicitors' professional body, The Law Society, sought to intervene in the appeal in order to support Barratts' case. By Direction of 2 February 2010, the tribunal granted The Law Society permission to file written submissions pursuant to rule 5(3)(d) of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009. In accordance with that direction, Mr David Milne QC assisted by Mr Oliver Connolly provided such submissions.

9. Before me, Barratts was represented by Mr. James Henderson, and the Commissioners by Mr. James Puzey, both of counsel. They provided me with an agreed statement of facts and a bundle of copy documents. I also took oral evidence from Mr. David Tomlinson, a former partner in Barratts. From the whole of that evidence, I find the facts which follow my rehearsal of the relevant European and domestic legislation.

10. Dealing first with the European legislation, Article 73 of Council Directive 2006/112/EC provides:

> "...the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party..."

11. This is implemented into UK law in the Act. Section 1(1)(a) of the Act provides that VAT is charged on inter alia "the supply of goods or services in the United Kingdom (including anything treated as such a supply)". Under s 5(2)(a) of the Act, supply "includes all forms of supply, but not anything done otherwise than for consideration".

12. Article 79(c) of the 2006 Council Directive provides that:

> "the taxable amount shall not include the following factors:
>
> ...
>
> (c) amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered into his books in a suspense account.
>
> The taxable person must furnish proof of the actual amount of the expenditure referred to in point (c) of the first paragraph and may not deduct any VAT which may have been charged."

13. If the conditions laid down in Article 79(c) are met, and so are the requirements as to proof in the final sentence of Article 79, the amounts falling within Article 79(c) do not form part of the "supply" of the taxable person to the customer.

14. The previous version of the European legislation referred to above was to be found in Article 11A of the Sixth VAT Directive (EEC/77/388). So far as relevant, that Article provided:

> (1) The taxable amount shall be:
>
> 1. in respect of supplies of goods and services... everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third part for such supplies...
>
> (2) The taxable amount shall include:
>
> (a) taxes, duties, levies and charges, excluding the value added tax itself
>
> (3) The taxable amount shall not include:
>
> ...

2. the amounts received by a taxable person from his purchaser or customer as repayment for expenses paid out in the name and for the account of the latter and which are entered in his books in a suspense account..."

15. The amounts in Article 79(c) of the 2006 Directive are generally referred to as "disbursements". This term appears neither in the 2006 Council Directive nor in the Act. It is, however, used in the Commissioners' published guidance (Notice 700, para 25), and is adopted in this decision as a useful shorthand.

16. I then turn to the facts. At the outset of my decision, I indicated the nature of Barratts' business and its particular area of expertise; I need not repeat them. I should, however, record that Barratts registered for VAT on 1 May 1991.

17. In evidence Mr. Tomlinson explained that all claims for compensation, including those settled prior to the commencement of proceedings, have to be brough under the Civil Procedure Rules ("CPR"). On receipt of instructions from a client, Barratts must go through a two-stage process, the first of which stages is the pre-action protocol. It involves the use of medical records and reports respectively. With regard to medical records, Barratts will invariably obtain a standard letter of authority addressed to the relevant hospital or general practitioner asking for the records to be sent to them.

18. The Law Society's Pre-Action Protocol for the Resolution of Clinical Disputes provides at paragraph 3.7 and 3.8, under the heading "Obtaining the Health Record", as follows:

> "3.7 Any request for records by the patient or their adviser should –
>
> - Provide sufficient information to alert the healthcare provider where an adverse outcome has been serious or had serious consequences;
>
> - Be as specific as possible about the records which are required.
>
> 3.8 Requests for copies of the patient's clinical records should be made using the Law Society and Department of Health approved standard forms, adapted as necessary".

19. The Law Society and Department of Health approved standard forms are headed "Application on behalf of a patient for hospital medical records for use when court proceedings contemplated". In part 1, the form provides full details of the client's identity, address, date of birth, hospital reference (if available) and NI number (if available). Part 2 specifies that "This application is made because the patient is considering (a) a claim against your hospital as detailed in para 7 overleaf (b) pursuing an action against someone else". The completion of the remainder of the form depends in part on whether (a) or (b) is chosen. Part 11 provides a box for the solicitor's signature. At the bottom of the form, there is also a box for the patient's signature (or that of his personal representative where the patient has died). The fee charged for this supply is limited to a maximum of £50.

20. In order to pursue a client's claim for personal injury, it is necessary for Barratts to obtain proper evidence from an expert medical witness. That is a requirement of part 35 of the CPR. It is also a requirement of the CPR that an expert medical witness is nominated for the preparation of a medico-legal report, which is designed to establish the extent of the injuries the client has suffered. Up to three medical experts can be nominated in any particular discipline, but in routine cases only one will be required – typically an orthopaedic surgeon or a general practitioner. In clinical negligence cases, it is generally the case that medical reports are obtained dealing with causation of injury/negligence, and subsequently reports dealing with the extent of the injury. All the experts instructed have an overriding duty to the court, rather than the party instructing them: see CPR 35.3.

21. Once in possession of the medical records, Barratts instructs a medical expert to examine the client and prepare a medical report for the purposes of litigation. (If the claim is a relatively small one, e.g worth up to about £25,000, the parties will appoint a joint expert to produce a report. When asked in whom ownership of such a report vested, Mr Tomlinson was unable to reply). There is a standard "Letter of instruction to medical expert" under the Pre-Action Protocol for Personal Injury Claims for this purpose. The letter identifies the client, and commences "We are acting for the above named in connection with injuries received in an accident which occurred on the above date". It reminds the expert that the report must comply with the CPR, that he must be independent, and that he must address his report to the court. The letter goes on to request an examination of the client, and requests that the medical expert "[please] send our Client an appointment direct for this purpose". The medical records are provided to the medical expert for the purpose.

22. Once the medical report is produced, Barratts considers it in detail to ensure that it deals with all the relevant injuries sustained by the client, in so far as they are of the type within the province of the expert concerned, that it deals with the relevant consequences of the accident and provides sufficient prognosis to enable the parties to proceed to negotiate a settlement, or for the action to move to trial. All the time Barratts expends considering the report is recorded, and is ultimately charged to the client. Not uncommonly in serious injury claims, a report subsequent to that initially obtained is required to obtain a final prognosis. A copy of the medical report is sent to the client for his comments (unless, in very rare cases, the medical expert should consider it inadvisable for the client to read the report).

23. It is standard practice for Barratts to give instructions to a medical expert, rather than for the client to instruct him or her. One reason for this is to ensure that the report covers all matters relevant to the quantification of the client's claim. The invoice for the expert's report is addressed to Barratts, but records the client's name.

24. Although addressed to the court, the medical report is the property of the client. Should he decide to change solicitors or conduct the litigation himself, he is free to utilise the report as he wishes.

25. If the client's claim has been commenced by another firm of solicitors, whose instructions have been withdrawn and the matter transferred to Barratts, it obtains the

client's file from his former solicitors. In such cases it usually adopts the medical evidence previously obtained.

26. Barratts sends the medical records (or a copy thereof) to the defendant's insurers, and they may ultimately become part of the court bundle should the case go to trial. They may be redacted where permitted. Should the case go to trial, expert medical reports may also be included as evidence before the court.

27. When Barratts re-charges the client for the cost of obtaining medical records / reports, the amounts invoiced for the medical records / reports are itemised separately on the bill from the cost of the services supplied by the solicitor himself. It is rarely, if ever, that the client ultimately bears the cost of the medical records and reports.

28. Mr Tomlinson explained that some insurers make offers of settlement immediately on receipt of the pre-action protocol letter where the client has suffered a minor injury. He added that it was his practice to reject such offers until Barratts had received a medical report in case the injury was more severe than was immediately apparent, but admitted that he has completed a few minor personal injury cases without a medical report.

29. Mr Tomlinson identified four methods of funding a personal injury compensation claim. First, there is that of private client funding where the client is responsible for Barratts' fees and disbursements, together with the fees and disbursements of the defendant's insurers should his claim fail. Secondly, there are conditional fee arrangement, commonly referred to as "No win, no fee", under which the majority of personal injury cases are funded. At the time a client enters into such an agreement, Barratts purchases a separate insurance policy from an after-the-event insurer. Such policies do not cover Barratts' fees in the event of the client's claim not succeeding, but do cover all disbursements and expenses incurred in support of the claim, and any liability for the defendant's costs. The premium for such a policy is not paid until a case is concluded, and the full cost of the policy is typically recovered from the defendant. If the claim is unsuccessful, the policy is "self-insuring". Thirdly, in the event that the client has purchased a legal expenses insurance policy before being involved in an accident, and his insurers authorise Barratts to act on his behalf, such policy will fund his costs. Fourth and finally, legal aid may be available. It is no longer available for personal injury claims, but remains so for clinical negligence claims, subject to means testing and the Legal Services Commission being satisfied that the claim has reasonable prospects of success. Whichever method of funding is adopted, Barratts enters into its standard client agreement with the client, adapted to take account of the funding method agreed. Regardless of the method of funding, Barratts' clients always have ultimate responsibility for payment of disbursements.

30. At the conclusion of a successful claim on behalf of the client, Barratts then prepares a schedule of its legal costs, which it submits to the defendant with details of the time spent on the claim, and disbursements.

31. For the purposes of the CPR, "disbursements" covers all experts' reports (whether from medical experts or not), medical records, travelling expenses incurred

in connection with the case, and all court fees. The fees of barristers are listed separately as "counsels' fees".

32. Once a case has been concluded, and all costs have been determined, Barratts renders a formal bill to the client, i.e. a VAT invoice. It separates those disbursements on which VAT has been charged from those on which it has not. It includes no profit element on disbursements paid.

33. In many cases Barratts successfully recovers all its costs from the defendant. As all its work is for individuals, and their claims are of a private nature, none of them is VAT registered for the purposes of the litigation.

34. The courts have in a number of cases considered the correct VAT treatment of expenditure made in contexts similar to the present one. Mr Henderson and Mr Milne submitted that the cases on which they seek to rely, which I consider below, when properly understood, point to the conclusion that the expenditure in point in the appeal does not form part of the whole of the services rendered by Barratts; when it incurs such expenditure, it is acting in the name and on behalf of the client. The expenditure should be treated as disbursements. Mr Puzey maintains that the cases point to the opposite conclusion.

35. The starting point identified by the parties is the case of *Nell Gwynn House Maintenance Fund Trustees v Customs and Excise Commissioners* [1999] STC 79. There trustees who managed a group of apartments and who argued that they did not themselves provide staff services to the tenants, but rather arranged for the staff to provide services to them. When the case came before the House of Lords, Lord Slynn adopted Sir Christopher Slade's reasoning on disbursements in the Court of Appeal. Replacing 'A', 'B' and 'C' as they were used in his judgment with the appropriate persons for Barratts, Sir Christopher Slade said:

> "there is a clear distinction in principle between
>
> > (i) the case when the relevant expenses paid to [an expert] have been incurred by [a solicitor] in the course of making his own supply of services to [the client] and as part of the whole of the services rendered by him to [the client]; and
> >
> > (ii) the case where specific services have been supplied by [an expert] to [the client] (not [the solicitor]) and [the solicitor] has merely acted as [the client's] known and authorised representative in paying [the expert].
> >
> > Only in case (ii) can the amounts of the payments to [the expert] qualify for treatment as disbursements for VAT purposes, and on this account as constituting no part of the consideration for [the solicitor's] own services to [the client]."

36. In *Rowe & Maw (a firm) v Customs and Excise Commissioners* [1975] STC 340, the Divisional Court considered two items of expenditure by a solicitor on his own travel expenses. In the one case the expenditure related to travel to a Crown

Court in connection with the defence of a client; in the other the expenditure was incurred in travelling to Rotterdam in connection with the sale of shares by a client.

37. The Court held that the expenditure concerned did not constitute a disbursement made on behalf of the clients, Wien J, citing the VAT tribunal's view of the nature of the supply made, said:

> "In our view that supply consisted of what we may comprehensively call the legal services rendered by the appellants in connection with the proposed sale, some of which had to be rendered in Rotterdam and could only be so rendered if a member of the firm travelled there for the purpose." (cited at p. 343)

38. Wien J concluded that the nature of the services provided by the solicitor necessarily involved expenditure on travel tickets, which was a cost component of his services, saying that the expenditure was "something which is not strictly a payment that the client has asked for, either expressly or impliedly, but is part of the whole legal services rendered by the solicitor for which there is a consideration" (at p.345). Eveleigh J agreed with Wien J.

39. Bridge J also agreed with Wien J, and identified a class of cases "where the goods or services purchased are supplied to the solicitor, as here in the form of travel tickets, to enable him effectively to perform the service supplied to his client, in this case to travel to the place where the solicitor's service is required to be performed. In such case, in whatever form the solicitor recovers such expenditure from his client, whether as a separately itemised expense or as part of an inclusive overall fee, value added tax is payable because the payment is part of the consideration which the client pays for the service supplied by the solicitor".

40. Thus, the question is whether a payment is part of the consideration for the "service supplied by the solicitor", which involves an analysis of what that service is.

41. In his submissions Mr. Milne, whose line of reasoning is followed by Mr. Henderson, submits that *Rowe & Maw* is very easily distinguishable from the present case. He contends that a personal injury solicitor *uses* medical reports and records as part of the service to his client, a use reflected in the time spent by the solicitor in analysing the reports, which is charged to the client. The act of obtaining the medical records and reports is quite separate, and does not form part of the service provided by the solicitor to his client; it is carried out by Barratts as agent for and on behalf of the client.

42. Mr. Milne maintains that the position can be tested by analysing a situation where a solicitor buys a travel ticket for a client, saying that such expenditure would be a disbursement. Indeed, Bridge J considered that scenario at p.345 of his judgment in *Rowe & Maw*:

> "a solicitor (like any other agent) may purchase goods or services for his client, as for instance when paying stamp duty, court fees or buying, say, a travel ticket to enable the client to travel. The goods or services purchased are supplied to the client, not to the solicitor, who merely acts as an agent to make the payment. Naturally no value added tax is payable (if the goods or services

in question are themselves exempt or zero-rated) because such payments form no part of the consideration for the solicitor's own services to his client."

43. Mr. Milne acknowledges that the situation in *Rowe & Maw* differs from that of Barratts in that in the latter the client permits the solicitor to use the reports and records whereas in the former the client does not use the travel tickets himself. Mr. Milne submits that the fact that the client owns the medical records and reports is a critical factor pointing to the conclusion that the solicitor obtains them for and on behalf of the client: the use by the solicitor of the records and reports subsequent to his obtaining them is irrelevant to the question of whether the act of obtaining and paying for them is an inherent part of the solicitor's service to the client, or one provided as agent, for convenience.

44. In contrast Mr. Puzey maintains that Barratts and the Law Society are seeking artificially to dissect the supply made by a solicitor to his client into a supply of legal services and the separate provision of reports and records. He contends that the obtaining of medical records and reports is fundamental to the discharge of the solicitor's service to his client. The fact that the solicitor charges separately for his time in perusing and advising on such documents does not detract from the point that the solicitor obtains them essentially in order to advance the case as a whole and the legal services which he provides. Mr. Puzey contends that trying to separate the use of the document by the solicitor from the act of obtaining it is to make a distinction without any real substance.

45. Mr. Puzey further submits that the reports and records are just as necessary to a solicitor to put him in a position to provide legal services to his client as the travel tickets in *Rowe & Maw*. The comparison Barratts and The Law Society seek to make - that the supply of documents is to the client with a solicitor buying a rail ticket for a client – is misconceived; the rail ticket is for use by the client directly and exclusively, and forms no part of the provision of legal services by the solicitor. Where records and reports are concerned, the client is not using the documents himself; they are a form of evidence to be used by his chosen representatives in litigation. Whether the solicitor pays directly for the records and reports, in Mr. Puzey's further submission, he has to obtain the documents to provide his own service; to separate the act of obtaining the documents from their use is artificial when the reason the documents are obtained is to allow the solicitor to advance the client's case.

46. The third case cited to me was the tribunal case of *Shuttleworth & Co. v Customs and Excise Commissioners* (1994) Decision No. 12805. It underlines the importance of characterising the nature of the services rendered by a solicitor in determining whether expenditure by him is a disbursement. That case raised the question whether fees for the transfer of moneys by CHAPS paid by a solicitor to his bank as part of his conveyancing services were disbursements. The fees in question were a fixed sum of £25. It was found that the bank provided its services to the solicitor (since the payments were made through his account or accounts), and the bank did not know the identity of the client. The tribunal analysed the conveyancing service in detail, and held that the CHAPS fees were not disbursements, the CHAPS payment was part and parcel of the whole conveyancing service provided by the solicitor; the making of the CHAPS payment, a small part of a number of inter-related

administrative tasks, was inextricably enmeshed with other tasks together constituting the complex conveyancing service.

47. The second tribunal case, cited by Mr Henderson, was that of *David John Curtis* (2007) Decision No 20330. It concerned elements of the conveyancing service supplied by solicitors which might be described as disbursements, in addition to CHAPS payments, search fees and payments made to HM Land Registry for office copy documents supplied. The chairman, Mr Michael Tildesley, in dismissing the appeal, "found unconvincing the appellant's arguments that the disputed items of expenditure were disbursements", adding that "The appellant gave no evidence to support his arguments. He produced no authorities for his submissions that VAT should only be charged on the profit element of the notional fees for land and bankruptcy services". (In that case, the appellant "charged his clients a notional amount of £10 for land searches of any mortgages against the property and bankruptcy services. The notional amount charged did not represent the actual cost of the searches". I take that statement to mean that the appellant added a charge of £10 to each search fee for his trouble in making the search).

48. Whilst acknowledging that the *Shuttleworth* decision (and, I might add, that in *Curtis*) went in favour of the Commissioners, Mr. Milne endorses the approach of the tribunal in those cases, which involved the characterisation of the legal services supplied, and an analysis of how the disputed item of expenditure fitted into that service.

49. Mr. Milne makes two submissions in reliance on the *Shuttleworth* decision. First, he observes that, in comparison with the administrative tasks involved in conveyancing services, the legal services provided by personal injury solicitors in the context of prospective litigation are predominantly advisory and analytical. He further submits that *Shuttleworth* is distinguishable from the present case in that in the former the bank did not know the identity of the solicitor's client, whereas those supplying records and reports in the latter case, do know the identity of the client.

50. Mr. Puzey responds that *Shuttleworth* "followed the trend" where, what were claimed to be disbursements by solicitors, on closer examination were found to be part of the overall supply of legal services to the client.

51. The next case relied on by Mr. Henderson and Mr. Milne is that of *De Danske Bilimporter v Skatteministeriet* [2006] ECR I-4945, a decision of the Court of Justice of the European Communities. In that case, a Danish car dealer was supplying registered vehicles to customers and included in its invoices to those customers an amount corresponding to the vehicle registration duty it paid in order to register those cars. On the facts it was held that the payment of registration duty was necessary if the car was to be registered, and since the purchaser could personally pay the duty, there was no legal obligation on dealers to sell only vehicles which had been registered. The Court held that the expenditure on the registration duty fell under Article 79(c) of the 2006 Council Directive and thus constituted a disbursement inter alia because:

i) the occurrence that triggered liability to duty was its registration in Denmark (para 18 of the judgment);

ii) the supply of the car and the registration were conceptually different (para 23); and

iii) under a contract of sale such as that in issue in the main proceedings, the registered dealer who paid the registration duty before supplying the vehicle did not do so in his own interest but in that of the purchaser who wished to take possession of a new vehicle registered in his name and appropriate for driving legally on public roads in Denmark (para 26)

52. Mr. Milne submits that the reasoning in *De Danske* is broadly analogous to the instant case. First, he maintains that the obtaining of the documents and their use are distinct both in time and conceptually. In *De Danske* the dealers could sell cars without registration, which could be arranged by the customer himself. Similarly, in the instant case the solicitor's client could obtain and pay for the medical documents himself. In both cases Mr. Milne contends that it is administrative convenience which dictates the normal practice on the one hand of the car dealer paying the registration duty and on the other of the solicitor paying for the documents, and both re-charge the client for the sums paid. The solicitor's "whole legal service" is the analysis and use of the medical records and reports, and not the act of obtaining them. Secondly, Mr. Milne submits that the solicitor pays to obtain the medical documents in the interest of the client, not in his own interest. The client needs them to establish the extent and type of his injuries. Mr. Milne maintains that this is a factor counting in favour of an analysis that for VAT purposes the medical records and reports are supplied to the client, who permits the solicitor to make relevant use thereof.

53. Mr. Puzey rejects Mr Milne's submissions as an attempt by Barratts and The Law Society to draw parallels between *De Danske* and the instant case, saying that it simply "does not work". He accepts that it is possible, but unlikely, for the client personally to obtain the medical documents. In any event, the question is whether the car dealer or the solicitor obtains a third party service. Ultimately, in Mr. Puzey's further submission, all steps taken in the course of litigation should be in the client's interest, not the solicitor's. However, the solicitor can act in the client's interest only if he obtains and uses the evidence necessary to establish the case; and, in doing so, the solicitor enables himself the better to provide the service he has agreed to provide.

54. Although the English case law cited to me contains general indicators as to where the line is to be drawn between what constitutes a disbursement, and what does not, in my judgment it leaves a grey area between the two. Into that area falls the European decision in *De Danske*, which appears to me substantially to provide the answer to the question before me.

55. At paras 15 to 21 of her opinion in *De Danske*, with which the Court of Justice appear to have implicitly agreed, Advocate-General Kokott set out her "Preliminary observations concerning the interpretation of Article 11(A) of the Sixth Directive". The parts thereof relevant to my determination of the instant case are the following:

"15. The basic rule of Article 11(A)(1)(a) of the Sixth Directive is that the value of the consideration, that is to say in general the price paid, constitutes the taxable amount in respect of goods and services supplied within the national territory. Paragraphs 2 and 3 set out in more detail which amounts must be included in the taxable amount (paragraph 2) and which must be excluded (paragraph 3). Those provisions must therefore be examined first. Nevertheless the basic rule in paragraph 1 remains of significance when interpreting paragraphs 2 and 3.

16. In accordance with Article 11 (A)(2)(a) of the Sixth Directive taxes and duties in particular must be included within the taxable amount. At first sight that rule is surprising. It leads in fact to the result that a tax or duty is itself subject to VAT even though payment of a tax is in itself not connected with the added value.

17. The provision can be understood if one interprets it in the light of Article 11(A)(1)(a) of the Sixth Directive and applies it only to duties which are so closely connected with the supply of goods that they have become incorporated in the value of that supply. The consideration, which constitutes the general basis for taxation must accordingly relate to the supply of goods inclusive of the taxes or duties which contribute to its value. It is indeed evident from case law, in particular, that only such consideration as is directly linked to the supply constitutes the taxable amount.

18. The decisive test for including a duty in the value of goods supplied is whether the supplier paid the duty *in his own name and on his own account*. If this is the case the consideration relevant for determining the taxable amount includes the corresponding amount of duty...

19. On the other hand, duties are not included in the taxable amount if they are entered 'in a suspense account' in accordance with Article 11(A)(3)(c) of the Sixth Directive. The broad wording of the provision thereby includes all types of 'amounts', thus also duties. If the person liable to pay VAT pays a duty *in the name and for the account of his customer* and if the corresponding amount is entered in the books of the taxable person in a suspense account, the duty does not in fact constitute an element of the services supplied by that person. On repaying the duty paid out in advance, the customer is not, therefore, rewarding the taxable person for a service provided. In those circumstances it is instead the customer himself who actually pays the duty; the taxable person is merely an intermediary used to facilitate payment."

56. I should make a number of points on the Advocate-General's opinion. First, in stating the decisive test for including amounts in the value of the supplies concerned, she determined that the consideration relevant for determining the taxable amount is whether the person making the supply in *De Danske* of the vehicle paid the duty, i.e. the amount concerned, "in his own name and on his own account". Since that person is the one making the payment, almost certainly from his own bank account, clearly the account on which payment is drawn plays no part in determining the meaning of the phrase "in his own name". In my judgment, the fact that the invoice raised by

whoever makes supplies to Barratts records on it the name of Barratts' client (a fact I infer from the whole of the evidence) is sufficient to satisfy the 'in his own name' requirement. As to the additional 'on his own account' requirement, again in my judgment, it is satisfied if the service is provided by Barratts as agents for and on behalf of the client, as I find it to be.

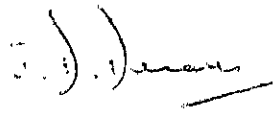
57. The further requirement for an amount paid to qualify as a disbursement identified by the Advocate-General is that the amount paid is entered into 'a suspense account'. Such an account is defined as one which items are temporarily entered until their proper place is determined. I am in no doubt that Barratts' office account, i.e. the account containing the firm's own money as opposed to that of its clients, out of which, on the basis of Mr Tomlinson's evidence, I infer all relevant payments are made, qualifies as 'a suspense account'.

56. It will be recalled that Mr Milne made a number of submissions on the *De Danske* case. I need not repeat them. Suffice it say that I accept them without reservation, and in so doing reject the related submissions of Mr Puzey.

57. Having considered all the arguments presented to me, I have concluded that the case presented by Mr. Milne, as supported by Mr. Henderson, is to be preferred to that offered by Mr. Puzey. In reaching that conclusion I have taken account of all the submissions of both parties and borne in mind that I am bound by the decisions in *Nell Gwynn House* and *Rowe & Maw*. I allow the appeal.

58. This being a case covered by the Transfer of Tribunal Functions etc. Order 2009 (2009/56), Mr Henderson made application for Barratts' costs in the event of the appeal succeeding. I grant his application, and direct the Commissioners to pay Barratts' costs, calculated on the standard basis if the costs cannot be agreed, I direct that they be assessed by a costs judge of the High Court.

59. 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.



DAVID DEMACK
TRIBUNAL JUDGE

Release Date:

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