TC02006

Appeal number: TC/2010/8155

VAT— (a) whether assessment in time – s 73 VAT Act 1994 – YES – (b) place of supply of services – nature of accounting services– para 3 sch 5 VAT Act 1994 – whether VATable – NO – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MATRIX SECURITIES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE PETER KEMPSTER
MRS SHEILA CHEESMAN

Sitting in public at Bedford Square, London on 16 December 2011

Mr John Voyez (Smith & Williamson Limited) for the Appellant

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

DECISION

1. On 31 August 2010 the Respondents ("HMRC") raised a VAT assessment ("the First Assessment") against the Appellant ("the Taxpayer") for the VAT periods 08/06 to 08/07 in respect of supplies made by the Taxpayer to a company based in the Republic of Ireland, Trinergy Limited ("Trinergy"). The First Assessment was subsequently adjusted on 24 September 2010. Also on 24 September 2010 HMRC issued a second VAT assessment for the VAT periods 02/07 to 05/08, again in respect of supplies to Trinergy. Taking together the two assessments as adjusted, the final amount in dispute is £51,411.00.

2. The Taxpayer appeals against the VAT assessments on two grounds. First, in respect of both assessments, that its supplies to Trinergy fell within para 3 sch 5 VAT Act 1994 ("VATA") and, the recipient being based in Ireland, those supplies were outside the scope of UK VAT. Second, in respect of only the First Assessment, that it was made out of time.

Relevant Law

3. The VAT provisions are stated as in force at the date of the relevant events.

Relevant law relating to nature of supplies

4. Section 1 VATA provides, so far as relevant:

> **"1 Value added tax**
>
> (1) Value added tax shall be charged, in accordance with the provisions of this Act—
>
> (*a*) on the supply of goods or services in the United Kingdom (including anything treated as such a supply), …
>
> (2) VAT on any supply of goods or services is a liability of the person making the supply and (subject to provisions about accounting and payment) becomes due at the time of supply."

5. Section 7 VATA provides, so far as relevant:

> "**7 Place of supply**
>
> (1) This section shall apply … for determining, for the purposes of this Act, whether goods or services are supplied in the United Kingdom.
>
> …
>
> (10) A supply of services shall be treated as made—
>
> (*a*) in the United Kingdom if the supplier belongs in the United Kingdom; and

(*b*) in another country (and not in the United Kingdom) if the supplier belongs in that other country.

(11) The Treasury may by order provide, in relation to goods or services generally or to particular goods or services specified in the order, for varying the rules for determining where a supply of goods or services is made."

6. Article 16 of the VAT (Place of Supply of Services) Order 1992 (SI 1992/3121) ("the 1992 Order") provides, so far as relevant:

"Where a supply consists of any services of a description specified in any of paragraphs 1 to 8 of Schedule 5 to the Act, and the recipient of that supply—…

(*b*) is a person who belongs in a member State, but in a country other than that in which the supplier belongs, and who—

(i) receives the supply for the purpose of a business carried on by him; and

(ii) is not treated as having himself supplied the services by virtue of section 8 of the Act,

it shall be treated as made where the recipient belongs."

7. Section 9 VATA provides, so far as relevant:

"9 Place where supplier or recipient of services belongs

(1) Subsection (2) below shall apply for determining, in relation to any supply of services, whether the supplier belongs in one country or another and subsections (3) and (4) below shall apply … for determining, in relation to any supply of services, whether the recipient belongs in one country or another.

(2) The supplier of services shall be treated as belonging in a country if—

(*a*) he has there a business establishment or some other fixed establishment and no such establishment elsewhere; or

(*b*) he has no such establishment (there or elsewhere) but his usual place of residence is there; or

I he has such establishments both in that country and elsewhere and the establishment of his which is most directly concerned with the supply is there.

…

(4) … the person to whom the supply is made shall be treated as belonging in a country if—

(*a*) either of the conditions mentioned in paragraphs (*a*) and (*b*) of subsection (2) above is satisfied; or

> (*b*) he has such establishments as are mentioned in subsection (2) above both in that country and elsewhere and the establishment of his at which, or for the purposes of which, the services are most directly used or to be used is in that country.
>
> (5) For the purposes of this section (but not for any other purposes)—
>
> (*a*) a person carrying on a business through a branch or agency in any country shall be treated as having a business establishment there; and
>
> (*b*) "usual place of residence", in relation to a body corporate, means the place where it is legally constituted."

8. It is common ground that the Taxpayer belongs in the UK, and that Trinergy belongs in Ireland (and not in the UK). Thus, if the services supplied to Trinergy by the Taxpayer fall within paras 1 to 8 sch 5 VATA then the supply is treated as being made outside the UK, and so does not attract UK VAT. Otherwise, the supply takes place in the UK and is VATable.

9. The services stated in para 3 sch 5 VATA are:

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

10. The provisions of para 3 sch 5 VATA are derived from art 9(2)(e) of the Sixth Directive (77/388/EC) and art 56(1) of the Principal VAT Directive (2006/112/EC).

11. In *Von Hoffman v Finanzamt Trier* [1997] STC 1321 the ECJ stated (at ¶ 15):

> "… it must first be noted that art 9(2)(e), third indent, of the Sixth Directive does not refer to professions, such as those of lawyers, consultants, accountants or engineers, but to services. The Community legislature has used the professions mentioned in that provision as a means of defining the categories of services to which it refers."

12. In *American Express Services Europe Limited v RCC* [2010] STC 1023 Proudman J (at ¶¶ 74-75) quoted the above passage in *Von Hoffman* and stated:

> "It is the services which are relevant, not the label applied to the professionals. Thus the indent does not apply to all services which are performed by a person who happens to be a lawyer or accountant.
>
> The right approach (see *von Hoffmann*, paras 16 and 20–21) is to ask whether the services under consideration, "… fall within the category of those principally and habitually carried out as part of the professions listed …""

Relevant law relating to deadline for assessment

13. Section 73 VATA provides, so far as relevant:

> "(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.
>
> ….
>
> (6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—
>
> (*a*) 2 years after the end of the prescribed accounting period; or
>
> (*b*) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,
>
> but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment."

14. In *Cumbrae Properties (1963) Ltd v Customs and Excise Commissioners* [1981] STC 799 the High Court referred to the decision of the House of Lords in *Customs and Excise Commissioners v J H Corbitt* (*Numismatists*) *Ltd* [1980] STC 231, and held (at 805) that:

> " … the tribunal cannot substitute its own view of what facts justify the making of an assessment but can only decide when the last of those facts was communicated or came to the knowledge of the officer.
>
> … the court can only interfere if there is sufficient material to show that the officer's failure to make an earlier assessment was perverse …"

15. In *Spillane v Customs and Excise Commissioners* [1990] STC 212 Simon Brown J stated (at 216):

> "The reference … to evidence of facts coming to the commissioners' 'knowledge', in my judgment, means what it says; the word does not encompass constructive knowledge …"

Evidence

16. For the Taxpayer Mr Randhir Singh FCCA, Group Financial Controller, adopted and confirmed a witness statement dated 9 June 2011 and gave oral evidence. For HMRC Mr Mark Reilly, HMRC Officer, adopted and confirmed a witness statement dated 4 July 2011 and gave oral evidence; and Mr Andrew Veitch, HMRC Officer, adopted and confirmed a witness statement dated 4 July 2011 and gave oral evidence.

17. To avoid confusion we below refer to the witness Mr Randhir Singh as "Mr Singh", and to Mr Sarabjit Singh of counsel as "HMRC Counsel".

18. The Taxpayer is part of a financial services group and operates as a service company for the group, providing management, administration, accounting and compliance services. Mr Singh described the key functions of his central finance team as preparation and management of financial statements, tax returns, FSA regulatory returns, management information, cashflows and budgets, and oversight of statutory audits. Trinergy is an Irish company whose principal business is the sourcing and operation of windfarms across Europe, which are marketed to investors as investment opportunities. The Taxpayer and Trinergy are not connected and are at arms' length. In July 2004 Trinergy had some 20 energy projects in progress and required accounting and professional support beyond its own resources. Mr Singh explained that this was a function often performed by the Taxpayer for other companies in the Matrix group and third parties. The Taxpayer billed Trinergy monthly at £6,250 plus recharge of internal costs. A computer-generated analysis of those costs was prepared but not submitted to Trinergy, who received only the invoice. There was no formal written contract. No VAT was charged as Mr Singh understood that to be the correct treatment. The arrangements ceased in February 2008 when Trinergy's ownership changed.

19. The monthly invoices stated simply "Provision of accounting and professional services". Mr Singh's description of the services provided to Trinergy in the relevant period was:

- "organised banking facilities via Barclays Bank PLC (2005 through to 2006)
- liaised with various professional advisors throughout this period prepared, cashflows, fund statements, reconciliations (2004 through to 2007)
- reviewed and considered operational reports prior to circulation (2004 through to 2007)
- prepared cash reconciliations for Trinergy Limited funds (2004 through to 2007)
- Prepared quarterly management information throughout the period
- Liaised with Trinergy Limited auditors annually in respect of intercompany transactions and balances."

20. Mr Singh's evidence was that he considered these services to be of a professional accounting nature.

21. Mr Singh's explanation of the calculation of the invoices was that the Taxpayer's accounting system allocated to Trinergy's account a percentage of the Taxpayer's operating overhead costs – the "central recharge" items identified on the supporting schedules – relating to rent, rates, electricity, staff costs, office cleaning and so on. Additionally, specific costs incurred by the Taxpayer in performing the services to Trinergy were added to the invoices (and also identified on the supporting schedules). Examining some of these latter costs:

(1) Trinergy owned a portfolio of windfarms around Europe and travel costs of staff attending those sites, as well as business trips to meet Trinergy in Ireland, were charged. This included the use of a private aircraft operated by the Taxpayer's group, when that transport was considered appropriate.

(2) The Taxpayer sub-contracted some of the specialist accounting work to a company called Atlantic Consulting. This was a "one-man company" whose proprietor was a qualified accountant whom Mr Singh had worked with and found valuable.

(3) Some mobile phone contracts were used exclusively for Trinergy assignments, and so could be directly identified as costs for Trinergy.

(4) Costs of client entertaining (including food and wine) were recharged to Trinergy.

(5) Costs of couriers were recharged as appropriate.

(6) Bank charges, arrangement fees etc were recharged.

22. After the termination of the arrangements it was necessary to issue a credit note to Trinergy to reverse several months' invoices which had continued to be issued, because the Taxpayer's accounting system produced the central recharge amount each month automatically. The credit note adjustment had been correctly taken into account by HMRC when making the assessments. Apart from that correction, Trinergy had never challenged the amounts invoiced.

23. HMRC commenced an enquiry into the tax affairs of the Taxpayer in January 2008. Most issues were resolved satisfactorily but the dispute concerning VAT on charges to Trinergy comes before this Tribunal, and it is necessary to give a partial chronology of that dispute.

(a) In March 2009 Mr Veitch queried why no VAT had been charged to Trinergy.

(b) In May 2009 the Taxpayer's advisers explained that the services were outside the scope of UK VAT.

(c) The parties met in May 2009 and the advisers followed with a letter in July addressing a number of matters raised at the meeting, including a statement that, "The accounting/promotional/distributional services provided to Trinergy are deemed to be provided in Ireland and therefore outside the scope of UK VAT (VATA 1994 schedule 5 item 3)."

(d) In August 2009 Mr Veitch stated that he was taking specialist advice on the VAT issues, and in November stated that further information would be required. In November 2009 the advisers asked what further information was required, as they considered they had already given comprehensive replies.

(e) On 7 December 2009 Mr Veitch stated that "the detailed analysis of charges describes a number of services that … are not schedule 5 services." He listed over two dozen services that he considered not covered by schedule 5, and asked for a calculation to be performed; he estimated that 85% of the invoices should be VATable.

(f) On 21 December 2009 the advisers replied:

> "The principal objective of any agreement such as this is for the purchaser to acquire an accounting and professional service, and for the seller to provide that service – this is the main objective for both parties. However, any commercial agreement for the provision of such services will inevitably break down exactly what activities are involved in order for the supplier to provide that accounting and professional service, and it is common practice to the list those activities which are often found in the Service Levels appendix to an agreement. There is however no suggestion that the purchaser is buying and being charged for the individual services identified on a "line by line" basis. Quite simply, Trinergy is buying a single supply of accounting and professional services, rather than a multiple supply of the individual services you have identified.
>
> The items shown in the summary you have provided simply identify the inhouse activities and associated costs which our client has incurred in order to provide a single supply of accounting services to Trinergy for a single fee. Trinergy does not receive an itemised breakdown of the component parts and costs incurred, and there is no suggestion that the items identified are charged separately on a line by line basis.
>
> With reference to the insurance figure, in the same way as the individual items you have highlighted make up a single supply of accountancy services, so the insurance also forms a component part of the single supply. As you note in your letter, there is no recharge of insurance per se, and it forms a component part of the main supply of accountancy services to Trinergy.
>
> With respect, I would suggest you speak to your VAT colleague to confirm the concept of single versus multiple supplies with which he will be very familiar if you continue to have difficulty with this.
>
> We consider the provision of this single service is covered by Schedule 5 paragraph 3."

(g) On 7 May 2010 Mr Veitch wrote as follows (the reference to zero-rated supplies should be to supplies outside the scope of VAT):

> "In respect of the services of Accountancy and Professional Services provided to Trinergy Ltd we will have considered the matter further in accordance with our discussion. Whilst we can agree the majority of the costs could be included within the zero rated supply we cannot at this time, without further information, agree that bank charges can be similarly zero rated."

(h) On 7 June 2010 the advisers replied in detail on the point concerning bank charges, and on 20 July 2010 wrote an extensive letter concerning the nature of the supply to Trinergy which included the following:

> "You go on to say that the main supply is not clear, and yet invoices were issued by [the Taxpayer] to Trinergy for "accounting and professional services", and we would remind you again that the invoices were issued without the back up schedule which breaks down the value of the invoice. It was quite clear to Trinergy that they were buying and paying for accounting and professional services. Again we would emphasise that Trinergy is in a third party relationship with [the Taxpayer].
>
> For the avoidance of any further doubt, [the Taxpayer] and Trinergy were jointly involved in a number of projects. [the Taxpayer] already had a systems infrastructure in place and was therefore well placed to provide an accounting and related service function to Trinergy which could not itself support these services in Ireland. It was a practical business decision for Trinergy to use [the Taxpayer] to provide these services. "These services" consisted of the preparation of statutory accounts and review of audit and financial statements, to include liaising with auditors and providing documentation, liaising with professional advisers, circulating papers, considering and providing tax and VAT advice, producing tax returns, arranging banking credit facilities, and general administrative support throughout. These services quite clearly fall within what was VATA 1994 Schedule 5 Item 3, being services of consultancy, accounting and similar services, and provision of information.
>
> ...
>
> It is abundantly clear from the descriptions given on the schedules that the costs identified were not separate supplies made by [the Taxpayer] to Trinergy, but costs incurred by [the Taxpayer] in order to provide its single supply of accounting and professional services to Trinergy.
>
> *Summary*
>
> As noted above, it is clearly nonsensical to suggest that Trinergy, an unconnected third party, would buy from [the Taxpayer] as separate supplies the kind of services identified on the schedules.
>
> Your approach in this matter is clearly contrary to HMRC published guidance.
>
> There is no basis for analysing the services in the way you have suggested given case law and HMRC's own pronouncements on the

issue of single versus multiple supplies. In this case the supplies are not economically dissassociable.

Trinergy received only an invoice from [the Taxpayer] and not the supporting schedules. It is what Trinergy considered they were buying that is important. Did they think they were buying multiple services from [the Taxpayer] of a courier service, a travel service, a car parking service, professional indemnity service for themselves, an equipment maintenance service, a property service etc etc, or did they think they were buying a single accountancy and professional service as per the invoices they received and agreed to pay on? We believe that any court would have little trouble concluding that there was a single supply of Schedule 5 services."

(i) On 11 August 2010 the Taxpayer wrote to HMRC to give its own explanation of the charges made to Trinergy:

"As advised, [the Taxpayer] provided a single accounting and professional service, to Trinergy, the constituent parts of which included the provision of;

- Preparation of Statutory Financial Statements and tax returns
- Oversight of the audit of the Financial Statements. (liaising with auditors and providing relevant documentation)
- Sourcing and liaising with Professional Advisors together with all meetings
- Assisting will the circulation of legal documentation. E.g. notarisation
- Considering Tax & VAT advice on behalf of Trinergy
- Arranging Banking Facilities.

As [the Taxpayer] and Trinergy were involved in various projects and Trinergy did not have the infrastructure, contacts or expertise in Ireland to carry out these services it was commercially easier for Trinergy to use [the Taxpayer] to provide these services."

(j) HMRC then issued the assessments described in ¶ 1 above.

24. Mr Reilly explained that as part of HMRC's enquiry he felt it was necessary to go beyond the description given on the face of the invoices and check what really was the nature of the services supplied to Trinergy by the Taxpayer. HMRC's analysis of the costs schedules revealed that only 4% was specifically identified as accounting costs; that did not tally with the description on the invoice or the explanation given by the Taxpayer and its advisers. Certain item descriptions – for example, the use of a private plane – suggested that the services went further than accounting support. Preparation of spreadsheets could be an administrative function (rather than one falling within para3 sch 5) and even generation of management accounts could be

little more than pushing a button for automatic production by a computer system. It had been necessary to require further information from the Taxpayer to understand exactly what services were being supplied. The advisers' letter dated 21 December 2009 proposed that there was a single supply of professional services rather than a multiple supply of individual services and, in Mr Reilly's view, that was a marked difference of view and was information key to the nature of the single supply and its VAT treatment.

25. Mr Veitch explained that HMRC's enquiry covered a number of aspects for a number of group companies, involving substantial provision of information and supplemental questions. Although the enquiry commenced in January 2008, the initial concentration was on direct tax matters and the VAT issues now before the Tribunal were not raised until March 2009. Mr Veitch was not a VAT specialist but he had access to his colleague Mr Reilly. HMRC's questions and requests for information were directed at establishing exactly what services had been supplied to Trinergy, as there was concern that these went beyond the description on the invoice. The adviser's letter in December 2009 was the first confirmation of a single supply of services.

Submissions

26. For HMRC, HMRC counsel submitted:

(1) The relevant test (from *Von Hoffman* and *American Express*) was whether the services were of the sort that would be supplied by a professional accountant – HMRC accepted that it was not necessary for the provider himself to be a professional accountant.

(2) Detailed consideration of the supporting schedules revealed clearly that the items identified as "accounting" represented only a minor contribution to the invoice totals. Most of what the Taxpayer was doing was providing an administrative service and charging for (for example) courier costs, office rent and rates, bank fees, and so on.

(3) The evidence on the costs items described as fees from Atlantic Consulting was inconclusive. There was limited evidence of what the consultant did; this barely featured in Mr Singh's witness statement or the correspondence from the advisers.

(4) Given the Taxpayer's contention of the services performed, there should be reams of documentation available to support the accounting services allegedly supplied over many months at significant cost. Instead, only a few pieces of paper had been put forward – and then only in the weeks preceding the hearing. The Tribunal might consider that even these were not professional accounting services but instead the sort of information that could be produced by any administrator.

(5) The fact that the invoices continued to be produced even after the contract terminated showed that the description on the invoices could not be relied upon. The costs breakdown revealed that the description was in fact wrong; most of

the breakdown was not for accounting items and some charges had no clear relationship to supplies of accounting services – eg wine purchases. Even the advisers' own description of the services provided was akin to back-office services. If there was any professional accounting service then it was merely incidental to the principal supply of administrative type services.

(6) On the timing of the First Assessment, the relevant test was when evidence of facts, sufficient in the opinion of HMRC to justify the making of the assessment, came to their knowledge, and (from *Cumbrae Properties*) whether the failure to assess earlier was perverse. Correspondence from the advisers in July 2009 had referred to "accounting/promotional/distributional services". That suggested multiple supplies of various services and HMRC had scrutinised the information made available and challenged (in December 2009) whether many of those services fell with sch 5. It was only in the advisers' letter dated 21 December 2009 that the suggestion of a single composite supply was first raised. Only on receipt of that letter (on 24 December) could HMRC be said to have evidence sufficient to justify the making of the assessment. Subsequent correspondence satisfied HMRC that the true nature of the single supply was of administrative services, not para 3 sch 5 services. Therefore the First Assessment was made within the one year window permitted by s 73(6)(b).

27. For the Taxpayer, Mr Voyez contended:

(1) The parties were now agreed that there was a single supply of services. The Taxpayer agreed with HMRC's statement of the test on para 3 sch 5 – it was the nature of the services supplied, rather than the qualification of the adviser, that was relevant. The Taxpayer exercised considerable expertise and professional knowledge in delivering the services to Trinergy. The evidence before the Tribunal, and already provided to HMRC, was clear that the work performed by the Taxpayer was not mere administrative services. The argument that the relevant financial statements could be produced at the press of a button was false – no such system existed.

(2) The Taxpayer was obliged to incur costs in order to be able to perform the accounting and professional services to Trinergy, in the same way as any other business incurs both direct and indirect overhead costs in order to make supplies. Those costs were incurred in order to make a single supply of sch 5 services.

(3) The crediting of the later invoices had been explained and did not affect the principle in dispute. Such invoices would have been appropriate if the contract had continued.

(4) The First Assessment was out of time. It was made on 31 August 2010 when the relevant information had been supplied in May 2008 – the assessments were actually based on the numbers supplied in May 2008. HMRC had all the information to justify the assessment by, at the very latest, 14 July 2009 when the advisers wrote following the May 2009 meeting with HMRC.

Findings of Fact

28. We accept the evidence of Mr Singh concerning the arrangements between the Taxpayer and Trinergy. Trinergy contracted with the Taxpayer on an arms' length basis for the provision of certain services, as detailed in the letter from the Taxpayer to HMRC dated 11 August 2010 (¶ 23(i) above) and in Mr Singh's witness statement (¶ 19 above). The charge made was calculated on a "cost plus" basis. The Taxpayer's computerised accounting system allocated relevant costs to Trinergy's account and monthly invoices were raised. Some items were identified on an actual disbursement basis, and others represented a "central recharge" percentage of overhead. Details of the calculation of the charge were available – these were the schedules later provided to HMRC – but were not sent to Trinergy, who never requested details. The Taxpayer's computerised accounting system continued churning out these invoices even after the arrangements ceased, and they had to be reversed later (in April 2008) when the error was spotted.

29. HMRC were justified in enquiring into the composition of the services supplied by the Taxpayer to Trinergy. In particular, scrutiny of the costs schedules provided by the Taxpayer revealed items such as "wine order", "use of plane" (over £48,000 in one year) and "mobile phones". That caused HMRC to question, exactly what was the nature of the services being supplied to Trinergy? However, Mr Singh gave the Tribunal a full explanation why these costs were incurred by the Taxpayer, and why they were legitimately part of the calculation of the charges to Trinergy. We find that the Taxpayer's method of accounting for the costs incurred was reasonable and performed in a business-like manner.

30. We consider that HMRC's justifiable scrutiny of the costs incurred by the Taxpayer did however cause them to lose sight of the function and meaning of the backup schedules. Those schedules did not purport to document what was being supplied by the Taxpayer; rather, they documented what costs were incurred by the Taxpayer in order to put it in a position to deliver its services to Trinergy. The Taxpayer did exactly the same as any professional accounting firm – it charged a fee designed to cover its operating costs, plus disbursements, plus a profit element. The method employed by the Taxpayer in calculating the monthly invoice totals was reasonable and achieved that end.

Consideration and conclusions

Was the First Assessment out of time?

31. We deal first with the argument by the Taxpayer that the First Assessment is out of time under s 73(6) VATA. We need to identify the point in time when "evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge." We also bear in mind the explanations of those words given by the High Court in *Cumbrae Properties* and *Spillane.*

32. Having considered carefully the chronology and correspondence in this dispute (partly summarised at ¶ 23 above), our conclusion is that the seminal piece of information provided to HMRC was the advisers' letter dated 21 December 2009.

Until receipt of that item HMRC did not have sufficient knowledge of the argument that there was a single composite supply of para 3 sch 5 services (rather than multiple supplies of various services) to justify the making of an assessment. As illustrated by Mr Veitch's letter dated 7 December 2009, HMRC were at that time proceeding on the basis of "a number of supplies".

33. The First Assessment was issued on 31 August 2010 and, therefore, was made within the time limit set by s 73(6)(b) VATA.

Were the supplies to Trinergy VATable?

34. We turn to the argument by the Taxpayer that the services supplied to Trinergy were within para 3 sch 5 VATA. We bear in mind the explanations of the ECJ in *Von Hoffman* and the High Court in *American Express*, that the test is whether the services are those normally performed by the professions listed (eg accountants); it is not necessary for the provider of the services to be such a professional. We accept the agreed position of the parties that the Taxpayer made a single supply of services.

35. We accept Mr Singh's evidence as to the nature of the work performed by the Taxpayer for Trinergy. Examples of the work product delivered by the Taxpayer to Trinergy were available to the Tribunal. These were clearly sophisticated accounting analyses and cashflow forecasts for large-scale projects. Also available to us was an example of an agenda for a meeting between the Taxpayer and Trinergy (in April 2006) which illustrated the business items to be discussed; these included cash flows, timing of audits, loans and arrangement fees, book-keeping information from Italy, future deals, fees, finance charges, and information flows. We do not accept HMRC Counsel's submission that the services supplied to Trinergy were administrative in nature, so as to fall outside para 3 sch 5.

36. We conclude that the services supplied to Trinergy by the Taxpayer did constitute services within para 3 sch 5 VATA: "Services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services; data processing and provision of information …". Accordingly, the services are deemed to be made outside the UK: art 16 of the 1992 order and s 9 VATA. Thus no VAT is chargeable on the supply of those services: s 1 VATA.

Decision

37. For the reasons set out in ¶ 36 above, the appeal is ALLOWED.

38. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 25 April 2012