TC02358

Appeal number: TC/2010/08094

VAT – INPUT TAX – Fleming claim for unclaimed input tax incurred on investment management fees between 1973 and 1990 – whether evidence that appellant paid investment management fees throughout period of claim sufficient? – held yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GUIDE DOGS FOR THE BLIND ASSOCIATION **Appellant**

- and -

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

TRIBUNAL: JUDGE GREG SINFIELD
HARVEY ADAMS

Sitting in public in London on 28 August 2012

Mr Thomas Mobee, of Saffery Champness, for the Appellant

Mr Colin Strudwick, officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Guide Dogs for the Blind Association ("GDBA") claims an amount of £4,879.19 VAT from Respondents ("HMRC"). GDBA claims that it had incurred that amount of VAT on investment management services during the period 1 April 1973 to 31 March 1990. It was not disputed that, if GDBA had incurred such an amount of VAT then it was entitled to recover a proportion, also agreed, of the VAT but had not done so at the time. The only question in this appeal is: did GDBA pay investment management fees throughout the period 1973 to 1990?

Background

2. GDBA is a charity. GBDA instructs third party investment managers to provide services in relation to the management of its investments. Until some time in 2005, GBDA treated the input VAT incurred on investment managers' fees as irrecoverable.

3. Following the High Court's decision in *The Church of England Children's Society v HMRC* [2005] EWHC 1692 (Ch), [2005] STC 1644, HMRC issued Business Brief 19/05 on 7 October 2005. The Business Brief confirmed that VAT incurred by a charity on raising funds to support both the charitable and the business activities of the charity should be treated as overhead costs of the charity as a whole and recoverable to the extent they are attributable to taxable supplies.

4. In January 2008, the House of Lords in *HMRC v Michael Fleming (t/a Bodycraft* [2008] UKHL 2, [2008] STC 324 held that the three-year cap on claims for repayment of under-claimed input tax must be disapplied until an adequate transitional period had been applied. Following the *Fleming* case, GDBA made a claim on 25 March 2009 for a proportion of the input VAT incurred on investment management fees which had been treated as irrecoverable in the period 1April 1973 to 31 March 1997.

5. In a letter dated 26 July 2010, HMRC approved GDBA's claim for the period 1 April 1990 to 30 March 1997 but rejected the claim for the period 1 April 1973 to 31 March 1990. HMRC refused the claim on the grounds that GDBA had failed to establish that:

> (1) it had paid investment management fees throughout the period of the claim;
>
> (2) it made taxable supplies throughout that period; and
>
> (3) a proportion of the input tax incurred on investment management fees was attributable to taxable supplies by GBDA.

6. GDBA appealed and a hearing took place on 28 August 2012. In paragraph 5 of their skeleton argument for the hearing, HMRC accepted that, in principle, the investment management fees can be treated retrospectively as taxable supplies and input tax reclaimed subject to the normal rules. At the hearing, HMRC (properly in

our view) made certain admissions in the light of the evidence of Mrs Samantha Aarvold of GDBA. Those admissions suggested to us that agreement might be reached between HMRC and GDBA or, at least, the scope of the dispute could be narrowed by further discussion between the parties. Accordingly, we adjourned the hearing of the appeal.

7. On the day after the hearing, we issued Directions that GDBA should serve further submissions, together with any supporting evidence, on HMRC. The further material concerned the basis of calculation of the amounts of VAT incurred on the investment managers' services and GDBA's rate of recovery of VAT relating to overheads during the period 1 April 1973 to 31 March 1990. We also directed that HMRC should provide their comments, together with any supporting evidence, in reply to GBDA. Finally, we directed both parties to notify the Tribunal if they had reached agreement and whether they required a further hearing of the appeal.

8. In a letter dated 12 September 2012, GDBA's advisers set out the details of the calculation of the claim. The calculation was split into two parts. The first part showed the "base period" on which all the ratios used to calculate the pre-1997 claim were based. The base period data was taken from actual figures, either extracted from GDBA's Financial Statements for 1 April 2004 to 30 June 2007 or from figures used to claim VAT on investment managers' fees for the same period which had since been agreed and paid by HMRC. The second part of the calculation showed how the ratios had been applied to the period 1973 to 1990 and the final amount of the claim. Applying the methodology in the letter of 12 September produced a claim for £4,879.19.

9. In a letter dated 26 September 2012, HMRC stated that they accepted the methodology used by GDBA which was the same methodology as had been used in claims for later periods that HMRC had previously accepted and paid. HMRC stated that they also accepted Mrs Aarvold's evidence that taxable supplies were made by GDBA during the period 1973 to 1990. That evidence was corroborated by further evidence which HMRC only became aware of when considering their response to the Tribunal's directions. The letter also stated that, subject to a minor point, HMRC considered the calculation of the proportion of recoverable VAT to be a fair and reasonable method of calculation. The letter stated that HMRC did not consider that there was sufficient evidence that taxable investment management fees were paid by GDBA throughout the period of the claim. HMRC asked the Tribunal to make findings of fact on the remaining issue which would decide the appeal. Both HMRC and, subsequently, GDBA confirmed that they did not consider that a further hearing of the appeal would be necessary to enable the Tribunal to determine the appeal.

Did GDBA pay taxable investment management fees during 1973 to 1990?

10. At paragraph 15 of their skeleton argument, HMRC submitted that, among other things now conceded, GDBA needed to establish that it had paid investment management fees throughout the period 1973 to 1990. HMRC contend that GDBA has not produced sufficient evidence to establish that taxable investment management fees were paid by GDBA throughout the period of the claim. HMRC did not adduce

any evidence that GDBA had not paid investment management fees during the relevant period but simply put GBDA to proof on this issue. It was common ground that the burden of proof was on GDBA and that the standard of proof required is the balance of probabilities.

11. GDBA could not produce any direct documentary evidence to show that it had paid investment management fees during the relevant period. GDBA explained that it did not retain any of the books and records for the relevant period because there was no requirement for it to keep such records beyond a period of six years and also it was not practical to retain detailed records going back thirty years. GDBA, relying on *Morrison Bowmore Distiller's Ltd v Revenue & Customs* [2010] UK FTT 394 (TC), submitted that the absence of historic evidence, such as invoices, was not fatal to its claim in a case where there was such a long period of time between the date of the claim and the events in issue. In the *Morrison Bowmore* case, the taxpayer made a claim for repayment of input tax incurred between 1994 and 1997, for which no records were available, based on an extrapolation from the figures for one year, 2007, for which records were available. The Tribunal in *Morrison Bowmore* reviewed all the evidence, including the "tax history" of the taxpayer, and accepted that, on the balance of probabilities, the calculation by extrapolation showed that the taxpayer had incurred the amount of input tax claimed. The Tribunal did not decide that the passage of time reduced the burden on the appellant of proving its case. The appeal in *Morrison Bowmore* was decided on its own particular facts. We agree with the approach adopted by the Tribunal in *Morrison Bowmore* but that does not indicate that we should make any particular finding in this case. We consider that we must review such evidence as there is in this case and decide, on the balance of probabilities, whether GDBA paid investment management fees throughout the period 1973 to 1990.

12. HMRC previously accepted that GDBA had incurred investment management fees for the period 1 April 1990 to 30 March 1997 on the evidence of the base period data. In the course of correspondence relating to the claim, GDBA provided HMRC with the Financial Statements of GDBA for each year from 1974 to 1990. HMRC submitted to the Tribunal that the Financial Statements did not show that GDBA had paid any amount by way of investment management fees. HMRC acknowledged, in the letter dated 26 September 2012 following the hearing, that Mrs Aarvold's evidence to the Tribunal supported, to an extent, the proposition that investment management fees had been incurred by GDBA but HMRC did not consider that the evidence was sufficiently strong for them to concede the point.

13. We were provided with the Financial Statements for the years 1974 to 1990. During that period the format of the Financial Statements changed slightly but nothing turns on that. Relevant to the issue in this appeal is the fact that the Financial Statements for the years ending 1974 – 1977 contained a note to the accounts headed "Loans and Deposits" which stated:

> "Deposit with Lazard Bros. & Co Ltd, for investment on behalf of the Association".

Between 1978 and 1980, the note simply stated "Deposits with Lazard Bros. & Co Ltd". From 1981 onwards, the same note does not mention Lazard Bros but simply has the heading "Loans and Deposits". From 1987, however, the Financial Statements list the investment advisors to the GDBA as Lazard Investors, in 1987, and Lazard Investors and Mercury Asset Management for 1988 to 1990.

14. Mrs Samantha Aarvold is a Senior Financial Accountant in GDBA. She has worked in the Finance Department of GDBA since 2001. She provided a witness statement and gave evidence at the hearing of the appeal. Mrs Aarvold explained that there was no one still working for GDBA who could give evidence about the provision of investment management services to GDBA in the 1970s and 1980s. Mrs Aarvold's evidence was that GDBA had incurred investment and portfolio management fees in the period 1973 to 1990 and any VAT incurred on those fees had been treated as irrecoverable at that time. Mrs Aarvold accepted that her evidence was based on information for the base period used to calculate the claim and her knowledge of how GDBA had treated investment management fees during the time that she had worked for the GDBA until the change of treatment following the issue of Business Brief 19/05.

15. We found Mrs Aarvold a truthful and honest witness but her evidence was of limited help. As Mrs Aarvold acknowledged, her evidence amounted to no more than saying that GBDA incurred investment management fees during her period with the organisation, no one had ever said anything to her to suggest that there had been a time when GDBA did not pay investment management fees and so she assumed that GDBA had always incurred investment management fees.

16. In *Jonas v Bamford* 1973 51 TC 1, 1973 STC 519 Walton J observed, at page 25, that once an inspector comes to the conclusion that, on the facts which he has discovered, the taxpayer has additional income beyond that which he has so far declared, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer. Such a presumption is not the exclusive preserve of HMRC but is also available to taxpayers. It is, however, only a presumption and may be rebutted. We agree with the observations of the Tribunal in *Dr I Syed v HMRC* [2011] UKFTT 315 (TC) on this point at paragraph 38 that:

> "In our view this quotation [from *Jonas v Bamford*] expresses no legal principle. It seems to us that it would be quite wrong as a matter of law to say that because X happened in Year A, it must be assumed that it happened in the prior year. An officer is not bound by law and in the absence of some change to make or to be treated as making a discovery in relation to last year merely because he makes one for this year. This tribunal is not bound to conclude that what happened this year will happen next year. It seems to us that Walton J is instead expressing a common sense view of what the evidence will show. In practice it will generally be reasonable and sensible to conclude that if there was a pattern of behaviour this year then the same behaviour will have been followed last year. Sometimes however that will not be a proper inference: there will

be occasions when the behaviour related to a one off situation, perhaps a particular disposal, or particular expenses; in those circumstances continuity is unlikely to be present."

17. In the case of GDBA, we consider that if GDBA paid investment managers to provide investment management services in the years since Mrs Aarvold joined the organisation then there is a strong likelihood that GDBA paid such fees in earlier years. The investments in respect of which GDBA incurred investment management fees were not one-off events but carried on, no doubt with changes, from year to year. Further evidence of some relationship with an investment manager or managers is contained in the Financial Statements which, from 1974 to 1980 and in 1987, refer to Lazards and, from 1988 to 1990, refer to Lazards and Mercury. We consider that those references strongly suggest a professional relationship. In the later period of 1987 to 1990, it is clear that the companies were investment advisors to GDBA and we conclude, on the balance of probabilities, that Lazards had a similar relationship with GDBA in the earlier years. Based on our knowledge of the commercial dealings between investment managers and their clients in general, we infer that such a professional relationship involved GDBA paying fees for the services of the investment manager. There is a period between 1981 and 1986 where the Financial Statements do not make any reference to any investment manager but we consider that this was no more than a change in the format of the statements. The fact that the Financial Statements for those years show that GDBA still had investments and that Lazards are shown as investment advisors in 1987 suggests that they never stopped providing investment management services and, we infer, charging fees. In conclusion, we find on the balance of probabilities that GDBA paid investment management fees throughout the period 1973 to 1990.

Decision

18. The only issue in this case was whether GDBA incurred investment management fees in the period 1 April 1973 to 31 March 1990. For the reasons given above, we have found that GDBA did incur investment management fees throughout the period. Accordingly, our decision is that the appeal is allowed.

19. 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.

GREG SINFIELD
TRIBUNAL JUDGE

RELEASE DATE: 8 November 2012