

## **Birmingham City Football Club Plc v Revenue & Customs Commissioners**

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**First published by De Voil Indirect Tax  
Intelligence, Issue 133, June 2007**

As Birmingham City celebrates promotion back to the Premiership, it kicks off the close season less successfully in the VAT & Duties Tribunal.

*Birmingham City Football Club plc v Revenue and Customs Commissioners (2007) VAT Decision 20151* arose out of a question as to whether Birmingham City Football Club plc ("BCFC") was entitled to credit for the VAT charged on fees paid to players' agents. HMRC accepted that BCFC has paid the agent's fees and the VAT charged on them, but argued that this was simply part of the remuneration package provided to the player. Thus, as a matter of trade practice, a player would not negotiate with a club which was unwilling to pay his agent's fees, but despite that payment the agent's services were provided exclusively to the player. As a result, BCFC could not reclaim the relevant tax.

On the other hand, BCFC argued that the agent's supplies were made to BCFC, notwithstanding the fact that the agent may have had a pre-existing contractual relationship with the agent. In the alternative, the club maintained that it had in any event received a benefit which would, under the principles set out in *Commissioners of Customs and Excise v Redrow Group plc* [1999] STC 161, allow it to recover the input tax.

With regard to the parties' primary contention, the Tribunal concluded that in the majority of cases the agents had acted exclusively for the players. That conclusion was based on an interpretation of the evidence before the Tribunal. It is in the

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analysis of BCFC's alternative argument that issues of potentially wider application were considered.

BCFC argued that the agents in fact "faced both ways": i.e. "that they alternated between representing the player and representing BCFC, or represented both simultaneously, effectively acting as an intermediary, bringing them together" (see paragraph 73) The first limb of the argument (i.e. that the agents represented both parties alternately) was rejected on the basis that the Tribunal had already found that the agent represented the player throughout. The Tribunal however considered that the second limb (i.e. that the agents acted as intermediaries) could not be so "easily disposed of" and required a detailed consideration of *Redrow*.

In that case the taxpayer, a house builder, offered to prospective purchasers of its houses a scheme by which it would pay the fees of the estate agents who sold the prospective purchasers' existing homes. It successfully asserted its right to recover as input tax the VAT added to the agents' fees which it had paid.

When the case reached the House of Lords, Lord Millett stated (at page 172) that:

"... one should start with the taxpayer's claim to deduct tax. He must identify the payment of which the tax to be deducted formed part; if the goods or services are to be paid for by someone else he has no claim to deduction. Once the taxpayer has identified the payment the question to be asked is: did he obtain anything — anything at all — used or to be used for the purposes of his business in return for that payment?"

BCFC contended that this test was satisfied because in each transaction it obtained something in return for the payment: i.e. the services of a player it wanted. This was the case notwithstanding that at the same time, the agent had represented the player since, "just as in *Redrow* and *WHA* [*WHA Limited v. Customs and Excise Commissioners* [2004] STC 1081], the fact that a service had been rendered to two recipients did not undermine the deductibility of the VAT in the hands of the payer" (Tribunal at paragraph 76).

The Tribunal accepted the wide application of the *Redrow* principles, "What *Redrow* shows is that provided the payer claiming the right to deduct can show that he has received some supply for which the payment is the consideration, it is immaterial that someone else may also have derived a benefit" (Tribunal at paragraph 77).

It nevertheless also emphasised the limits to the application of those principles, "*Redrow* does not undermine the fundamental principle that the payer must be the recipient of a supply of something to be used for his business of making taxable supplies if he is to acquire the right to deduct. 'Supply' is not synonymous with 'benefit' or 'advantage', but has an autonomous, Community meaning, implying a reciprocal obligation, on the one hand to provide goods or a service, and on the other to make a payment..." (*ibid*).

In the light of this analysis, the Tribunal concluded that in cases in which it had found that the agent had a representation agreement with the player, the necessary reciprocity did not exist between BCFC and the agent. Insofar as the agent in such circumstances continued to represent the player (who, had a contrary interest to BCFC, unlike *Redrow* and the prospective purchasers), the only analysis which the Tribunal considered withstood scrutiny was that BCFC agreed to discharge the player's obligation to pay the agent's fee, as part of the price it was required to pay for securing the player's services.

There has been considerable debate concerning the limits to the principles in *Redrow* and in particular Lord Millett's "anything at all" test. Some commentators and advisors have contended that it is to be read literally and that if any benefit whatsoever flows to the paying party then VAT will be reclaimable. Such an interpretation would have potentially important consequences and challenge the conventional wisdom as to when tax can be reclaimed. Others contend that Lord Millett's analysis is simply a restatement of traditional VAT principles in the context of the novel facts of that case. The Tribunal's decision in the present case lends considerable support to the traditionalists.

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