TC01971

Appeal number: TC/2010/05389

VAT; joint venture; written agreement; whether written agreement truly reflected arrangements between individuals and companies they controlled; acquisition and sale of development land; supply of services; identification of supplier; nature of services; whether activities of joint venturers constituted supply of services; contribution to capital of joint venture; consideration; nature of consideration; whether distribution of one half share of net profits amounted to consideration for supply of services; no; appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARITSAN DEVELOPMENTS LIMITED **Appellant**

- and -

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

TRIBUNAL:JUDGE J. GORDON REID Q.C., F.C.I.Arb.
PETER SHEPPARD F.C.I.S., F.C.I.B., ATII

Sitting in public at George House, Edinburgh on 5, 6 and 7 March 2012

Phillip Simpson, advocate, on the instructions of Johnston Carmichael, Chartered Accountants, Edinburgh, for the Appellant

Iain Artis, advocate, instructed by the Office of the Advocate General, for the Respondents

DECISION

Introduction

1. The issue in this appeal is whether payments made by the Appellant (Maritsan) to another company, MacIntyre House Ltd ("MHL") were consideration for the supply of services by MHL to Maritsan in relation to the sale of development land at Whiteshaws Farm, Mauldslie Road, Carluke (the "Whiteshaws Site"). If so, then Maritsan is bound to pay at least some VAT on these payments. MHL have raised VAT invoices against Maritsan and sued them for the VAT in the Court of Session. Maritsan originally said that VAT is not exigible as the payments constituted a share of profits under a written agreement with MHL. Maritsan's interest to make this appeal to the Tribunal arose because, under the written agreement, VAT liability is treated as a cost which affects the amount of net profits available for division between Maritsan and MHL (cf. VATA s83(1)(b)).

2. However, the evidence in the appeal has not been as the representatives of either party expected it to be. This has led us to find that a somewhat different factual background existed. This has a material bearing on the rights and obligations of the parties involved in this appeal.

3. The appeal was heard at Edinburgh on 5, 6 and 7 March 2012. Phillip Simpson, advocate, appeared on behalf of Maritsan, on the instructions of Johnston Carmichael, Chartered Accountants, Edinburgh. He led the evidence of Michael Munro, the principal director of Maritsan. A written statement of his evidence in chief was produced in advance of the Hearing. Mr Simpson also led the evidence of Daniel Meikle, the principal director of MHL. No written witness statement was produced for Mr Meikle. Ian Artis, advocate, appeared on behalf of the Respondents ("HMRC") on the instructions of Ian Mowat of the Office of the Advocate General. He led no evidence. A Joint Bundle of Productions, skeleton arguments and a Statement of Agreed Facts were also produced.

Facts

4. We incorporate into our findings of fact the relevant parts of the Statement of Agreed Facts.

General Background

5. Mr Munro is a chartered quantity surveyor. He is self-employed and has no staff. Mr Meikle is a councillor for South Lanarkshire Council. He was a councillor between about 1996 and 1999, and then from 2003 to date. For part or all of that period he was chairman of the Council's planning committee. Although he has no formal qualifications or trade, he has a background in building and roads construction. His son operates a building company. Mr Munro provided quantity surveying services to Mr Meikle's son from time to time. That is how he came to know Mr Meikle.

6. Maritsan was incorporated on 1 November 1994. Its registered office is 65 High Street, Grantown-on-Spey. Mr Munro and his wife have been the directors throughout. Maritsan is registered for VAT. Maritsan nominally carries on business as a property developer. It does not provide consultancy services or advice. Apart from the Whiteshaws Site transaction referred to below, it has been relatively inactive.

7. MHL was incorporated on 2 June 1999. Its registered office is 1 Cambuslang Court, Cambuslang, Glasgow. Mr Meikle and his wife have been the directors throughout. MHL was not initially registered for VAT. It was registered in 2008. MHL owns a building and related yard, together with some other parcels of land. It has not carried out any active business. It does not provide consultancy services or advice.

The Braidwood Transaction

8. In 2002, Mr Munro entered into an option agreement with the owners (Mr & Mrs Gray) of a site, which was a former petrol station, at Braidwood, Carluke. While the documentation was not produced and the details are not directly relevant, Mr Munro's plan was to be able to sell the site with planning permission for development at profit to a third party builder, on such terms as enabled him to carry out both the purchase from the site owners and the sale to the builder back-to-back on the same day without any, or any significant, financial risk to himself. In particular, missives would be conditional on satisfactory planning permission being obtained; the arrangements made with other professionals such as surveyors and solicitors would be on a contingency basis; fees would only be payable on completion. If the transaction did not proceed or fell through because eg satisfactory planning permission could not be obtained, no such fees would be payable. Mr Munro described these arrangements as risk free. The reason he did so was because they involved no financial commitment on his part.

9. Mr Munro wished to explore the possibility of the site being developed as a supermarket instead of its existing zoning as housing. He contacted Mr Meikle and explained his plan. Mr Meikle was prepared to help. They agreed verbally that should a developer be found and the site sold, they would split the net profit "50/50". No other terms were expressly agreed. Thereafter, they worked independently and together towards the common goal of onward sale to a builder for profit.

10. Through a chartered surveyor acquaintance of Mr Munro, a builder (Wimpey) was found who were interested in acquiring the land. Wimpey obtained planning and other administrative permissions. Mr Munro assisted in obtaining various servitude rights from neighbours. Solicitors, (Brechin Tindall Oats ["BTO"]) were instructed. The site was acquired from the owner and conveyed directly to Wimpey. Neither Maritsan, Mr Munro, MHL nor Mr Meikle took title to the site. The owner was paid from the proceeds of sale from Wimpey. The chartered surveyor was paid an introduction fee of about 1% of the sale price (typical for the provision of such consultancy services), and the solicitors' fees were paid all out of the sale proceeds. When the transaction settled in 2003, the net, VAT free proceeds of sale were paid

equally between Mr Munro and Mr Meikle who each, for their own reasons, directed that his share be split equally with his wife.

The Whiteshaws Site Transaction (Summary)

11. In about March 2004, Mr Munro became aware that a farmer and his wife, Mr & Mrs John Whiteford, had about 10.4 acres of land to sell at Whiteshaws, Carluke (the Whiteshaws Site). He contacted the farmer, and corresponded with him in his own name and not in the name of Maritsan, and agreed a price for an option to buy the land.

12. In or about April 2004, Mr Munro and Mr Meikle spoke to and discussed the Whiteshaws Site. They may have discussed it on an earlier occasion. The precise date does not matter. They agreed to work together with a view to selling it at profit to a builder. They also agreed that the net profit from the transaction, should it bear fruit, would be split between them, as with the previous transaction, 50/50. They referred to the arrangement in their discussions with each other as a joint venture. No other terms were mentioned or discussed, although Mr Meikle expected that any expenses would be shared between them. In particular, neither Munro nor Meikle considered that Maritsan or MHL was a party to the agreement. Neither company was mentioned by either Meikle or Munro when they reached agreement. Nor did they mention the companies subsequently to each other until after the joint venture was completed. They each worked towards the common goal of finding a buyer and selling the Whiteshaws Site (including a small adjacent parcel of land required for a roundabout at the Site entrance) to the buyer at profit. While they did not broadcast to third parties the existence of their joint venture, Meikle at some stage, mentioned it to his family, and to a planning official at the Council.

13. Messrs Munro and Meikle thus entered into an oral agreement in the nature of a joint venture, the common goal of which was to find a buyer for the Whiteshaws Site, to enter into missives for its purchase and immediate re-sale to the buyer for profit, all at minimal financial risk. To that end and in fulfilment of their obligations under the joint venture, they carried out investigations, engaged professional advisers on a contingency fee basis, shared information, discussed strategy, site access, and land values, contributed to the progress of the planning process to enable planning permission to be obtained for residential development of the Whiteshaws Site, and agreed the best way forward from time to time all to achieve their goal. The joint venture did not have a separate name. It owned no property and kept no separate books or accounts.

14. As the more detailed facts set out below disclose, a buyer was found, Bett Ltd (the well-known house builder). Mr Munro arranged for suitable back-to-back missives to be entered into through the medium of Maritsan (an arrangement with which Mr Meikle was content). The transaction was carried into effect and settled on 13 June 2006 along with the purchase and sale of the small adjacent parcel of land needed to form a roundabout at the entrance to the Whiteshaws Site. The net proceeds of sale were distributed in two tranches (one in June 2006 the other a year later) to Mr Munro's nominee, Maritsan, and to Mr Meikle's nominee, MHL. The

goal of the venture they agreed to embark on was thus achieved and the joint venture came to an end.

The Whiteshaws Site Transaction (Detail)

15. After the discussion in April 2004, Mr Munro set about trying to find a buyer for the Whiteshaws Site. He did not believe in marketing such a site, preferring to identify builders who might be interested. In the meantime, he concluded missives with the Whitefords through the agency of Maritsan in July 2004. Mr Meikle was involved to some extent in the negotiation of the missives. The missives were conditional on the grant of planning permission for residential development.

16. In August 2004, Mr Munro (not Maritsan) engaged the same chartered surveyor (named Rankin and trading as Prime Land Consultants) to assist him. Their fee for their appointment as sole selling agents for the Whiteshaws Site, should a sale be effected was to be 1% of the selling price. Eventually, Bett Homes were identified as an interested party. Negotiations took place with them. Mr Meikle was not involved in the negotiations although he was kept fully informed by Mr Munro. Mr Meikle's position was somewhat sensitive as he was a councillor, had been chairman of the Council's planning committee in the past and had declared an interest in relation to the Whiteshaws Site on the Council's website, although he was not (according to an email dated 26 August 2010 from the Council) actually obliged to declare such an interest. He was not in a position to provide and did not provide directly or through MHL to Mr Munro or to Maritsan anything significant in the nature of consultancy services in relation to the Whiteshaws Site.

17. Missives were initially concluded between Maritsan and Bett Limited on 18 October 2004. BTO were instructed by Mr Munro. BTO were Mr Meikle's solicitors and he had introduced Mr Munro to them. Mr Meikle, at some point, made a payment to BTO as a contribution towards their fees and outlays. How or why this came about is not clear. It may have related in part to the preparation of the 2005 Agreement referred to below.

18. The missives were complex but, in summary, were conditional on Bett obtaining planning permission for residential development of the Whiteshaws Site, which was eventually obtained in 2006. Entry was linked to the date of grant of such permission. The missives were amended in November and December 2004. They subsequently lapsed but were resurrected in February 2005. The purchase price was reduced, partly due to the requirement of a play area within the development and the consequent loss of one housing unit. The price was to be paid in two instalments, the first on the date of entry, the second one year later. Other changes were made. There was to be a non-returnable deposit of £100,000 instead of £50,000. The resurrected missives were, in turn, amended later in February 2005 and again in August 2005, possibly in October 2005 (the documents are incomplete) and finally in February 2006.

19. The deposit of £100,000 was paid in February 2005. Some legal expenses and a part payment of the introduction fee to the surveyor were met out of that deposit. A balance of £80,000 was divided equally between Mr Munro and Mr Meikle and paid

to their respective companies. £40,000 was paid by cheque from Maritsan's RBS account on 4 March 2005 to MHL. Neither Mr Meikle nor MHL treated the payment of £40,000 as consideration for consultancy services supplied by Mr Meikle or MHL to Maritsan or anyone else. At that stage, neither Mr Meikle nor MHL had done anything significant in relation to the Whiteshaws Site transaction which could be described as the supply of services for which he or the company would be entitled to remuneration.

20. Bett proceeded with a planning application and applied for the other usual administrative permissions. They incurred all the costs of doing so. The transaction was complicated by the Council's insistence that a roundabout be constructed at Mauldslie Road, Carluke, at the entrance to the Whiteshaws Site. The Council owned the small parcel of land there on which the roundabout was to be built. They had previously acquired it compulsorily from the Whitefords and earmarked it for a roundabout. Mr Munro entered into negotiations with the Council and the District Valuer. Mr Meikle made some enquiries too and had some discussions with officials about the price the Council was seeking. He also had discussions with Mr Munro in relation to land values and site access.

21. Eventually, Mr Munro, through Maritsan, concluded conditional missives with the Council in May 2006, for the purchase of the roundabout site at the sum of £450,000 plus VAT. It was to be sold on to Bett Ltd at the same price plus VAT. The missives were all linked and conditional, so as to minimise the financial risk of the transaction not proceeding. Throughout, Mr Munro kept Mr Meikle informed of progress and discussed various matters with him. Most of Mr Munro's correspondence was by and to him as an individual and not as director of Maritsan. This was also a feature of his correspondence with the Whitefords and with Mr Meikle. For example Mr Munro, as an individual, wrote to Mr Meikle on various planning matters in October 2005. By this stage the 2005 Agreement referred to below had already been executed (15 June and 5 July 2005).

22. The transaction eventually settled on 13 June 2006. The consideration for the sale of the Whiteshaws Site to Maritsan by Mr and Mrs Whiteford was £950,000. They granted and delivered a Disposition in favour of Maritsan. The consideration for the sale of the roundabout site to Maritsan by the Council was £450,000 (plus VAT). The Council granted and delivered a Disposition in favour of Maritsan. The consideration for the sale of the Whiteshaws Site by Maritsan to Bett Ltd was £4,028,000. The consideration for the sale of the roundabout site by Maritsan to Bett Ltd was £450,000 plus VAT of £78,750. The total consideration was £4,556,750. Bett Ltd paid to Maritsan the first instalment of the purchase price (£3,200,000) less the deposit of £100,000. Maritsan granted and delivered a Disposition in favour of Bett Ltd of the Whiteshaws Site and the roundabout site. BTO have subsequently stated in correspondence with Mr Munro's accountants (letter dated 10 March 2011) that the *dispositions could equally have been rolled into one with there being a conveyance by the sellers to Bett with consent of Maritsan.*

23. Although HMRC have no record of Maritsan exercising the option to tax, Maritsan accounted to HMRC for the VAT on the transactions with Bett Ltd and the

Council. By letter dated 5 June 2006 to HMRC, which proceeded upon advice from accountants acting for Maritsan and Mr Munro, Maritsan explained that the figures in their latest VAT return were considerably different from usual. They informed HMRC of the *residential property deal* in which they had been involved and stated that

> "The income was received from the housebuilder and the large outgoing (or the majority of it) was the payment to our joint venture partner in the development.
>
> The VAT on the purchases relates to this transaction by way of fees to solicitors and land agents …"

24. Various costs including legal fees and outlays (£17,680.84) and the surveyor's introduction fee (£39,750 plus VAT of £69,56.25 ie a total of £46,706.25) were paid out of the proceeds of sale.

25. Later in June 2006, Maritsan paid £787,731.45 to MHL. MHL did not issue an invoice in respect of this payment. The balance of the purchase price was paid by Bett Ltd to Maritsan in June 2007. Later that month, Maritsan paid MHL the sum of £638,779.68. MHL issued an invoice dated 19 June 2007. It stated *inter alia*

> "To share of profit as per the Joint Venture Agreement development at Mauldslie Road Carluke
>
> | | |
> |---|---|
> | NET | £638,779.68 |
> | VAT 0%....." | £0.00 |
> | GROSS | £638,779.68 |

26. Although it was not put to Mr Munro, we are prepared to accept Mr Meikle's evidence that the terms of this invoice were provided or at least influenced by Mr Munro. At that stage MHL was not registered for VAT.

The 2005 Agreement

27. While the Whiteshaws Site transaction was developing, Mr Munro and Mr Meikle decided that their simple joint venture agreement should be reduced to writing. The background to and reasons for this are unclear on the evidence. Mr Munro said it was Meikle's idea as he, Munro, had been ill and they both agreed that it would be in Meikle's interests for the 50/50 split to be recorded in writing in case something happened to Munro. Meikle for his part said the opposite. He had been ill and Munro had made the suggestion to which he, Meikle, agreed. Whatever the origins of the proposal, Mr Meikle instructed BTO towards the end of 2004 to draft an appropriate agreement. This is where the trouble started.

28. The evidence does not enable us to conclude precisely what instructions were given or what investigations BTO carried out to identify what was the nature of the existing agreement between Messrs Munro and Meikle. However, what began as a simple agreement between two individuals ended up as a complex, awkwardly drafted, agreement between two companies, which did not reflect pre-existing

arrangements. In the course of discussion Mr Munro informed BTO in January 2005 that the net proceeds from the Whiteshaws Site transaction were to be divided equally between Maritsan and Mr Meikle. BTO appeared to be acting for Meikle. Mr Munro took no separate legal advice, whether as an individual or as director of Maritsan.

29. In the light of the facts which we have found it is unnecessary to set out or discuss the 2005 Agreement at length. It is sufficient to say that the Agreement did not reduce to writing what Mr Munro and Mr Meikle had agreed. This can be illustrated by reference to clause 7 which provided that

> Nothing in this Agreement shall be construed as creating a partnership, joint venture, contract of employment or relationship of principal and agent between the parties.

30. Leaving aside the fact that the 2005 Agreement bore to be between Maritsan and MHL, this clause negated the very notion of the joint venture which had been agreed upon. Neither Mr Munro nor Mr Meikle wished a separate and parallel agreement between the two companies.

31. A number of internal BTO emails about the drafting of the 2005 Agreement were produced at the Hearing. However, in isolation they make little sense. They were not spoken to and we decline to attach any weight to them. Mr Meikle said some of them were simply wrong. We take this to mean and accept his evidence that some of these emails did not reflect what he wished to be expressed in the Agreement.

32. In evidence, which we accept, both Mr Munro and Mr Meikle said in effect that they left the detail to the professionals and simply signed the document ultimately produced and thereafter forgot about it until HMRC raised queries about the two payments by Maritsan to MHL following settlement of the Whiteshaws Site transaction. They both maintained and we accept that it did not reflect the simple arrangements between them as they understood them to be and as they thought they were operating. These arrangements had operated in relation to the Braidwood transaction and were operating when the Whiteshaws Site transaction was proceeding. There has been no further joint venture, although they did investigate another possible site in the locality. There appears to be no ill-feeling between them despite the existence of the Court of Session action referred to below.

33. Both Munro and Meikle conducted their affairs and dealings with each other on the basis that their business relationship was not between their respective companies (Maritsan and MHL) and was not governed by the 2005 Agreement but instead continued to be governed by their oral agreement in 2004 establishing the joint venture between them.

HMRC Enquiries

34. In 2008, MHL's accountant, Atkinson Donnelly, became concerned that VAT should have been paid on the two payments paid to MHL in 2006 and 2007. Mr Meikle had explained to the accountants that he had entered into a joint venture agreement with Mr Munro. Nevertheless, they contacted HMRC and met with an official. The 2005 Agreement was produced. After examining the 2005 Agreement,

the official advised MHL's accountant by letter dated 3 July 2008 that MHL had supplied services as a *land buyer* to Maritsan as set out in the 2005 Agreement and that the transactions were subject to VAT at the standard rate. A review of that decision was sought. By letter to Maritsan dated 27 May 2010, HMRC upheld the original decision.

35. At Maritsan's request, HMRC considered the matter further. By letter to Maritsan dated 22 June 2010, HMRC expressed the view that there was no joint venture between Maritsan and MHL. This was based on the terms of the 2005 Agreement and the erroneous view that Maritsan took title to the Braidwood site and the Whiteshaws Site. The letter also noted the principle of looking *beyond the contract and look at what both parties believed actually was taking place.*

36. MHL were not, as at 2008, registered for VAT. They, through their accountants and on their advice, therefore applied to be registered. The application was granted. Thereafter, MHL's accountants, with the assistance of a specialist firm of VAT consultants, Tenon, prepared and issued two invoices to Maritsan on behalf of MHL. If the accountants' advice and HMRC's views were sound, these invoices had to be issued promptly (see VAT Regulations 1995 as amended Regulation 13(5)). Mr Meikle simply accepted the advice that the invoices should be issued.

The Disputed Invoices

37. Thus, on advice from their accountants, MHL rendered two invoices to Maritsan. Both are dated 26 August 2008 with a tax point of 22 June 2008. MHL's VAT registration number is stated. Both contain the following narrative:-

> Fee in respect of Whiteshaws introductory and consultancy fees in accordance with paragraphs 3.1 and 4 of the Agreement between MacIntyre House Limited and Maritsan Developments Limited dated 15 June and 5 July both dates in 2005

38. The first invoice (No 268/011) contains the following figures:-

Fee in respect of ……..	£787,731.46
VAT at 17.5% on £787,731.45	£137,853.00
Less, already settled	(£787,731.45)
Balance due within 14 days	£137,853.00

39. The second invoice (No 268/012) contains the following figures:-

Fee in respect of ……..	£638,779.68
VAT at 17.5% on £787,731.45	£111,786.44
Less, already settled	(£638,779.68)

Balance due within 14 days £111,786.44

40. The narrative of these invoices is incorrect. MHL provided no services to Maritsan. Nor did Mr Meikle. The bulk of the work carried out in relation to the Whiteshaws Site transaction was carried out by Mr Munro. Such work or services as Mr Meikle supplied were supplied in furtherance of his joint venture with Mr Munro. They were not supplied to Mr Munro or Maritsan.

41. These invoices were returned to MHL by Mr Munro on the basis that the transaction was carried out under a joint venture and not the 2005 Agreement. Maritsan's accounts, for the year to 30 November 2007, were prepared (before the issue of VAT arose) on the basis that the payments to it were proceeds of a joint venture and the payments by it to MHL were Mr Meikle's share of the proceeds of the joint venture.

The Court of Session litigation

42. In the Court of Session, MHL's action proceeded on the basis that the VAT was the balance payable in respect of fees due under the 2005 Agreement for the introduction of the Whiteshaws Site. The court observed that the contract was not easy to interpret and criticised the drafting. Lord Hodge in his Opinion (see 2011 SLT 936) following a debate on relevancy stated that it was clear that the parties did not want their relationship to be a partnership or a joint venture (paragraph 33). His Lordship construed clause 3.1 of the agreement as requiring the parties to share the actual net profits equally and the VAT charge on MHL's services to be calculated accordingly (paragraph 36). He said that the mechanism to share equally the burden of any VAT which might be due on MHL's services was straightforward and could be expressed by the formula Net Profits = 2.175X where X is the share of each party of the actual net profits payable to each party (paragraph 37). We were informed that the formula referred to by Lord Hodge had been proposed at the debate by Mr Simpson who also appeared for Maritsan in the Court of Session action.

43. In relation to rectification of the 2005 Agreement, which was the subject of a Counterclaim, his Lordship noted that the legal effect of the contract as rectified was not an issue for the court when considering the question of relevancy (paragraph 38). The court ultimately allowed a proof before answer on the question of rectification. In terms of an Interlocutor dated 8 June 2011, the court ordered the Agreement to be rectified as proposed by Maritsan. The terms of the rectification appear to have been agreed between Maritsan and MHL. The court did not adjudicate on the matter. The action was then sisted pending the outcome of the appeal to this Tribunal.

44. There were several changes made by the agreed rectification. One was that the heading of the Agreement (*Re:Introductory and Consultancy Fees*) was changed to *Joint Venture Agreement.* Another change was the deletion of clause 7 quoted above. In its place *The parties hereby declare their intention that this Agreement constitutes a joint venture between them in relation to any Development project that falls within it.* was substituted.

45. There has also been sundry correspondence, and various discussions and meetings between the advisers representing Mr Munro/Maritsan and Mr Meikle/MHL. It appears that at some stage, Biggart Baillie, Solicitors acted for MHL in the Court of Session action, and Semple Fraser, Solicitors acted for Maritsan. Burnett & Co CA, also acted for Mr Munro/Maritsan. The thrust of Semple Fraser's argument was that in spite of the 2005 Agreement a joint venture had been created. Biggart Baillie appeared to rely on the 2005 Agreement.

Submissions

46. Mr Simpson initially submitted that there was a joint venture between Maritsan and MHL, but subsequently departed from that submission to argue that, on the evidence before the Tribunal, the joint venture was between Mr Munro and Mr Meikle, although at one stage he submitted that it did not matter who were the parties to the joint venture. The 2005 Agreement did not reflect the genuine intentions of Munro and Meikle. There were no documents showing that MHL did anything. The joint venture came to an end in June 2007. He referred to the Partnership Act 1890 section 2 (rule 3-receipt of profits; rule 5-management) and section 24). *Mair* v *Wood* 1948 SC 83 was referred to in order to illustrate a joint venturer contributing his services to the venture. Here, both Munro and Meikle contributed their skills, and experience. A partner's contribution to the capital of a partnership could consist of services.

47. Mr Simpson also referred to *Narich Pty Ltd* v *Commissioner of Pay-Roll Tax* 1984 ICR 286 for the proposition that a written agreement cannot transform the substance of an agreement into something else, although the label the parties use to describe their arrangement may be decisive (*Barnett* v*Brabyn* 1996 69 TC 133.) No question of deliberate tax avoidance arose. He also pointed out that Maritsan did not register title to the Whiteshaws Site; there was, in any event, no rule of law preventing a partner taking title in his own name (*Gillespie* v *Gillespie &Ors* 2011 CSOH 189). Although the missives ran in the name of Maritsan, that is, if necessary, explicable by agency, the ultimate principal being the joint venture. The share of the net profit to which Munro and Meikle became entitled was channelled through their companies.

48. For HMRC, Mr Artis submitted that the payments to MHL were either the consideration for a supply of services by MHL or they were MHL's share of the profits from the sale of the Whiteshaws Site by a joint venture comprising Maritsan and MHL. HMRC's position was that no joint venture existed. There was no sharing of risk, no assets, no bank account, no name, no holding out as a joint venture. The rectification of the 2005 Agreement was not determinative and made no difference to its meaning. Rectification re-writes documents not history. He made submissions on the nature of joint venture under reference to *Mair* v *Wood* 1948 SC 83, *Barr* v *Gilchrist* 2011 CSOH 72, *Miller on Partnership* 2nd edition ch 15, *Dollar Land (Cumbernauld) Ltd CIN Properties Ltd* 1996 SLT 186, *Strathearn Gordon Estates* 1985 VATTR 79, *Keydon Estates* UKVATTR LON/88/1225X, *Britton* 1986 VATTR 209, *Fivegrange Ltd* LON/89/1631Y, *Private and Confidential Ltd* 2009 UKFTT 59 (TC) and *Walker West Developments Ltd* v *FJ Emmett Ltd* 1978 252 EG 1171 (CA). The receipt of a share of profits does not of itself make a person a partner in a

business (*Partnership Act 1890 section 2(3)*). Where property is held exclusively by one of the parties that is a strong indication against joint venture.

49. Maritsan held rights in relation to land and they were not held in trust. A joint venture agreement could easily have been prepared by BTO if instructed to do so. If the joint venture was between Meikle and Munro, Maritsan still received services; it just changed the person supplying the services. Mr Artis postulated various permutations of the arrangements involving Munro, Meikle, Maritsan and MHL. He recognised that Meikle could nominate MHL to receive payments. He also accepted that if the joint venture was between the two individuals then the 2005 Agreement was irrelevant.

Discussion

Evidence

50. The findings of fact which we have made (and in particular, those at paragraphs 11-14) render much of the detailed background and much of the legal argument redundant. We should therefore explain why we have made these findings.

51. We found Mr Munro and Mr Meikle to be credible witnesses. Both were generally reliable although they differed on some significant areas of detail. Mr Munro, as a chartered quantity surveyor, was very familiar with property development. He was plainly successful in business, meticulous in his approach to projects and plainly horrified at the turn of events which have come about following the signing of the 2005 Agreement and the MHL invoices rendered in 2008.

52. Mr Meikle, on the other hand left school at fourteen, without qualifications and has been in the building and roads construction business much of his life. He described himself as a slow reader as he is dyslexic, and dull of hearing. In spite of these disadvantages, he has had a successful career in business, which his son essentially now carries on. He has also devoted much of his time to public service as a councillor. His evidence was quite detailed in places, carefully considered and generally made sense.

53. Both Mr Munro and Mr Meikle gave their evidence in a straightforward manner. In spite of the Court of Session action, there did not appear to be any animosity between them. If they were together trying to create a story to defeat either each other or HMRC, then they have gone about it in a very strange way indeed. We considered that each was telling the truth from his perspective as he remembered the events of eight or more years ago. We are not dealing with an attempt to create a tax avoidance scheme. Much of Mr Meikle's evidence was destructive of the underlying justification for the 2008 invoices and the Court of Session action, which he authorised having been advised to raise it.

54. What was plain to us was that they both considered that they had entered into a joint venture in relation to the Whiteshaws Site transaction. Both regarded the arrangement as one which involved minimal or virtually no financial risk. Missives

were instructed accordingly. Professional advisers were engaged on a contingency fee basis.

55. Each had an independent role to play although Mr Munro's was the dominant role. If the transaction were carried through, each would receive an equal share of the net profit. When entering this arrangement no mention was made of their respective companies. There is no reason to assume that each was dealing with the other in the capacity of director. Meikle's company was essentially dormant, and apart from the three invoices referred to above (paragraphs 25 and 36-38), there is no documentation emanating from MHL. It is clear that MHL did not supply any services to Maritsan.

56. The fact that the joint venture arrangement was expressed with commendable brevity does not mean that it cannot exist. The sharing of profits points towards the existence of a joint venture as do the pooling of resources, sharing of information and other actings towards a common goal. The agreement to share the net profit is *prima facie* evidence of the existence of a joint venture (see *Dollar Land* at p192*)*. The equal sharing of losses would be implied (Partnership Act 1890 s 24(1)). Mr Meikle said he expected to share expenses equally with Mr Munro. Whether mutual agency existed did not arise. Certainly, Munro had authority from Meikle to enter into missives in whatever manner he thought fit. Doing so through the medium or agency of Maritsan did not destroy the joint venture or count against its existence. The fact that Munro and Meikle described their arrangement as a joint venture is of some significance (*Barnett* v *Brabyn* 1996 69 TC 133 at 146), and seems to us to reflect the substance and reality of the situation as we have found it to be. In particular, in relation to the Whiteshaws Site, Mr Meikle described shaking hands with Mr Munro at the embryonic stage of the Whiteshaws Site transaction and referring to their arrangement at the time as a joint venture.

57. The agreement between Munro and Meikle as individuals in relation to the Whiteshaws transaction was in the nature of a joint venture. They agreed to work together and did work together with the common goal of profit which they agreed to share equally. The joint venture did not have a separate name. It owned no property and kept no separate books or accounts. However, Munro did provide Meikle with a statement of income and expenditure to show how the 50% profit figure was calculated. The joint venture was not registered for VAT. Nevertheless, we do not think that the agreement can be described in any other way than a joint venture. Meikle was not providing services to Munro for remuneration. Nor was Munro providing services to Meikle for remuneration. Each was contributing his particular skills, talents, abilities and business connection in pursuit of the common goal of acquiring the property and selling it at profit with the benefit of planning permission for residential development on a conditional back-to-back missives basis. That was their capital contribution to the joint venture. None of this constituted supplies of services by Meikle or MHL to Munro or Maritsan. The two payments made by Munro through Maritsan to Meikle's nominee, MHL, did not constitute consideration for services supplied to Munro or Maritsan. No such services were supplied to either Munro or Maritsan.

58. The Braidwood Transaction illustrates an earlier almost identical arrangement between Munro and Meikle. A site was identified. They agreed to pursue its development together with a view to a risk free sale at profit to a builder. This was duly done and the profits shared between them as individuals. Whether for tax or other reasons, Mr Munro decided to split his share with his wife, and Mr Meikle did likewise. The evidence does not disclose an involvement in the transaction on the part of the wives. When the possibility of acquiring and selling the Whiteshaws Site arose, Munro and Meikle entered into a very similar arrangement.

59. It is therefore clear, on the evidence and the facts as we have found them to be, that MHL did not supply any services to Maritsan. The 2008 invoices did not reflect the substance and reality of the situation and were unjustified. On that basis alone, the appeal must be allowed.

60. The activities carried on by Munro and Meikle in relation to the Whiteshaws Site transaction did not constitute the supply of services by one to the other or by Meikle to Munro or to Maritsan. These activities (even if properly termed services) were carried out in fulfilment of their obligations in terms of the joint venture. The 2007 invoice in respect of the second tranche of the distribution of the net profit was probably unnecessary. No invoice was issued in respect of the first tranche distributed in 2006. Just as four of the members of the share-fishing joint adventure in *Mair* v *Wood supra* at page 85, contributed their services as crew (and the fifth contributed the boat and gear), the activities of Munro and Meikle constituted their contribution to the capital of the joint venture. As such, that is not the supply of services for a consideration and is therefore outwith the scope of VAT. For that reason too, the appeal must be allowed.

61. The fact that the distribution of the profits was channelled through the agency of their respective companies, which was reflected in Maritsan's books and in the 2007 invoice, does not alter the fact that MHL provided no services to Maritsan or the conclusion that the activities of Mr Munro and Mr Meikle in pursuance of their joint venture did not constitute the supply of services for consideration falling within the scope of the VAT regime. Had Mr Munro retained the entire net profit, we consider that, on the basis of our findings of fact, Mr Meikle would have had an enforceable claim against him for his share.

2005 Agreement

62. Both Mr Munro and Mr Meikle regarded the 2005 Agreement as unimportant. How its ultimate terms came to be drafted and executed is something of a mystery. We suspect it is a combination of the professional advisers not ascertaining what the true position was, and Mr Munro and Mr Meikle paying insufficient attention to what was being drafted and to giving accurate and comprehensive instructions. The one element of their relationship which both Munro and Meikle wished to retain was the joint venture, whether it was between them as individuals or their respective companies. The 2005 Agreement (at least until it was rectified) expressly excluded joint venture. In the light of the evidence we heard, the 2005 Agreement cannot be regarded as a genuine statement of the intentions of Maritsan, Mr Munro, MHL or

Mr Meikle. We attach little weight to the agreed rectification. By that stage, the tax dispute had arisen. Moreover, the substance and reality of the arrangement actually entered into between Munro and Meikle, as we have found it to be, was either not properly explained to the professional advisers involved, or at least some of them, or was not known or properly understood by those professional advisers or at least some of them.

63. Whatever rights and obligations were created by the 2005 Agreement, the joint venture between Mr Munro and Mr Meikle remained in place. The substance and reality of the arrangements were that they were bound together as individuals in a joint venture. Perhaps more importantly, it was clear on the evidence, particularly Mr Meikle's evidence, that MHL did not supply Maritsan or Mr Munro with any services at all. As previously explained, Mr Meikle's contribution to the joint venture was performed by him as an individual in furtherance of the common goal of acquiring the property and selling it at profit with the benefit of planning permission for residential development on a conditional back-to-back missives basis. He was at pains to point out in his evidence that there was no mention of the two companies while the joint venture was proceeding.

The Court of Session Action

64. In the light of the evidence we heard, it seems surprising that the action to recover all the VAT claimed in the 2008 invoices was raised at all, and even more surprising that it proceeded to a debate on the terms of an Agreement which neither party to the action had concerned itself with until the question of the treatment of VAT arose in 2008. In evidence, Mr Meikle claimed he only ever wished to recover half the VAT. The debate in the Commercial Court appears to have been an unnecessary exercise. It might have been better (with the benefit of hindsight), if it was necessary at all to raise the action, to sist it at an earlier stage pending the outcome of Maritsan's appeal to this Tribunal.

Other Matters

65. In the light of our findings of fact, it is unnecessary to discuss the other authorities which were briefly canvassed in argument by counsel. Most of the cases cited turned on their own particular facts, which were all somewhat different from the facts as we have found them to be in this appeal (see *Barnett* at 144). The general statutory background relating to the supply of services by taxable persons was not in dispute (see VATA ss 1, 3, 5, 6, 19, 31 and 45 and Schedules 1 and 9).

Summary

66. We summarise our conclusions as follows:-

1 The agreement between Munro and Meikle as individuals in relation to the Whiteshaws transaction was in the nature of a joint venture.

2 Each contributed his particular skills, talents, abilities and business connection in pursuit of the common goal of acquiring the property and

selling it at profit with the benefit of planning permission for residential development on a conditional back-to-back missives basis. That was their capital contribution to the joint venture. None of this constituted supplies of services by Meikle or MHL to Munro or Maritsan.

3 The two payments made by Munro, through Maritsan, to Meikle's nominee, MHL, did not constitute consideration for services supplied to Munro or Maritsan. No such services were supplied to either Munro or Maritsan.

4 MHL did not supply any services to Maritsan.

5 The activities of Munro and Meikle constituted their contribution to the capital of the joint venture. As such, that is not the supply of services for a consideration and is therefore outwith the scope of VAT.

6 Whatever rights and obligations were created by the 2005 Agreement, the joint venture between Mr Munro and Mr Meikle remained in place. The substance and reality of the arrangements were that they were bound together as individuals in a joint venture.

Result

67. HMRC's conclusions that MHL supplied services to Maritsan and that there was no joint venture are both unsound. We allow the appeal. Whether our decision has further fiscal consequences for Maritsan, MHL, Mr Munro or Mr Meikle remains to be seen.

68. 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.

J. GORDON REID Q.C., F.C.I.Arb.
TRIBUNAL JUDGE

RELEASE DATE: 23 April 2012
Amended pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 30 April 2012.