[2018] UKFTT 746 (TC)

TC06879

Appeal number: TC/2017/01777; TC/2017/06790

VALUE ADDED TAX – appeals against the cancellation of registration, refusal to re-register and denial of input tax deductions on the basis that the Appellant was not carrying on an economic activity or making supplies for a consideration – Appellant doing so only to the extent that its right to invoice for its services was no longer contingent on the generation of revenues by the recipients of its supplies – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

W RESOURCES PLC **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 12 and 13 November 2018

Ms Sarah Black, instructed by Greenwoods GRM LLP, for the Appellant

Mr Ewan West, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

© CROWN COPYRIGHT 2018

DECISION

Introduction

5 1. This decision relates to two connected appeals by the Appellant in relation to its VAT position.

2. The first appeal is against:

> (a) an assessment issued by the Respondents on 31 January 2015 in relation to the Appellant's VAT periods 1/11 to 9/14 in the amount of
> 10 £80,307, together with interest of £3,846.74;
>
> (b) an assessment issued by the Respondents on 6 December 2016 in relation to the Appellant's VAT periods 12/14 to 9/16 in the amount of £68,699, together with interest of £1,832.53; and
>
> (c) a decision issued by the Respondents on 9 December 2016 to cancel
> 15 the Appellant's VAT registration with effect from the close of business on 1 October 2016,

each of which was upheld on review on 17 January 2017.

3. The second appeal is against the refusal by the Respondents on 20 February 2017 to reinstate the Appellant's VAT registration, which refusal was upheld on
20 review on 9 August 2017.

4. The Tribunal has directed that the appeals should proceed together because they relate to the same subject matter – namely, whether, over the periods to which the appeals relate, the Appellant was entitled to be registered for VAT and to recover the amounts in respect of VAT ("VAT input tax") that it incurred on the basis that:

> 25 (a) it was carrying on an "economic activity" (or, in the language of the UK domestic legislation, carrying on a "business"); and
>
> (b) it incurred the VAT input tax in acquiring goods and services that it used in making supplies outside the United Kingdom which would have been taxable supplies if they had been made in the United Kingdom in the
> 30 course of that "economic activity" (or "business").

5. The parties have requested that this decision deal solely with the issues of principle to which the appeals give rise and not with issues of quantum.

Background

6. The Appellant is the holding company of a group involved in mineral
35 exploration and exploitation. It was incorporated on 30 May 2003 and is listed on AIM.

7. In January 2006, the Appellant applied for VAT registration, which registration was backdated to 8 April 2004.

8. The Appellant was initially founded as an oil and gas exploration and production company and its initial subsidiaries, Taraz LLP and Black Gold Kentucky Inc., were involved in that area. However, following the termination by the Kazakhstan Government of the licence for Taraz LLP in 2008, and the consequent financial failure of the Appellant's original subsidiaries, the Appellant decided in around 2010 and 2011 to focus its future activities on the exploration and exploitation of tungsten.

9. The VAT input tax which is in issue in the appeals was incurred by the Appellant in relation to two of its subsidiaries which were acquired as a result of that decision to refocus – Iberian Resources Spain SL ("IRS"), which the Appellant acquired on 31 December 2011, and Iberian Resources Portugal – Recuros Minerais, Unopessoal Lda ("IRP"), the parent company of which (then named Australian Iron Ore PLC) was acquired by the Appellant on 4 July 2012.

10. Subject to the point made in paragraph 11 below, that VAT input tax was incurred by the Appellant in order:

> (a) to enable IRS and IRP to raise funds to carry out their exploration activities;
>
> (b) to exercise financial control over IRS and IRP; and
>
> (c) to obtain geological expertise, project management and supervision and day to day management and supervision for IRS and IRP so that the two companies could carry on their exploration and exploitation activities.

11. Certain of the VAT input tax which is in issue in the appeals was incurred by the Appellant at a time before it acquired IRS and IRP – ie at a time when the Appellant was still conducting preparatory activities. It is common ground that, if I decide that, for VAT purposes, all of the supplies which were made by the Appellant to IRS and IRP (following their acquisition by the Appellant) were supplies made for a consideration and in the course of carrying on an "economic activity", then the VAT input tax which was incurred by the Appellant during the preparatory phase should be recoverable by the Appellant in the same way as the VAT input tax which was incurred thereafter because such VAT input tax would then have been incurred at a time when the Appellant had the intention of making supplies for a consideration in the future. The question of what constitutes an intention to make future supplies for a consideration is highly material to the determination of the appeals and I shall say more about that in the discussion below.

The relevant legislation

12. There is no disagreement between the parties as to the legislation, both EU and domestic, which is applicable in relation to the two appeals or as to the issues to which that legislation gives rise. However, for the sake of completeness, I would summarise that legislation as follows.

13. The primary legislation governing the operation of VAT in the UK is set out in EU Directive 2006/112/EC (the "PVD"). The provisions of the PVD which are relevant in this case are as follows:

(a) Article 2(1) provides that:

"The following transactions shall be subject to VAT:

…(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;";

(b) Article 9(1) provides that:

""Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.";

(c) Article 14(1) provides that:

""Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.";

(d) Article 24 provides that:

""Supply of services" shall mean any transaction which does not constitute a supply of goods.";

(e) Article 167 provides that:

"A right of deduction shall arise at the time the deductible tax becomes chargeable.";

(f) Article 168 provides that:

"In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out those transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

(b) the VAT due in respect of transactions treated as supplies of goods or services pursuant to Article 18(a) and Article 27;

(c) the VAT due in respect of intra-Community acquisitions of goods pursuant to Article 2(1)(b)(i);

(d) the VAT due on transactions treated as intra-Community acquisitions in accordance with Article 21 and 22;

(e) the VAT due or paid in respect of the importation of goods into that Member State."; and

(g) Article 169 provides that:

"In addition to the deduction referred to in Article 168, the taxable person shall be entitled to deduct the VAT referred to therein in so far as the goods and services are used for the purposes of the following:

(a) transactions relating to the activities referred to in the second subparagraph of Article 9(1), carried out outside the Member State in which that tax is due or paid, in respect of which VAT would be deductible if they had been carried out within that Member State;…".

14. In terms of the UK domestic legislation, the above provisions are reflected in the Value Added Tax Act 1994 (the "VATA"). The provisions of the VATA which are relevant in this case are as follows:

(a) Section 1(1) provides that:

"Value added tax shall be charged, in accordance with the provisions of this Act – (a) on the supply of goods and services in the United Kingdom (including anything treated as such a supply),…";

(b) Section 3(1) provides that:

"A person is a taxable person for the purposes of this Act while he is, or is required to be, registered under this Act.";

(c) Section 4 provides that:

"(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.";

(d) Section 5 provides that:

"(1) Schedule 4 VATA shall apply for determining what is, or is to be treated as, a supply of goods or a supply of services.

(2) Subject to any provision made by that Schedule and to Treasury orders under subsections (3) to (6) below –

(a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;

(b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services.";

(e) Section 7A provides that a supply of services which is made to, inter alia, a taxable person for the purposes of Article 9 PVD or a person which is identified for the purposes of VAT in accordance with the law of a Member State other than the UK is to be treated as being made in the country in which the recipient belongs;

(f) Section 24(1) provides that:

"Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say – (a) VAT on the supply to him of any goods or services…being …goods or services used or to be used

for the purpose of any business carried on or to be carried on by him.";

(g) Section 25(2) provides that a taxable person can claim credit for "so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.";

(h) Section 26 provides that:

"(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this section are the following supplies made or to be made by the taxable person in the course or furtherance of his business –

(a) taxable supplies;

(b) supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom;

(c) such other supplies outside the United Kingdom and such exempt supplies as the Treasury may by order specify for the purposes of this subsection.";

(h) Paragraph 9 of Schedule 1 provides that:

"Where a person who is not liable to be registered under this Act and is not already so registered satisfies the Commissioners that he –

(a) makes taxable supplies; or

(b) is carrying on a business and intends to make such supplies in the course or furtherance of that business,

they shall, if he so requests, register him with effect from the day on which the request is made or from such earlier date as may be agreed between them and him.";

(i) Paragraph 10 of Schedule 1 provides that:

"(1) Where a person who is not liable to be registered under this Act and is not already so registered satisfies the Commissioners that he –

(a) makes supplies within paragraph (2) below; or

(b) is carrying on a business and intends to make such supplies in the course or furtherance of that business,

and (in either case) is within sub-paragraph (3) below, they shall, if he so requests, register him with effect from the day on which the request is made or from such earlier date as may be agreed between them and him.

(2) A supply is within this sub-paragraph if –

(a) it is made outside the United Kingdom but would be a taxable supply if made in the United Kingdom….

(3) A person is within this sub-paragraph if –

(a) he has a business establishment in the United Kingdom or his usual place of residence is in the United Kingdom; and

(b) he does not make and does not intend to make taxable supplies."; and

(j) Paragraph 13 of Schedule 1 provides that:

(1) Subject to sub-paragraph (4) below, where a registered person satisfies the Commissioners that he is not liable to be registered under this Schedule, they shall, if he so requests, cancel his registration with effect from the day on which the request is made or from such later date as may be agreed between them and him.

(2) Subject to sub-paragraph (5) below, where the Commissioners are satisfied that a registered person has ceased to be registrable, they may cancel his registration with effect from the day on which he so ceased or from such later date as may be agreed between them and him.

(3) Where the Commissioners are satisfied that on the day on which a registered person was registered he was not registrable, they may cancel his registration with effect from that day.

(4) The Commissioners shall not under sub-paragraph (1) above cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement to be registered under this Act.

(5) The Commissioners shall not under sub-paragraph (2) above cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement, or entitled, to be registered under this Act.

(6) In determining for the purposes of sub-paragraph (4) or (5) above whether a person would be subject to a requirement, or entitled, to be registered at any time, so much of any provision of this Act as prevents a person from becoming liable or entitled to be registered when he is already registered or when he is so liable under any other provision shall be disregarded.

(7) In this paragraph, any reference to a registered person is a reference to a person who is registered under this Schedule.

(8) This paragraph is subject to paragraph 18 of Schedule 3B (cancellation of registration under this Schedule of persons seeking to be registered under that Schedule, etc)."

15. The parties agree that, in order for the Appellant to succeed in the appeals, the burden is on the Appellant to establish that:

(a) during the period to which the appeals relate, it was making supplies to its subsidiaries;

(b) those supplies were being made for a consideration and therefore fell to be treated as supplies which would be taxable supplies for the purposes of Article 2 PVD had they been made in the UK; and

(c) it made those supplies in the course of carrying on an economic activity within the meaning of Article 9 PVD.

16. For completeness, I would note that, whilst the parties were content to conduct

the appeals on the basis of the Appellant's rights under the PVD, the domestic equivalents of Articles 2 and 9 PVD in the UK are Section 5 VATA and Section 3 VATA respectively. It seems to me that Section 3 VATA does not quite cover the ground laid out in Article 9 PVD in that it defines a "taxable person" as a person who is, or is required to be, registered for VAT and therefore excludes a person who is entitled to be registered for VAT pursuant to paragraphs 9 or 10 of Schedule 1 VATA but is not actually registered because the Respondents fail to satisfy their obligations under those paragraphs. The relevant section ought in my view to include such persons in the definition of "taxable person". Nevertheless, nothing turns on this because it is common ground that the Appellant is entitled to rely on its rights under the PVD to the extent that those are inconsistent with the UK domestic legislation. Accordingly, for the purposes of this decision, I will refer almost exclusively to the relevant provisions of the PVD.

<u>The relevant case law</u>

17. There are a number of decisions - both by the European Court of Justice (the "ECJ") and by the UK domestic courts - which are relevant in determining whether or not the Appellant has satisfied the conditions set out in paragraph 15 above. In most instances, there is no dispute between the parties as to how those decisions should be interpreted but, where there is such a disagreement, I will note it in the paragraphs which follow and then set out my conclusion on the point in issue.

18. The most useful starting point in the analysis of the authorities is the recent decision of the Court of Appeal in *Wakefield College v Revenue and Customs Commissioners* [2018] EWCA Civ 952 ("*Wakefield*"). It is common ground that this decision makes it clear that the ECJ case law requires a two-stage test to be adopted in determining whether a particular person is a taxable person making taxable supplies (or supplies which would be taxable supplies if they were to be made in the Member State in which the relevant person belongs). The first test relates to Article 2 PVD and is satisfied if the relevant person is making supplies for a consideration, whilst the second test relates to article 9 PVD and is satisfied if the relevant person is making the supplies for the purposes of obtaining income therefrom on a continuing basis – see paragraph [52] in *Wakefield*.

<u>*Supplies for a consideration*</u>

19. In relation to the first test, the Court of Appeal noted as follows:

"A supply for a consideration is a necessary but not sufficient condition for an economic activity. It is therefore logically the first question to address. It requires a legal relationship between the supplier and the recipient, pursuant to which there is reciprocal performance whereby the goods or services are supplied in return for the consideration provided by the recipient: see, for example, the judgment in *Borsele* at [24]. That is what is meant by "a direct link" between the supply of the goods or services and the consideration provided by the recipient: see *Borsele* at [26] and contrast *Apple and Pear Development Council v Customs and Excise Comrs*. There is no need for the consideration to be equal in value to the goods or services. It is simply the price at which the goods or services are supplied. This

requirement was satisfied in both *Finland* and *Borsele*."

20. It can be seen from the above that the necessary ingredients for satisfying the first test are that there needs to be a "legal relationship" between the supplier and the recipient, pursuant to which there is "reciprocal performance" whereby the goods or services are supplied in return for the consideration, thus meaning that there is a "direct link" between the supply of the goods or services and the consideration.

21. The three ECJ cases to which reference is made in the above extract are *Gemeente Borsele v Staatssecretaris van Financien* (Case C - 520/14) ("*Borsele*"), *Apple and Pear Development Council v Customs and Excise* Commissioners (Case C - 102/86) [1988] STC 221 ("*Apple and Pear*") and *Commission v Republic of Finland* (Case C - 246/08) [2009] ECR I-10605 ("*Finland*").

22. In *Borsele*, a Dutch local authority provided school transport services and whether or not parents had to make a contribution to the authority depended on the distance travelled by their children and, in some instances, the parents' means. Only one third of the parents using the service were required to make contributions and the aggregate contributions made by parents were equivalent to only 3% of the amount paid by the authority in providing the services. The ECJ concluded that the authority was supplying a service and that the service was being supplied for a consideration for the purposes of Article 2 PVD. The ECJ noted that it did not matter that the price paid was higher or lower than the cost of providing the service. All that was required was that "there be a direct link between the supply of goods or the provision of services and the consideration actually received by the taxable person". The existence of the legal relationship between the authority and the parents and the fact that the authority was receiving payment in return for providing the service meant that such a direct link existed. In reaching its conclusion to that effect, the ECJ in *Borsele* was considering the activity of the local authority in providing school transport services as a whole and not the individual supplies that were being made by the local authority. In other words, it did not address the distinction between those parents whose children travelled between 6 kilometres and 20 kilometres (who were required to make a fixed payment to the local authority) and those parents whose children travelled further than that (who were required to make a payment which was determined by reference to the cost of providing the transport and their means).

23. In *Finland*, the question was whether the Republic of Finland could treat supplies of legal aid provided by the public legal aid office as being outside the scope of VAT while taxing similar supplies made by lawyers in private practice. The amount which a recipient of legal aid was required to contribute to the cost of the legal aid depended on the recipient's income and capital. The recipient of the legal aid had the choice of using the lawyers employed by the state or using his or her own lawyers and it made no difference to the amount of the recipient's contribution which of those two choices the recipient made. The ECJ held that the legal aid services were being supplied for a consideration to the recipients who made some payment for them because there was a direct link between the provision of the services and the payments.

In *Apple and Pear*, a body established for the purposes of promoting the production in England and Wales of, and the marketing of, apples and pears imposed a mandatory annual charge on its members to finance its activities. The ECJ held that there was no direct link between the service which the body provided to its members and the mandatory charges that the body received. It said as follows:

"14 It is apparent from the order for reference that the Council's functions relate to the common interests of the growers. In so far as the Council is a provider of services, the benefits deriving from those services accrue to the whole industry. If individual apple and pear growers receive benefits, they derive them indirectly from those accruing generally to the industry as a whole. In that connection, it must be stated that the possibility cannot be ruled out that, in certain circumstances, only apple growers or else only pear growers can derive benefit from the exercise of specific activities by the Council.

15 Moreover, no relationship exists between the level of the benefits which individual growers obtain from the services provided by the Council and the amount of the mandatory charges which they are obliged to pay under the 1980 Order. The charges, which are imposed by virtue not of a contractual but of a statutory obligation, are always recoverable from each individual grower as a debt due to the Council, whether or not a given service of the Council confers a benefit upon him.

16 It follows that mandatory charges of the kind imposed on the growers in this case do not constitute consideration having a direct link with the benefits accruing to individual growers as a result of the exercise of the Council's functions. In those circumstances, the exercise of those functions does not therefore constitute a supply of services effected for consideration within the meaning of [Article 2 PVD]".

24. There are other ECJ cases which reflect the principles described above.

25. One such case is *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C - 16/93) [1994] STC 509 ("*Tolsma*"). That case related to donations made to a person who played the barrel organ on a public highway in the Netherlands. The ECJ held that the donations received by the appellant were not consideration for the services supplied by the appellant because the ingredients necessary for there to be a direct link between those donations and the services were not present. There was no legal relationship between the appellant and the passers-by who made donations to the appellant pursuant to which a reciprocal obligation arose whereby the donations were made in return for the service. There was therefore no direct link between the donations and the provision of the service.

26. Whilst *Tolsma* is authority for the proposition that, in order for there to be a supply for a consideration, there needs to be a legal relationship between the supplier and the recipient of the supply, it is clear that a legal relationship can exist even if there is no legally enforceable contract. The authority for this proposition is the decision of the ECJ in *Town and County Factors Ltd v Customs and Excise Commissioners* (Case C - 498/99) [2002] STC 1263 ("*Town and Country*"). That case concerned a spot-the-ball competition the rules of which provided that the obligations of the competition organisers as stated in the rules were binding in honour only and were not legally enforceable. Despite that provision, the organisers

never refused to provide the prizes specified by the rules. The ECJ held that the fact that the rules of the competition were not enforceable did not preclude the existence of a legal relationship. To do otherwise would compromise the effectiveness of the VAT regime because, first, it would mean that transactions falling within the regime could vary from Member State to Member State as a result of differences between the various legal systems and, secondly, it would enable suppliers to escape the incidence of VAT by simply including a non-enforceability provision in their contracts. Moreover, it could not validly be maintained that no legal relationship existed between the parties on the basis that the obligation on the provider of the service was not enforceable in circumstances where the impossibility of seeking enforcement derived from an agreement between the supplier and the recipient of the service because that agreement in itself was the very expression of a legal relationship. So it is clear that the requirement that there be a legal relationship can be satisfied by an agreement of a legal nature even if that agreement does not give rise to enforceable obligations.

27. Even if the legal relationship between the parties is legally enforceable, the uncertain nature of the provision of any payment can be sufficient to break the direct link between the service and the payment, such that the service cannot be regarded as being supplied for a consideration. In *Odvolaci financni reditelstvi v Pavlina Bastova* (Case C – 432/15) ("*Bastova*"), the appellant carried on an economic activity of breeding and training horses. One type of income which the appellant earned from her activities consisted of prizes obtained by her own horses for being placed in races and the trainer's share of prizes won by horses owned by others which she trained. The ECJ held that the supply of a horse by its owner to the organiser of a horse race for the purposes of the horse's participation in the race did not amount to a supply for a consideration because of the uncertainty that the relevant horse would win any prize money from the race. In effect, it was not the supply of the horse which gave rise to the prize money but rather the achievement of a certain result at the end of the race. The uncertainty precluded the existence of a direct link between the supply and the receipt of a prize. Only in circumstances where the owner was paid come what may simply because of the participation of the horse in the race could there be said to be a supply for a consideration.

28. Whilst there was no disagreement between the parties as to the fact that an obvious uncertainty such as the one in *Bastova* would have the effect of preventing a supply from satisfying the requirements of Article 2 PVD, there was some disagreement between them as to the precise extent to which an uncertainty as to whether or not a supplier will be entitled to invoice and/or receive payment for its supplies of services can preclude the supplier from satisfying those requirements. That disagreement manifested itself in their submissions at the hearing in relation to the Upper Tribunal decision in the domestic law case of *Norseman Gold plc v Revenue and Customs Commissioners* [2016] UKUT 69 (TCC) ("*Norseman*").

29. In *Norseman*, which was also a case involving costs incurred by a holding company of a mining group in relation to one of its subsidiaries, although the directors of the holding company alleged that it was always intended that charges in respect of those costs would be made to the subsidiaries as and when the subsidiaries

could afford to pay, no such charges were raised by the holding company for some time. In addition, when one of the directors did raise the point in an email, this led to an exchange which was described by Judge Bishopp in the First-tier Tribunal in that case as being somewhat "desultory". The evidence showed that, prior to the commencement of the Respondents' investigation into the group's VAT affairs, very little had been done towards agreeing on the amounts to be charged, the frequency with which the invoices were to be sent or the details of the services to be exchanged in return for the payments. In the circumstances, Judge Bishopp was not satisfied that the holding company was making its supplies of management services for a consideration (or, for that matter, carrying on an economic activity). He noted that:

"It does not, however, seem to me that a rather vague intention to levy an unspecified charge, at some undefined time in the future, is enough. Mr Lall could not show me that there was any more than that. The fact that Norseman could have imposed a charge does not, in my view, lead to the conclusion that it should be treated as if it had done so" (see paragraph [49] of the First-tier Tribunal decision in *Norseman* ([2014] UKFTT 573 (TC)).

30. Judge Bishopp went on:

"I accept Mr Lall's argument that payment is not a requirement as long as there is an obligation to pay, and I am willing also to accept, at least in principle, that as long as a charge has been determined it does not matter that no invoices have been sent. I understand, too, that there was little commercial rationale for raising charges the subsidiaries could not pay without subvention from the parent. But it seems to me, from what the Court said in *Commission v Finland*, that the failure in this case to agree on or stipulate any price or consideration at all can lead only to the conclusion that there was no obligation to pay for the supplies at the time they were made. It was not until after the last of the assessed periods that an ascertained price was agreed. That later agreement does not, in my view, help Norseman; what matters is the position at the time the supplies were made. At that time the payment of a charge was, if not voluntary, certainly unenforceable; in that I agree again with Mr Connell. The failure to determine the amount of the charge beforehand is in my view fatal to Norseman's case."

31. Judge Bishopp's decision was upheld by the Upper Tribunal for essentially the same reasons. The Upper Tribunal pointed out that it is not enough for a holding company in this position to intend to make supplies. Instead, the intention of the holding company must be to make taxable supplies (or supplies which would be taxable supplies if they were to be made in the same Member State as the one in which the supplier belongs) – ie supplies for a consideration.

32. Both parties agreed that, in order for supplies of management services to satisfy the test in Article 2 PVD, a vague intention that payment be received in return for the supplies is insufficient and that there needs instead to be a legal agreement to that effect, even if that legal agreement is not enforceable. The parties did, however, differ in relation to the extent to which a failure on the part of the subsidiary to make payments to the holding company in respect of the services could cause the holding company to fail the test.

33. Mr West considered that the risk of a default by the subsidiary and the subsequent non-payment by the subsidiary were factors that would need to be taken into account in considering the application of the test.

34. In contrast, Ms Black alleged that neither of those were factors that needed to be taken into account. As regards the risk of a default, she pointed out that every supply in return for consideration carries with it the risk of a default by the recipient of a supply. So the existence of that risk cannot possibly be a relevant factor in applying the tests. As regards the absence of payment, she pointed out that consideration passes when the recipient of a supply enters into the obligation to pay. Thus, any subsequent default does not negate the existence of that consideration. Ms Black pointed me to paragraph [51] of the decision at first instance in *Norseman*, where Judge Bishopp accepted the proposition that the critical issue is the obligation to pay and not payment itself. She also referred me to paragraph [26] of the ECJ decision in *Lebara v Revenue and Customs Commissioners* (Case C – 520/10) [2012] STC 1536, which reiterates the fact that VAT is charged on supplies of goods and services and not on the payments which are made for those supplies of goods and services. This, she says, shows that neither the ability of the recipient to pay for a supply nor the question of whether or not the recipient has actually paid for a supply is relevant in determining whether there is consideration for the supply.

35. My view is that, subject to the one point which I go on to mention below, Ms Black's views on these points are to be preferred. That is to say that consideration is provided for a supply when the obligation to provide that consideration is entered into and that that is the case regardless of the extent of any risk of default or any subsequent failure to discharge the relevant obligation. The one caveat to that which I would make is that there might be circumstances where the risk of default is so great and the subsequent failure to discharge the specified obligation is so certain to occur at the time when the agreement is made that the transaction can, in effect, be analysed as if the obligation were illusory. In effect, in those cases, the transaction should be analysed as if there were no obligation to provide the consideration in the first place.

36. Finally in relation to the test in Article 2 PVD, I should refer to the decision by the First-tier Tribunal in *African Consolidated Resources v Customs and Excise Commissioners* [2014] UKFTT 580 (TC) ("*ACR*"). Although that decision is not binding on me, it touches on an aspect of the test which I have not hitherto mentioned. In addition, the Upper Tribunal in Norseman saw "no reason to doubt that it is correct and do not accept Mr Lall's criticisms of it" (see paragraph [136] of the Upper Tribunal decision in *Norseman*).

37. In *ACR*, the services provided by a consultant to the holding company in relation to the holding company's subsidiaries were on-charged by the holding company to the subsidiary at a fixed fee of £10,000 per annum. No details of the services supplied were shown in those invoices and no cash payments were made as a result – instead, the debt outstanding between the relevant subsidiary and the holding company was increased. In its board minutes, the holding company noted that the fee payable by the subsidiary could be increased substantially in future years

if the subsidiary and the sub-group of which it formed part were to start earning substantial profits. Neither the management services to be provided by the holding company to the subsidiary nor the loan between the holding company and the subsidiary were documented. However, the balance on the loan and the interest charged were recorded in the companies' board minutes each year.

38. Judge Short considered that the provision of management services in return for a fixed fee based on what the subsidiary could afford could not be regarded as involving the making of taxable supplies for the purposes of Article 2 PVD. Those terms meant that, in her view, there was insufficient evidence of an economic link between the value of what the holding company was providing and the price that the holding company was charging for its services.

<u>*Economic activity*</u>

39. Turning then to the application of the economic activity condition in Article 9 PVD, the starting point in relation to this test is to note that it is distinct from the first test and therefore that it is possible for a particular set of circumstances to satisfy the first test - because there are supplies being made as result of a "legal relationship" between the supplier and the recipient, pursuant to which there is "reciprocal performance" whereby the goods or services are supplied in return for the consideration, thus meaning that there is a "direct link" between the supply of the goods or services and the consideration – and yet fail the second – because the supplier does not have the purpose of obtaining income from its supplies on a continuing basis. In the words of Lord Justice David Richards in *Wakefield*, "[a] supply for a consideration is a necessary but not sufficient condition for an economic activity" and "[s]atisfaction of the test for a supply for consideration under article 2 does not give rise to a presumption or general rule that the supply constitutes an economic activity" (see paragraphs [52] and [53] in *Wakefield*).

40. Examples of circumstances which have been held to satisfy the first test but fail the second may be found in both *Borsele* and *Finland*.

41. In *Borsele*, the ECJ held that, in determining whether there is an economic activity, all the circumstances in which a service is being supplied must be examined. It went on to say the following:

"30. Comparing the circumstances in which the person concerned supplies the services in question with the circumstances in which that type of service is usually provided may therefore be one way of ascertaining whether the activity concerned is an economic activity (see, by analogy, judgment of 26 September 1996 in *Enkler*, C-230/94, EU:C:1996:352, paragraph 28).

31. Other factors, such as, inter alia, the number of customers and the amount of earnings, may be taken into account along with others when that question is under consideration (see, by analogy, judgment of 26 September 1996 in *Enkler*, C-230/94, EU:C:1996:352, paragraph 29).

32. While it is, of course, ultimately for the national court to assess all the facts of the case

in the main proceedings, the Court, which is called on to provide answers of use to the national court, may provide guidance, based on the file in those proceedings and on the written and oral observations which have been submitted to it, which may enable the national court to give judgment in the specific case before it.

33. In that regard, it should be noted, first, that the municipality of Borsele recovers, through the contributions that it receives, only a small part of the costs incurred. The contributions at issue in the main proceedings are not payable by each user and were paid by only a third of the users, with the result that they account for only 3% of the overall transport costs, the balance being financed by public funds. Such a difference between the operating costs and the sums received in return for the services offered suggests that the parental contribution must be regarded more as a fee than as consideration (see, by analogy, judgment of 29 October 2009 in *Commission* v *Finland*, C-246/08, EU:C:2009:671, paragraph 50).

34. It therefore follows from that lack of symmetry that there is no genuine link between the amount paid and the services supplied. Hence, it does not appear that the link between the transport service provided by the municipality in question and the payment to be made by parents is sufficiently direct for that payment to be regarded as consideration for that service and, accordingly, for that service to be regarded as an economic activity within the meaning of Article 9(1) of the VAT Directive (see, by analogy, judgment of 29 October 2009 in *Commission* v *Finland*, C- 246/08, EU:C:2009:671, paragraph 51).

35. It should be noted, second, that the conditions under which the services at issue in the main proceedings are supplied are different from those under which passenger transport services are usually provided, since the municipality of Borsele, as the Advocate General observed in point 64 of her Opinion, does not offer services on the general passenger transport market, but rather appears to be a beneficiary and final consumer of transport services which it acquires from transport undertakings with which it deals and which it makes available to parents of pupils as part of its public service activities.

36. It follows from all the forgoing considerations that, in answer to the questions submitted by the referring court, Article 9(1) of the VAT Directive must be interpreted as meaning that a regional or local authority which provides a service for the transport of schoolchildren under conditions such as those described in the main proceedings does not carry out an economic activity and is not therefore a taxable person."

42. In its reference in paragraph [34] of the above extract to the absence of a direct link between the amount paid and the service supplied, the ECJ was getting close to mixing up the two tests. Nevertheless, the Court of Appeal in *Wakefield* explained that this should be regarded as no more than a shorthand way of expressing the broad enquiry as to whether the relevant supplies have been made for the purposes of obtaining income – see paragraphs [56] to [59] in *Wakefield*.

43. In any event, it is clear from the rest of the extract (and the decision as a whole) that, even though a supplier may be making supplies for a consideration for the purposes of Article 2 PVD, it may not be carrying on an economic activity where:

(a) the supplier is not a market participant – ie does not offer similar

services to the market in general; and

(b) the consideration which it receives for its supplies represents such a small proportion of its costs that the consideration should be seen more as a fee than as income.

This is because, in that instance, the purpose of the supplier can be said not to be obtaining income. However, that is not to say that the supplier needs to be intending to make a profit – as noted by the Advocate General in *Borsele*, "it is important in particular not to confuse the purpose of obtaining income with the intention to make a profit".

44. Similarly, in *Finland*, the ECJ focused on the quantum of the consideration which had been given in return for the supplies, which was low in comparison to the general overheads of the supplier, and concluded that this suggested that the payments made by the recipients of the supplies "must be regarded more as a fee, receipt of which does not, per se, mean that a given activity is economic in nature, than as consideration in the strict sense" and therefore that the supplier in that case was not carrying on an economic activity despite the fact that its supplies satisfied the test in Article 2 PVD.

45. Whilst the fact that the supplier is not a market participant – ie does not offer similar services to the market in general – is not necessarily fatal to its being regarded as carrying on an economic activity, the fact that the terms on which it contracts are widely off market can have that effect. In *ACR*, although Judge Short noted that it was not realistic to expect intra-group transactions to be undertaken on terms that are comparable to transactions between unrelated parties or to expect the documents in relation to intra-group transactions to be as sophisticated as documents between unrelated parties, the fact that the loan in that case was on off-market terms led her to regard the loan as not being made in the course of an economic activity. In particular, there was no detailed evidence to support the commerciality of the interest rate or evidence that the interest rate was regularly reviewed and there was no fixed repayment date.

46. In the light of the decisions in *Borsele* and *Finland*, the Court of Appeal in *Wakefield* summarised the economic activity test as follows:

(a) the test is objective and not subjective;

(b) it requires a wide-ranging and fact-sensitive enquiry which takes into account all the circumstances;

(c) there is no need for the supplier to be intending to make a profit – the supplier needs merely to have the purpose of obtaining income; and

(d) while cases concerning other facts provide helpful pointers to some of the factors to be considered, there is no checklist of factors and, "[e]ven where the same factors are present, they may assume different relative importance in different cases. The CJEU made clear in *Borsele* at [32] that it was for the national court to assess all the facts of a case" (see paragraph [59] in *Wakefield*).

47. Although *Borsele* and *Finland* demonstrate that there can be circumstances where a supplier will satisfy the first test but not the second, it is clear that such circumstances will be unusual – as noted by Lord Justice David Richards at paragraph [53] in *Wakefield*.

48. I believe that both parties accepted the above analysis of how the economic activity test should be applied in general. However, where they differed was in considering how the test needs to be applied in the context of a holding company which provide supplies of management services to its subsidiaries.

49. Mr West submitted that there was nothing unique about the provision of management services by a holding company to its subsidiaries which would justify a departure from the general principles set out in paragraphs 39 to 46 above, whereas Ms Black contended that various decisions of the ECJ made it plain that, in those circumstances, a finding that the holding company was making supplies for a consideration in supplying management services to its subsidiaries – and therefore satisfied the test in Article 2 PVD in relation to those supplies of services - must lead inexorably to the conclusion that the holding company necessarily satisfied the test in Article 9 PVD.

50. In that regard, Ms Black referred me to the following four cases in relation to holding companies - *Polysar Investments Netherlands BV v Inspecteur der Invoerrechten en Accijnzen (Inspector of Customs and Excise), Arnhem* (Case C - 60/90) ("*Polysar*"), *Cibo Participations SA v Directeur regional des impots du Nord-Pas-de-Calais* (Case C – 16/00) ("*Cibo*"), *Beteiligungsgesellschaft Larentia & Minerva mbH & Co. KG v Finanzamt Nordenham* (Case C – 108/14) ("*Larentia*") and *MVM Magyar Villamos Muvek Zrt v Nemzeti Ado-es Vamhivatal Fellebbviteli Igazgatosag* (Case C – 28/16) ("*MVM*") and it is to those decisions that I now turn.

51. The starting point is the decision in *Polysar* to the effect that a holding company whose only activity is the holding of shares in its subsidiaries is not carrying on an economic activity. In the course of that judgment, the ECJ noted at paragraph [14] that :

"It is otherwise where the holding is accompanied by direct or indirect involvement in the management of the companies in which the holding has been acquired, without prejudice to the rights held by the holding company as shareholder."

Whilst this statement makes it clear that the involvement of a holding company in the management of its subsidiaries amounts to an economic activity, it is not, in and of itself, authority for the proposition that, as long as the supplies made in the course of that management are for a consideration, the economic activity test in what is now Article 9 PVD will automatically be met.

52. The decision in *Cibo* is different in that respect. That case related to the extent to which a holding company which was providing various management services to its subsidiaries for a consideration could deduct VAT input tax on services purchased in the context of acquiring the shares in its subsidiaries, given that the holding

company was also receiving dividends from its subsidiaries. Whilst the second and third questions in that case related to the impact, on the right to recover VAT input tax, of the receipt of dividends by the holding company, the first question involved a request for the criteria for establishing whether the involvement of a holding company in the management of companies in which it has acquired a shareholding constitutes an economic activity for the purposes of what is now Article 9 PVD.

53. In response to that question, the ECJ stated at paragraphs [21] and [22] that:

> "20. It is clear from paragraph 19 of the judgment in *Floridienne and Berginvest* that direct or indirect involvement in the management of subsidiaries must be regarded as an economic activity within the meaning of Article 4(2) of the Sixth Directive where it entails carrying out transactions which are subject to VAT by virtue of Article 2 of that directive, such as the supply by a holding company such as Cibo of administrative, financial, commercial and technical services to its subsidiaries.
>
> 21. The answer to the first question referred for a preliminary ruling must therefore be that the involvement of a holding company in the management of companies in which it has acquired a shareholding constitutes an economic activity within the meaning of Article 4(2) of the Sixth Directive where it entails carrying out transactions which are subject to VAT by virtue of Article 2 of that directive, such as the supply by a holding company to its subsidiaries of administrative, financial, commercial and technical services."

In other words, in its response to the first question, the ECJ clearly stated that, where a holding company is making supplies for a consideration falling within Article 2 PVD, it is carrying on an economic activity for the purposes of Article 9 PVD.

54. The view expressed by the ECJ in *Cibo* was repeated by the ECJ in two other cases relating to the ability of a holding company to recover VAT input tax, *Larentia* and *MVM* – see paragraph [21] in *Larentia* and paragraph [33] in *MVM*. However, unlike *Cibo*, the statement in question did not form any part of the ratio of either of those cases. In *Larentia,* no question had arisen as to whether or not the holding company was carrying on an economic activity. It was simply accepted that it was – see paragraph [7] in *Larentia* – and the only issue in that context was the extent to which the holding of shares in the subsidiaries, which was clearly not an economic activity, should affect the ability of the holding company to recover VAT input tax on supplies connected with the procurement of capital for the purchase of shares in the holding company's subsidiaries. In *MVM*, the holding company had been supplying the management services for no consideration. As a result, it was neither making supplies of management services for a consideration nor carrying on an economic activity. Consequently, the statement made at paragraph [33] to the effect that the making of supplies for a consideration constitutes an economic activity had no bearing on the point at issue.

55. The conclusion which I draw from these cases is that Ms Black is correct in her submission that, in the case of a holding company supplying management services to its subsidiaries, a finding that those management services are being supplied for a consideration for the purposes of Article 2 PVD must lead inexorably to the conclusion that the holding company is also carrying on an economic activity for the purposes of Article 9 PVD. However, I believe that it is only *Cibo* that decides this

point. Whilst the repetition of the point in *Larentia* and *MVM* is of some comfort in reaching that conclusion, it cannot be said that that is what those cases decided.

56. This conclusion sits a little uneasily with the conclusions set out at paragraphs 39 to 46 above. However, it seems to me that, in the case of a holding company making supplies of management services to its subsidiaries for a consideration, there can be no circumstances where that holding company is not also carrying on an economic activity. It is, effectively, one situation where the divergence between the two tests, which occurred in *Borsele* and in *Finland,* cannot arise.

The evidence

57. The evidence presented to me for the purposes of the appeals comprised:

(a) four board minutes of the Appellant which refer to the on-charging to its subsidiaries of various consultancy costs incurred by the Appellant in relation to the businesses of its subsidiaries;

(b) the witness statement and oral evidence of Mr Michael George Masterman ("Mr Masterman"), chairman and director of the Appellant and sole director of each of IRS and IRP;

(c) the contract between the Appellant and Mr Randell;

(d) the invoices provided by the four consultants in question to the Appellant in relation to their services;

(e) the invoices provided by the Appellant to IRS in respect of the consultancy costs incurred by the Appellant in relation to the business of IRS;

(f) a table - headed Appendix 1 to Mr Masterman's witness statement - listing the invoices mentioned in paragraph 57(e) above and, in each case, the period and consultants to which the relevant invoice related, the date of the invoice, the invoice amount, the date of payment (where applicable) and the amount outstanding (where applicable);and

(g) correspondence which has passed between the Appellant and the Respondents in relation to the subject matter of the appeals.

58. Crucially, the evidence did not include any written agreement between the Appellant and either of IRS or IRP in relation to the consultancy costs or any board minute or other contemporaneous record of either of IRS or IRP in relation to those costs.

The board minutes

59. In his evidence, Mr Masterman referred me to four board minutes of the Appellant. Given the significance of those board minutes to this decision, I have set them out in full below.

60. The first minute is dated 16 May 2007, at a time before the period which is the

subject of the appeals and when neither IRS nor IRP was a subsidiary of the Appellant. The minute reads as follows:

"During the meeting the Board of Directors discussed the provision of management services between [the Appellant] and its Subsidiaries Taraz LLP and Black Gold Kentucky Inc.

The Board received external advice from F.W Smith, Riches & Co and agreed to their recommendation to provide management services from the parent company to the subsidiaries.

The Board agreed that invoices for management services provided would be raised when the subsidiaries are generating revenue."

61. The second minute is dated 16 March 2012, at a time shortly after the acquisition by the Appellant of IRS and shortly before the Appellant's acquisition of the parent company of IRP. The minute reads as follows:

"During the [Appellant] Board meeting held on Friday 16 March 2012 the Directors discussed Tony Randell's consultancy services provided to [the Appellant] ('the Company') in the capacity of Financial Controller for [IRS] newly acquired by the Company in December 2011. It was unanimously agreed that a portion of his consultancy services will be recharged by the Company to [IRS] when [IRS] generates revenues and is thus in a position to reimburse such fees to the Company."

62. The third minute is dated 20 January 2015, at a time shortly after the Appellant had acquired the services of two additional consultants. The minute reads as follows:

"During the [Appellant] Board meeting held on Tuesday 20 January 2015 the Directors discussed Fernando de la Fuente and Aaron Szumilak's management consultancy services provided to [the Appellant] ('the Company') in the capacity of Country Manager Spain and Project Development Manager respectively for [IRS].

It was unanimously agreed that the consultancy services will be recharged by the Company to [IRS] when [IRS] generates revenues."

63. The final minute is dated 14 June 2016, at a time shortly after the Appellant had acquired the services of a further consultant. The minute reads as follows:

"During the [Appellant] Board meeting held on Tuesday 14 June 2016 the Directors discussed Eduardo Luis Contreras Lopez consultancy services provided to [the Appellant] ('the Company') in the capacity of geological and technical advisor relative to the La Parilla Project, Spain for [IRS].

It was unanimously agreed that the consultancy services will be recharged by the Company to [IRS] when [IRS] generates revenues."

Mr Masterman's evidence

64. Mr Masterman made the following points in the course of giving his evidence:

(a) prior to its decision to refocus on the exploration and exploitation

of tungsten in 2010 and 2011, the Appellant's business involved the exploration and exploitation of oil, primarily in Kazakhstan. That business failed as a result of the decision by the Kazakhstan Government in 2008 to revoke the licence held by the Appellant's subsidiary, Taraz LLP;

(b) IRS was acquired in 2011 and IRP was acquired in 2012 and he was the sole director of IRS and IRP, as well as being chairman and director of the Appellant;

(c) IRS first began to generate revenues towards the end of 2014 - prior to that point, it would not have been capable of making any payments to the Appellant in respect of the consultancy costs - and IRP has yet to generate any revenues although it is expected to do so in 2019;

(d) IRS discharged the first invoice which was rendered to it by the Appellant in part out of funding which it had received from the Spanish government (ie out of monies which were not revenues);

(e) a number of the invoices which have been rendered to IRS remain unpaid because IRS does not currently have the means to discharge all of the invoices which have been rendered to it and a decision has been taken within the group to discharge the later invoices before the earlier ones;

(f) each of the Appellant's directors has a service contract with the Appellant but no part of the costs incurred by the Appellant pursuant to those service contracts has been on-charged to the Appellant's subsidiaries; and

(g) initially, the only consultant to the Appellant in relation to IRS and IRP was Mr Tony Randell but other consultants were hired later on in 2015 and 2016.

65. There were two main areas in which the evidence given by Mr Masterman was somewhat confused and at times contradictory.

66. The first was in relation to the reference in each of the board minutes set out in paragraphs 60 to 63 above to the fact that each subsidiary would be invoiced only when it started to receive revenues. I put it to Mr Masterman that the most natural construction of that drafting was that the relevant subsidiary would therefore not be obliged to reimburse the Appellant in the event that it never started to receive revenues. Mr Masterman initially admitted that that was the case but subsequently said that, in reaching their understanding, the group companies had never considered the possibility that a subsidiary might never receive revenues (notwithstanding the experience of the Appellant in relation to its investment in Kazakhstan) and that, had they thought about that possibility at the time, they would have agreed that the relevant costs would still need to be reimbursed, come what may. His final stated view was that the understanding between the group companies was that the reference to the delay in invoicing until revenues were received was merely a matter of timing and that the subsidiaries understood that they were bound to reimburse the Appellant even if no revenues ever arose.

67. A related issue was whether the reference to the deferral of invoicing until revenues arose meant that each invoice could be rendered only at a time when the relevant subsidiary had sufficient revenues to discharge the relevant invoice or whether the first revenues received by a subsidiary was intended to operate as a "cliff-edge" condition precedent to all subsequent invoices to that subsidiary, with the result that, once a subsidiary received its first revenues, it could then be invoiced regularly without regard to whether or not its revenues at the time were sufficient to discharge the relevant invoice in full.

68. Mr Masterman in his evidence suggested that the understanding between the group companies was that the second basis would apply and that this was supported by the fact that, following the submission of the first invoice to IRS on 31 December 2014, the Appellant had been submitting invoices to IRS on a regular basis and a number of those invoices had yet to be discharged (on the basis that IRS did not have sufficient revenues to do so). (Mr Masterman pointed out that it had been agreed within the group that later invoices would be prioritised over earlier ones in circumstances where IRS could not discharge them all). However, it was noted at the hearing that the board minute of 16 March 2012 was not consistent with that understanding in that, after the reference to the receipt of revenues by the relevant subsidiary, it goes on to say "...and is thus in a position to reimburse such fees to the Company".

69. The second main area of confusion was in relation to the first invoice that was rendered to IRS on 31 December 2014 and the exchange of correspondence which took place between the Respondents and Cook & Partners Limited, the adviser to the Appellant ("Cook"), in relation to that invoice. The invoice in question related to the costs incurred by the Appellant under its contract with Mr Randell over the three years since Mr Randell's appointment. Over that period, as is clear from the terms of the letter from Cook to the Respondents of 19 August 2015, Mr Randell had done 1,336 hours of work in relation to IRS and been paid €60 per hour for that work. This amounted to €80,183 in aggregate, which equated to £72,236 at the average exchange rate between Sterling and Euro over that period of 1.11. The invoice of 31 December 2014 was for £72,000, which was almost the same aggregate amount once the average exchange rate between Sterling and Euro over that period was taken into account but the invoice from the Appellant referred to work of 360 hours at £200 per hour.

70. Mr Masterman was unable to explain why the invoice from the Appellant was for broadly the same aggregate amount as had been charged by Mr Randell in relation to IRS and yet showed that the number of hours worked was only 26% of the actual hours worked whilst the hourly rate was more than 3 times the actual hourly rate. He could also not explain why the letters written by Cook on its behalf prior to the letter from Cook of 19 August 2015 – as to which, see paragraphs 77(e) to 77(k) below – were so misleading.

71. None of the invoices rendered to IRS after the 31 December 2014 invoice contains a reference to the hours worked in providing the services to which the

invoice relates.

The contract between the Appellant and Mr Randell

72. The contract between the Appellant and Mr Randell is undated but is stated to be effective as of 1 January 2012. The crucial clauses so far as the appeals are concerned are clause 1 - which states that the Appellant has engaged Mr Randell "to provide to the [Appellant] administrative, legal, finance support, and such other services relative to the business activity of the [Appellant], especially related to the Spanish and Portugese Subsidiaries of the [Appellant]" – and clause 4 – which states that Mr Randell will be paid €60 per hour for his services.

73. I was not provided with equivalent written contracts in relation to the other three consultants but Mr Masterman in his evidence said that they were expressed in similar terms to those of the contract between the Appellant and Mr Randell.

The invoices

74. The invoices from the consultants to the Appellant were of varying degrees of detail ranging from a simple statement of the time period to which the relevant invoice related and the amount of the charge, through to a detailed breakdown of the work and time involved.

75. A similar range can be seen in the invoices from the Appellant to IRS. The invoice of 31 December 2014 has a detailed description of the services to which it relates whereas subsequent invoices refer simply to "management services" and "management services expenses" for the period to which the invoice relates.

The table at Appendix 1 to Mr Masterman's witness statement

76. The key features which emerge from the table at Appendix 1 to Mr Masterman's witness statement are as follows:

> (a) IRS has been invoiced on a six-monthly basis between 31 December 2014 and 31 December 2017 but has been invoiced monthly from 31 March 2018 onwards; and
>
> (b) a number of the invoices still remain unpaid despite a considerable passage of time since they were rendered. For example, none of the invoices which have been rendered by the Appellant to IRS between 31 December 2015 and 31 December 2017 in respect of the services of Mr de la Fuente, Mr Szumilak or Mr Contreras Lopez has been discharged and neither of the invoices which have been rendered by the Appellant to IRS in 2017 in respect of the services of Mr Randell has been discharged.

The correspondence between the Appellant and the Respondents

77. The key features which emerge from the correspondence between the Appellant and the Respondents are as follows:

(a) the Respondents' position – which they advanced in their letters of 11 December 2014, 13 March 2015, 21 November 2016 and 7 March 2017 – was that the fact that payment by each subsidiary to the Appellant was dependent on the relevant subsidiary's having revenue and was therefore not linked to the value of the services supplied to the relevant subsidiary meant that the necessary direct economic link between the supplies and the payments did not exist. Thus, the supplies of services made by the Appellant to the subsidiaries were not supplies for VAT purposes. In short, in the view of the Respondents, the supplies were "non-economic for VAT purposes…because the services supplied [were] not supplies for a consideration" (see the letter from Ms Martin of the Respondents to Cook of 11 December 2014). This meant that, in the view of the Respondents, the Appellant had no entitlement to be registered for VAT purposes and could not recover its VAT input tax;

(b) in contrast, the Appellant's position – as advanced by Cook on behalf of the Appellant in Cook's letters of 6 February 2015, 8 April 2015 and 11 June 2015 – was that such a direct economic link between the supplies and the payments did exist because the amount payable by each subsidiary once it began to generate revenue was quantified by reference to the value of the services which were being supplied by the Appellant to the relevant subsidiary. Accordingly, the Appellant was entitled to be registered for VAT and to recover its VAT input tax;

(c) My interpretation of the basis for the difference between the parties is that, whereas the Respondents were focusing on the fact that payment by each subsidiary was contingent on the generation of revenues by the relevant subsidiary and was therefore necessarily being determined by reference to a factor other than the value of the services which were being supplied by the Appellant to the relevant subsidiary – namely, the relevant subsidiary's generating revenue - Cook was focusing on the amount which would be payable by each subsidiary assuming that it did in fact generate revenues and the condition precedent to the obligation to make payment was satisfied;

(d) in support of their position, the Respondents noted in their letters of 11 December 2014 and 13 March 2015 that a similar arrangement had been adopted by the Appellant in relation to Taraz LLP and Black Gold Kentucky Inc in earlier years and that those subsidiaries had never derived any revenue and had consequently never paid for the services supplied to them by the Appellant on similar terms;

(e) in support of the Appellant's position, in its letter of 6 February 2015, Cook referred to "the significant management time, expertise and commitment on The Boards (sic) behalf" and stated that the intention was to charge each subsidiary for such management time as soon as the relevant subsidiary had revenue "and was consequently able to pay for such services". As evidence of this, Cook referred to the invoice of 31 December 2014 from the Appellant to IRS, reflecting the fact that IRS had begun to

generate revenues in 2014;

(f) there was some discussion between the parties in relation to the calculation of the aggregate amount shown in that invoice. As noted in paragraph 77(e) above, Cook submitted that this "reflect[ed] the specific management time spent on the company's and group's affairs in the period as described" (see Cook's letter of 8 April 2015). The Respondents pointed out that the number of hours recorded in that invoice (360) equated to just 120 hours per annum over each of the years to which the invoice related and that this seemed to be at odds with Cook's assertion that significant amounts of management time had been spent by the management on IRS's behalf;

(g) in the course of the exchange between the parties in relation to the invoice, Cook stated that the invoice reflected 360 hours of work at £200 per hour and that this accurately recorded the hours actually worked and an economic rate of £200 per hour. Cook went on to say that this represented a mark up for the Appellant;

(h) in fact, it subsequently transpired that Cook's assertions in relation to the invoice of 31 December 2014 were misleading in two significant respects;

(i) first, the time taken into account in determining the amount payable under the invoice did not reflect any management time whatsoever, in that none of the amount set out in the invoice reflected the work carried out by the directors of the Appellant on behalf of the subsidiaries. Instead, the only time which was reflected in the invoice was the time spent by Mr Randell;

(j) secondly, and more significantly, Cook was ultimately forced to concede that the invoice in fact reflected 1,336 hours of work by Mr Randell at €60 per hour and not 360 hours of work by Mr Randell at £200 per hour. The aggregate amount of the invoice was not affected by these self-cancelling discrepancies but they were highly relevant to the question of whether the Appellant was making supplies for a consideration and carrying on an economic activity, which was the subject of the correspondence. The discrepancies meant that Cook could suggest that the Appellant was making a mark up from its supplies to IRS when in fact the Appellant was charging for those supplies at a fraction less than its costs; and

(k) I can see in the correspondence no apology to the Respondents from Cook or the Appellant for the above discrepancies and I believe that that should have been forthcoming.

Findings of facts

78. The evidence summarised above contains a number of omissions, inconsistencies and contradictions which have made it difficult for me to determine the facts in this case.

79. For example, whereas the board minutes suggest that payment by a subsidiary would not be required if the relevant subsidiary never generated any revenues, Mr Masterman's evidence was (eventually) to the contrary.

80. Similarly, whereas the board minutes of 20 January 2015 and 14 June 2016 are capable of being construed in one of two ways – that is to say that it is unclear whether the reference to payment as and when revenues were generated meant that the Appellant could submit an invoice to a subsidiary only at a time when the relevant subsidiary had revenues with which to discharge the relevant invoice or whether, once a subsidiary started to generate revenues, the Appellant would be entitled to submit invoices on a regular basis without regard to whether or not the relevant subsidiary had the wherewithal to discharge the relevant invoices – the board minute of 16 March 2012 strongly suggests that the former was intended (because of the words at the end of the board minute - "..and is thus in a position to reimburse such fees to the Company").

81. There is also the fact that there is absolutely no contemporaneous written evidence in the form of a written agreement or relevant board minutes of the subsidiaries to demonstrate that the subsidiaries ever agreed to the terms which are set out in the Appellant's board minutes.

82. Finally, there is confusion and contradiction in the evidence submitted by the Appellant as regards the question of whether or not the Appellant ever rendered invoices to either Taraz LLP or Black Gold Kentucky Inc, following the board minute of 16 May 2007 to the effect that the Appellant was providing services to those companies and that invoices would be rendered to those companies when they were generating revenues.

83. In paragraph 22 of their letter to the Appellant of 11 December 2014, the Respondents stated that no invoices had ever been raised by the Appellant in respect of its supplies to those entities. This statement was not contradicted by Cook in its response to that letter of 6 February 2015. The Respondents repeated their allegation in relation to Taraz LLP at paragraph 11 of their letter to Cook of 13 March 2015 and, in its response of 8 April 2015, Cook stated that this was agreed.

84. In response to my request for evidence on this point following the hearing, the Appellant admitted that no invoices had ever been rendered to Black Gold Kentucky Inc but said that this was because that entity had had no operational responsibilities and therefore had never received supplies from the Appellant. This statement is directly contradictory to the terms of the Appellant's board minute of 16 May 2007, which stated that management services were to be supplied to Black Gold Kentucky Inc.

85. In its submission following the hearing in response to my request, the Appellant also produced an invoice from the Appellant to a company called Caspian Oil Limited of 1 February 2007 in the amount of $65,615.00 (and a bank statement showing that a payment had been made to the Appellant of $65,416.35 on 9 February 2007). The submission from Mr Masterman accompanying that evidence stated that

the invoice had been rendered to a company called Caspian Oil Pty Limited (which he asserted related to services rendered to that company in relation to the Taraz oil field) and that the invoice had been discharged in full on 22 February 2007. None of those statements was supported by the evidence which was attached to the submission in that the invoice was rendered to a company with a different name, the amount paid to the Appellant was not the full amount of the invoice in question, the date on which the amount was paid was 9 February 2007 and not 22 February 2007 and there was nothing to support the proposition that the services related to the Taraz oil field. In addition, and more significantly, the question I had asked related to supplies to Taraz LLP and the evidence in question related to a quite separate entity, Caspian Oil Limited.

86. The Respondents have, quite rightly, focused on the shortcomings in the evidence described above. Their position has been that the Appellant never intended to invoice its subsidiaries in respect of the services which it has supplied to them and that it was only when the Appellant received a shot across the bows from the Respondents in the form of their letter of 11 December 2014 that the Appellant decided that it would start invoicing IRS. The Respondents urged me to treat the evidence of Mr Masterman as to the Appellant's true intentions as self-serving, inaccurate and made with the benefit of hindsight.

87. I also have some significant reservations about some of the evidence of Mr Masterman. In particular, I was struck by the contrast between his claim to have a clear recollection of the terms of the agreement between the Appellant and its subsidiaries in relation to the services and his denial of any knowledge of the error in the invoice of 31 December 2014 or the terms of the correspondence between Cook and the Respondents in relation to that invoice. However, even if very little weight is accorded to Mr Masterman's evidence, which I consider to be the right approach, given the numerous discrepancies that it contained, I believe that the Respondents' position overlooks the fact that, in the board minute of 16 March 2012, the Appellant was clearly contemplating that it would in due course render invoices to IRS and IRP for the services that it was providing to the two subsidiaries. In addition, on the basis that IRS first began to generate revenues in 2014, the fact that the first invoice rendered by the Appellant to IRS was rendered on 31 December 2014 is consistent with that board minute and therefore explicable for a reason other than the receipt by the Appellant of the Respondents' letter of 11 December 2014. It is also difficult to disregard the fact that, since the first invoice of 31 December 2014 was rendered to IRS, the Appellant has rendered regular invoices to IRS and a number of those have been discharged, thereby indicating IRS's acceptance that it was obliged to discharge those invoices.

88. Despite the difficulties summarised above, after considerable deliberation and weighing up the evidence, I have reached the following findings of fact in relation to the appeals, on the balance of probabilities:

(a) notwithstanding the absence of any contemporaneous written evidence on the part of the subsidiaries to the effect that each subsidiary entered into an agreement with the Appellant in relation to the fees of the

various consultants, such agreements did exist and arose in each case at or around the time when the relevant Appellant board resolution was passed.

My reasons for reaching this conclusion are that, first, Mr Masterman was the sole director of each subsidiary and was clear in his testimony that he had reached such agreements on their behalf at the relevant times and, secondly, the fact that a number of invoices have been rendered to, and, in many cases, paid by, IRS since 31 December 2014 strongly suggests that IRS at least had agreed that the Appellant was entitled to invoice it in respect of the consultancy fees.

For the sake of clarity, because this was raised at the hearing, I should note that, in relation to the second basis for my conclusion on this point, I am not saying that the issue of each invoice in and of itself gave rise to an agreement to the effect that IRS was bound to reimburse the Appellant for the relevant fees. Instead, I am saying that the fact that such invoices were rendered and, in many cases, discharged, has satisfied me as an evidential matter that there must have been an agreement between the Appellant and the subsidiaries in relation to the costs of the consultants since at least 31 December 2014 and, that being the case, the likelihood is that that each such agreement arose at the time recorded in the relevant board minute, as stated by Mr Masterman in his evidence;

(b) one of the terms of the agreement between the Appellant and each subsidiary was that the Appellant would make onward supplies to the relevant subsidiary of the services which it obtained in relation to the relevant subsidiary from the external consultants.

My reasons for reaching this conclusion are that, based on the terms of the contract between the Appellant and Mr Randell, the board minutes of the Appellant of 16 March 2012, 20 January 2015 and 14 June 2016 and the evidence of Mr Masterman, I consider that the Appellant entered into agreements, as principal, with the consultants for the provision of services to the Appellant which the Appellant required for the benefit of the subsidiaries and that therefore the Appellant should be regarded as having made onward supplies of those services to the subsidiaries when it received them;

(c) another term of the agreement between the Appellant and each subsidiary was that no invoice could be rendered to the relevant subsidiary if the relevant subsidiary never generated any revenues.

I have three reasons for reaching this conclusion.

First, when one looks at the form of each board minute of the Appellant which purports to describe the agreement between it and its subsidiaries - ie the board minutes of 16 March 2012, 20 January 2015 and 14 June 2016 - the one point which emerges clearly from the relevant board minutes is that no invoice would be rendered to a subsidiary if that subsidiary were to fail to generate revenues. It is impossible to interpret

the relevant board minutes in any other way because, if it was intended that the Appellant would be entitled to invoice a subsidiary come what may even in the absence of the relevant subsidiary's generating revenues, then each minute would have gone on to make provision to that effect - in other words, to state that, in the absence of revenues by a specified backstop date, the Appellant would be entitled to invoice the relevant subsidiary come what may.

In his oral evidence at the hearing, Mr Masterman initially conceded that the relevant minutes were saying that the Appellant would not be entitled to render an invoice to a subsidiary if the relevant subsidiary never generated any revenues but then changed tack and alleged that the Appellant simply did not consider the possibility that either subsidiary would never generate revenues and therefore saw the minutes as reflecting the agreement that the Appellant would be entitled to render invoices to each subsidiary come what may and even in the absence of any revenues in the relevant subsidiary.

Whether or not the Appellant considered the possibility that a subsidiary might never generate revenues, the Appellant has failed to persuade me that the agreement between it and each subsidiary was that the Appellant would be entitled to render an invoice to each subsidiary come what may in the absence of any revenues. There is simply no evidence to that effect in the written record and, as I have already noted, Mr Masterman's oral evidence was contradictory in this respect.

Secondly, I find it telling that the board minute of the Appellant on 16 May 2007 in relation to similar services which the Appellant resolved to make to its subsidiaries Taraz LLP and Black Gold Kentucky Inc is expressed in exactly the same terms as the minutes which are under consideration in the appeals and, even after taking into account the contradictions and confusion implicit in the submissions which were made by the Appellant in this regard following the hearing – as to which see paragraphs 82 to 85 above - the fact remains that neither of those companies was ever invoiced by the Appellant (or made any payment to the Appellant) in respect of the fees in question. So the Appellant's past conduct in a case where a resolution on precisely the same terms had been passed was that it did not invoice, and was not reimbursed by, the relevant subsidiary in the absence of any revenues generated by that subsidiary.

Thirdly, precisely the same point can be made in relation to the services supplied by the Appellant to IRP in this case. The latter has never generated any revenues and has yet to be invoiced for any of the services which it has received from the Appellant;

(d) notwithstanding the ambiguity in the relevant board minutes, the terms of the agreement between the Appellant and each subsidiary were such that, once a subsidiary started to generate revenues, the Appellant would be entitled to render invoices to that subsidiary on a regular basis

thereafter regardless of whether or not the relevant subsidiary had sufficient revenues at the time when an invoice was rendered to discharge the relevant invoice.

I have reached this conclusion for two reasons.

First, it accords with the conduct of the Appellant and IRS since IRS began to generate revenues in 2014. Since then, the Appellant has rendered regular invoices to IRS (a number of which have been discharged by IRS) but without regard to whether or not IRS had sufficient revenues at the time when each invoice was rendered to be able to discharge the relevant invoice (because a number of the invoices remain unpaid). In addition, IRS discharged the first invoice which was rendered to it by the Appellant in part out of funding which it had received from the Spanish government and not out of its revenues.

Secondly, two of the board minutes – the ones of 20 January 2015 and 14 June 2016 – are clearly capable of being construed in this way, whilst the third – the one of 16 March 2012 – could either be seen as being outweighed by the other evidence to the contrary or, on a generous construction of the language used in that board minute, be seen as saying no more than that each subsidiary would not be in a position to make payments to the Appellant until it started to generate revenues (without saying that there needed to be sufficient revenues to cover each particular invoice at the time when the invoice was rendered).

89. I should add that, in reaching the conclusions set out in paragraph 88 above, I have taken into account the fact that the board minutes of the Appellant – which are the only written evidence of the agreement between the Appellant and its subsidiaries - are thoroughly inadequate as regards setting out the precise terms of the agreement between the Appellant and each subsidiary.

90. For example, the board minute of 16 March 2012 records that "a portion" of the fees paid to Mr Randell for his consultancy services would be recharged to IRS but it does not say what portion of those fees would be so recharged. The implication is that the portion in question is the portion that is attributable to work done for IRS, but it would have been helpful if the relevant board minute had said that.

91. In a similar vein, there is absolutely no indication in the board minutes of the terms on which the relevant fees would be recharged - for example, the dates on which the Appellant would be entitled to submit invoices to the subsidiaries or the dates by which the subsidiaries would be required to discharge those invoices. Moreover, the subsequent behaviour of the parties does not shed much light on what those terms might be. Appendix 1 to Mr Masterman's witness statement reveals that IRS has been invoiced on a six-monthly basis between 31 December 2014 and 31 December 2017 but has been invoiced monthly from 31 March 2018 onwards. It also shows that a number of the invoices still remain unpaid despite a considerable passage of time since they were rendered and that those that have been discharged have been discharged somewhat irregularly. For example, none of the invoices which

have been rendered by the Appellant to IRS between 31 December 2015 and 31 December 2017 in respect of the services of Mr de la Fuente, Mr Szumilak or Mr Contreras Lopez has been discharged and neither of the invoices which have been rendered by the Appellant to IRS in 2017 in respect of the services of Mr Randell has been discharged. Similarly, the Appellant's invoice of 31 December 2014 in respect of the services of Mr Randell was discharged on 17 June 2015 – approximately 6 months after the invoice was rendered – whereas the subsequent invoices in respect of the services of Mr Randell were all discharged only after a much longer period of delay.

92. Whilst a degree of informality can be expected to exist when it comes to transactions within a group, these features are clearly unsatisfactory. However, in the light of the fact that so many invoices have now been issued on a regular basis and have in many cases been discharged by IRS, I do not think that it would be right to say that the lack of clarity as to the precise terms which have been agreed between the parties as to when invoices would be rendered and would be required to be discharged negates the existence of an agreement between the parties at all. I believe that there is such an agreement and I have identified in the paragraphs set out above my view of the terms of each agreement insofar as they are pertinent to the appeals.

Discussion

93. I now turn to consider, in turn, the three issues mentioned in paragraph 15 above as being relevant to the appeals – namely, whether, during the periods in question:

(a) the Appellant was making supplies to its subsidiaries;

(b) those supplies were being made for a consideration and therefore fell to be treated as supplies which would be taxable supplies for the purposes of Article 2 PVD had they been made in the UK;

(c) the Appellant made those supplies in the course of carrying on an economic activity within the meaning of Article 9 PVD.

Was the Appellant making supplies of services to the subsidiaries?

94. As noted in paragraphs 88(a) and 88(b) above, I consider that the Appellant was making supplies of services to the subsidiaries because it entered into agreements, as principal, with the consultants for the provision of services to the Appellant which the Appellant required for the benefit of IRS and IRP and it also entered into an agreement with each subsidiary to make an onward supply to the relevant subsidiary of the services which it obtained in relation to the relevant subsidiary from the consultants. I therefore consider that the Appellant should be regarded as having made onward supplies to each subsidiary of the services which it received in relation to the relevant subsidiary from each consultant when it received them.

95. Indeed, although Mr West, in his submissions at the hearing, made the point that the existence of supplies by the Appellant to the subsidiaries was a necessary

pre-condition to the ability of the Appellant to register for VAT and to recover VAT input tax – a point with which I agree - I did not see anything in the correspondence from the Respondents leading up to the hearing which suggested that they doubted that to be the case. Instead, the correspondence was focused entirely on the other two pre-conditions to registration and VAT input tax recovery – namely, whether or not the supplies of services in question were for a consideration and whether or not the Appellant was carrying on an economic activity.

Were the relevant supplies being made for a consideration?

96. It can be seen from the summary of the relevant case law, both ECJ and domestic, set out above that the key features that are required in order for supplies to be treated as being for a consideration (and therefore capable of constituting taxable supplies for the purposes of Article 2 PVD) is that there needs to be a "legal relationship" between the supplier and the recipient, pursuant to which there is "reciprocal performance" whereby the goods or services are supplied in return for the consideration, thus meaning that there is a "direct link" between the supply of the goods or services and the consideration.

97. As regards the question of whether or not there was a legal relationship between the Appellant and each subsidiary in relation to the supplies of services in this case, I have found as a fact that, despite the deficiencies in the evidence in that regard, there was a legal relationship between the Appellant and each subsidiary in relation to the supplies of services pursuant to which the Appellant agreed to supply the services and would be entitled to invoice the relevant subsidiary as and when the relevant subsidiary began to generate revenues. As such, these circumstances are not equivalent to the facts in *Tolsma*.

98. However, it can be seen from cases such as *Bastova*, *Norseman* and *ACR* that the existence of a contingency which must be satisfied before the services can be invoiced can break the link between the supply and the provision of payment therefor which is necessary to satisfy the requirements of Article 2 PVD. In my view, those cases mean that:

(a) the supplies of services which the Appellant has made to IRP over the periods in question have never been for a consideration because the Appellant will not be entitled to invoice IRP (and IRP will therefore never be required to pay) for such supplies unless and until IRP generates revenues, a condition that has yet to be satisfied; and

(b) the same is true (for the same reason) of those supplies of services which were made by the Appellant to IRS before the date when IRS began to generate revenues and the pre-condition to invoicing was satisfied (the "Threshold Date"); but

(c) the supplies of services which were made by the Appellant to IRS on and after the Threshold Date were made for a consideration because, by the time that those supplies were made, the condition precedent to the Appellant's ability to invoice for the services had been satisfied.

99. Ms Black sought to persuade me that, even if the Appellant's ability to invoice each subsidiary in this case was contingent on the commencement of revenue generation by the relevant subsidiary, the present facts were distinguishable from those in each of the three cases noted above. She pointed out that:

(a) the contingency in *Bastova* was much more extreme than the one in this case in that the uncertainty in that case was being placed in a competitive race whereas, here, the contingency was simply the time when the relevant subsidiary started to generate the revenues which the parties confidently expected it to receive;

(b) in *Norseman*, the facts as found at first instance showed that there was no more than "a vague intention to levy an unspecified charge" (see paragraph [49] of the First-tier Tribunal decision in *Norseman*) whereas, here, there was much more than that in that there was an agreement that the services could be invoiced at cost subject to the satisfaction of the contingency; and

(c) in *ACR*, the agreement between the parties involved a fixed fee which bore no relation to the value of the supplies whereas, here, once the contingency was satisfied, the amounts to be invoiced by the Appellant would be determined by reference to the value of the supplies.

100. I agree with the distinction made by Ms Black as set out above in relation to *Norseman*. It is less easy to accept her distinctions in relation to *ACR* and *Bastova*. In relation to *ACR*, it seems to me that, whilst it is true that the amount which would be required to be paid by a subsidiary once the contingency was satisfied would be determined by reference to the value of the relevant supplies, there was no guarantee that the contingency would be satisfied and therefore, viewed in the round, the consideration payable by the relevant subsidiary was being determined, in part at least, by the ability of the relevant subsidiary to generate revenues – a matter which is unrelated to the value of the relevant supplies. In relation to *Bastova*, it seems to me that a contingency is a contingency, regardless of the likelihood that it will be satisfied. In addition, I do not think that just because the facts in *Norseman* are distinguishable from the facts in this case, those distinctions are necessarily relevant ones and should therefore lead to a different conclusion in this case. In my view, the case law in this area clearly demonstrates that any contingency which has the result that the recipient of a supply will not be required to pay for the supply if it lacks the means to do so is enough to mean that there is no "reciprocal performance" by the parties and therefore breaks the "direct link" which is required in order for the relevant supplies to be "for a consideration". As is stated by the ECJ at paragraph [29] of its decision in *Bastova*, 'it is apparent from the Court's case-law that the uncertain nature of the provision of any payment is such as to break the direct link between the service provided to the recipient and any payment which may be received".

101. Mr West sought to persuade me that the mere fact that the Appellant was entitled to invoice for its supplies once a subsidiary began to generate revenues was not sufficient to mean that the Appellant's supplies thereafter were for a consideration because focusing on invoicing failed to take into account the risk that the relevant subsidiary would fail to discharge the relevant invoice. Mr West pointed

out that a number of the invoices still remain undischarged and that a supply for which no payment had actually been made could not be said to be for a consideration.

102. As I have already noted in paragraphs 32 to 35 above, I do not agree with Mr West in this regard. I accept that there may be circumstances where the likelihood of payment by the recipient of a supply may be so remote that the mere fact that the supplier is entitled to render an invoice, and the recipient has an obligation to pay, for a supply would not lead to the conclusion that the relevant supply was for a consideration. But I do not accept the general proposition that, where a legal obligation to make a payment for a supply has arisen, the mere fact that that legal obligation might not be discharged, or is in fact not discharged for some reason, means that there has not been consideration for the relevant supply. I believe that my view on this point is the same as the one adopted by Judge Bishopp at paragraph [51] of the decision at first instance in *Norseman*.

103. Finally, it can be seen that one consequence of my conclusions in paragraph 98 above is that a distinction needs to be drawn between supplies of services made to IRS before the Threshold Date and supplies of services made to IRS thereafter. This raises the question of when the various supplies of services by the Appellant to IRS should be treated as having been made. Neither party to the proceedings suggested that this would be other than when the supplies of services were actually made – which is to say, as and when the Appellant obtained the services of the various consultants and immediately on-supplied those services to IRS.

104. I agree with the parties' approach to this. That is because the general rule in relation to supplies of services, which is set out in Section 6(3) VATA, is that the date when such services should be regarded as being supplied is the date when the services are performed. I do not think that the timing of the supplies by the Appellant to IRS should be treated as being affected by Section 6(14) VATA and Regulation 90 of the Value Added Tax Regulations 1995 (the "VAT Regulations") because those provisions apply only to supplies for a consideration and I have determined that supplies made to IRS before the Threshold Date were not made for a consideration. Although I recognise that there is an element of circularity in this approach, it is consistent with the view adopted in relation to Regulation 90 of the VAT Regulations by the Upper Tribunal in *Norseman* – see paragraphs [88], [109] to [111] and [118] in the Upper Tribunal decision in *Norseman*.

Was the Appellant carrying on an economic activity within the meaning of Article 9 PVD?

105. At the hearing, Ms Black submitted that, as long as I concluded that, during the period in question, the Appellant was making, or intended to make, supplies for a consideration, I was necessarily required to go on to conclude that the Appellant was carrying on an economic activity. She said that this was the case for two distinct reasons – one of them procedural and the other of them based on case law.

106. Ms Black's procedural point was that, in their statement of case, the

Respondents did not refer to the fact that whether or not the Appellant was carrying on an economic activity was a separate and distinct condition from whether or not the Appellant was making or intending to make supplies for a consideration. Instead, the necessary implication to be drawn from the terms on which the statement of case was expressed was that the two tests were identical. For example, paragraph 2 of the statement of case says:

"The issue is whether W (a holding company) was making taxable supplies to its subsidiaries during the relevant periods. If so (as W contends) the appeals fall to be allowed; if not (as HMRC contends) the appeals must be dismissed"

and paragraph 4 of the statement of case describes the authorities on which the Respondents were relying in the following terms:

"Each case was determined against the taxpayer holding company on the grounds that its involvement in the management of its subsidiaries could not be regarded as an "economic activity", since it was not making supplies for consideration to those subsidiaries."

107. Then, in paragraphs 39 to 42 of the statement of case, the Respondents refer to the first two conditions which are necessary in order for a taxpayer to be registered for VAT purposes and to recover VAT input tax – namely, the need for there to be supplies and for those supplies to be for a consideration – but does not refer expressly to the need for the taxpayer also to be carrying on an economic activity.

108. I agree with these submissions on behalf of the Appellant. Rule 25 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") contains a requirement that, in relation to any appeal, the Respondents must set out its position in relation to the appeal. It seems to me that the Respondents in their statement of case have not described their position as being that the economic activity condition raises different issues from those raised by the supplies for a consideration condition. And, although the statement of case is dated 1 December 2017 and therefore preceded the decision of the Court of Appeal in *Wakefield*, in which the Court of Appeal drew attention to the fact that the two conditions were separate and raised different issues, the Respondents did not seek to amend their statement of case accordingly. The Respondents first raised this point in their skeleton argument of 26 October 2018, which was only a few weeks before the hearing. In the circumstances, I consider that the Respondents are now precluded as a procedural matter from asserting that, even if the Appellant was making or intending to make supplies for a consideration, it was not carrying an economic activity.

109. Even if I am wrong in reaching that conclusion, I agree with Ms Black's second submission in relation to the relationship between the economic activity condition and the supplies for a consideration condition, which is that, although the conditions do in general raise slightly different issues, the existing case law of the ECJ makes it clear that, in the context of a holding company which supplies management services to its subsidiaries, no such distinction exists. In other words, as long as a holding company is making, or intending to make, supplies for a

consideration to its subsidiaries, then that holding company is necessarily carrying on an economic activity. As mentioned in paragraphs 50 to 56 above, that is the ratio of the decision in *Cibo* and it is cited with approval in each of *Larentia* and *MVM*.

110. It follows that, in my view, as long as the Appellant was making, or intending to make, supplies for a consideration to its subsidiaries during the period which is the subject of the appeals, the Appellant was necessarily carrying on an economic activity during that period.

111. I have referred in paragraphs 109 and 110 above to the fact that an intention to make supplies for a consideration in the future is sufficient to mean that an economic activity is currently being carried on. There are a number of ECJ authorities to that effect which are summarised in the Upper Tribunal decision in *Norseman*. I believe that it is common ground that a person who incurs VAT input tax with the intention of making future supplies for a consideration should both be treated as carrying on an economic activity during the period in which it has that intention but has yet to make the supplies in question and entitled to deduct the VAT input tax which is attributable to those expected future supplies even if the expected future supplies subsequently do not occur. But, insofar as that is not common ground, I consider that this is the effect of ECJ decisions such as those in *Belgium v Ghent Coal Terminal NV* (Case C-37/95) [1998] STC 260, [1998] ECR 1-4321 and *Finanzamt Goslar v Breitsohl* 4321 (Case C- 400/98) [2001] STC 355, [2000] ECR 1-4321.

112. A difficult question which arises in this context is whether the principle set out above is relevant in circumstances where the relevant supplier has an intention to make future supplies which may or may not be for a consideration (because of the existence of a contingency). In other words, is a present intention to make future supplies which may be for a consideration but may turn out to be for no consideration because a pre-condition to payment is not satisfied sufficient to mean that an economic activity is presently being carried on? The ratio of the Upper Tribunal decision in *Norseman* is of no direct assistance in this regard because, in that case, the vagueness of the intention in relation to charging for the relevant supplies meant that there clearly was no intention to make future supplies for a consideration – see paragraphs [123] et seq. in the Upper Tribunal decision in *Norseman*. The position in this case is different in that I have found as a fact that there was a fixed intention that the Appellant would be able to invoice in due course for its supplies of services at an amount quantified by reference to the value of the services received but only if the relevant subsidiary began to generate revenues.

113. In that regard, I have considered whether the following paragraphs from the Upper Tribunal decision in *Norseman*, which were obiter, shed any light on the answer to the question of whether the Appellant should be treated as carrying on an economic activity even before it made any supplies for a consideration, on the basis that it intended to make supplies for a consideration in the future:

"134....Even if it is correct to say, on the evidence, that there was an intention, before any services were provided, that they would be made for payment, and even if it is correct (contrary to my own view) that an intention to make payment for the services provided

during the relevant period continued into the future, I reject Mr Lall's submission that that is enough to demonstrate an intention to make taxable supplies or to demonstrate that the services provided during the relevant period were in fact taxable supplies.

135. In either case, the link required by EU law must be established. An intention to make taxable supplies in the future will be established if, but only if, the intended payment is such that the necessary link between the future supply and the future payment is established at the relevant time or times, that is to say the time or times when the input tax was incurred. The taxable nature of supplies already made during the relevant period will be established only if the intended payment in respect of those supplies is such that the necessary link between the supply which has been made and the future payment is established as at the time of the supply.

136. On the facts found by the Judge, Norseman is reduced to reliance on a vague and general intention that payment would be made. This is not a case where the payment could be particularised in any way. Thus, on the facts found, it cannot be said that the intended payment would be full cost recovery (although I remark that, even if the intention was full cost recovery, there would still remain uncertainty about whether payment would be made at all, let alone about exactly when). Since payment *per se* is not enough to establish consideration, Norseman has failed to establish that it had an intention, during the relevant period, to make taxable supplies at any time in the future. And it has failed also to establish that consideration was given for the services actually provided during the relevant period. I have not, in reaching this conclusion, relied on the decision in *African Consolidated Resources*. I would, however, say that I see no reason to doubt that it is correct and do not accept Mr Lall's criticisms of it.

137. Putting the matter in the very briefest of ways, this is a case where one party (Norseman) has supplied services to closely related parties (its subsidiaries) with, at best from Norseman's point of view, an intention on its part to charge at some unspecified time in the future for its services, but with no agreement with the subsidiaries to that effect (even to the effect that the subsidiaries would pay if and when they had funds available to do) and no understanding of the amount of timing of such payment. The charge/payment, if and when introduced, might or might not match or exceed recovery of the costs incurred in providing the service and might or might not include a profit element. It might even be nominal consistently with the intention which the Judge identified as to which see further at paragraph 126 above. This is an insufficient basis on which to be able to say, at any time prior to or during the relevant period, that the eventual charge and payment would have the immediate and direct link with the services provided which EU law requires. If it is not possible to find the necessary link in relation to future supplies and the intended payments for those supplies, still less is it possible to find a link where there has, as yet, been no payment at all, in particular in relation to services provided during the relevant period."

114. I have found these paragraphs somewhat difficult to construe. It would seem from the statement in paragraph [136] that "[t]his is not a case where the payment could be particularised in any way…on the facts found, it cannot be said that the intended payment would be full cost recovery" that the Upper Tribunal in this part of its decision was focusing primarily on hypothetical circumstances where, at the time when the relevant input tax is incurred, there is an intention to make future supplies in return

for payments but it is presently unclear whether the necessary degree of reciprocity will exist between the relevant supplies and the payments because the quantum of the payments is unclear. That is not the position in this case because I have concluded that, as long as payments fall to be made for the relevant supplies (ie the contingency is satisfied), the necessary degree of reciprocity will exist between the relevant supplies and the payments. This is not a case where the amount to be charged is unspecified or unrelated to the value of the services which have been supplied. On the contrary, the amounts to be charged are clear and clearly linked to the value of the services which have been supplied. The only thing which is unclear is whether any such payments will ever be made because of the condition precedent to the Appellant's ability to invoice the subsidiaries in respect of its supplies.

115. Left to my own devices, I would have been inclined to conclude that, because the necessary degree of reciprocity between the relevant supplies and the payments will exist as long as the contingency is satisfied and the parties intended at the outset that the contingency would be satisfied, this should be treated in the same way as any other situation where a person intends to make future supplies which will definitely be for a consideration. If that is right, then I would necessarily conclude that, in the period prior to the Threshold Date, the Appellant was carrying on an economic activity by virtue of its intention to make supplies for a consideration in the future even though it was not making supplies for a consideration during that period.

116. However, the fact that, in the middle of paragraph [136] of its decision, the Upper Tribunal has added the words "(although I would remark that, even if the intention was full cost recovery, there would still remain uncertainty about whether payment would be made at all, let alone about exactly when)" suggests that the view I would have been inclined to reach would be at odds with those of the Upper Tribunal in *Norseman*. Whilst the words in question are obiter and are therefore not binding on me, I am reluctant to depart from the view of a superior court on a point which is of such significance and difficulty.

117. Accordingly, I have concluded that, although the contrary is certainly arguable, during the period prior to the Threshold Date, the Appellant did not have the intention to make future supplies for a consideration and was therefore not carrying on an economic activity for the purposes of Article 9 PVD.

Conclusion

118. The consequences for the appeals of the conclusions drawn above are as follows:

> (a) since the Appellant was, prior to the Threshold Date, not carrying on an economic activity and not making supplies for a consideration, the Appellant was, prior to the Threshold Date, not a taxable person for the purposes of Article 9 PVD and not making supplies which would have been subject to VAT if they had been made in the UK;
>
> (b) since the Appellant was, on and after the Threshold Date, carrying on an economic activity, the Appellant was, on and after the Threshold

Date, including on the date with effect from which the Appellant's VAT registration was cancelled – 1 October 2016 – and the date on which the Appellant applied for voluntary VAT registration – 20 February 2017 – a taxable person for the purposes of Article 9 PVD. It follows that the Appellant's VAT registration should not have been cancelled and the Appellant's application for voluntary VAT registration should not have been refused;

(c) to the extent that the VAT input tax which is the subject of the appeals is attributable to supplies made to the Appellant before the Threshold Date, the Appellant is not entitled to deduct the VAT input tax because it received those supplies at a time when it did not intend to make supplies for a consideration and was therefore not carrying on an economic activity and not a taxable person for the purposes of Article 9 PVD (even though it was registered for VAT purposes throughout that period); and

(d) to the extent that the VAT input tax which is the subject of the appeals is attributable to supplies made to the Appellant on or after the Threshold Date, the Appellant is entitled to deduct such VAT input tax (because it was carrying on an economic activity and therefore a taxable person for the purposes of Article 9 PVD at the time when such VAT input tax was incurred) but only to the extent that such VAT input tax is attributable to supplies made to it which were used by it in making its supplies for a consideration to IRS on and after the Threshold Date (because only those supplies were supplies which were made in the course of that economic activity and were supplies which would have been taxable supplies if they had been made in the UK).

119. The principles to be adopted in calculating the VAT input tax to be deducted as described in paragraph 118 above are described in Articles 168 et seq. PVD, Sections 25 and 26 VATA, Part XIV of the VAT Regulations and the ECJ case of *Securenta Göttinger Immobilienanlagen und Vermögensmanagement AG (as the legal successor of Göttinger Vermögensanlagen AG) v Finanzamt Göttingen* [2008] STC 3473. In short, the Appellant may deduct:

(a) the whole of the VAT input tax which is attributable to supplies made to it on or after the Threshold Date that were used exclusively by the Appellant to make supplies for a consideration to IRS on and after the Threshold Date; and

(b) a proportion of the VAT input tax which is attributable to supplies made to it on or after the Threshold Date that were used by the Appellant for a mixed purpose – such as general overheads or supplies which were used to make both (i) supplies to IRS (on and after the Threshold Date) and (ii) supplies to IRS (before the Threshold Date) and to IRP – such proportion's reflecting the extent to which the Appellant used the relevant supplies to make supplies to IRS on and after the Threshold Date.

120. The above sets out my decision in principle in relation to the matters which are the subject of the appeals. Insofar as the parties are unable to agree on the application of any conclusion which is set out in this decision in principle – such as identifying the Threshold Date or determining the extent of the VAT input tax which the Appellant is entitled to deduct pursuant to the principles set out above – they may apply to the First-tier Tribunal for a further decision in that regard.

Right to appeal

121. 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 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 18 DECEMBER 2018