[2019] UKFTT 442 (TC)

VAT – Oil exploration and production in sub-Saharan Africa – Activities undertaken through local subsidiaries – Provision of technical services by Plc – Financed through additions to intercompany loans – Whether supply for consideration – Whether supply made in the course of economic activity – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07256

Appeal number: TC/2017/00306

BETWEEN

TOWER RESOURCES PLC **Appellant**

-and-

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 28 – 31 May 2019

Michael Firth, Counsel, for (and instructed by) the Appellant

Hui Ling McCarthy QC and Edward Hellier, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. Tower Resources Plc ("Tower") appeals against a decision of HM Revenue and Customs ("HMRC"), dated 25 April 2016 and upheld on 24 October 2016 following a review, to deny it credit for input tax in the sum of £613,169.96 claimed for its VAT accounting periods 12/14 to 12/15 (inclusive) and to issue an assessment in the sum of £842,850 for VAT periods 06/12 to 09/14 (inclusive) on the grounds that Tower did not make taxable supplies for consideration.

2. In April 2019 HMRC amended their statement of case to include an additional argument, that if Tower was making taxable supplies it was not doing so in the course of an economic activity. There are, therefore, two issues before the Tribunal:

(1) Whether Tower made supplies for consideration; and

(2) If so, whether such supplies were made in the course of an economic activity.

3. Mr Michael Firth appeared for Tower. HMRC were represented by Ms Hui Ling McCarthy QC and Mr Edward Hellier. Their full and extensive submissions were most appreciated. However, in reaching my conclusions it has not been necessary to refer every argument advanced or of all the authorities cited at the hearing.

EVIDENCE AND FACTS

Evidence

4. In addition to some 12 bundles of documentary evidence ,which included correspondence between the parties, HMRC visit reports, audit working papers and post-2015 loan and service agreements, I heard from the following witnesses on behalf of Tower (no witnesses were called by HMRC):

(1) Mr Jeremy Asher, the Chairman of Tower. He has been a director of Tower since 2007 having been a director of numerous other companies in the oil and gas industry. He was elected chairman of Tower's Board of Directors in late 2011 and assumed the responsibilities of Chief Executive Officer in Autumn 2016 whilst continuing his role as Chairman. Mr Asher also chairs Tower's Audit Committee.

(2) Mr Colin Wright, a partner at UHY Hacker Young LLP, Chartered Accountants ("UHY"). UHY have been auditors to Tower since 2006 and Mr Wright was the audit partner between 2010 and 2014.

(3) Mr Brian Brittney, a manager of TM Services Limited who was contracted to Tower to oversee its financial accounts and VAT returns between 2006 and 2015. His work for Tower included basic bookkeeping, payroll and invoice payments. Mr Brittney was assisted at Tower by Mr David Doyle who helped with the preparation of financial statements including monthly management accounts, interim and annual accounts. Like Mr Brittney, Mr Doyle was also an independent contractor. It was Mr Brittney who completed Tower's application for VAT registration

(4) Mr Andrew Smith, the Group Financial Controller of Tower from 1 December 2014. He was employed by Tower to consolidate the recently acquired structures of Rift Petroleum Holdings Limited and its subsidiaries in Zambia and South Africa and to bring their accounting into line with Tower's and also to support the expansion of Tower into West Africa, particularly Cameroon where had a number of years prior experience. On joining Tower Mr Smith consolidated the roles of management/joint venture accountant (Mr Doyle) and financial accountant (Mr Brittney).

5. In *Gestmin SGPS SA v Credit Suisse (UK) Limited & Anor* [2013] EWHC 3560] Leggatt J (as he then was) observed, at [15]:

> "15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.

Having noted that the legal system has not sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony and that the process of civil litigation subjects the memories of witnesses to powerful biases and subtle influences such as a desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces, Leggatt J continued, at [22]:

> "In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

6. Although mindful of the fallibility of the human memory as outlined by Leggatt J, I found all of the witnesses to be credible and truthful and accept their evidence in full.

Facts

7. Tower, which was incorporated on 6 December 2004, is a UK holding company listed on the Alternative Investment Market ("AIM"). It was registered for VAT with effect from 6 December 2004.

8. Its business model is to acquire licences to explore for and produce oil in sub-Saharan Africa. This involves preparation for drilling of the wells which both discover and produce the oil, a process which involves obtaining a production licence, undertaking the geological and geophysical work, seismic data acquisition, processing and interpretation, exploratory drilling, appraisal drilling and production. Such an operation generally takes up to ten years between the first step and "first oil".

9. Although, as Mr Asher explained, at the time that a licence is obtained there is a hope, expectation and a belief that it will succeed – he said he would not be a "competitive businessman" if he thought otherwise – it was accepted that this was not always the case with an average rate of success for genuine exploration wells (as opposed to appraisal or development wells) of approximately 20%.

10. The exploration and production activities in the various countries are not undertaken by Tower but conducted through local subsidiaries with development and production taking place over a decade or several decades.

11. Although the use of a local subsidiary to conduct such activities, which is usual in the oil industry, is often a legal requirement of the country concerned there are advantages in such an arrangement even if this is not the case, eg it can allow for a local manager to act for the company without being a director of the parent company, to insulate assets and liabilities

associated with operating a licence in one country from the assets and liabilities in another and to allow financing of the licence at the level of subsidiary.

12. The subsidiaries do not operate completely independently of Tower. Indeed Mr Asher said that a subsidiary, which may have local management and offices in addition to its own board of directors, cannot function independently as it would not have the technical and human resources to operate the licences alone.

13. It is Tower, a signatory and guarantor of a licence, that usually negotiates its terms before a subsidiary is established and which subsequently provides the bulk of technical services (eg the geological and geophysical work, seismic data acquisition etc, referred to above) and funds the local costs. In addition, Tower has at least one director in common with its subsidiary and the chief executive officer of Tower is always a board member of each subsidiary.

14. The provision of technical services and payment of local costs by Tower is charged to the subsidiary, not by the issue of an intercompany invoice to be paid by the subsidiary but through the addition of such sums to the balance of the intercompany loan accounts. Before April 2015 Tower passed on these charges to its subsidiaries at cost but after April 2015, following the appointment of Mr Smith and the introduction of written agreements, added a 5% mark-up and interest.

15. Mr Asher compared the oil business to that of a record label which may release and distribute many records which will not all be hits. Although some will be "total losers" and not recover their costs it does not follow that the company was not trying to make money with all of its releases but, as Mr Asher said, "you can't have hits without also having some misses." Like the record company, where the hits are expected to pay for the misses, successful oil wells can generate very substantial amounts of cash flow, more than sufficient to repay the intercompany loans and generate further cash flow to be remitted to Tower.

16. Other than invoices relating to payments of £389,446 and $1,119,774 for reimbursement of back costs incurred by Tower in Namibia in connection with a Farm-in Agreement with Arcadia Petroleum Limited in 2007 and a $2 million payment by Wilton in relation to a similar payment in relation to Madagascar, to which Mr Smith referred for the first time in cross examination (both of which pre-date the period with which this appeal is concerned), there is no documentary evidence of any repayment to Tower by any of the subsidiaries, in full or in part, of the outstanding balances shown in the loan accounts. Neither has there been any demand by Tower for payment by any of its subsidiaries in respect of the services it has provided or for sums left outstanding in the intercompany loan accounts.

17. As Mr Asher explained, Tower did not demand repayment of the loans because it was acting in its own interests by not doing so, he said "we [Tower] wanted them [the subsidiaries] to go forth and develop their assets."

18. As at 31 December 2015 the closing balances of intercompany accounts showed the $60,180,051 (in US dollars) to be owed to Tower by its subsidiaries. This sum can be broken down to identify the outstanding intercompany balance of the subsidiary in each country as follows:

(1) Cameroon - $2,832,401;

(2) Kenya – $11,164,804;

(3) Namibia – $ 42,026,390;

(4) SADR – $391,924;

(5) South Africa – $896,769; and

(6) Zambia – $2,867,763.

19. The intercompany loan accounts have been treated as assets in the financial statements of Tower and as liabilities in those of the subsidiaries accounts. They are "netted off" in the group accounts. Although not aware of the exact terms of the loans, Mr Wright explained that these would have been discussed as part of the audit process.

20. Despite there not having been any repayment by the subsidiaries, the loans have been treated for accounting purposes as repayable on demand. Mr Wright said that they would not have been treated as such if there was a contingent as opposed to an immediate liability on the subsidiaries to repay the outstanding loan account balances.

21. During the period in which Mr Wright was the Audit Partner at UHY with responsibility for Tower (2010 – 2014) the inter-company loan accounts were reviewed annually as part of the audit process. This was done in accordance with International Financial Reporting Standards ("IFRS") and International Accounting Standards ("IAS") and would include an "impairment review" undertaken by UHY in which it was required, "at each balance sheet date", to:

> "… review all assets to look for any indication that an asset may be impaired (its carrying amount may be in excess of the greater of its net selling price and its value in use)." (IAS 36.9).

22. Indications of impairment, both external and internal sources, are listed in IAS 36.12. These include declines in market value, negative changes in technology, markets economy or laws, increases in market interest rates and company stock value being below book value (external sources) and obsolescence or physical damage, asset being part of a restructuring or held for disposal or worse than expected economic performance (internal).

23. Mr Wright did not recall there being any irregularities or inconsistencies with the inter-company loan accounts and confirmed that if there had been it would be recorded in the Audit Report included as part of the accounts. All of the Audit Reports were unqualified.

24. Mr Asher said that he was unable to find any written loan or service agreements between Tower and its subsidiaries for the period before 2015. Mr Wright confirmed that no such written agreements had been provided as part of the audit process. Mr Brittney, who confirmed he was aware of the legislative requirement to retain records, said that he had not seen any written loan agreements between Tower and its subsidiaries dated earlier than April 2015. Although Mr Smith thought that there had been written loan agreements before 2015 but said that these could not be found.

25. The only conclusion to be drawn in the absence of any such agreements or reference to them in company minutes, correspondence or any other documents that were produced, is that before April 2015 there were no written loan or service agreements. However, it does not necessarily follow that Tower did not have any agreements with its subsidiaries in relation to the loans and the services it provided to them, a subject to which I shall return in due course.

26. As for the terms of the post-2015 agreements, taking the Loan Agreement, dated 14 April 2015, between Tower and its subsidiary Tower Resources (Kenya) Limited ("Kenya") as an example, it provides that Kenya:

> "… shall pay interest on the Loan at the rate of LIBOR plus 1 percent per annum" (Clause 5.1 of the Loan Agreement)

and that:

> "The Borrower [Kenya] shall repay the Loan on demand from the Lender [Tower]". (Clause 6.1 of the Loan Agreement)

27. The Services Agreement between Tower and Kenya, also dated 14 April 2015, provides:

"**1 DEFINITIONS AND INTERPRETATION**

1.1 In this Agreement, unless the context otherwise requires, the following expressions shall have the following meanings:

"**Annual Fee**" means an annual fee equal to the costs incurred by Tower in connection with the provision of the Services (employee costs being attributed on a time apportioned basis), plus 5% per [calendar] Year, to be agreed in accordance with Clause 4.

…

"**Services**" means the Tower Services.

"**Term**" means the duration of this Agreement.

"**Tower Services**" means the services set out in Schedule 1.

2 APPOINTMENT AND THE SERVICES

(a) [Kenya] hereby appoints Tower to provide the Tower Services,

upon the terms of this Agreement, for the extent of the Term (and to the extent that such services require dealings with third parties, to perform those Services as agent of [Kenya]). Save as provided in Clause 2.3(d) [to act in the interests of the receiving party] Tower is not authorised or entitled to make any assurance or commitment to any third party and shall have no authority to bind [Kenya].

…

4 CHARGES, EXPENSES AND PAYMENT

4.1 In consideration of the Providing Party performing the Services, the Receiving Party shall pay the Annual Fee for each Year on the last Business Day of each Year. The Receiving Party shall make all payments due to the Providing Party without set-off, counterclaim or abatement.

4.2 All out of pocket costs, charges or expenses which the Providing Party incurs in connection with the provision of the Services pursuant to this Agreement shall, save to the extent agreed in writing by the Providing Party otherwise prior to the same being incurred, be for the account of the Receiving Party within 30 days of an invoice being rendered in respect thereof together with reasonable evidence of the relevant costs, charges or expenses.

…

SCHEDULE 1

THE SERVICES

Services shall comprise such strategic, management, logistical, scientific and expert services as are required by [Kenya] and provided using the resources of Tower.

The value of the Services shall comprise of the cost of indirect services ("Indirect Recharges") and related costs charged to the Company by way of time written by management ("Tmewriting") in addition to the cost of any services directly recharged to the Company and provided by third

> parties ("Direct Recharges") together with the agreed percentage addition, together comprising the 'Annual Fee'.
>
> Indirect Recharges shall include the costs of technical and professional personnel, their benefits and al support costs necessary for such technical and professional personnel to perform such services for the benefit of [Kenya].
>
> Neither Indirect or Direct Recharges shall themselves contain any element of profit within their composition, such commercial profit catered for in the terms of the Annual Fee."

28. Mr Smith explained that interest charges and mark-ups to the cost of services that Tower added to the intercompany loans were to ensure that the loans were "commercial". He said that these had been introduced as a result of comments made by HMRC Officers during a visit to Tower on 18 February 2015 which had been made in regard to Tower's 12/14 VAT return.

29. However, this was not the first visit HMRC had made to Tower. On 6 February 2008 an officer of HMRC visited Tower and met with Mr Brittney who had completed and submitted Tower's application for VAT registration.

30. Mr Brittney explained that, although he no longer has a copy of the VAT registration document, it would have made referred to Tower as an oil and gas exploration company. He, quite properly, accepted that it was the subsidiaries rather than Tower that actually undertook the exploration for oil and gas. Mr Brittney also accepted that, when applying for VAT registration, he would not have referred to the provision of management services provided by Tower to its subsidiaries.

31. HMRC also visited Tower on 30 October 2014. The Report of that visit did not refer to the activities of the subsidiaries but recorded that Tower's business was "Oil and Gas exploration" and that it was:

> "… a London-based oil and gas Exploration Company. The Company has successfully pursued a strategy and had four oil well projects during the year 2008 to 2012 where 3 projects in Uganda from 2008 to 2012 and 1 Namibia during 2008 but none of them were successful. [Tower] now holds licensing positions in South Africa, Zambia, Kenya, SADR (Western Sahara) and maintains a regional office in Uganda"

The report also noted that:

> "The business has not received any income yet. Since 2008 the business took four projects and did not get any success.
>
> Checked the Exploration Licences and the document confirming the block allocation by the local government for all four projects and found all satisfactory."

32. Clearly in 2014 HMRC did not understand that it was its subsidiaries and not Tower that undertook the oil exploration activities. However, this changed as is apparent from the report of the visit that took place on 18 February 2015 which records that the "exploration licences are all held in the non-UK based subsidiaries".

33. It was as a result of becoming aware of the correct position that subsequently led to the denial of input tax, the issue of the assessment and ultimately to this appeal.

APPLICABLE LEGISLATION AND AUTHORITIES

34. Article 2(1)(a) of EU Directive 2006/112/EC, the Principal VAT Directive ("PVD") provides that "the supply of services for consideration within the territory of a Member State by a taxable person acting as such" shall be subject to VAT.

35. Article 9(1) PVD provides that for these purposes:

> 'Taxable person' shall mean any person who, independently, carries out in any place any 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."

36. Article 73 PVD provides:

> In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.

37. The PVD has been implemented into UK domestic law by the Value Added Tax Act 1994 ("VATA").

38. Section 4(1) VATA provides:

> 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.

39. "Supply" is defined by s 5(2)(a) and (b) VATA which provides:

> (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."

40. Section 19(2) VATA provides:

> If the supply is for a consideration in money its value shall be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration.

41. Having considered the authorities, both European and domestic, and highlighted, at [14], that when considering Court of Justice of the European Union ("CJEU") cases it is "important to note that there is on occasion some inconsistency between the English and French versions of the judgments as to the use of the words "consideration" and "remuneration" and the necessity to look at both versions, David Richards LJ (with whom Patten and Moylan LJJ agreed) in the Court of Appeal in *Wakefield College v HMRC* [2018] STC 1170 ("*Wakefield*") said:

> "52. Whether there is a supply of goods or services for consideration for the purposes of article 2 and whether that supply constitutes economic activity within article 9 are separate questions. A supply for 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 para 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 para 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*.

53. Satisfaction of the test for a supply for consideration under art 2 does not give rise to a presumption or general rule that the supply constitutes an economic activity. However, as Mr Puzey for HMRC pointed out, the Advocate General remarked in her opinion in *Borsele* at para 49, 'the same outcomes may often be expected'.

54. Having concluded that the supply is made for consideration within the meaning of article 2, the court must address whether the supply constitutes an economic activity for the purposes of the definition of 'taxable person' in article 9. The issue is whether the supply is made for the purposes of obtaining income therefrom on a continuing basis. For convenience, the CJEU has used the shorthand of asking whether the supply is made 'for remuneration'. The important point is that 'remuneration' here is not the same as 'consideration' in the article 2 sense, and in my view it is helpful to keep the two terms separate, using 'consideration' in the context of article 2 and 'remuneration' in the context of article 9.

55. Whether article 9 is satisfied requires a wide-ranging, not a narrow, enquiry. All the objective circumstances in which the goods or services are supplied must be examined: see the judgment in *Borsele* at para 29. Nonetheless, it is clear from the CJEU authorities that this does not include subjective factors such as whether the supplier is aiming to make a profit. Although a supply 'for the purpose of obtaining income' might in other contexts, by the use of the word 'purpose', suggest a subjective test, that is clearly not the case in the context of article 9. It is an entirely objective enquiry.

56. In describing the relationship between the supply and the charges made to the recipients in the context of article 9, the CJEU has used the word 'link'. In *Finland* at para 51, the court concluded that 'it does not appear that the link between the legal aid services provided by public offices and the payment to be made by the recipients is sufficiently direct … for those services to be regarded as economic activities'. Likewise, in *Borsele* at para 34, the court adopted precisely those words in concluding that the provision of the school transport was not an economic activity.

57. Mr Prosser QC for the College submitted that whether there was 'a sufficiently direct link' between the services and the charge made was an important circumstance, while Mr Puzey submitted that 'direct link' does not feature in the analysis.

58. I regard this as a largely semantic point. The word 'link', whether 'sufficient' or 'direct', is used as no more than shorthand to encompass the broad enquiry as to whether the supply is made for the purpose of obtaining income. It is not a separate test, or one of the factors to be considered when addressing the central question. For my part, I think it is apt to cause some confusion to use the same word for both article 2 and article 9 and I have not myself found it particularly helpful or illuminating in considering whether there exists an economic activity.

59. Each case requires a fact-sensitive enquiry. While cases concerning the supply of legal aid services or school transport will provide helpful pointers to at least some of the factors relevant to the supply of subsidised educational courses, there is not a checklist of factors to work through. Even where the same factors are present, they may assume different relative importance in

> different cases. The CJEU made clear in *Borsele* at para 32 that it was for the national court to assess all the facts of a case."

42. Although not cited by either party, further guidance on "consideration" can be derived from the recent decision of the Court of Appeal in *National Car Parks Ltd v HMRC* [2019] EWCA Civ 854 in which Newey LJ said:

> "8. The word "consideration", which features in both articles 2(1)(c) and 73 of the Principal VAT Directive and section 5(2)(a) of the 1994 Act, does not in the VAT context refer to what might be deemed "consideration" for the purposes of domestic contract law but has an autonomous EU-wide meaning (see e.g. Case 154/80 *Staatssecretaris Van Financiën v Cooperatiëve Vereniging Cooperatiëve Aardappelenbewaarplaats GA* [1981] 3 CMLR 337 ("the *Dutch potato* case"), at paragraph 9 of the judgment of the Court of Justice). "[T]he concept of the supply of services effected for consideration within the meaning of art 2(1) of the Sixth Directive [i.e. the predecessor of the Principal VAT Directive] presupposes the existence of a direct link between the service provided and the consideration received" (Case 102/86 *Apple & Pear Development Council v Customs and Excise Commissioners* [1988] STC 221, at paragraph 12 of the Court of Justice's judgment; see also e.g. *Commission of the European Communities v Finland* [2009] ECR I-10605, at paragraph 45 of the Court of Justice's judgment). A supply of services is effected "for consideration", and hence is taxable, "only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient" (Case C-16/93 *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509, at paragraph 14 of the Court of Justice's judgment; see also e.g. Case C-520/14 *Geemente Borsele v Staatssecretaris van Financiën* [2016] STC 1570, at paragraph 24 of the Court of Justice's judgment).
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> 9. The authorities also show that "consideration" is a "subjective value" in the sense that "the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria" (the *Dutch potato* case, at paragraph 13 of the judgment). In Case C-285/10 *Campsa Estaciones de Servicio SA v Administración del Estado* [2011] STC, the Court of Justice explained in paragraph 28 of its judgment:
>
>> "According to settled case law …, the taxable amount for the supply of goods or services for consideration is the consideration actually received for them by the taxable person. That consideration is thus the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria.""

43. In cases, such as the present, concerning a holding company and its subsidiaries, the CJEU has held that where the only activity of a holding company is the holding of shares in in its subsidiaries is not carrying on an economic activity (*Polysar Investments Netherlands BV v Inspecteur der Invoerrechten en Accijnzen* [1993] STC 222.

44. However, in *Cibo Participations SA v Directeur régional des impôts du Nord-Pas-de-Calais* [2002] STC 460 ("*Cibo*"), in answer to a request for the criteria 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 Article 9 PVD purposes the CJEU stated:

"19. It is clear from case-law that that conclusion is based, amongst other things, on the finding that the mere acquisition and holding of shares in a company is not to be regarded as an economic activity, within the meaning of the Sixth Directive, conferring on the holder the status of a taxable person. The mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis because any dividend yielded by that holding is merely the result of ownership of the property (see the judgments in Case C-333/91 *Sofitam* [1993] ECR I-3513, paragraph 12, and in Case C-80/95 *Harnas & Helm* [1997] ECR I-745, paragraph 15).

20. However, the Court has held 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 (*Polysar*, paragraph 14, and *Floridienne and Berginvest*, paragraph 18).

21. 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.

22. 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."

45. The CJEU in *Beteiligungsgesellschaft Larentia & Minerva mbH & Co. KG v Finanzamt Nordenham* (Case C – 108/14) [2015] STC 2101 ("*Larentia*") stated, at [21] 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 (see, inter alia, judgments in *Cibo Participations*, C-16/00, EU:C:2001:495, paragraph 22, and *Portugal Telecom*, C-496/11, EU:C:2012:557, paragraph 34)."

46. In *MVM Magyar Villamos Művek Zrt v Nemzeti Adó-és Vámhivatal Fellebbviteli Igazgatóság* (Case C – 28/16) [2017] STC 452 ("*MVM*") having noted, at [31], that the mere acquisition and holding of shares in a company is not to be regarded as economic activities for Article 9 purposes and that the acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis as any dividend is merely the result of ownership of the property the CJEU continued:

"32. The position will be 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 in its capacity as shareholder (judgment of 16 July 2015,

> *Larentia + Minerva and Marenave Schiffahrt*, C-108/14 and C-109/14, EU:C:2015:496, paragraph 20 and the case-law cited).
>
> 33. In that respect, it follows from settled case-law of the Court 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 9(1) of Directive 2006/112 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 (judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C-108/14 and C-109/14, EU:C:2015:496, paragraph 21 and the case-law cited).
>
> 34. Thus, the mere involvement of a holding company in the management of its subsidiaries, without carrying out transactions subject to VAT under Article 2 of Directive 2006/112, cannot be regarded as an 'economic activity' within the meaning of Article 9(1) of that directive (see, to that effect, order of 12 July 2001, *Welthgrove*, C-102/00, EU:C:2001:416, paragraphs 16 and 17). Accordingly, such management does not come within the scope of Directive 2006/112."

47. The conclusion drawn from these cases by Judge Beare in *W Resources Plc v HMRC* [2018] UKFTT at [55] ("*W Resources*"), with which I respectfully agree and adopt, was 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."

48. When considering whether there was a supply for consideration within Article 2 PVD or economic activity within Article 9 PVD it is necessary, in addition to the contractual position between the parties, to have regard to commercial and economic reality of the transactions concerned.

49. As the CJEU stated in *HMRC v Newey* [2013] STC 2432:

> "42. As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case-law of the Court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, Joined Cases C-53/09 and C-55/09 *Loyalty Management UK and Baxi Group* [2010] ECR I-9187, paragraphs 39 and 40 and the case-law cited).
>
> 43. Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of Articles 2(1) and 6(1) of the Sixth Directive have to be identified.
>
> 44. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
>
> 45. That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions."

50. In *Airtours Holidays Transport Ltd v HMRC* [2016] STC 1509, at [47], Lord Neuberger referred to the observation of Lord Reed at [27] in *WHA Ltd v HMRC* [2013] STC 943 that:

> ""[t]he contractual position is not conclusive of the taxable supplies being made as between the various participants in these arrangements, but it is the most useful starting point". He then went on in paras 30 to 38 to analyse the series of transactions, and in para 39, he explained that the tribunal had concluded that "the reality is quite different" from that which the contractual documentation suggested. Effectively, Lord Reed agreed with this, and assessed the VAT consequences by reference to the reality. In other words, as I said in *Secret Hotels2 Ltd v Revenue and Customs Comrs* [2014] STC 937, para 35, when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts."

DISCUSSION AND CONCLUSION

51. Before considering the Article 2 and Article 9 issues, whether a supplies were made for consideration and if so were those supplies made in the course of an economic activity, it is necessary to ascertain whether, before 2015, there was an agreement between Tower and its subsidiaries for the provision of services and/or loans and, if so, the terms of those agreements. Additionally if there were such agreements before 2015, in relation to those and the post-2015 written agreements whether the implied or express contractual terms reflected the commercial and economic reality of the transactions.

52. Ms McCarthy, for HMRC, contends that, in the absence of any evidence of agreements between Tower and its subsidiaries before 2015 there were either no agreements at all or if there were these were contingent on the subsidiary being able to afford to repay Tower. She says that, as they had directors in common, this was the understanding of both Tower and its subsidiaries. While accepting that this was not how the intercompany loans were treated in the financial statements of Tower or its subsidiaries Ms McCarthy contends that this cannot be determinative of the issue.

53. However, I agree with Mr Firth that the evidence of Mr Asher and particularly that of Mr Wright the audit partner at UHY confirms that, although not in writing, agreements did exist between Tower and its subsidiaries under which Tower provided services and met expenses of the subsidiaries for which they were charged, at cost, with the sum concerned being added to the intercompany loan which was repayable on demand and that this reflected the commercial and economic reality of the relationship between them.

54. While I accept that the accounting treatment of the loans cannot be determinative, the accounts of Tower and its subsidiaries, which have been prepared in accordance with IAS and IFRS, supports such a conclusion as do the unqualified Audit Reports over the period in question.

55. I do not consider that this position changed after 2015, notwithstanding the introduction of loan and service agreements between Tower and is subsidiaries, as the loan agreements expressly refer to the intercompany loans being repayable on demand, as was the position pre-2015. I now turn to the issues.

Issue 1 – whether Tower made supplies for consideration

56. HMRC, relying on the decision of the Upper Tribunal in *Norseman Gold Plc v HMRC* [2016] STC 1276 ("*Norseman*"), contend that before 2015 Tower did not make supplies for consideration. Additionally, HMRC contend that increases in intercompany balances not did

not constitute consideration and should not be considered as loans in the normal sense and that uncertainty of payment breaks the direct link between the supply and purported consideration.

57. For Tower, it is argued that a reciprocal agreement providing for payment is sufficient for a supply to be for consideration irrespective of actual payment but even if that were not the case the right to payment is itself consideration. Also, in any event, an addition to the intercompany loan account constitutes payment.

58. Taking *Norseman* first, this case concerned an AIM listed UK holding company with an Australian subsidiary that carried out gold mining activities in Australia. The parent company appointed the subsidiary's directors, and directed its mining activities and provided management services and working capital through interest free loans. Although the parent company had a broad intention to charge the subsidiary in respect of the management services it did not issue invoices as the subsidiary had not begun to generate revenue.

59. As Warren J in the Upper Tribunal noted (with emphasis as in the judgment):

> "94. It is plain that merely holding 'a rather vague intention to levy an unspecified charge, at some undefined time in the future' is not 'enough' as the Judge held at Decision [49]. A mere hope of payment in the future is not a sufficient basis on which to recover input tax as an intending trader. Nor is the stated subjective intention of the company directors sufficient, if unsupported (as here) by objective evidence. Similarly, the Judge was entirely right to hold that there was no reciprocity of obligation because 'what was lacking here was any common understanding of what was payable, when and in what circumstances'. (Decision [52]).
>
> 95. These findings are fatal to Norseman's case that it had (during the relevant period) an intention to make supplies in return for **sums capable of amounting to consideration for VAT purposes** at some point in the future.
>
> 96. Without the relevant intention to make supplies **for consideration**, Norseman is unable to establish that it intended to make **taxable** supplies so as to enable it to recover input tax during the relevant period. Accordingly, the Judge was entirely right to conclude that it was not entitled to the input tax it sought to recover."

60. Ms McCarthy contends that the facts of Norseman are directly analogous to the pre-2015 position in the present case and, as such, provide the answer as to whether during this period Tower made supplies for consideration.

61. However, I agree with Mr Firth who says that the present case can be distinguished from *Norseman*, as unlike the "rather vague intention to levy an unspecified charge, at some undefined time in the future" in *Norseman*, Tower not only intended, but did charge its subsidiaries for the services that it provided to them.

62. As such, and as Judge Beare said in *W Resources* at [35]:

> "… 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."

63. The question is whether that, as HMRC contend, as a matter of commercial and economic reality this case falls within Judge Beare's caveat. Ms McCarthy submits that Tower did not make supplies for consideration to its subsidiaries, in essence adopting the reasoning of Judge Beare above and at [100] in *W Resources* that:

> "… 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"."

64. Ms McCarthy submits that, as a matter of economic reality, there is not any obligation on the subsidiaries to repay Tower. However, Mr Firth contends that HMRC have confused the commercial possibility that a debt might not be repaid due to lack of resource with a legal contingency, something that was recognised by Judge Beare in *W Resources* who, at [102] accepted that:

> "… 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*."

65. Given my conclusion that there was, under both the pre and post-2015 agreements, a legal obligation on the subsidiaries to make payment on demand in relation to the intercompany loans, the fact that it is not discharged does not mean that there has not been consideration for the relevant supply. As such I have come to the conclusion that Tower did make supplies to its subsidiaries for consideration.

66. However, for completeness and in deference to the submissions of the parties, I should briefly address the additional arguments advanced. First, whether a right to payment is consideration; secondly if, contrary to my conclusion above, actual payment is required for there to be a supply for consideration, whether this is satisfied by an addition to the intercompany loan; thirdly, whether the loans to the subsidiaries were genuine; and finally, whether the uncertainty of conditionality of payment breaks the direct link between the supply and consideration.

67. Mr Firth contends that the characterisation of a supply cannot depend upon what the counter-party subsequently does and relies on the reasoning of the CJEU in *Air France-KLM, formerly Air France (C-250/14), Hop!-Brit Air SAS, formerly Brit Air (C-289/14) v Ministère des Finances et des Comptes publics* [2016] STC 4571 ("*Air France*") in support. In *Air France* it was argued that if a passenger did not turn up for a flight the purchase price should be treated as a non-taxable contractual indemnity. The CJEU observed that:

> "26. … the services provided in performance of obligations arising from a contract to transport passengers by air are the checking-in and the boarding of passengers, the on-board reception of those passengers at the place of take-off agreed in the transport contract, the departure of the aircraft at the scheduled

> time, the transport of the passengers and their luggage from the place of departure to the place of arrival, the care of passengers during the flight, and, finally, their disembarkation in conditions of safety at the place of landing and at the time scheduled in that contract (see judgment in *Rehder*, C-204/08, EU:C:2009:439, paragraph 40).
>
> 27. However, it is possible to perform those services only if the passenger of the airline company turns up on the agreed date and at the agreed place of boarding, the customer's right to performance of those services being given by the company until the time of boarding, according to the conditions set out in the contract to transport passengers concluded when the ticket was purchased.
>
> 28. Therefore, the consideration for the price paid when the ticket was purchased consists of the passenger's right to benefit from the performance of obligations arising from the transport contract, regardless of whether the passenger exercises that right, since the airline company fulfils the service by enabling the passenger to benefit from those services.
>
> 29. As a consequence, the applicants in the main proceedings cannot claim that the price paid by the 'no-show' passenger and retained by the company constitutes a contractual indemnity which, since it seeks to compensate for a harm suffered by the company, is not subject to VAT.
>
> 30. First, such an interpretation would change the nature of the consideration paid by the passenger, which would become a contractual indemnity where that passenger did not use the identifiable service offered by the airline company.
>
> 31. The term 'supply of services', within the meaning of the Sixth Directive and the amended Sixth Directive, must, in the light of its objective nature, be interpreted without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person (see judgment in *Newey*, C-653/11, EU:C:2013:409, paragraph 41 and the case-law cited)."

68. Applying a similar reasoning, Mr Firth submits, that whether a supply is "for consideration" should not vary depending on whether the customer decides, or is able to, pay or not. This must be right. Indeed I did not understand it to be seriously disputed by Ms McCarthy whose argument against the proposition sought to rely, contrary to my conclusion, on lack of an obligation on the subsidiaries to pay breaking the link to the supply of services by Tower.

69. As to an addition to the intercompany loan being payment Ms McCarthy contends as a matter of economic reality that such an addition, which merely replaces a sum due for services with a sum due by way of a loan, cannot amount to payment.

70. In support of her argument that an outstanding debt is not payment she relied on *Paton v Inland Revenue Commissioners* [1938] AC 341 in support of her argument that is not. The question before the House of Lords in that case, identified by Lord Atkin, at 347, was:

> "… whether when the charges are added to the existing indebtedness at the end of one half-year, and the whole sum brought down is a debit item at the beginning of the next half-year so that interest is charged on the last half-year's interest, the charges have been paid."

He concluded:

> "The ordinary man would, I think, say that so far from being paid they are added to the ordinary indebtedness because they are not paid: and I can see no

reason why the law should say anything different. It is obvious that the system adopted by banks, which seems to have been common practice in Lord Eldon's time, is for the purpose of giving them compound interest without perhaps flaunting that fact before their customers."

71. Lord Macmillan in the same case agreed saying, at 356:

> "My Lords, it is a condition of a claim for repayment of tax on bank interest under s. 36, sub-s. 1 [of the Income Tax Act, 1918], that the taxpayer shall have "paid" to his bank the interest in respect of which he claims repayment of tax. In my opinion this means that the taxpayer must really, and not merely notionally, have paid the interest; there must be payment such as to discharge the debt; the payment must be a fact not a fiction.
>
> Now what justification can there be for holding that Mr. Fenton in the year to April 5, 1921, "paid" to the bank a sum of 7777*l.* in discharge pro tanto of the interest charges of 27,076*l.* 10*s.* 10*d.* which he incurred to them in that year? What happened was that Mr. Fenton did not pay the interest due by him at June 30 and December 31, 1920, and it was because he did *not* pay it that it was debited to his loan account on each half-yearly occasion and the accumulated sum carried forward to the next half-year. The effect of this method of accounting between Mr. Fenton and the bank, it is suggested, was that when the interest was debited to the loan account Mr. Fenton ceased to owe it to the bank qua interest and it became transmuted into an addition to the principal loan
>
> The transaction at each half-year, it was said, when analysed, involved the following steps - a demand by the bank for the interest due, a request by Mr. Fenton for a further advance to enable him to pay the interest, an agreement by the bank to make this further advance, and finally the application by Mr. Fenton of this further advance to the payment of the interest, with the result that Mr. Fenton was entitled to maintain that he had "paid" the interest.
>
> My Lords, the origin of this agreeable fiction whereby debts are to be deemed to be paid without payment may be traced historically to the ingenuity of lenders in devising a method of obtaining compound interest without contravening the usury laws."

72. However, it is clear that the issue with which the House of Lords were concerned in *Paton* was very much in relation to particular legislation, the Income Tax Act 1918 and can be contrasted with the later decision of the House of Lords in *MacNiven (HM Inspector of Taxes) v Westmoreland* [2003] 1 AC 311 in which Lord Hoffman said, at [67], under the sub-heading, 'The concept of payment':

> "My Lords, payment of a debt such as interest ordinarily means an act, such as the transfer of money, which discharges the debt. It is accepted that in this case the interest debt was indeed discharged. So why did this not count as payment for the purposes of the Act? One of the difficulties which I have with the argument for the Crown is that I find the alternative concept of payment for which it contends completely elusive. It is easy to understand a commercial sense of a loss which treats as irrelevant the fact that one part of a composite transaction produced a loss which was never intended to be more than momentary and theoretical. But what is the commercial concept of payment of a debt which treats as irrelevant the fact that the debt has been discharged? Mr McCall [counsel for the Crown] does not contend that payment must involve a negative cash flow which is not compensated by a cash flow in the opposite direction. He accepts, for example, that many commercial refinancing operations discharge old debts and create new ones without any

> cash flow either way. Nor is there any apparent policy to be found in section 338 which would require a negative cash flow. Otherwise, why should bank interest be deductible without any payment at all?"

73. On balance, and given that *MacNiven v Westmoreland* which supports Mr Firth's argument that payment does not necessarily requires negative cash flow, was decided more recently than *Paton*, had it been necessary to do so I would have found that the addition to an intercompany loan account balance would amount to payment.

74. Having found that there were agreements between Tower and its subsidiaries under which the intercompany loans were payable on demand and not conditional on the subsidiary being able to afford to do so, the argument in relation conditionality of payment falls away as does HMRC's argument, relying on *Smart v Lincolnshire Sugar Co. Ltd* 20 TC 643, that as a matter of economic reality the loans made by Tower to its subsidiaries being based on services being provided for a contingent liability were not genuine.

75. However, HMRC contend that if this were not the case the uncertainty of payment breaks the direct link between the supply and consideration. Ms McCarthy submits that the facts of the present case are analogous with those considered by the CJEU in *Odvolací finanční ředitelství v Pavlína Baštová* Case C-432/15. ("*Baštová*").

76. In *Baštová* the CJEU was concerned with whether the prize awarded for a horse being placed in a race was consideration for entering the horse in the race. As [37] the CJEU stated:

> "… it is not the supply of the horse by its owner to the race organiser which, as such, gives rise to the award of prize money, but the achievement of a certain result at the end of the race, namely the placing of the horse. Even if the race organiser were to have committed himself to awarding such a prize, of a fixed amount known in advance, the fact remains that the award of the prize is thus subject to a specific performance and to a degree of uncertainty. According to the case-law recalled in paragraph 28 above, that uncertainty precludes the existence of a direct link between the supply of a horse and obtaining a prize."

77. Ms McCarthy compares the comparison of "hits" and "misses", with the hits financing the misses, described by Mr Asher as analogous to the to the entry of a horse into a race. In each the taxable person incurs costs in providing the relevant services for which, although it is more likely than not payment will be made there is nevertheless a chance of success (a "hit" or a win) sufficiently often and of such magnitude to counteract the "misses" or losses. However, as in *Baštová* there is such uncertainty of payment that the services are not provided for consideration.

78. However, I agree with Mr Firth that the present case is distinguishable from *Baštová*. In that case payment which conditional on a particular result, the horse being placed in a race was clearly uncertain, whereas this is not so in the present case in which the liability of a subsidiary to pay Tower is unconditional and immediate even if payment is not actually made.

Issue 2 – whether supplies were made in the course of an economic activity

79. As David Richards LJ pointed out in Wakefield, at [53]:

> "Satisfaction of the test for a supply for consideration under art 2 does not give rise to a presumption or general rule that the supply constitutes an economic activity."

80. It is therefore necessary to consider whether the supply by Tower constitutes an economic activity for the purposes of Article 9 PVD, ie whether the supply is made for the purposes of obtaining income therefrom on a continuing basis (see *Wakefield* at [54], paragraph 41, above).

81. This requires a "wide ranging, not a narrow, enquiry" in which all "the objective circumstances in which the goods or services are supplied must be examined but does not include subjective factors such as whether the supplier is aiming to make a profit (see *Wakefield* at [55], paragraph 41, above). Although each case requires a fact-sensitive enquiry there is not a checklist of factors and even where the same factors are present they may assume different relative importance in different cases. Also, as made clear by the CJEU in *Geemente Borsele v Staatssecretaris van Financiën* [2016] STC 1570 ("*Borsele*"), it was for the national court to assess all the facts of a case (see *Wakefield* at [59], paragraph 41, above).

82. Ms McCarthy contends that the services provided by Tower were not provided for the purposes of obtaining income therefrom.

83. In particular, she says that:

(1) the provision of management services and loans is an ancillary activity of Tower whose principal activity is owning subsidiaries;

(2) the amount of earnings generated by Tower is limited and has not covered the cost of the services it provided;

(3) as a matter of economic or commercial reality the price of the services is set by reference to the subsidiaries means;

(4) the services are not comparable to a normal supply of management services and are not on offer to the general market; the services are not provided in a similar manner to a commercial provider; and

(5) as a matter of economic reality Tower would provide finance to its subsidiaries regardless of whether, or indeed if, it received payment.

84. Expanding on these propositions, Ms McCarthy compared the provision of the services by Tower to the provision of transport to schoolchildren by the Municipality in *Borsele* where contributions from parents amounted to 3% of the overall costs which the CJEU held was not an economic activity having observed:

> "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.
>
> …
>
> 35. it should be noted … 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 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."

85. As David Richards LJ said, at [78] in *Wakefield*, having concluded that the provision of courses to students was an economic activity of the College:

> "… the sole activity of the College, in the most general terms, is the provision of educational courses. It is not comparable to the municipality in *Borsele* for whom the provision of school transport was very much ancillary to its principal activities."

86. However, as is clear from [32] of *Borsele*, that while factors such, inter alia, the number of customer and the amount of earnings **may** be taken into account it is ultimately for the national court to assess **all** the facts of the case. As Mr Firth points out, there is no support for the proposition that a holding company only carries out an economic activity through managing its subsidiaries if that is its principal activity.

87. For example, in *Cibo* the holding company derived "most of its turnover from the receipt of dividends" rather than management charges (see [11] of the decision in *Cibo*) and in *Portugal Telecom SGPS SA v Fazenda Pública* [2012] EUECJ C-496/11 the CJEU noted:

> "43 Portugal Telecom submits that the national tax authorities maintain that, having regard to their character as ancillary to the main activity, the supplies of technical administration and management services are indissociable from the management of shares. Therefore, the services acquired by SGPSs and provided to their subsidiaries are regarded as mixed transactions for the purposes of the right to deduct VAT and those authorities impose the pro rata method of deduction.
>
> 44. If the position of the tax authorities is indeed as described in the previous paragraph, which is for the referring court to ascertain, it should be observed that the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see, *Midland Bank*, paragraph 19; *Abbey National*, paragraph 24; *Cibo Participations*, paragraph 27; *Kretztechnik*, paragraph 34, and *Inverstrand*, paragraph 22).
>
> 45. If the input services were to be regarded, overall, as having a direct and immediate link with the output financial transactions giving rise to a right to deduction, the taxable person concerned would be entitled, pursuant to Article 17(2) of the Sixth Directive, to deduct all the VAT chargeable on the relevant input services acquired. That right to deduct cannot be limited simply because, on account of the purpose or general activity of those companies, the national legislation treats the taxed transactions as ancillary to their main activity."

88. As for the second and third of Ms McCarthy's propositions, the earnings not meeting the costs of the services and as a matter of commercial and economic reality the price of the services is set by reference to the subsidiaries means, while it is clear from *Borsele* that the amount of earnings may be taken into account, it is also clear that, as David Richards LJ said at [52] in *Wakefield*:

> "There is no need for the consideration to be equal in value to the goods and services. It is simply the price at which the goods or services are supplied."

89. With regard to the price of the services, it is clear, as a matter of fact (and commercial and economic reality), that in the present case the subsidiaries were charged "at cost" for the services supplied by Tower (see paragraph 53, above) and after 2015 with a 5% mark-up (see paragraph 55, above) and not by how much they could afford.

90. Turning to the fourth and fifth proposition, that the services are not comparable to a normal supply of management services, are not on offer to the general market and are not provided in a similar manner to a commercial provider, it is clear that, in relation to economic activity, it is relevant to consider whether services are provided as a participant in a particular market, both *Borsele* at [35] (see paragraph 84, above) and *Wakefield* at [85] where David Richards LJ, in setting out the reasons for finding that the College was engaged in economic said:

> "… it is undeniable that there is a market in the provision of further and higher education, whose viability is underpinned by a combination of grant aid and fees. There is no reason to suppose that the College is other than a typical participant in that market or that it provides courses to students paying subsidised fees on anything other than a typical basis, allowing no doubt for some variations between different institutions. If the College was in any way in a position that was unique or atypical, it was for the College to put evidence of it before the FTT."

91. Although these are factors to be taken into account it is necessary to bear in mind, as David Richards LJ observed at [59] of *Wakefield* (see paragraph 41, above), that each case requires a fact sensitive enquiry and that even where the same factors are present they may assume different relative importance in different cases. Unlike the Municipality in *Borsele* and the College in *Wakefield* Tower is a holding company. As such, and consistently with CJEU cases on holding companies, as the Tribunal accepted at [51] of *African Consolidated Resources Plc v HMRC* [2014] UKFTT 580 (TC):

> "… it is not realistic to expect that the manner in which lending and management activities are undertaken intra-group will be strictly comparable to the way in which they would be undertaken between third parties. It is not reasonable to expect documents for loans to be as rigorous between group companies as they would be from a third party. The Tribunal has accepted that a lack of sophisticated documentation does not necessarily mean that the services are not being provided on a commercial basis, in the course or furtherance of a business."

92. The proposition that as a matter of economic reality Tower would have financed and provided its subsidiaries with services regardless of whether or not it received payment is inconsistent with the fact that there were agreements in place under which supplies were made by Tower (see paragraph 53, above).

93. Mr Firth also submits that this and several other of the propositions advanced by HMRC were not put to witnesses and cannot be relied upon. In response Ms McCarthy referred to *Hawksbridge LLP and Others v HMRC* [2014] UKFTT in which the Tribunal, at [152], considered it necessary to dispose of a procedural argument that:

> "… the absence of a direct challenge by HMRC, in the material produced by them during the course of the appeals and the reference, to the various amounts paid by the partnerships for the exploitation of the intellectual property rights they had acquired, to the promoters, and by the principal exploitation companies to others who were to undertake the production of, for example, music albums or books, must lead us to find that the amounts paid represented fair market value for what was to be provided in return. Mr Maugham [counsel for the referrers], in particular, relied for that proposition on dicta of the House of Lords in *Browne v Dunn* (1894) 6 R 67 as they were explained and expanded upon by the Court of Appeal in *Markem Corpn v Zipher Ltd* [2005] EWCA Civ 267. It is not necessary for present purposes to do more than set out the proposition in *Halsbury's Laws* which was drawn from the speeches in *Browne v Dunn*, and approved by the Court of Appeal in *Markem Corpn*:
>
> > "Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence."

94. Having summarised the evidence of the witness and noted that HMRC's response was that its case had been clear throughout, the Tribunal continued:

> "155. We do not accept the proposition that HMRC's case was unclear to the appellant partnerships or the individual referrers before the hearing. On the contrary, we are quite sure, not only from the documents exchanged in advance but from the manner in which they gave their evidence, that Ms Hamilton, Mr Hutton and the individual referrers knew exactly what was being said by HMRC. In the statement of case served in Acornwood's appeal, in November 2009, it was said that
>
> > "… the Respondent asserts additionally that the present case constitutes one of mislabelling. This is because the terms in which various documents pertaining to the activities of [Acornwood] and its arrangements with Centipede and others, seek to characterize certain items, do not reflect the reality of the situation. By way of example, invoices issued by Centipede to [Acornwood], on their proper construction, purport to be in respect of exploitation costs within the meaning [of] the Principal Exploitation Agreement, when in fact, at least in the main, they are not."
>
> 156. Although that passage does not deal directly with the question of negotiation it was not alone in advancing HMRC's case that the arrangements were in many respects artificial, and that the level of the payments made, in certain cases, was equally artificial. The s 28ZA questions referred to us, without more, make it perfectly plain how HMRC are putting their case about the arrangements: no-one could realistically be under any illusion that HMRC did not view the Icebreaker Partnership arrangements as a tax avoidance device. The argument in relation to Mr Ironmoat's evidence amounts, in our view, to little more than a pedantic objection to HMRC's choice of words. We accordingly reject the individual referrers' argument on this point.

95. Similarly, in the present case I accept that HMRC's position has been clear throughout and accordingly do not consider it improper of Ms McCarthy to have made such submissions.

96. However, given my agreement at paragraph 47 above, with Judge Beare in *W Resources*, that the conclusion to be drawn from *Cibo* (particularly at [21], see paragraph 44, above), *Larentia* (at [31], see paragraph 45, above) and "*MVM*" (particularly at [33], see paragraph 46, above) that a finding that holding company was supplying services to its subsidiaries for 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", it follows that the supplies made by Tower were made for the purposes of obtaining income therefrom on a continuing basis and therefore in the course of an economic activity.

97. As Judge Beare, recognised at [56] in *W Resources* 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."

98. It therefore follows that not only was Tower making supplies of services to its subsidiaries for consideration but was doing so in the course of an economic activity.

DECISION

99. Therefore, for the reasons above, the appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

100. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

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