# TC08006

*VAT – right to deduct input tax on supplies – Article 168 Principal VAT Directive*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Appeal number: TC/2017/08181**
**TC/2017/00942**

**BETWEEN**

**IMPRIMATUR CAPITAL HOLDINGS LIMITED** **Appellant**

**-and-**

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

**TRIBUNAL: JUDGE ALEKSANDER**
**REBECCA NEWNS**

**Sitting in public at Taylor House, London on 27 and 28 January 2020**

**George Perez QC, instructed by VAT Advice Line Limited, for the Appellant**

**Mark Fell and Edward Hellier, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### INTRODUCTION

1. This is an appeal by Imprimatur Capital Holdings Limited ("ICH") against:

   (1) a review by HMRC dated 20 December 2016 upholding their decision issued 9 June 2016 to disallow input tax deducted by ICH totalling £102,205 for the periods 06/12 to 06/15; and

   (2) a review by HMRC dated 5 October 2017 upholding their decisions dated 31 October 2016 and 1 September 2017 to disallow input tax deducted by ICH totalling £82,609 for the periods 12/15 to 03/17.

2. The dispute relates to input tax on supplies made to ICH which were used for the purposes of supplies made (or to be made) to companies in which ICH (or its subsidiary, Letzone Limited) owned shares, and to other unrelated entities. HMRC assert that the inputs were not used for the purposes of taxed transactions or intended taxed transactions.

3. Ian Watson (founder and director of ICH) and Benjamin Ferrari (chief strategic officer of Imprimatur Capital Limited) provided witness statements (in the case of Mr Watson, he provided two witness statements) and both gave oral evidence under oath and were cross-examined. Three bundles of documentary evidence were submitted in evidence.

4. In addition, a letter from Grunberg & Co was produced. Grunberg & Co undertake bookkeeping and the preparation of VAT returns for ICH. Attached to the letter were printouts from Grunberg & Co's computer records of ICH's daybook and sales invoice ledgers, confirming that these had been reconciled to ICH's bank statements. The ledgers had been marked-up in manuscript to show where the entries in these ledgers had been agreed with the spreadsheet produced by Mr Watson as an exhibit to his witness statement. However, the letter concludes that the information is provided "without any responsibility on the part of the writer, Grunberg & Co, or the employees thereof". The signatory of the letter did not appear as a witness.

5. ICH was represented at the hearing by Mr Perez. HMRC were represented by Mr Fell and Mr Hellier.

### BACKGROUND FACTS

6. We find the background facts to be as follows:

7. ICH (whose name was changed from "Imprimatur Capital Limited" in 2015) is a member of a corporate group ("the Group") which includes Letzone Limited ("Letzone"); Imprimatur Capital Corporate Finance Limited ("ICCF"); Imprimatur Fund Management Limited ("IFM") and Imprimatur Capital Limited ("IC" – not to be confused with ICH). ICH was registered for VAT on its own from 1 September 2004. This registration was cancelled on 1 October 2015, when ICH joined (as representative member) a group registration with IC. Letzone is a subsidiary of IC. ICCF was regulated by the (then) FSA and IFM is regulated by the FCA. None of Letzone, ICCF, nor IFM were ever part of the VAT group. IFM was incorporated after 2009. ICCF was dissolved in 2015.

8. As IC and ICH were members of a VAT group from 1 October 2015, in this decision, for convenience, reference to supplies being made by or to ICH, include circumstance where the supply would have been treated (but for the VAT group) as being made to (or by) IC.

9. The Group invests in projects which were originated in universities and research institutions. Companies would be incorporated to exploit intellectual property commercially and "spun out" of the institution, and the Group would invest in the spin-out company

(referred to in this decision as a "portfolio company"). The evidence is that the shareholdings in portfolio companies were registered in the name of Letzone, which was also the beneficial owner of the shares.

10. In addition, the Group provides services to its portfolio companies, such as the provision of "management services" (such as introductions to potential executives and other advisors, advice on how best to exploit the intellectual property commercially, provision of office accommodation and contact points). Some of the agreements with portfolio companies included in the bundles provided that Lezone would provide services, but as Letzone had no staff, any services provided to a portfolio company by the Group would be provided by ICH (or IC).

11. The Group also provides services to third-party clients, an example would be advising a university on technology transfer.

12. ICH was founded by Mr Watson and Andrew Bottomley in 2003 to invest in technology spun out of universities and other educational institutions (Mr Bottomley has since left the employment of the Group) Mr Watson's evidence was that he considered that the academics who invented the technology did not have the business skills or experience needed to exploit the invention commercially, and he wanted to mitigate this risk when making an investment. The model he developed was only to provide financial capital where ICH could also find and install experienced management to assist the academics to take their invention out of the lab into the commercial world. In many cases, ICH would find a chief executive or operational executive for the business and would also appoint experienced advisors as non-executive directors. In some cases, the commercial advice was provided by Mr Watson himself.

13. Mr Watson said that he always described ICH as. "commercial operation" which provided a combination of services and investment capital. The company had received clearances from HMRC for the purposes of EIS relief and substantial shareholder exemption in connection with flotations on AIM (which ultimately aborted due to the financial crisis).

14. In its early years, ICH built up relationships with universities and research institutions, and entered into "first look" agreements with some of them. Dr Ferrari was first employed by ICH in 2005 to work on the development of the Group's university partner network around the world. Dr Ferrari's evidence was that the Group adopted a deliberate policy to provide services to universities and government agencies without necessarily charging for those services in order to build its "eco system". This was necessary in some jurisdictions where institutions had previous bad experiences of dealing with European and US businesses who levied high fees but whose impact was minimal. This policy enabled the Group to build its brand, establish credibility, and source deals. By 2008, ICH had roughly 50 such partners with whom it had "first look" or "equal first look" agreements, and roughly 150 other relationships where the cooperation was on a more informal basis.

15. ICH invested in software, new materials, medical devices, new energy, and computer gaming technologies businesses. It had relationships with, and a database of, executives with skills in developing and managing businesses in these areas and had additionally a group of business and academic advisors. This gave the projects into which ICH invested access to a network of advisors to ensure that these new businesses were well staffed and managed.

16. The objective of the Group was to build up the portfolio company (and the intellectual property vested in that company) to a certain stage, and then obtain a return from selling its shares. Mr Watson's evidence was that this was how very large returns might be generated potentially anything from ten to ten thousand times the original investment. Mr Watson's evidence was that a portfolio company might require further rounds of funding before its

shares were sold, and as more shares were issued to new investors, the Group's percentage ownership of the portfolio company would be diluted, possibly to a very small percentage.

17. Often individuals in the advisory group would be given options over shares in the portfolio company as part of their arrangement for the provision of their advice and services to the particular portfolio company (any such options were arranged directly between the company in question and the advisor).

18. Mr Watson's evidence was that investment agreements were concluded with the portfolio companies into which the Group invested, and that these agreements included provisions for the payment of various fees for services such as consulting services, management services, the provision of directors, and the placement of executives with the portfolio company. Mr Watson's evidence was that in the light of his experience of the bursting of the `'dot com" bubble in 2000, he was concerned that the Group should generate a level of fee income to contribute towards its operational expenses, (we assume, and find, that this was so that it was not solely reliant on the cash generated from disposals of its investments to cover its expenses). Mr Watson's evidence was that it was for this reason that the Group's investment agreements with portfolio companies provided for fees to be charged for the provision of the Group's services. The level of fees charged was not always the same for every company, and not every company required the same set of services. Rather than charging by the hour for the supply of services, the Group charged a set fee, which could be on a one-off basis, and/or at regular intervals (such as monthly, quarterly, or annually), irrespective of the amount of work that the Group actually did for the company concerned. Mr Watson's evidence was that the level of the fee might initially be less than the rate that the Group would normally seek but would reflect the ability of the portfolio company to pay – although there was an expectation that the level of the fee would be increased in the future. Mr Watson described these fee arrangements as "de-risking" the investment.

19. In addition to supplying services to its portfolio companies, the Group also supplied services to unrelated third parties. Examples given by Dr Ferrari include undertaking a peer review in 2010 of Stockholm University's knowledge and technology transfer programme, and a joint venture in 2016 with Orbiz advising Brazilian software companies on improving their ability to raise capital from non-Brazilian investors.

20. Unfortunately, only a small selection of the agreements that the Group had with its portfolio companies or its other clients were included in the bundles, and in some cases only extracts from those agreements were included. Mr Watson in his second witness statement explains that ICH had moved offices several times, and copies of the agreements were mislaid while moving, or not retained after the contract had come to an end (for example if the portfolio company was no longer in existence). But from our review of the limited number of agreements included in the bundles, we note, for example, that the investment agreements relating to Burning Arrow Limited and Hertzian Limited (which were in very similar terms) provided only for the payment of fees of £6000 (plus VAT) per annum in respect of the investor's director, and not any other fees or services (the agreements provided for the portfolio company to make a contribution of £1000 (plus VAT) towards the professional fees incurred by the Group in making its investment – but that payment of course related to services being provided to the Group by its professional advisers, and not to services provided by ICH to the portfolio company). When cross-examined, Mr Watson could not identify with any degree of specificity the basis on which ICH or IC was entitled to charge fees to Burning Arrow, Hertzian or Stormtide, for services (other than the fees for its director) (including, for example the date of any relevant agreement, the parties to that agreement, or its terms).

21. Mr Watson's evidence was that there were only two exceptions to these fee arrangements in the case of portfolio companies:

(1) The first related to the Group's investment in Marmirus LLC, where it was agreed that no fees would be charged – Dr Ferrari's evidence was that this was because ICH had been advised that Russian innovation investment agencies (from whom co-funding would be sourced) would respond very negatively to fees being levied.

(2) The other exception related to ICFM, which was the manager (and general partner) of two funds based in Latvia. Mr Watson's evidence was that the Group wanted to generate income by establishing a fund management operation in Latvia, and this would generate income from fees charged to the fund manager. ICFM was incorporated as the fund manager, and was 60% owned by ICH and 40% owned by the Latvian team (although subsequently, the Latvian team acquired ICH's shares). Mr Watson did not regard ICFM as a portfolio company. Mr Watson explained that some of the prospective investors in these funds would only commit if ICH also committed to invest in the fund. ICH therefore had to commit to the funds before knowing the amount that would be raised, and the amount that could be levied in fees. The service agreement between ICH and ICFM dated 11 June 2010 provided that ICH would only charge a fee to ICFM for the provision of advisory services and the provision of the services of named individuals if one of the funds successfully raised €10m, the level of the fee for any year was to be agreed in the fourth quarter of the preceding year (there is no provision in the agreement to address what is to happen if the parties fail to reach agreement). Although this is an "agreement to agree", and therefore no agreement at all, in fact fees were paid by ICFM to ICH in respect of the periods in dispute. An invoice dated 11 July 2016 for a fee of £93,000 was issued to ICFM in respect of the five years from 1 April 2011 to 31 March 2016 inclusive (being £18,600 per year). Mr Watson's witness statement states that this fee was received on 13 February 2017. In addition, a fee of £319.39 was charged in 2017. The services provided by ICH to ICFM under the services agreement included assistance with evaluation of investment opportunities, access to ICH's networks and advisory group, advise relating to the funds' investment strategies, and participation in the funds' investment committees.

22. In the period leading up to the 2008 financial crash, the Group had six satellite offices (additional to its London headquarters) in: Brazil (1 person), Latvia (4 persons), Singapore (2 persons), Hong Kong (2 persons), Australia (2 persons), and Ukraine (1 person). In London, the Group engaged 8 analysts (covering the particular technology areas in which the Group invested), 4 portfolio managers, and 2 human capital specialists.

23. With the 2008 financial crash (following from Lehman's collapse), Mr Watson was concerned to "protect" the portfolio companies into which the Group had invested. His evidence was that he deferred the fees that the Group charged to its portfolio companies – on the basis that the Group would be entitled to recover these fees as and when the companies were able to pay without endangering their own solvency. Mr Watson's evidence was that the Group's decision to defer fees was critical to the survival of these companies, and he did not want to bring portfolio companies down by enforcing recovery of fees that they were unable to pay.

24. The board minutes of ICH of 16 December 2008 show that it had taken steps to reduce its costs. The minutes noted that redundancies had been previously reported to the board, and noted further redundancies, terminations, staff leaving, or moving to a part-time or consultancy role. Mr Watson's evidence was that the number of employees in London was

reduced from 16 to 4, and that all the satellite offices (other than Latvia) were closed. The minutes recorded that:

> New policies to charge service fees to portfolio companies whether directly or through Imprimatur Capital Corporate Finance Limited had been put in place, and already this had produced revenues of approx. £100k from MSL and BigDna with additional revenues anticipated from Camiri and Clusterpoint.

25. This paragraph suggests that ICH had not previously charged fees to portfolio companies – contrary to Mr Watson's evidence – and that fees were only now being charged to portfolio companies as a measure to improve the financial viability of ICH. Although ICH submit that these minutes evidence Group revenues of about £100,000 per annum from fees charged to portfolio companies, the revenue that they evidence is fees charged by ICCF, which was never a member of the ICH VAT group.

26. In 2012, the Group had only two offices, one in London (with 3-4 staff) and the other in Latvia (with 4 staff). The Group continued to have access to its networks of executives and advisors. It also engaged former staff on freelance consultancy basis from time to time.

27. The board minutes of IC for 12 January 2016 noted that the service fee charged to ICFM had been agreed at £32,000 per annum, but because of the poor cash flow for ICFM, IC had deferred invoicing and charging the fee. It was resolved that the fee would continue to be deferred until such time as ICFM's cash flow was sufficient to support payment and that the level of the fee would be reviewed in six months. Included in the bundles is an email from Mr Moore (managing partner of ICFM) to a Mr Self dated 22 November 2018 as follows:

> Here's an Excel spread from Feb 2017 which describes how IC should invoice ICFM £93,000 (EUR equivalent €111,133.68) for services covering 2011 to 2016 (payment of which was deferred to Feb 2017 when ICFM could afford to pay) and for 2017 and for services to be provided through to 2018.
>
> I attach also the payment confirmation from 13 Feb 2017 when ICFM paid IC €111,113.68 for the above-mentioned services. Note however the small typo in the payment confirmation "… mgt services 2011 2016" should have been written "… mgt services 2011 to 2018".

Mr Watson's evidence was that payment was deferred in the case of ICFM because of the provision in the service agreement relating to the raising of €10m capital, but there is no reference in the board minutes nor in the email to the provision in ICH's agreement with ICFM that fees would only be payable if €10m capital had been raised by one of the ICFM funds. Included in the bundle is an invoice dated 11 July 2016 for £93,000 in respect of fees for the period from 1 April 2011 to 31 March 2016 (in other words, £18,600 for each year). Mr Watson, in his witness statement, says that this amount was received on 13 February 2017, which is consistent with the email. Mr Watson was questioned on the discrepancy during cross examination between the date of the invoice, the date of the payment, and the reference in the email to how IC should invoice the fee. Mr Watson said that he could not explain why the invoice was dated July 2016, but probably only sent to ICFM in February 2017. In any event, he agreed that the entry relating to this amount should have been in the 2017 column of the spreadsheet discussed below and should not have been shown as having been paid in 2016.

28. The board minutes of IC for 3 February 2016 include a statement that the fees initially agreed with Hertzian, Burning Arrow and Stormtide were below what IC would normally seek for the services it provided, but reflected what those companies could afford. Mr

Watson's spreadsheet (discussed below) states that the fees being paid at that time by these companies were around £1500/quarter (including VAT), which is consistent with the level of directors' fees payable under their investment agreements. The board resolved that the fees would be increased to £24,000 per annum with effect from 1 April 2016, but that the companies could defer payment until their cash flow was sufficient to be able to support the payment – and that the fees would be reviewed again in six months' time.

29. Dr Ferrari left IC in 2012 as a result of the financial crisis. Between 2012 and 2016, Dr Ferrari worked for The Climate Group (an NGO), and returned to working for IC in 2016 (Dr Ferrari continued to advise The Climate Group after re-joining IC, and IC charged The Climate Group a fee in 2016 and 2017 for Dr Ferrari's services). Dr Ferrari's evidence was that since re-joining IC, he has focussed on building higher value ("slow burn") opportunities for generating income. These include working with Sheffield Hallam University, a Latvian "accelerator", a new fund in Dublin, a new fund in sub-Sahara Africa, and a private placement programme. In addition, the Group has worked with individuals who could introduce the Group to government agencies, financial institutions, and other advisory businesses (such as large accounting firms).

30. Mr Watson referred in his evidence to various projects where the Group intended to make supplies, but for some reason, the projects did not come to fruition. These included a project to outsource Falmouth University's technology transfer (which relied on EU funding, and was cancelled with Brexit), and a project to manage a space fund (but the British Business Bank withdrew its support at the last minute, which resulted in the project aborting).

31. Attached to Mr Watson's second witness statement was a spreadsheet itemising the Group's fee income from 2006 to 2019, together with a summary table analysing the income by year and by paying entity. The entities listed in this table, according to Mr Watson's evidence, do not include all the Group's portfolio investments, as the Group did not charge fees for the provision of services to some of its portfolio companies. His evidence was that the table included all portfolio companies and third-party clients to whom the Group provided services in consideration for a fee.

32. We have analysed the fee income shown in Mr Watson's spreadsheet in relation to portfolio and group companies as follows:

(1) BigDNA and Mobile Sports. These are both portfolio companies. Fee income is shown for the years 2008 only and is described in the itemised list attached to the spreadsheet as being ICCF income (which is consistent with the services agreements with ICCF included in the bundles). Mr Watson agreed that the Group had no contractual right to any fee from BigDNA other than under the agreement with ICCF, and that this agreement expired in 2008. Mobile Sports last filed accounts were made up to 31 March 2010, and it was subsequently struck off. There is no evidence of any activity relating to either company since 2009. We find that no services were provided, nor fees charged in the periods under appeal.

(2) Camitri (formerly named ICIPR). This is a portfolio company. Mr Watson agreed during cross-examination that this was a failed investment. Its last filed accounts were made up to 31 March 2011, and it was subsequently struck off. Mr Watson acknowledged during his evidence that no services were provided to this company, and no fees charged, since 2012. In the case of the invoices listed in Mr Watson's spreadsheet for periods up until 2008, his evidence was that some of the invoices issued to Camitri in respect of "management fees" were cancelled by the issue of a corresponding credit note. We find that no services were provided, nor fees charged, in the periods under appeal.

(3) Burning Arrow, Hertzian, and Stormtide. These portfolio companies were all spun out of Falmouth University. The investment agreements with Letzone provides for a Letzone to appoint a non-executive director, and to be paid a fee of £6000 (plus VAT) per annum for his services, but there is no evidence of there being any agreement for the provision of any other services, or the payment of fees in excess of £6000 per annum. The investment agreements also make provision for the portfolio companies to contribute £1000 (plus VAT) towards the professional costs incurred by Letzone in making its investment. IC's board minutes of 3 February 2016 confirm that fees were set at a level that these companies could afford, but IC would increase the fees in the future – but that payment of the fees would be deferred if the company was unable to pay. According to Mr Watson's spreadsheet, fees of £8400 were received for Burning Arrow and Stormtide in 2016 (which corresponds to the directors' fees and contribution to costs), and £7200 for Hertzian (corresponding to the director's fee). In 2017 fees of £3600 were received from Burning Arrow and Stormtide, and £7200 for Hertzian. But in 2018 and 2019 no fees were received from both Burning Arrow and Stormtide, and £5400 and £1800 respectively was received from Hertzian. The evidence from Companies House records is that Burning Arrow was dissolved in January 2019, but that both Herzian and Stormtide are active companies.

(4) ICFM. This is a Group company. IC's minutes for 12 January 2016 noted that the service fee had been agreed at £32,000 per annum, but because of the poor cash flow for ICFM, IC had deferred invoicing and charging the fee, and that the fee would continue to be deferred until such time as ICFM's cash flow was sufficient to support payment. An email from Mr Moore of ICFM states that the fee was deferred because ICFM could not afford to pay it until February 2017. Mr Watson's evidence was that the deferral was made because of the condition in the service agreement that fees could only be charged if the capital raised by one of the funds exceeded €10m. However, we do not find Mr Watson's evidence credible in this respect. The service agreement was concluded in 2010, but the board minute is some five and a half years later, by which time any capital raising would have long closed. In the light of the board minute and the email, we find that the deferral of the fee was due to ICFM's inability to pay the fee. The email from Mr Moore refers to a spreadsheet of February 2017 setting out the basis of the fee, and "how IC should invoice". HMRC submit that the invoice was not presented until February 2017. We disagree. The email suggests that no invoice had been issued by 22 November 2018, and we so find. We consider that it is more likely than not, and therefore find, that ICFM made its payment on the basis of the Excel spreadsheet, and the invoice was only issued subsequently (after the 22 November 2018 email). It follows that we find that the invoice had been backdated. It is not disputed that the fee of £93,000 was paid in February 2017, and we so find.

(5) QS Biodiesel. There is no evidence of any documented agreement for the supply of any services with this portfolio company, and we find that there was none. Mr Watson's evidence was that the payment of £1200 made in 2017 was to recharge the costs of a patent agent, although there is no documentary evidence to support this.

(6) Boston Neuroscience (previously named Vittamed). There is no evidence of any documented agreement for the supply of any services with this portfolio company, and we find that there was none. There is a payment shown on the spreadsheet as occurring prior to 2006, and then payment in 2017 of £11,013.41 and payments in 2018 of £8759.34 in respect of the costs of board meetings. No payments were received between 2007 and 2016.

(7) Included in the bundles of evidence is a list of portfolio companies stating the date of investment by the Group. This includes portfolio companies where the investment was made in the periods under appeal, but which are not included in the spreadsheet. We conclude and find that no fees were paid by these portfolio companies in the relevant periods. These companies include Hypermancer, InfoGov, Mobile Investment Tech, and Zephyr.

33. Although Mr Watson's evidence was that fees were often deferred, in practice we find that this deferral was sometimes indefinite, to the extent that the portfolio or group company was sold or dissolved before the deferred fees were ever paid. This can be seen in the case of Burning Arrow, where only £3600 fees were paid in 2017, no fees paid in 2018, and the company was dissolved in 2019.

34. The spreadsheet shows fee income from third party clients in the periods under appeal as follows:

(1) Scottish Enterprise. £1151.81 in 2015

(2) Max Lewinsohn. £271 in 2016

(3) The Climate Group. £11,070 in 2016 and £6750 in 2017

(4) Orbiz. £6800 in 2017

(5) Simon Vane Percy. £282 in 2017

(6) Spirit IA. £4800 in 2017

(7) Ulster University. £16,281 in 2017

35. In addition to the fee income actually generated, ICH submits that it undertook work on projects that were intended to generate fee income, such as the work on the space fund, and a fund with Ulster University. There is evidence of services being provided to Ulster University by IC in the periods under appeal, but Mr Watson's evidence in relation to the space fund was that it would be managed by IFM (which is not a member of the VAT group), and the only evidence that it would generate fee income for IC or ICH is Mr Watson's oral evidence that IC or ICH would charge fees to IFM (in a similar manner to the fees charged to ICFM), but this is uncorroborated by any documentary evidence.

36. We note that no fee income of any kind was paid in 2011 to 2014 inclusive. And for the years 2008 to 2010, the only fee income paid to ICH and IC was by Scottish Enterprise.

37. We find that Mr Watson's spreadsheet is not completely reliable. The ledger printouts included with the letter from Grunberg & Co were marked-up in manuscript to show where those ledgers agreed with the itemised entries in the spreadsheet. We note that not all the entries on the spreadsheet agreed with Grunberg & Co's ledgers, and in a number of cases, the amounts shown in Grunberg & Co's ledger differed from the amount included in the itemised entry. Even in the cases where Grunberg & Co's ledgers agree with the spreadsheet, we could not always reconcile the fee invoices included in the bundles to the amounts shown in the spreadsheet. And in any event, we note that Grunberg & Co's covering letter disclaimed responsibility for the accuracy of their work.

38. We also note that two of the items on the spreadsheet were itemised as being ICCF income and were therefore not even fees for services provided by either ICH or IC. These were the fees paid by BigDNA and by Mobile Sports in 2008. This is consistent with the services agreements that were included in the bundles for these two companies, which were both with ICCF.

39. Mr Watson was asked why there was little, or no fee income shown on the spreadsheet in the period from 2011 to 2015. His explanation was that during this time the Group was focussed on its fund management side (in particular, the space fund), as it wanted to generate regular income through charging fees to a fund manager. Although services were being provided to portfolio companies during this period, they would not have been of significance.

40. Mr Watson did not know how much it cost to run the Group between 2012 and 2017. He did say that neither he nor Mr Bottomley were taking any salary, so the only costs the Group incurred were for a serviced office, one member of staff (around £30,000 per annum), and some accountancy fees. Mr Watson said that since 2017, the business's financial position has improved, and its revenues were looking promising.

**THE LAW**

41. Article 168 of the Principal VAT Directive ("PVD") sets out the entitlement of taxpayers to deduct input tax as follow:

> …. 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 these 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.

42. The term "taxed transaction" is defined in article 2(1)(c) as follows:

> the supply of services for consideration … by a taxable person acting as such …

43. Taxable person is defined in article 9(1) as follows:

> Any person who, independently, carries out in any place any economic activity.

44. Thus, for ICH to be able to claim a deduction for input VAT on supplies made to it, ICH must be using those supplies for taxable transactions that it makes, or for taxable transactions that it intends to make (there are exceptions set out in Article 169 of the PVD, but these are not relevant to this Appeal). There are two basic conditions that those "outputs" must satisfy in order to be taxable transactions (or intended taxable transactions):

> (a) First, they must be made by ICH for consideration; and
>
> (b) Secondly, ICH must be acting as a taxable person when making, or intending to make, the supply – in other words, the supply must constitute an economic activity carried on by ICH.

45. ICH accept that in order to establish its entitlement to deduct input tax, it must show that there was (at the time when it received the supplies made to it) an intention to make supplies for a consideration. In addition, those intended supplies had to be made in the course of economic activities.

46. For the periods from 1 October 2015, IC and ICH were members of a VAT group, of which ICH was the representative member. Therefore, for VAT purposes, all supplies were deemed to be made by (or to) (s43, VAT Act 1994). We therefore refer in this decision to supplies being made by (or to) ICH, even if the underlying activity (or payment) was made by (or to) IC.

47. The decision of the CJEU in *Magyar Villamos Művek Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság* (2017) C-28/16 sets out the general principles governing the entitlement of a taxpayer to credit for input tax:

> 29. In this regard, it must be recalled that, in order for VAT to be deductible, the input transactions must have a direct and immediate link with the output transactions giving rise to a right of deduction. Thus, the right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct (judgment of 16 July 2015, *Beteiligungsgesellschaft Larentia + Minerva mbH & Co KG v Finanzamt Nordenham; Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG* (Joined cases C-108/14 and C-109/14) [2015] STC 2101, para 23 and the case law cited).
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> 30. More specifically, as regards the right of a holding company to deduct, the court has previously held that a holding company which has as its sole purpose the acquisition of shares in other undertakings and which does not involve itself directly or indirectly in the management of those undertakings, without prejudice to its rights as a shareholder, does not have either the status of taxable person, within the meaning of art 9 of Directive 2006/112, or the right to deduct tax under art 167 of that directive (judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, para 18 and the case law cited).
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> 31. The mere acquisition and holding of shares in a company are not to be regarded as economic activities, within the meaning of Directive 2006/112, 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 (judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, para 19 and the case law cited).
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> 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*, para 20 and the case law cited).
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> 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 art 9(1) of Directive 2006/112 where it entails carrying out transactions which are subject to VAT by virtue of art 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*, para 21 and the case law cited).
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> 34. Thus, the mere involvement of a holding company in the management of its subsidiaries, without carrying out transactions subject to VAT under art 2 of Directive 2006/112, cannot be regarded as an 'economic activity' within the meaning of art 9(1) of that directive (see, to that effect, order of 12 July 2001, *Welthgrove BV v Staatssecretaris van Financiën* (Case C-102/00) [2001] ECR I-5679, paras 16 and 17). Accordingly, such management does not come within the scope of Directive 2006/112.

48. The decision of the CJEU in *Commission of the European Communities v Republic of Finland:* (2009) C-246/08, ECLI:EU:C:2009:671 addresses whether a link between the ability of a customer to pay for services prevents the supply from constituting an economic activity. The case concerned the provision of legal aid in return for a contribution by the recipient:

> 44 It follows from that, according to the Court's case-law, that a supply of services is effected 'for consideration' within the meaning of Article 2(1) of the Sixth Directive 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 (see, inter alia, *Tolsma*, paragraph 14; Case C-2/95 SDC [1997] ECR I-3017, paragraph 45; and *MKG-Kraftfahrzeuge-Factoring*, paragraph 47).
>
> 45 Consequently, according to the case-law of the Court, a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive presupposes a direct link between the service provided and the consideration received (see, inter alia, Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, paragraphs 11 and 12; Case C-258/95 *Fillibeck* [1997] ECR I-5577, paragraph 12; and *Commission v Greece*, paragraph 29).

49. *Finland* was considered by the Upper Tribunal in *Norseman Gold v HMRC* [2016] UKUT 69 (TCC), where the Tribunal said:

> 54. In [46] to [47] [of *Finland*], the CJEU noted that the legal aid services in the case were not provided free of charge since the recipients were required to make a payment to the public office and that the payment was only part payment since it did not cover the whole of the amount of the fees set by the legislation. Then, at [48] and [49] one finds this:
>
> > "48. Although the part payment represented a portion of the fees, its amount is not calculated solely on the basis of those fees, but also depends upon the recipient's income and assets. Thus, it is the level of the latter – and not, for example, the number of hours worked by the public offices or the complexity of the case concerned – which determines the portion of the fees for which the recipient remains responsible.
> >
> > 49. It follows that the part payment made to the public offices by recipients of legal aid services depends only in part on the actual value of the services provided – the more modest the recipient's income and assets, the less strong the link with that value will be."
>
> 55. At [50], the CJEU referred to some data which showed that contributions by recipients of legal aid were a modest proportion of the gross operating costs of the public offices. The difference, the CJEU said,
>
> > "suggests that the part payment born by recipients 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."
>
> 56. The conclusion, in [51], was 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 that payment to be regarded as consideration for those services and, accordingly, for those services to be regarded as economic activities….."

50. ICH submit that the indicia in *Finland* that demonstrated that there was no economic activity was that there was no commercial negotiation of the fee, and that there was no link between the fee and the services supplied, and this distinguishes the facts in *Finland* from those in this appeal. ICH submit that the mere fact that a business decides, as a commercial matter, to discount its fees, does not mean that it is not carrying out economic activities.

51. The Tribunal then addressed at [123] the circumstances in which an intention to make supplies gives rise to a right to deduct input tax:

> 123. As to the second question, I agree with Ms McCarthy that an intention merely to make supplies is not a sufficient basis on which to recover input tax. What needs to be established is an intention to make taxable supplies. Mr Lall may well be right in making the submissions which I have summarised in paragraphs 71 and 72 above. But the important point for present purposes is that the intention which must be shown to exist is one to make taxable supplies, that is to say supplies for a consideration. What the Advocate General said in *Breitsohl* was that economic activities might consist in several components so that preparatory acts might themselves be treated as constituting economic activity giving the trader a right to deduct input tax. In that case, the eventual supplies which were expected would clearly be supplies for a consideration and would be taxable. The preparatory acts were part of the economic activity so that input tax would be brought into account. But if there had never been an intention to make supplies in such way that they would be taxable supplies, there would be no justification for bringing any input tax into account in respect of the preparatory acts. Neither *INZO* nor *Town and County* would be of any relevance. This is, in essence, the same point as the one which the Judge was making in Decision [52].

In other words, it is not sufficient for there merely to be an intention to make supplies, it is necessary for those intended supplies to be taxable supplies.

52. As regards the need for consideration, there must be a legal relationship between the supplier and the customer, with the consideration received by the supplier constituting the value received for the supply. We were referred to the decision of the CJEU in *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (1994) C-16/93, ECLI:EU:C:1994:80 at [14] in support of this submission. That case related to donations made to a person who played the barrel organ on a public highway in the Netherlands. The CJEU 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. We were also referred to *Norseman* at [136] in relation to the need for there to be a link between the payment and the services supplied:

> 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.

53. The provisions in the decision of the First tier Tribunal in *African Consolidated Resources v HMRC* [2014] UKFTT 580 (TC) to which Upper Tribunal refers are at [64] to [65]:

> 64. … the Tribunal has concluded that the provision of management services for what was essentially a fixed fee based on what the subsidiary could afford cannot be treated as a taxable supply. The lack of any relationship between the level of the fees and the value of the services provided is made clear in the statements made by Mr Tucker in his letter to HMRC of 5 March 2008; "the fees for the consultancy services took account of the fact that at this stage of its development Canape has no ability to pay....."
>
> 65. As made clear in the *Finland* and *Tolsma* decisions, in order for a supply of services to be treated as a taxable supply, there has to be some legal and economic link between the consideration paid and the services provided: "A supply of services is effected for consideration.... 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". ([*Tolsma*]). In this instance, there is insufficient evidence of an economic link between the value of what is being provided and the price which is being charged; in fact the evidence suggests that there is intentionally no such link. For that reason the Tribunal's view is that the management services are not being provided for valuable consideration and so should not be treated as taxable supplies by ACR for VAT purposes.

54. HMRC submit that there is no consideration for VAT purposes if the payment for the supply is dependent upon the subsidiary generating sufficient revenues so as to be able to afford to make the payment: this contingency breaks the link between the supply of the services and the payment, preventing there being consideration. This is because it is the generation of sufficient revenues (the contingency) that gives rise to the payment, not the original supply of services. We were referred to the decision of the First tier Tribunal in *W Resources v HMRC* [2018] UKFTT 0746 (TC), which applied the decision of the CJEU in *Odvolací finanní editelství v Bastová* (2016) C-432/15:

> 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*.

55. The distinction between supplies made for a consideration and supplies constituting an economic activity was considered by the Court of Appeal in *Wakefield College v HMRC* [2018] EWCA Civ 952:

*The present state of the law*

51. There was a good deal of agreement between the parties on the correct legal approach, following these cases, particularly *Borsele*. What follows is my analysis of the current legal position, but I will indicate any disagreements between the parties.

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 [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*.

53. Satisfaction 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. However, as Mr Puzey for HMRC pointed out, the Advocate General remarked in her Opinion in *Borsele* at [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 [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 [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 [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 [32] that it was for the national court to assess all the facts of a case.

56. ICH submit that supplies made to portfolio companies meet the requirements for the "automatic satisfaction condition" discussed in the decisions of the CJEU in *Polysar Investments Netherlands BV v Inspecteur der Invoerrechten en Accijnzen, Arnhem*: (1991) C-60/90, ECLI:EU:C:1991:268 and *Cibo Participations SA v Directeur régional des impôts du Nord-Pas-de-Calais* (2001) C-16/00, ECLI:EU:C:2001:495. These cases suggest that the requirement for a supplier to be undertaking an economic activity does not need to be considered in circumstances where a holding company is supplying services to a subsidiary for consideration. This condition was considered by the First tier Tribunal in *W Resources* and in *Tower Resources v HMRC* [2019] UKFTT 442 (TC). It is convenient to set out the provisions of the decision of the Tribunal in *W Resources*, the conclusions of which were adopted by the Tribunal in *Tower Resources*:

> 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.

**HMRC SUBMISSIONS**

57. HMRC submit that the Tribunal must engage in a wide-ranging enquiry of all the objective circumstances to determine whether the services being supplied by ICH for the purposes of obtaining income on a continuing basis. (see *Wakefield* at [55]). It was submitted that we should take account of the following factors:

(1) Whether the services were the principal activity of ICH, or merely ancillary (see *Wakefield* at [79] which drew a distinction between the provision of education by Wakefield College – being its only activity - and the supply of school transport by the local council in *Gemeente Borsele v Staatssecretaris van Financiën*: (2016) C-520/14, ECLI:EU:C:2016:334, which was an ancillary activity);

(2) The amounts earned from the supplies made by ICH (see *Borsele* at [31] which included the amount of earnings as one of the factors that needed to be considered in determining whether an activity is an economic activity for VAT purposes, and

*Wakefield* at [81] which noted that the fee income was a significant proportion of the college's income)

(3) The extent to which the amounts received covered the costs of providing the supply (see the decision of the CJEU in *Borsele* at [33] where the court noted that the contributions made by parents was only a small part of the costs incurred for the provision of the transport, which suggested that the contribution must be regarded more as a fee than as consideration).

(4) Whether the price was established by reference to the means of the customer, or by reference to the cost of making the supplies (see the decision of the CJEU in *Finland* at [48] which referred to the calculation of the fees being dependent on the recipient's income and assets – and not the hours worked or complexity of the case).

58. HMRC submit that the services supplied to portfolio companies (or intended to be made to portfolio companies) were not made for consideration, and do not constitute an economic activity.

59. HMRC say that there is no consideration because there is no reciprocal performance in relation to ICH's activities, under which the payment received (or which would be received in respect of intended supplies) constitutes the value received (or to be received) for the services for the following reasons:

(1) Mr Watson's evidence is that the agreements that ICH has with its portfolio companies is for a fixed fee, which is levied monthly, quarterly, or annually, and that the fee is unrelated to the amount or value of the services provided – rather it is set at a level that the portfolio company can afford.

(2) ICH's practice was not to invoice a portfolio company for its fees unless and until the company was able to pay the fee. The existence of this contingency (that fees will not be charged if the portfolio company is unable to pay), breaks the link between the supply and the payment necessary for the payment to constitute consideration.

HMRC submit, therefore, that the supply of services made to portfolio companies is not made for consideration.

60. A similar analysis applies, says HMRC, as regards the services supplied to ICFM, which is a group company. As with the portfolio companies, ICH did not issue any invoices until such time as ICFM was generating sufficient cash revenues to be able to pay them. The existence of this contingency (that fees will not be charged if the portfolio company is unable to pay), breaks the link between the supply and the payment necessary for the payment to constitute consideration.

61. Further, submit HMRC, it is necessary to consider whether ICH had as its objective purposes in supplying services to portfolio companies the generation of obtaining income on a continuing basis from the provision of those services. HMRC acknowledge that ICH intended to generate cash flow – but the question is whether ICH's activities amounted to "economic activities" in relation to the services supplied. HMRC made the following observations:

(1) The services supplied to portfolio companies are an ancillary activity of ICH. On an objective assessment, ICH's principal purpose is to realise profits by selling the shares in the portfolio companies following the development of the intellectual property vested in the portfolio companies.

(2) The level of income generated from the provision of services to portfolio companies was very limited. It was nil for the seven years to 2015. Even on the basis of Mr Watson's spreadsheet (which we have found is not reliable), the fees received in 2016 were £24,000, and the fees generated in 2017 were £25,000 (in addition fees of £93,000 were paid by ICFM).

(3) There is very little evidence as to the costs incurred by ICH in the periods under appeal, other than in respect of the invoices for which input tax credit is claimed. So, ICH has not been able to show whether its fee income covers its costs.

(4) The amount charged to portfolio companies for the services provided to them is not set by reference to the cost of providing those services, or by reference to their value. Rather they are set by reference to the ability of the portfolio company to pay.

62. Similar arguments apply to the services supplied by ICH to ICFM.

63. It therefore follows, say HMRC, that the services supplied (or intended to be supplied) to portfolio companies and group companies (including ICFM) did not constitute economic activities, and when making (or intending to make) those supplies, ICH was not a taxable person acting as such. Further, the services agreement with ICFM provides that the services supplied by ICH include participation in the funds' investment committees, and therefore participation in the process by which the funds decide whether or not to buy or sell investments. HMRC submit that this is not a taxable activity (see article 135(1)(g) of the PVD and the decision of the CJEU in *GfBk* (C-275/11) at [24]).

64. HMRC submit that the requirements for the automatic satisfaction condition discussed in the decisions of the CJEU in *Polysar* and *Cibo* are not met in the case of supplies by ICH to portfolio companies for the following reasons:

(1) ICH is not a "holding company" in relation to its interest in portfolio companies. The evidence is that the percentage shareholding owned by the Group is a minority stake – the evidence is that holdings are around 15% or so), and that this shareholding may be diluted when the portfolio company raises further funds through new share issues. HMRC submit that it is not appropriate to apply the automatic satisfaction condition in circumstances where the supplier holds only a minority stake in the customer.

(2) The background to the decisions of the CJEU in *Polysar* and *Cibo* is that the mere holding of shares in a subsidiary does not amount to economic activity, as the dividends paid on those shares result merely from the ownership of those shares. The issue addressed in those cases (and relied upon by the Tribunal in *W Resources* and *Tower Resources*) was whether the fact that a holding company owned shares in its subsidiary prevented the supplies it made to its subsidiary from being an economic activity. The CJEU confirmed that it did not – it held that the supply of services by a holding company will constitute an economic activity "where it entails carrying out transactions which are subject to VAT by virtue of article 2 of [the PVD]. In *Cibo* the CJEU was focussed on the extent to which the shares owned by the holding company prevented it from undertaking an economic activity, and there was no indication that the broader test of economic activity would not otherwise have been met (even if consideration was found). HMRC submit that neither *Polysar* nor *Cibo* address circumstances where it is factors other than the existence of a holding company/subsidiary relationship that mean that there is no consideration or an absence of economic activity. We were referred to the decision of the CJEU in *Marie* (Case C-320/17), in which, submit HMRC, the CJEU held that it is for the national court to determine whether the general test of

economic activity is met, rather than concluding that it is automatically met as a matter of law, where there is no consideration.

(3) Articles 2 and 9 of the PVD distinguish between the concepts of "consideration" and "economic activity" (see also *Wakefield*), and even where a supply is made by a holding company to its subsidiary for "consideration", it is not automatic that the holding company is also carrying on an "economic activity".

65. As regards supplies made to third-party clients, HMRC put ICH to proof that the supplies were economic activities, and that ICH was a taxable person acting as such when making (or intending to make) those supplies.

**ICH SUBMISSIONS**

66. ICH submits that it intended to, and did, enter into contracts under which it provided services in exchange for remuneration, and those services were provided for an agreed price (or mode of calculating the price). It submits that the amounts payable were not determined by extraneous factors such as ability to pay, although it did agree (in line with its strategy and having regard to the financial difficulties faced by its portfolio companies) to defer payment. It submits that it had at all times the intention to make supplies for remuneration. Accordingly, ICH submits that consideration was paid for the supplies of services that it made.

67. ICH further submits that it intended to obtain income over the periods under appeal on a continuing basis for the supply of services. Definite sums were received by it pursuant to contracts between it and its customers for the services it supplied. It was therefore undertaking an economic activity for VAT purposes.

68. In relation to the supplies made to its portfolio companies and ICFM, the decision to defer the payment of fees was not a decision to waive the fees, and the liability to pay fees was never removed. ICH s

69. In relation to the fees paid by ICFM, ICH submits that there must have been an agreement to pay fees, otherwise why would ICFM have made payment. Similarly, in relation to the fees paid by the three portfolio companies Hertzian, Burning Arrow and Stormtide, IC's board minutes of 3 February 2016 demonstrate that ICH assumed that it could increase its fees and the fees of £1500/quarter shown as paid by the three companies in Mr Watson's spreadsheet were consistent with the provision for directors' fees in the corresponding investment agreements.

70. ICH submit that its circumstances can be distinguished from those considered by the CJEU in *Finland* and *Borsele* which both related to services supplied in the public sector, rather than by commercial businesses. This is not a case (such as the facts in *Finland*) where the state levies a charge based on the means of the consumer, and there is no link between the level of the fee and the services provide. Rather, ICH is a commercial business in which it negotiates its fee. The fact that ICH decides, as a commercial matter, to discount its fees (or not levy fees at all in some cases) does not mean that it is not conducting economic activities. The circumstances of ICH, it submits, can be distinguished from the facts in Norseman, where the Tribunal described the taxpayer as being reduced to reliance on a vague and general intention that payment would be made. In the case of ICH's customers (whether portfolio companies, group companies or third-party clients), it submits, there were contractual agreements to pay.

71. ICH submits also that the fact that the Group held shares in companies does not necessarily mean that the supplies that it made to those companies were ancillary to its shareholding.

72. Nor does the fact that ICH's expenses in 2012 were low have any relevance to the analysis of its supplies, as the reason the costs were low was due to the fact that Mr Watson and Mr Bottomley were not taking their salary.

73. ICH submits further that even though no fees were received in the period until 2015, work was nonetheless being done for the Latvian fund – for which it was subsequently paid.

**DISCUSSION**

74. We find that ICH's activities can be divided into the following broad categories.

(1) Investing in portfolio companies, with a view to realising a profit on the disposal of the company. Often these companies have been spun out of a university or a research institution. The Group subscribes cash in exchange for shares in the portfolio company. The shares are registered in the name of and are beneficially owned by Letzone. Examples of this category include the Group's investments in:

(a) Hertzian Limited - unsigned investment agreement dated October 2105 – cash subscription of £78,000 for a 14% shareholding;

(b) Burning Arrow Limited – investment agreement dated 30 June 2016 – cash subscription of £112,000 for a 15% shareholding;

(c) Stormtide Limited – investment agreement dated 3 June 2016 – cash subscription of £75,000 for a 15% shareholding.

(Amounts and percentages have been rounded).

(2) Holding shares in "group" companies, in other words acting as the holding company of a corporate group. This includes the ownership of shares in IC, Letzone, ICCF and IFM. Of these companies, only IC was ever a member of the ICH VAT group. We also include in this category the holding of shares in ICFM, as it was majority owned by ICH, and Mr Watson's evidence was that he did not consider ICFM to be a portfolio company.

(3) Providing services to portfolio companies. It appears that in many cases fees were either not charged for these services, or if they were charged, they were deferred (possibly indefinitely) and either not invoiced or a credit note issued if the cash-flow of the portfolio company could not support the fee. In some cases, the services were provided by ICCF (as it was regulated by the (then) FSA, it could provide regulated financial services relating to raising capital for portfolio companies or IPOs). ICCF was not a member of the ICH VAT group. Although Mr Watson's evidence was that there were only two exceptions to fees not being charged to portfolio companies (and one of these was ICFM, as to which see below), we do not find Mr Watson's evidence on this point to be credible and we do not believe him. The ICH board minutes of 16 December 2008 imply that fees were not previously charged to portfolio companies as a general rule, and that this was a new policy. There is no evidence to corroborate Mr Watson's oral evidence that fees had always been levied in order to de-risk investments. We accept that ICH was concerned to ensure that experienced managers and non-executive directors were engaged by its portfolio companies in order to de-risk inventors' lack of commercial experience. But such documentary evidence that we have in relation to the charging of fees is that these were not generally charged prior to December 2008 – and that a policy of charging fees was established in order to support the Group financially in the aftermath of the financial crisis. Even then, the evidence was that the fees of £100,000 mentioned in those minutes were fees charged by ICCF, which was not a member of the VAT group. And the evidence is also that ICH invested in portfolio

companies in the periods under appeal (such as Hypermancer, InfoGov, Mobile Investment Tech, and Zephyr) to whom it did not charge any fee.

(4) Providing services to Group companies – in particular, the provision of services to ICFM. Although Mr Watson discussed ICH or IC's intention to provide services in relation to a space fund and to a fund associated with Ulster University, it is clear that the space fund would be managed by IFM, and not by either ICH or IC. And although Mr Watson, during the course of his oral evidence, said that it was his intention that IC or ICH would supply services to IFM, there is no documentary evidence to corroborate this. As Mr Watson's evidence was that the space fund was aborted at the last minute, when the British Business Bank withdrew from the fund, we would have expected that there would have been draft documents showing the involvement of IC or ICH in the fund, draft cash-flows and budgets, and evidence of expenditure incurred by IC or ICH in relation to their abortive costs. In the absence of any documentary evidence to corroborate Mr Watson's oral evidence, we find that there was no intention on the part of either IC or ICH to make supplies to IFM in relation to the space fund. In contrast to the space fund, there is evidence of fees being charged to Ulster University and services being supplied to Ulster University. There is also the question of the extent to which the services supplied by ICH were taxable supplies.

(5) Providing services to third-party clients. In contrast to the services provided to portfolio companies, the evidence was that these fees were never deferred. If the client did not pay the fees, the services were terminated.

75. We did not find the fact that ICH and IC may have been treated as trading companies for direct tax purposes to be helpful or relevant to this decision. The analysis of the activities of the companies for VAT purposes is governed by completely different laws (not least European law), to which a UK direct tax analysis has no relevance.

**Portfolio companies**

76. We find that as regards ICH's investments in portfolio companies, its activities in relation to these companies was not "for consideration" for VAT purposes:

(1) We acknowledge that ICH was a commercial business, and its motivation for supplying its services was very different from those of the public authorities in *Finland* and *Borsele*, or the further education college in *Wakefield*. ICH was not providing a service as a social or public benefit.

(2) However, we do not accept ICH's submission that it made a commercial decision to provide services to portfolio companies at a discounted rate that was negotiated between the parties – and their submission that this is the reason that the fees represented consideration. The evidence is that in many cases ICH did not charge fees to its portfolio companies, and where it did levy a fee, the fee was set by reference to the ability of the company to pay – and was even then deferred or waived in recognition of the company's financial circumstances.

(3) We find that, as regards portfolio companies, the direct link required by *Finland* and *Tolsma* between the provision of the services and the payment received is missing. As was the case in *Africa Consolidated Resources*: "there is insufficient evidence of an economic link between the value of what is being provided and the price which is being charged; in fact, the evidence suggests that there is intentionally no such link" (at [65]). Although fees were paid by three portfolio companies (Hertzian, Burning Arrow and Stormtide) in the periods under appeal, Mr Watson's evidence was that their fees had no relationship to the services provided by ICH. The fees were not set by reference to the

costs incurred by ICH in providing the services, nor by reference to the value of the services provided – but rather by reference to their ability to pay.

(4) The board minutes of 3 February 2016 discuss raising the level of the fees charged to Hertzian, Burning Arrow and Stormtide to £24,000 per annum from 1 April 2016, but there is no evidence that this was ever done – and the investment agreements that the Group concluded with those companies provides only for the payment of directors' fees, and there is no provision for these to be increased. To adopt the language of the Tribunal in *Norseman*, we find that there only ever a vague intention on the part of ICH to levy an unspecified charge in respect of its portfolio companies.

(5) We note also ICH's practice to "defer" fees if the portfolio company is unable to pay them. This is discussed in the 16 December 2008 board minutes. Although ICH submit that the fees levied were only ever deferred, and never waived, this is not supported by the evidence – and it appears that it was ICH's practice to cancel fees or to defer them indefinitely in some cases, and there was no evidence before us that payment was ever enforced. This can be seen in relation, for example, to the fees charged to Camitri, where invoices for fees were cancelled through the issue of credit notes (admittedly in periods prior to those under appeal, but this does illustrate ICH's practice). This practice can also be seen in relation to Hertzian, Burning Arrow and Stormtide, where Mr Watson's spreadsheet shows that the level of fees paid by Hertzian dropped in 2018, and that neither Burning Arrow nor Stormtide paid any fees in 2018 and 2019 (2019 in the case of Stormtide only, as Burning Arrow dissolved in January 2019). We find that, in practice, ICH did waive liability to pay fees from its portfolio companies. There is no evidence that fees that were "deferred" were ever paid.

(6) The evidence that there were agreements with portfolio companies for the provision of services for a fee is (at best) thin, and in many cases non-existent. The only agreements produced in relation to the fees received during the periods under appeal were for Hertzian, Burning Arrow and Stormtide – which have been discussed above. These agreements provided for payment for the provision of a non-executive director, but not for the provision of services by ICH. And Mr Watson's evidence was that there were other portfolio companies in which the Group had invested in the periods under appeal, but there is no evidence of these companies paying fees, or of there being agreements with them for the provision of services.

(7) We do not accept ICH's submission that the board minutes of 3 February 2016 evidence the existence of an agreement with the three portfolio companies that permits an increase in the fees that it charged. The £7200 charged to Hertzian in 2016 and 2017 corresponds to £6000 plus VAT director's fee mandated by the investment agreement. The £8400 charged to Burning Arrow and Stormtide represent the £7200 directors fee plus a contribution of £1200 towards the professional fees incurred by the Group when making its investment (and this contribution is in relation to professional services provided to ICH, and not services provided by ICH to the portfolio company). While IC may have been under an erroneous belief that it could increase its fees, we note that it never did so beyond the amounts specified in the investment agreements, which suggests that the portfolio companies did not accept that any fee increase was permitted.

(8) Finally, we find that ICH had a policy of not requiring payment of fees if the portfolio company was unable to pay. We find that this breaks the direct link between payment and supply that is required for consideration (see *W Resources* at [98]). We find that this was not just a policy of managing credit risk by ICH but was built into the

arrangements that ICH had with its portfolio companies – as can be seen by the fact that any deferral in practice amounted to a waiver, as there was no evidence before us that deferred fees were ever recovered by ICH.

77. We also find that the activities of ICH did not amount to an economic activity for VAT purposes as regards its portfolio companies, as ICH did not provide services to its portfolio companies with the objective purposes of obtaining income on a continuing basis from the provision of those services (see *MVM Magyar* and *Wakefield*).

(1) ICH's principal purpose was to invest (through its subsidiary Letzone) in portfolio companies with a view to realising a profit on the eventual sale of its shares. Although we accept ICH's submission that the fact that the Group held shares in companies does not necessarily mean that any supplies made were ancillary to the investment, we find that, to the extent that ICH provided services to those companies, those services were very much ancillary to the Group's investments in the circumstances of this Appeal. This can be seen, for example, from the terms of the investment agreements with Burning Arrow, Hertzian, and Stormtide, where the only "service" provided by ICH is that of an investment director – and it is clear from the terms and context of the investment agreement that his appointment is for the purposes of protecting the interests of Letzone as an investor, rather than for the purposes of delivering ICH's services to the portfolio company.

(2) The fees paid by portfolio companies were limited – nothing for the seven years to 2015, and only £26,000 and £25,000 in each of 2016 and 2017 (assuming that the figures in Mr Watson's spreadsheet are correct). ICH were unable to show that the fees that it did charge covered the costs of supplying its services, and the fact that Mr Watson and Mr Bottomley did not take any salary for some of this period does suggest that they were subsidising ICH, and that its income did not cover its true costs.

78. We find therefore that ICH's activities in providing services to its portfolio companies was not an economic activity, and in providing such services (or intending to provide such services) it was not a taxable person acting as such.

79. We find that the "automatic satisfaction condition" is not relevant to the analysis in the case of the services that ICH provided to portfolio companies, and we agree with the submissions made by HMRC in this respect as described in paragraph 63 above.

**Group companies**

80. The analysis in relation to the provision of services to ICFM is slightly different.

81. We find that ICH's relationship with ICFM did have as its objective the generation of a continuing flow of income. This can be seen from the terms of the services agreement, which provides for ICH to supply services to ICFM, and for ICFM to pay fees to ICH for those services. Unlike its investment in portfolio companies, we find that ICH did not have as its objective the making of a profit from the disposal of its shareholding in ICFM. Its primary objective purpose was to generate fee income from the provision of services. We therefore find that there was economic activity in this regard.

82. For completeness, we find that the "automatic service condition" is relevant to the supply of services by ICH to ICFM, insofar as the fact that ICH owns shares in ICFM does not prevent ICH from being engaged in economic activities in relation to ICFM.

83. However, we find that the provision of those services was not for consideration. We reach this conclusion because the fee charged was unrelated to the value or cost of the services provided. Rather the fee was fixed by reference to what ICFM could afford (see *African Consolidated Resources* and *Norseman*). This is evidenced by the IC board minutes

of 12 January 2016 which note that the service fee had been agreed at £32,000 per annum, but that the fee would be deferred (and continue to be deferred) until ICFM's cash flow was sufficient to support payment. The service agreement with ICFM was concluded in 2010, and the closing of the two funds would have occurred shortly thereafter – at which point it would have become clear whether the €10m threshold (triggering the payment of fees) had been met. Any delay between the closing of the funds and the eventual payment of the fees could only have been due to the inability of ICFM to pay the fee, and we so find. We also note that the fee eventually paid in 2017 was less than the agreed £32,000 per annum – which suggests that there was either a further deferral or a waiver of the fees. We note also that only £319.39 was paid by ICFM in 2017, and nothing in either 2018 or 2019 – again indicating that payment was dependent on ICFM's means. We find that this contingency (by which no fee is payable if ICFM cannot afford the fee) breaks the direct link between the payment and the services necessary for there to be consideration.

84. We also note that the services agreement states that one of the services provided is for participation in the funds' investment committees, and therefore participation in the process by which the funds decide whether or not to buy or sell investments. We agree with HMRC's submission that this is not a taxable activity (see article 135(1)(g) of the PVD and the decision of the CJEU in *GfBk* (C-275/11) at [24]). If we were wrong as to whether there is consideration, we would have found that the services provided include activities which are not taxable.

85. As regards the Space Fund, we find that any services intended to be provided in relation to this fund would have been provided by IFM, which was not a member of the VAT group. The only evidence that the Space Fund would generate fee income for IC or ICH is Mr Watson's oral evidence that IC or ICH would charge fees to IFM (in a similar manner to the fees charged to ICFM), but this is uncorroborated by any documentary evidence. As Mr Watson's evidence was that the space fund was aborted at the last minute, when the British Business Bank withdrew from the fund, we would have expected that there would have been draft documents showing the involvement of IC or ICH in the fund, draft cash-flows and budgets, and evidence of expenditure incurred by IC or ICH in relation to their abortive costs. In the absence of any documentary evidence to corroborate Mr Watson's oral evidence, we have found that there was no intention on the part of either IC or ICH to make supplies to IFM in relation to the space fund.

86. In contrast to the evidence relating to the Space Fund, there is evidence of the supply of services to Ulster University, but as this evidence is of services supplied by ICH to the University (rather than of an intention of ICH to supply services to IFM in relation to an Ulster University fund), we find that it is a supply to a third-party customer, which we analyse below.

87. We therefore find that the provision of services by ICH to ICFM were not made for consideration. We find that there was also no intention on the part of ICH (or IC) to provide services to IFM in relation to any fund to be managed or operated by IFM. We find that there were supplies by ICH to Ulster University, but these were supplies to Ulster University as a third-party client and are dealt with below.

**Third-party clients**

88. We find that the services provide to third-party clients by ICH were undertaken for consideration and amounted to an economic activity. Although HMRC put ICH to strict proof as to this, there was no real challenge by HMRC and the evidence is clearly that fees were charged by ICH to third-party clients, and that these fees were never deferred. We find that there was a direct link between the provision of the services and the fees charged, and that the

services were provided with the objective purpose of obtaining income from the provision of those services on a continuing basis.

89. We find that ICH made taxable supplies to its third-party clients.

**CONCLUSIONS**

90. We have found that the provision of services (or the intended provision of services) by ICH and IC to portfolio companies and to group companies were not taxable supplies. It therefore follows that input tax incurred by ICH and IC on supplies made to them which were used (or intended to be used) for these purposes is not deductible.

91. However, we have found that the provision of services to third-party clients were taxable supplies, and therefore input tax incurred by ICH and IC on supplies made to them which were used (or intended to be used) for these purposes is deductible.

92. We were invited by HMRC to indicate the categories of input tax that would be deductible, and those that were not. However, as we heard no evidence on the nature of the supplies made to IC and ICH, we cannot do so, and invite the parties to seek to reach agreement on this. If they are unable to do so, they may make an application to the Tribunal to determine these issues (which will require the provision of evidence as to the supplies made to ICH and IC in the periods under appeal, and the purposes for which those supplies were made). We would also note that as the group sometimes provided services to portfolio or other group companies for no charge (or for a charge that was less than the charge that would be levied on an arm's basis) any "partial exemption" method that to allocate inputs to outputs cannot be based on turnover.

93. However, we note that IC and ICH only made supplies to third-party customers in 2015, 2016 and 2017. It must therefore follow that any input tax incurred in 2012 to 2014 cannot be deductible (save to the extent that it was incurred in relation to an intended supply to a third-party customer in subsequent periods).

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

94. 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.

**NICHOLAS ALEKSANDER**
**TRIBUNAL JUDGE**

**Release date: 27 JANUARY 2021**

**Cases mentioned in skeletons which are not referred to in the decision:**

*Beteilgungsgesellschaft Larentia + Minerva mbH & Co. KG v Finanzamt Nordenham; Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG*: (2015) C-108/14, ECLI:EU:C:2015:496

*Revenue and Customs Comrs v Loyalty Management UK Ltd*: (2010) C-53/09, ECLI:EU:C:2010:590

*Newey v Revenue and Customs Commissioners*: (2013) C-653/11, ECLI:EU:C:2013:409

*Flockton (Ian) Developments Ltd v Customs and Excise Commissioners*: [1987] STC 394

*Marle Participations SARL v Ministre de l'Économie et des Finances*: (2018) C-320/17, ECLI:EU:C:2018:537

*General Motors (UK) Ltd v Revenue and Customs Commissioners*: [2015] UKUT 605 (TCC)