[2016] UKUT 69 (TCC)

Appeal number FTC/118/2014

VALUE ADDED TAX – input tax –whether Appellant carrying on economic activity – UK management company providing management services to overseas subsidiaries – no agreement on amount of consideration to be paid by subsidiaries – whether taxable supplies made – no - appeal dismissed

UPPER TRIBUNAL

TAX AND CHANCERY CHAMBER

NORSEMAN GOLD PLC

Appellant

- and –

THE COMMISSIONERS FOR

HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: The Hon Mr Justice Warren

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 30 November 2015 and 1 December 2015

Tarlochan Lall, instructed by Keystone Law, for the Appellant

Hui Ling McCarthy, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

DECISION

Introduction

1. This is an appeal by the appellant, Norseman Gold plc, ("**Norseman**") against the decision of the First-tier Tribunal (Judge Bishopp ("**the Judge**")) released on 12 June 2014 ("**the Decision**"). The question is whether Norseman is entitled to recover input tax for the period 10/07 to 01/09 ("**the relevant period**"). The Judge decided that taxable supplies had not been made by Norseman to its subsidiaries in the relevant VAT accounting periods and that the input tax for which the tax credit was claimed was not properly allowable. The Judge refused permission to appeal. However, the Upper Tribunal (Judge Berner) gave permission on paper although the precise scope of that permission is a matter of contention with which I will need to deal. I will refer to paragraphs of the Decision in the format "Decision [xx]" or simply "[xx]", and similarly with other decisions and judgments to which I refer.

2. HMRC's position is that Norseman was not carrying on economic activity during the relevant period because it was not making, nor did it have an intention to make in the future, supplies for consideration for VAT purposes. The Judge agreed with HMRC. He accepted (see Decision [47]) that what Norseman supplied to its subsidiaries was in principle capable of amounting to a taxable supply. But what it supplied in the relevant period was not in fact supplied for consideration and was not therefore a taxable supply. He held that any understanding between Norseman and its subsidiaries about payment for services provided was insufficient to establish that supplies would be made for consideration with the result that there was no right to recover input tax incurred during the relevant period. Norseman's position, in contrast, is that it was during the relevant period

carrying on economic activity. Its intention in relation to charging when it made the supplies was such as to qualify the supplies made during the relevant period as taxable supplies, alternatively was such as to qualify supplies in the future as taxable supplies. In either case, the input tax incurred in the relevant period was deductible.

Permission to appeal

3. Norseman applied to the Judge for permission to appeal. There were essentially two grounds of appeal:

    a. First, that the Judge had applied the wrong test in identifying what is required to establish consideration chargeable to or within the scope of VAT.

    b. Secondly, that the evidence did not support the findings, in effect a challenge on *Edwards v Bairstow* [1956] AC 14 grounds. It was said that the Judge erred in finding that there was a "rather vague intention" (Decision [48]) to levy unspecified charges and that there was "lacking….any common understanding of what was payable" (Decision [52]); he was not entitled to make those findings.

4. The Judge refused permission to appeal. An application for permission to appeal was then made to the Upper Tribunal. The relevant document (titled "Section F to Form FCT1" – I shall refer to it as "**the UT Grounds of Appeal**") contains, on its first page, the heading "Error of Law" and there follow under that heading paragraphs numbered 1 to 3. Paragraph 1 raises the ground of appeal that the Judge applied the wrong test.

5. In paragraph 2 of the UT Grounds of Appeal, reference is made to an alleged inconsistency identified by the Judge in [6] of his reasons for refusing permission to appeal. It is then said that Norseman contests that there was any inconsistency in the light of an answer recorded in Decision [9]. Norseman then purports to identify an inconsistency between the Judge's own statements in Decision [50] and the paragraph [6] just referred to. Reference is then made to the finding at Decision [47] where the Judge held that the directors of Norseman played an active part in the direction of its subsidiaries. Then this is said:

> "Norseman argues that was enough to settle the central issue in the case that Norseman was carrying on economic activity and accordingly making taxable supplies… It was sufficiently clear that Norseman was not supplying services free of charge. Consequently, it appears that [Norseman] may not need to mount "*an attack on finding of fact*" on grounds permitted under *Edwards v Bairstow.*"

6. Paragraph 3 of the UT Grounds of Appeal refers to two passages appearing in [6] of the reasons for refusing permission to appeal. In these passages, the Judge stated that there was evidence that there was neither agreement upon "… a charge in an identified or ascertainable amount" or "any obligation on the subsidiary concerned to pay that amount". The first of these was said not to be the decisive test (so that it essentially did not matter). The riposte to the second of these was a legal argument that the reciprocity present was sufficient for indentifying the requisite legal relations.

7. It is impossible, in my view, to read the UT Grounds of Appeal as seeking to raise an *Edwards v Bairstow* challenge. Paragraphs 2 and 3 are clearly directed at aspects of the substantive ground of appeal under paragraph 1. Thus paragraph 2 contains material on which Norseman argues that "there was enough to settle the central issue" so that Norseman may not need to mount an *Edwards v Bairstow*

challenge. Paragraph 2 cannot be read as actually raising such a challenge. At most it can be read as saying that a challenge (raised elsewhere) may not in fact be necessary. There is nowhere else in the UT Grounds of Appeal which does raise such a challenge. The nearest one comes to that is in paragraph 16:

> "Norseman's case is that the accepted intention to make charges sufficiently clearly established that the services would not be provided free of charge. It must follow that they were taxable transactions. Neither the inability to point to an agreement nor the fact that "*What would be paid for them…*alters that conclusion."

8. However, even that paragraph does not raise a challenge on the findings of fact. It is simply a legal argument based on the findings which were made. My conclusion, therefore, is that the UT Grounds of Appeal cannot be read as raising an *Edwards v Bairstow* challenge. That is not, however, quite the end of this aspect of the appeal but it is best to explain that at a later stage of this decision.

The background

9. In Decision [4] to [26], the Judge set out the undisputed facts and also the evidence given on matters which were the subject of some contention. He set out his findings on those matters later in the Decision. The following summary can be taken from those paragraphs.

10. Norseman, a UK company, is the ultimate holding company of a corporate group. During the relevant period, it was listed on the Alternative Investment Market ("**AIM**") of the London Stock Exchange. Its operating subsidiaries (all companies registered in Australia) carry out gold mining activities in Australia. (Decision [5]).

11. Norseman has (Decision [5]) two principal subsidiaries:

a. Davos Resources Pty Ltd ("**Davos**"); and

b. Norseman Gold Pty Ltd ("**PTY**") – also a holding company and the parent of Central Norseman Gold Corporation Ltd ("**CNGC**"). CNGC is the company of the group which undertakes most of its operating activity.

12. Norseman was initially incorporated in 2005 as a shell company with only two shares. One share was held by Mr. Gary Steinepreis ("**GS**"), the other by his brother, Mr. David Steinepreis ("**DS**"). In 2006, Norseman acquired Davos which owned a licence to explore an area in Australia's Northern Territory (known as Pine Creek Tenement) for minerals. One of them then set about raising capital by persuading investors to purchase shares in Norseman to enable it to finance the work at Pine Creek and to float on AIM. (Decision [6])

13. In October 2006, Norseman was admitted to AIM. In early 2007, Norseman decided to acquire CNGC, which had entered into administration in June 2006. CNGC owned two underground gold mines, some open workings and various facilities in Western Australia. PTY was established to act as the vehicle for the acquisition which was funded by a share placing in the UK. The funds raised were transferred to Australia. Immediately after the acquisition, Norseman assumed control of CNGC, in particular by appointing its directors. (Decision [7])

14. Whilst CNGC undertook the mining operations, Norseman was the company that directed what was done, provided working capital (by way of interest-free loans), ensured those funds were used properly and took care of shareholders' interests. In June 2009, further working capital was raised when Norseman was additionally listed on the Australian stock exchange. (Decision [8])

Norseman's VAT registration

15. On 2 October 2006, with effect from 27 October 2006, Norseman became registered for VAT. In its application for VAT registration, it stated that its business was gold mining but it was accepted before the Judge that this had been an error: Mr Bottomley told the Judge that he had inserted the core group activity rather than Norseman's own activity. HMRC made some enquiries whereupon Norseman's description of its intended business activity was amended to "management charges to be made by the company to the operating subsidiary in Australia". An interchange of questions and answers between HMRC and Norseman ran (see Decision [9]) as follows:

> "Q. What specific services does this company supply or intend to supply? …..
>
> A. [Norseman] incurs running costs, which will be re-charged to the subsidiary company in the form of management charge. The directors of the subsidiary company are not the same as the parent company apart from one.
>
> Q. Describe the nature of any goods or non service-based supplies (if any) which this company supplies or intends to supply.
>
> A. Recharging of costs incurred which are to be borne by the subsidiary company and recharged by way of a management charge."

16. HMRC were evidently satisfied and registered Norseman for VAT with the trade classification "management consultancy". (Decision [10])

17. Between September 2006 and December 2013 (the date of the hearing before the Judge), Norseman and its principal subsidiaries had some directors in common. Save for DS and one other director, all were Australian residents. The Judge

found that there was considerable overlap between the various companies in the composition of their boards. Decision [11]

18. Norseman bore the cost of the directors' remuneration. Typically, the directors were engaged by service companies who made onward supplies of each individual's services to Norseman. Further detail not material to this appeal can be found in Decision [11] to [13].

19. Day-to-day management of the subsidiaries all took place in Australia and Norseman, PTY and CNGC typically held joint board meetings notwithstanding the incomplete overlap of their directors. Board meetings were in Australia – with those directors who were resident elsewhere joining by telephone. Norseman's statutory meetings took place in the UK. (Decision [14])

20. GS told the Judge that Norseman's function was to control the subsidiaries and to do so actively and that it was not intended that Norseman would provide its services to the subsidiaries free of charge. (Decision [16])

21. GS did not accept that Norseman was, in reality, an investment company. It was, he said, engaged in actively managing its subsidiaries and trying to turn them into profitable enterprises. GS said that the aim was "to generate revenue which would convert into income for Norseman: it was not to raise management charges for their own sake". Nevertheless, GS said that Norseman incurred costs in providing management services and it aimed to recover them by making charges. (Decision [17])

22. On the evidence, the Judge found that Norseman was actively engaged in managing its subsidiaries. This led to the conclusion that what Norseman provided to its subsidiaries was, in principle, capable of amounting to a taxable supply. (Decision [47])

Norseman's VAT returns for the relevant period

23. Norseman's VAT returns for the relevant period included within them claims for the input tax that Norseman had incurred. No output tax was declared because, according to Mr Bottomley (the company secretary, and not a member of the board), although it had been intended that Norseman would charge management fees to the subsidiaries, that did not happen. If it had made charges it would have been required to provide the money to pay them, as the subsidiaries were making losses. Thus, he said, there seemed to be little purpose in sending invoices. (Decision [18])

24. The subject was raised by Mr Bottomley in an email which he sent on 30 January 2008. The Judge set out the material parts of that email in Decision [19]. It recorded that the point was made to HMRC when applying for VAT registration that

> "there would be a management charge from the parent company to the operating subsidiary in Australia. This establishes a trade by Norseman Gold plc on which VAT would be charged.
>
> Could you please give consideration to the raising of a quarterly management charge by Plc."

25. That email led to others over the next few days. The Judge said this (see Decision [20]):

> "…. What is apparent is that nothing was done by way of agreeing on the amount to be charged, the frequency with which invoices would be sent, to which subsidiary they were to be sent, and the detail of the services to be provided in exchange for the charge. Mr Bottomley said he had made some rather tentative enquiries about the form of a possible agreement but nothing was in fact done until April 2009, when the first invoice was sent, by Norseman to PTY, for £15,000 plus VAT. That invoice was reflected in Norseman's VAT return for the period 04/09, by declaration of the output tax due of £2,250. At the same time, Norseman claimed credit for input tax of £8,287.27. The difference between those two figures is not consistent with Norseman's position that it was re-charging the costs incurred, but I leave that factor out of account for present purposes….."

26. I need to say a little more about the invoices which Norseman had raised prior to the hearing before the Judge and which were in the bundle for that hearing. None of these invoices related to services provided by Norseman to its subsidiaries during the relevant period. Indeed, as I understand it, no invoice has ever been raised for the relevant period and no payment has actually been made in relation to the services provided in that period. There were four invoices:

    a. Invoice No. 0001 issued on 15 April 2009 for £15,000 plus VAT stated as being "For the provision of Management Services for the period ended 31st March 2009". According to Mr Bottomley evidence in his first witness statement at paragraph 47, this invoice was intended to relate to services provided during the 04/09 VAT period.

    b. Invoice No. 0002 issued on 6 November 2009 for £15,000 plus VAT stated as being "For the provision of Management Services for the six months ended 30th September 2009".

    c. Invoice No. 0003 issued on 15 February 2010 for £15,000 plus VAT stated as being "For the provision of Management Services for the three months ended 31 December 2009".

d. Invoice No. 0004 issued on 12 May 2011 for £15,000 plus VAT stated as being "For the provision of Management Services for the year ended 31st December 2010".

27. The enquiries leading up to HMRC's assessment began in January 2009. The Judge observed that no explanation was given for the selection of Norseman's returns for verification but that since this was "the sixth successive repayment return without any declared output tax liability, I do not think it a matter for surprise that enquiries were made". (Decision [21]) The services in respect of which the disputed input tax are recorded in Decision [25].

28. The Judge recorded that it was common ground that, if Norseman had been making supplies of management services to the subsidiaries during the relevant period, those supplies would have been taxable supplies until the end of 2009, when s.7A Value Added Tax Act 1994 ("**VATA 1994**") came into effect and the rules on place of supply were changed.

The parties' submission to the Judge and the Decision

29. The submissions of the parties are recorded by the Judge in Decision [27] to [46]. His discussion and conclusions run from [47] to [61]. In summary, he decided that Norseman was actively managing its subsidiaries but that its services were not being made for consideration. Norseman had not established that the "rather vague intention to levy an unspecified charge at some time in the future" was enough to establish the existence of consideration for the purposes of VAT. (Decision [47] to [53]). The Judge also held that HMRC's assessments were in time. This is not the subject matter of any appeal.

30. I will need to consider later the Judge's reasoning for reaching his conclusion on the point now under appeal. But before I do that, I turn to the relevant EU and domestic legislation and the applicable principles.

EU Legislation

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

32. Article 9(1) provides (as far as is relevant here):

> "'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
>
> … The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

33. Article 73 PVD provides for the ascertainment of the "taxable amount":

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

34. A right of deduction arises under article 167 at the time the deductible tax becomes chargeable. Article 168 provides that insofar as goods and services are "used for the purposes of the taxed transactions of a taxable person" the person shall be entitled in the Member State in which he carries out the transactions to deduct input tax.

Domestic Legislation

35. Pursuant to section 3(1) VATA 1994, a "taxable person" is a person who is registered or required to be registered for VAT.

36. A "supply" includes "all forms of supply, but not anything done otherwise than for consideration": see section 5(2)(a) VATA 1994. Anything which is not a supply of goods but is done for a consideration is a supply of services: see section 5(2)(b) VATA 1994.

37. Prior to 1 January 2010, a supply of services was treated (subject to exceptions) as made in the United Kingdom if the supplier belonged in the United Kingdom: see section 7(10) VATA 1994.

38. Further provisions relating to VAT registration are in Schedules 1 to 3A VATA 1994. So far as relevant, paragraph 9 of Schedule 1 to VATA 1994 provides:

> "(1) Where a person who is not liable to be registered under this Act and is not already so registered satisfies the Commissioners that he –
>
> (a) makes taxable supplies; or
>
> (b) is carrying on a business and intends to make such supplies in the course or furtherance of that business,
>
> they shall, if he so requests, register him with effect from the day on which the request is made or from such earlier date as may be agreed between them and him."

39. Section 6 VATA 1994 makes provision for identifying the time of supply. The general rule is that a supply of services takes place when the service is performed. Section 6(14) allows HMRC to make regulations, in specified cases, concerning the time when a supply is to be treated as taking place. One such case is where the supply is "for a consideration the whole or part of which is determined or

payable periodically, or from time to time, or at the end of any period". Regulation 90 VAT Regulation 1995 then provides that the services are treated as separately and successively supplied at the earlier of (i) each time that payment is received by the supplier and (ii) each time that the supplier issues a VAT invoice.

The authorities and the principles to be derived

40. The central question in the present case is whether the supplies made by Norseman to its subsidiaries were made for consideration within the meaning of article 2(1) PVD and section 5(2) VATA 1994 since the answer to that question impacts on whether Norseman was carrying on economic activity during the relevant period.

41. In *Lebara Ltd v R&CC* (Case C-520/10) [2012] STC 1536 ("***Lebara***") at [27] the CJEU stated that a supply is "for consideration" within article 2(1) PVD and hence taxable

> "only if there is a legal relationship between the service provider and the recipient, pursuant to which there is reciprocal performance, the remuneration received by the service provider constituting the value actually given in return for the service supplied to the recipient. There must therefore be a direct link between the service supplied and the consideration received (see, *inter alia*, *RCI Europe v Revenue and Customs Commissioners* (Case C-37/08) [2009] STC 2407, [2009] ECR I-7533 paras 24 and 30; *European Commission v Finland* (Case C-246/08) [2009] ECR I-10605, paras 44 and 45, and *Finanzamt Essen-NordOst v GFKL Services AG* (Case C-93/10) [2012] STC 79 paras 18 and 19)."

42. The same principle is repeated in *Skandia America Corp. (USA), filial Sverige v Skatteverket* (Case C- 7/13) ("***Skandia***") at [24].

43. The need for a direct link between the services provided by the supplier and payment given by its customers, such that the remuneration received by the supplier constitutes the value given by the customer in return for the services

derives from earlier authority: *Tolsma v Inspecteur der Omzetsbelasting Leeuwarden* (Case C-16/93) [1994] STC 509 ("***Tolsma***") at [13] and [14]. It is the concept of reciprocity and the need for a direct link which are central, however. The legal relationship envisaged does not have to be a legally binding agreement.

44. The mere receipt of a payment does not, of itself, mean that a given activity is economic in nature. This is shown by *Commission v Finland* (Case C-246/08) ("***Finland***") at CJEU [38]. *Finland* is relied on by both sides in the context of establishing the necessary direct link. The case was referred to by the Judge at Decision [50] but I need to say rather more about it.

45. *Finland* concerned VAT on the provision of certain legal services by public legal aid offices:

    a. Article 1 of the Law of legal aid provides that legal aid, financed out of public funds, will be granted to any person who is in need of assistance with a legal matter but is unable, because of his financial situation, to meet the costs of dealing with his case. Legal aid may be granted both in legal proceedings and for non-contentious matters.

    b. Under Article 8, legal aid is, as a general rule, provided by legal advisers employed by the various public legal aid offices (referred to as "public offices"), advisers who are officials paid by the State. The operating costs of the public offices are met from public funds. Fees settled by recipients of legal aid are shown as receipts in the accounts of each public office and

no public financing is made available in respect of operating costs covered in that way.

c. Article 8 also provides that, in the case of legal proceedings, a private adviser may also be appointed. The recipient of legal aid can insist on the appointment of a suitably qualified identified private adviser.

d. Article 17 lays down rules concerning the fees of private advisers. The private adviser will be entitled to reasonable fees and reimbursement of expenses which are borne by the State and paid following deduction of any contribution owed by the recipient of the legal aid. Apart from that contribution, the private adviser is not allowed to receive any other payment from the recipient of legal aid.

e. The Government Decree on legal aid provides for legal aid to be granted on the basis of the applicant's disposable income and assets. Legal aid may be provided free of charge or in return for a contribution borne by the applicant. There is a distinction between a basic contribution and an additional contribution. The basic contribution corresponds to a percentage of the fees and expenses of the adviser consulted, including VAT if it is included in the calculation of costs. The percentage is fixed on a sliding scale depending on disposable income.

f. An additional contribution is required where the applicant has deposits or easily liquidated assets, the contribution being fixed at one half of the value of those assets in excess of EUR 5,000.

46. Finnish VAT law provides that legal aid provided by a private adviser in legal proceedings is subject to VAT as a supply of legal services. By contrast, legal aid provided by the public office free of charge or in return for a part contribution is not an activity which is subject to VAT.

47. The Commission considered that the difference in treatment of the provision of legal aid services depending on whether the supply was by private advisers or public offices was a distortion of competition to the detriment of private advisers. There was correspondence between the Commission and the Finnish authorities once this objection had been raised. The Commission, not being satisfied by the response of the Finnish authorities, brought the action which was before the CJEU.

48. The Commission contended that when the public offices provide legal aid services in legal proceedings in return for a part contribution from the recipient, they are carrying out an economic activity within the meaning of the Sixth Directive (the relevant Directive then in force). That economic activity gives rise to a supply of services effected for consideration since there is a direct link between the service supplied by the office and the consideration paid by the recipient.

49. The Finnish Government contended that the legal services provided by the public offices form an indivisible whole which cannot be regarded as economic activity with the meaning of the Sixth Directive for the reasons summarised in [29] of the Judgment which I do not need to set out.

50. The Commission's action was dismissed. It was held that the public offices were not carrying out an economic activity within the meaning of the Sixth Directive. In [34] to [36], the CJEU rehearsed these established points:

    a. Only activities of an economic nature are covered by VAT.

    b. The supply of goods or services is subject to VAT. Further, a "taxable person" means any person who independently carries out an economic activity, whatever the purpose or result of that activity.

    c. "Economic activities" are defined as including all activities or (among others) persons supplying services for the purpose of obtaining income therefrom on a continuing basis.

51. Accordingly, see [37], the scope of the term economic activities is very wide. The term is objective in character, "in the sense that the activity is considered *per se* and without regard to its purpose or results". And so

> "An activity is thus, as a general rule, categorised as economic where it is permanent and is carried out in return for remuneration which is received by a person carrying out the activity."

52. However, see [38], the case-law shows that the receipt of a payment does not, *per se*, mean that a given activity is economic in nature.

53. The CJEU considered it appropriate, see [42], to ascertain whether the services in question can be regarded as provided by the public office in return for remuneration. In that context it is clear, see [43], from the case-law, that taxable transactions

> "presuppose the existence of a transaction between parties in which a price or consideration is stipulated. Thus, where a person's activity consists exclusively in providing services for no direct consideration, there is no basis of assessment and the services are therefore not subject to VAT…."

and so that, see [44] and [45]:

> "44……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 to the recipient……
>
> 45. Consequently,…… a supply of services for consideration presupposes a direct link between the service provided and the consideration received…."

54. In [46] to [47], 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….."

57. So, although the payment was made because services were provided, the amount of the payment was not sufficiently connected with the service provided and the required direct link was not established. On the facts, the reason why the amount of the payment was not sufficiently connected was because of the way in which the legal aid system operated in relation to the calculation of the contribution to be made by the recipient of legal aid. In this context, it is worth referring to the Opinion of the Advocate General (Ruiz-Jarabo Colomer) in *Finland* at [44] to [52] and to the following passages in particular:

"46. If legal aid is provided in return for part payment, it is necessary to focus attention on the nature of the payment and its composition, in order to determine whether it involves 'actual consideration' for the service provided and if there is a 'direct and necessary link' between the two.

47. If subsidised legal aid is provided by a private lawyer, it is easy to find that direct relationship……. The professional always obtains true consideration…. Whether it comes in whole or in part from public funds, the price depends solely and exclusively on the nature of the work carried out.

…..

48. In the public office, however, it is unlikely that the link between the contribution payable by the recipient and the assistance provided meets the criterion of 'direct and necessary' required by the case-law. The payment received by the Administration does not correspond to the actual value of the service…. but is a percentage of that value…..

49. The consideration given by the private person does not depend solely and exclusively on the cost of the work, but also, to a large extent, on the client's

> financial position. There is therefore a certain connection between the service and the amounts he pays (since this contribution is calculated on the basis of the legal value of the legal aid provided), but that link is neither direct nor does it have the intensity which the case-law requires in order to identify a service effected for consideration, because it is 'contaminated' by the taking account of the client's income and assets. The more modest the person's income, the less direct the aforementioned link will be.
>
> ……..
>
> 52. The case-law concerning the treatment as taxable persons of notaries, tax collectors and other public agents does not, in my view suffice to contradict this idea [*ie* the idea at the end of [51] that "the legal aid provided by the Finnish Authority on a semi-gratuitous basis does not fulfil the conditions for being an economic activity subject to VAT."]. The judgments in *Commission v Netherlands*, *Ayuntamiento de Sevilla* and *Mihal* show that the duties of those professionals represent a genuine economic activity, since, although they are conferred by law for reasons of public interest, they involve a supply of services, which is constant and effect in return for remuneration to private persons, and the Directive contains no reservation in favour of the professions regulated. The difference between those situations and the present dispute lies in the type of consideration, because in the cases referred to there is nothing to indicate that the fees depend on factors other than the particular nature of the service."

58. Moving away from *Finland*, a taxable person acting as such is entitled to deduct the VAT payable or paid for goods or services supplied to him for the purpose of investment work intended to be used in connection with taxable transactions: see *Belgium v Ghent Coal* (Case (C-37/95) [1998] STC 260 ("***Ghent Coal***") at CJEU [17]. The right to deduct, once it has arisen, remains acquired even if the planned economic activity has not given rise to taxable transactions: see *Ghent Coal* at CJEU [19].

59. Reference has also been made to *Finanzamt Goslar v Breitsohl* (Case C-400/98) [2001] STC 355 ("***Breitsohl***"). In that case, the taxpayer began to develop vacant land with the intention of using it, when developed, for making taxable supplies. Unfortunately she ran out of money and was forced to make an exempt sale of the land to a third party. She nevertheless retained the right to recover input tax in

relation to goods and services received at a time when she still had the prior intention to make taxable supplies. The Advocate General (applying *Rompelman v Minister van Financiën* (Case 268/83) [1985] ECR 655) stated that

> "20. The court concluded that the deduction system was meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT therefore ensured that all economic activities, whatever their purpose or results, provided that they were themselves subject to VAT, were taxed in a wholly neutral way. In the same judgment the court held that the economic activities referred to in art 4(1) might consist in several consecutive transactions and that the preparatory acts, such as the acquisition of assets and therefore the purchase of immovable property, must themselves be treated as constituting economic activity. Any other interpretation of art 4 of the Sixth Directive would burden the trader with the cost of VAT in the course of his economic activity without allowing him to deduct it in accordance with art 17 and would create an arbitrary distinction between investment expenditure incurred before actual exploitation of immovable property and expenditure incurred during exploitation (see [1985] ECR 655 at 664-665, paras 19, 22 and 23)."

60. The CJEU again emphasised that the scope of the term "economic activities" is very wide in *Finanzamt Freistadt Rohrbach Urfahr v Unabhängiger Finanzsenat Außenstelle Linz (in the presence of Fuchs)* (Case C-219/12) [2014] STC 114 ("***Fuchs***") at [17]. At [18] to [20] one finds this:

> "18. …… That activity must be regarded as falling within the concept of 'economic activities' ….. if it is carried out for the purpose of obtaining income on a continuing basis.
>
> 19. The issue whether that activity is designed to obtain income on a continuing basis is an issue of fact which must be assessed having regard to all of the circumstances of the case, which include the nature of the property concerned….
>
> 20. That criterion must also make it possible to determine whether an individual has used property in such a way that his activity is to be regarded as 'economic activity'… The fact that property is suitable only for economic exploitation will normally be sufficient for a finding that its owner is exploiting it for the purposes of economic activities and, consequently, for the purpose of obtaining income on a continuing basis. By contrast, if, by reason of its nature, property is capable of being used for both economic and private purposes, all the circumstances in which it is used will have to be examined in order to determine whether it is actually being used for the purpose of obtaining income on a continuing basis".

61. In *Customs and Excise Commissioners v First National Bank of Chicago* (Case C-172/96) [1998] STC 850 (“***First National Bank of Chicago***”) the questions referred by the High Court related to transactions of foreign exchange as defined by the British Bankers’ Association. The first question was whether these transactions constituted the supply of goods or services effected for consideration. The second question was, if so, what was the nature of the consideration in relation to such consideration. On the first question, the CJEU held that the transactions were the supply of services. With regard to the second question, the CJEU said this at [27]:

> “Only where a person's activity consists exclusively in providing services for no direct consideration is there no basis of assessment and the services are therefore not subject to VAT (see *Tolsma* [1994] STC 509 at 515, [1994] ECR I-743 at 758, para 12).”

62. Mr Lall has referred to *Intercommunale voor Zeewaterontzilting (in liquidation) v Belgian State (“**INZO**”)* (Case C-110/94) [1996] STC 569 where the CJEU held that:

> “… entitlement to that deduction [namely input tax deduction] is retained, even if it was subsequently decided, in view of the results of that study, not to move to the operational phase but to put the company into liquidation, with the result that the economic activity envisaged did not give rise to taxed transactions.”

63. Reference was made by the Judge to *Town and County Factors Ltd v Customs and Excise Commissioners* (Case C-498/99) [2002] STC 1263 (“***Town and County Factors***”) . He summarised the case in Decision [35] as follows. The CJEU was required to consider a “Spot the Ball” competition in which prizes were awarded to successful participants. The obligation to pay the prizes was expressly said to be binding in honour only, because gambling debts are unenforceable in English

law, although in practice the promoter always paid them. The CJEU concluded nevertheless that there was sufficient reciprocity between the participant's payment of an entry fee and the promoter's obligations, making the observation that if it were otherwise a taxable person could avoid paying VAT by including a similar term in his contracts. Thus the CJEU held that:

> "21. It is clear, ... that adopting the approach of making the existence of a legal relationship in the *Tolsma* sense depend on the obligations of the provider of the service being enforceable would compromise the effectiveness of the Sixth Directive, in that it would have the consequence that the transactions falling within that directive could vary from one member state to another because of differences which might exist between the various legal systems in this respect.
>
> ……..
>
> 23.... it cannot be validly maintained that no legal relationship in the *Tolsma* sense exists, because the obligation on a provider of services is not enforceable, where the impossibility of seeking enforcement of that obligation derives from an agreement between the provider of services and the recipient, such an agreement constituting the very expression of a legal relationship in that sense."

64. Turning to domestic decisions, *African Consolidated Resources v HMRC* [2014] UKFTT 580 in the First-Tier Tribunal was a case concerning facts with much similarity to the present case. Ms McCarthy relies on it for its reasoning although it is not, of course, a binding authority and, indeed, Mr Lall submits that it is wrong. The Tribunal accepted (at [51]) that it is not realistic to expect that the manner in which lending and management activities are undertaken intra-group will be strictly comparable to the way in which they would be undertaken between third parties. A lack of sophisticated documentation does not mean that the services are not being provided on a commercial basis. However, the Tribunal went on to say this at [64]-[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."

Decision [47] to [61]: the Judge's discussion and conclusions

65. I have already mentioned the Judge's conclusion at Decision [47] that what Norseman provided to its subsidiaries was, in principle, capable of amounting to a taxable supply. That conclusion is not challenged by HMRC. However, he went on to articulate the problem facing Norseman in this way at Decision [48]:

> "The difficulty for Norseman lies in the absence of any agreement about payment for what was provided; on this point I accept Mr Connell's submissions. As I have indicated, Mr Bottomley did raise the point in an email, to which there was a rather desultory response. There was no evidence that the matter was addressed further until after Mr Melbourne's enquiry began [which, I interpose, was in January 2009, after the end of the relevant period under appeal], and it became apparent that Norseman would need to produce some evidence that taxable supplies—that is, supplies in exchange for consideration—were being made. I agree, too, that Mr Bottomley's email appears to have been motivated by the same need."

66. It is to be noted that Mr Connell's submissions included one to the effect that the evidence showed an intention to charge only when the subsidiaries could afford to do so: see [44]. As I read the Decision, the Judge accepted that submission. That

is consistent with Mr Bottomley's evidence as recorded in Decision [18] (as to which see paragraph 23 above).

67. In [49] the Judge said this about Mr. Bottomley's subjective intention that Norseman would charge fees:

> "……In his correspondence with HMRC prior to Norseman's registration for VAT Mr Bottomley indicated that it was the intention that fees would be payable, and I am willing to accept that he genuinely believed it to be the case. It does not, however, seem to me that a rather vague intention to levy an unspecified charge, at some undefined time in the future, is enough. Mr Lall could not show me that there was any more than that. The fact that Norseman could have imposed a charge does not, in my view, lead to the conclusion that it should be treated as if it had done so."

68. The Judge returned to this theme in Decision [51] and [52] where, having referred to *Finland*, he considered that the failure

> "51 ……..to agree on or stipulate any price or consideration at all can lead only to the conclusion that there was no obligation to pay for the supplies at the time they were made. It was not until after the last of the assessed periods that an ascertained price was agreed. That later agreement does not, in my view, help Norseman; what matters is the position at the time the supplies were made. At that time, the payment of the charge was, if not voluntary, certainly unenforceable…. The failure to determine the amount of the charge beforehand is in my view fatal to Norseman's case.
>
> 52. It does not seem to me that what was said in *Breitsohl* is relevant. There, the preparation for the future making of taxable supplies had been undertaken. There was no reason to doubt that if supplies were eventually to be made, they could be taxable. Here it is the supplies themselves which were made: what excluded them from the definition of taxable supplies was the absence of an agreement on the consideration to be paid for them. They were made without even an understanding of what would be paid for them; thus there was no reciprocity of obligation. I do not accept that what was said in *Town and County Factors* affects that conclusion. It is true that, in that case, the payment could not be enforced, but there was nevertheless a clear understanding on both sides of what would be payable and in what circumstances, and an undertaking, albeit binding only in honour, on the part of the taxpayer to pay. What was lacking here was any common understanding of what was payable, when and in what circumstances; there was nothing to enforce."

Norseman's submissions

69. Mr Lall's submissions appear in the following paragraphs. They reflect his skeleton argument as developed in oral argument. There were also two additional points raised. The first is the *Edwards v Bairstow* point which I have already looked at when considering the extent of the permission to appeal granted, and to which I will need to return. The second was an argument based on Regulation 90 of the VAT Regulations 1995 ("**the Regulation 90 point**") to which I will come in due course.

70. His main and overarching point is that the intention that payment should be made in respect of supplies is enough to establish consideration. He says that, on the facts, the charges which would be levied were intended to reflect the cost of the supplies and, on that footing, clearly amounted to consideration. Thus the intention to make such charges in relation to future supplies shows that those supplies would be taxable supplies so that the input tax in the relevant period, incurred in anticipation of taxable supplies, can be claimed. Further, not only is the intention that a charge (reflecting cost) should be made for future supplies enough to establish that those supplies would be taxable supplies, the actual supplies made in the relevant period were taxable supplies because they were made for consideration: notwithstanding that no invoice has been raised and no payment has in fact been made in relation to those supplies, he contends that the original intention to make a charge (reflecting cost) for those supplies has not been abandoned and is enough to provide the necessary element of consideration.

71. His primary submission is based on the proposition that the intended charge would be related to the cost of providing the supplies. But even if the intention was only

that **some** payment should be made, so that the supplies would not, as he put it, be "for free", that is enough in his submission to amount to consideration.

72. Relying on the passage quoted at paragraph 59 above from the Advocate General's opinion in *Breitsohl*, Mr Lall submits that the status of a taxable person is to be ascertained (on the basis of objective evidence) when the intention to commence economic activity is formed and that person starts preparatory acts such as incurring costs which will form the cost components of his activity.

73. He refers to the passage quoted at paragraph 62 above from *INZO* in this context. As he explains, that case concerned input tax incurred in carrying out a profitability study of a prospective desalination plant which would have involved it making taxable supplies. Plans for the plant were abandoned and the relevant company was put into liquidation. Essentially, it was held that *INZO* was entitled to recover the input tax even though it never made the intended supplies.

74. Mr Lall recognises that, for there to be a taxable supply, there has to be consideration. He correctly observes that the essential component of consideration is reciprocity, referring to *Tolsma* but noting that the reference in that case to a legal relationship does not require that the reciprocal arrangements must be enforceable, referring to the passages which I have quoted from *Town and County Factors* at paragraph 62 above. Thus, informal agreements can result in reciprocal performance: see for instance the CJEU's judgment in *Skandia*.

75. Referring to *Finland* at [43] (quoted at paragraph 53 above), Mr Lall again correctly observes that there must be a direct link between the consideration and the thing supplied and there is no basis for assessment where activity is carried on

exclusively for no consideration. The CJEU held that the part payment made by recipient of the legal services was not sufficiently directly linked to the services, hence there the services were not provided for consideration.

76. Referring to *Fuchs*, Mr Lall observes, again correctly, that the CJEU has consistently held that the scope of economic activity is very wide. Referring to the passage quoted at paragraph 60 above, his proposition is that as a matter of principle, where the thing done by its nature indicates that it is being done or must be done in return for something, that would support a finding that the activity is being undertaken for obtaining income on a continuing basis, taking account of all the circumstances.

77. Mr Lall is again correct when he says that *Tolsma, First National Bank of Chicago* and *Skandia* have consistently adopted a single test, to which I would add *Lebara*. The test is set out in the passage from *Lebara* quoted at paragraph 41 above and repeated in [24] of *Skandia*.

78. Mr Lall relies particularly on *First National Bank of Chicago* [27] quoted at paragraph 61 above, which he suggest shows that a court should be circumspect in finding that there was no taxable transaction. For my part, I do not think that what the CJEU said there adds anything to the pre-existing case-law: it remains the case that if there is no direct consideration, there is no basis of assessment and the approach to ascertaining whether there is direct consideration in any particular case did not change as a result of *Skandia*.

79. Mr Lall submits that *First National Bank of Chicago* also supports the proposition that any technical difficulties in determining the consideration does not prevent

there being consideration for VAT purposes and that even the absence of an identifiable mechanism for determining the consideration may not be fatal.

80. In giving his reasons for refusing permission to appeal, the Judge regarded reliance on *First National Bank of Chicago* as misplaced. Although in that case it was difficult to predict in advance what the consideration would be, there was nevertheless a mechanism by which it could be determined in due course, whereas in the present case there was not even that. Mr Lall's submission is that there was, in the present case, an intention to make charges which sufficiently clearly establishes that the services would not be provided free of charge. It must follow, he says, that they were taxable transactions: neither the inability to point to any agreement nor the fact that there was no understanding of what would be paid for them alters that conclusion.

81. Mr Lall submits that there was, in fact, no identifiable mechanism for determining the consideration in *First National Bank of Chicago*. There was no clear mechanism for determining the amount which the bank would receive, which was found to be consideration for VAT purposes. He notes that the bank had the "possibility" or an "expectation" of profit, and entered into each transaction in the "belief" that it had value, but it did not value each transaction individually.

82. Next, Mr Lall submits that Norseman registered for VAT intending to make taxable supplies. The Judge found that Norseman carried on activity which was "capable of amounting to a taxable supply." He submits that this is sufficient to establish its entitlement to the input tax. Thus, although the Judge found that there was only a "vague intention to levy unspecified charges", any such vagueness in

connection with intentions concerned the charges to be made. The Judge did not make any specific finding that there was any vagueness concerning Norseman's intention to make supplies. Mr Lall repeats that the evidence to the effect that the services were not being provided free was unchallenged. In terms of the principles derived from *Finland* and *First National Bank of Chicago,* Norseman's activity was not "exclusively" for no direct consideration.

83. Mr Lall further submits that *Breitsohl* and *INZO* support Norseman's argument that any doubt as to whether Norseman would make taxable supplies was not sufficient to affect its entitlement to deduct input tax. He says that the Judge was wrong in what he said at Decision [51], namely:

> "It was not until after the last of the assessed periods that an ascertained price was agreed. That later agreement does not, in my view, help Norseman; what matters is the position at the time the supplies were made. At that time the payment of a charge was, if not voluntary, certainly unenforceable; in that I agree again with Mr Connell. The failure to determine the amount of the charge beforehand is in my view fatal to Norseman's case."

84. It is said that the Judge was wrong for the following reasons:

    a. At the time Norseman incurred the input tax, it had a firm intention to make supplies. The Judge did not find that Norseman did not have such intention.

    b. What the Judge described as "the later agreement" was further evidence that Norseman's intention to make supplies was genuine. It is accepted that what matters is the position at the time the supplies giving rise to the impugned input tax were made. At that time, however, Norseman had a firm intention to make supplies, which it subsequently made. *INZO* shows

that even exploratory activity, which "may or may not lead" to the making of supplies is sufficient.

c. It follows that the Judge erred in concluding that the failure to determine the amount of the charges was fatal. In neither *Breitsohl* nor *INZO* was there evidence of what supplies would be made, to whom or for what consideration. In this case what was to be done and for whom was clear. Any doubt over consideration could not have been fatal to Norseman's entitlement to the input tax.

85. Mr Lall further contends that even a vague intention to levy unspecified charges was sufficient to support a finding that Norseman's activity was for consideration. In terms of the principles derived from *Finland* and *First National Bank of Chicago,* Norseman's activity was not "exclusively" for no direct consideration. It was clear that Norseman was not providing services gratuitously. GS's unchallenged evidence made that clear. Thus the Judge was also wrong when he concluded in [49] of the Decision that "the fact that Norseman could have imposed a charge does not… lead to the conclusion that it should be treated as if it had done so". He was wrong because, having accepted as a fact that Norseman "could" impose charges, it must follow that the subsidiaries would have been obliged to pay them, thus establishing the requisite reciprocity.

86. The present case is distinguished by Mr Lall from *Tolsma*. In the present case he says that is was clear what Norseman was going to supply and in fact supplied, and to whom; the aim was to recover, at least, the cost of making the supplies.

There was unchallenged evidence that Norseman was to make charges for the supplies.

87. Mr Lall has again referred to *Fuchs*. That case, he says, supports the proposition that where it is clear that the services could essentially only have been performed in exchange for something or must have been performed for something and not free, that is sufficient to support a finding that the services must constitute economic activity. He repeats his submission that it was clear on the evidence before the Judge that the services were not being provided free and the intention was for those services to generate income for Norseman in due course.

88. As to the Regulation 90 Point which Mr Lall has raised, this is really a short one. He says that Regulation 90 illustrates the point that it is not fatal to the argument that a payment constitutes consideration that the amount of the payment is not pre-determined (by which I mean either a pre-determined figure or ascertainable in the future by reference to some formula or methodology). He says that the statutory provisions expressly recognise the possibility in that section 6(14) VATA 1994 and regulation 90 VAT Regulations 1995 refer to a consideration which is determined or payable periodically for instance where there are continuous services, as in the present case. Accordingly, his argument, if I understand it correctly, is to the effect that, provided it can be said at the time when the input tax is incurred that **some** payment will be made for the services to be provided in the future, that is enough because the amount of the payment which is actually made will then be consideration.

HMRC's submissions

89. Ms McCarthy's submissions appear in the following paragraphs.

90. The critical point arising from the case law is that for there to be a direct link between the services performed by Norseman and a payment made by one of its subsidiaries, the amount of the payment must be dependent on the value of the service rendered and not on the circumstances of the subsidiary.

91. In the present case, it is clear that the sums actually charged in respect of supplies made after the relevant period could not amount to consideration for those supplies for VAT purposes because:

    a. The amounts so charged were calculated not by reference to the value of the services rendered by Norseman but by reference to the amount the subsidiary in question might be able to afford. This is the only possible conclusion from the Decision [18] to [20], [33] and [51] to [52].

    b. Whether or not the subsidiary was ever expected to pay was entirely unknown: Decision [51] to [52].

92. A taxpayer will not have established the requisite intention to make taxable supplies (and will not therefore be able to recover input tax as an intending trader) if he cannot establish that the supplies he did intend to make (if any) were capable in law of being taxable supplies (*ie* supplies **for consideration** which are not exempt supplies).

93. In the present case, Norseman failed to persuade the Judge that, based on objective evidence, it had an intention to charge its subsidiaries on any more

concrete or reciprocal basis in the future than it had sought to do shortly after the relevant period by way of the invoices it had issued. Accordingly, whilst Norseman may have held an intention to make supplies at a point in the future, the supplies it intended to make were not, as a matter of law, taxable ones because the supplies as intended were not **for consideration** in the relevant sense.

94. It is plain that merely holding "a rather vague intention to levy an unspecified charge, at some undefined time in the future" is not "enough" as the Judge held at Decision [49]. A mere hope of payment in the future is not a sufficient basis on which to recover input tax as an intending trader. Nor is the stated subjective intention of the company directors sufficient, if unsupported (as here) by objective evidence. Similarly, the Judge was entirely right to hold that there was no reciprocity of obligation because "what was lacking here was any common understanding of what was payable, when and in what circumstances". (Decision [52])

95. These findings are fatal to Norseman's case that it had (during the relevant period) an intention to make supplies in return for **sums capable of amounting to consideration for VAT purposes** at some point in the future.

96. Without the relevant intention to make supplies **for consideration**, Norseman is unable to establish that it intended to make **taxable** supplies so as to enable it to recover input tax during the relevant period. Accordingly, the Judge was entirely right to conclude that it was not entitled to the input tax it sought to recover.

97. Ms McCarthy, who did not appear before the Judge, notes that there are a number of places in his written skeleton argument where Mr Lall has referred to certain

witness evidence being unchallenged. I have no way of knowing whether what he says is correct. There is no transcript of the hearing in the bundle before me nor even any notes of the evidence. I have before me an appeal on a point of law. I can see from the Decision what the Judge did and did not decide. But I cannot take as an established fact something which depends only on an assertion that the evidence on that fact was unchallenged.

98. Ms McCarthy refers to the submission which I have recorded at paragraph 82 above. She identifies the argument as being to the effect that since Norseman carried on an activity which was capable of amounting to a taxable supply, that was sufficient to establish its entitlement to input tax. That argument is, clearly in my view, unsustainable since, if a person does not carry on the activities in return for a consideration (*eg* the activities are services which are carried out gratuitously), there will not be a taxable supply. However, Mr Lall's argument had another limb to it, namely that Norseman registered for VAT intending to make taxable supplies. If it did so intend, then it may be entitled to an input tax deduction, but in that case the attribution questions which the Judge did not need to address could arise.

99. HMRC does not accept the assertion made in Mr Lall's skeleton argument that Norseman was not providing its services free of charge during the relevant period.

100. As to the submission recorded at paragraph 86 above (that it was clear what Norseman was going to supply and that the aim was to recover at least the cost of making the supplies), Ms McCarthy's submission is that the asserted aim is directly contradicted by the Judge's findings of fact at Decision [20] that the

difference between the output tax declared and the input tax recovered was "not consistent with Norseman's position that it was recharging the costs incurred".

101. As to Norseman's reliance on the authorities cited and its attempts to align itself with the taxpayers in those cases, Ms McCarthy contends that such reliance is misplaced, as discussed in the following paragraphs.

102. One question which arose in *First National Bank of Chicago* was whether a bank made supplies for consideration where it dealt in foreign currency seeking to make a profit not by charging fees but by the spread between its bid and offer quotes. A bilateral legal relationship existed between the bank and its counterparty under which the two parties to the transaction gave reciprocal undertakings to transfer amounts in a given currency and to receive the countervalue in another currency. The rates at which the bank was prepared to sell or buy currencies were different and separated by a spread. Therefore, in return for the service provided by it, the bank took for itself a consideration which it included in the calculation of those rates. The CJEU held that it did not follow from the fact that no fees or commission were charged by the bank on a specific foreign exchange transaction that no consideration existed. The CJEU's ruling at [27] (see paragraph 61 above) that "Only where a person's activity consists exclusively in providing services for no direct consideration is there no basis of assessment" must therefore be considered against this background. The consideration in that case derived from the difference in calculation of the bid and offer quotes. Accordingly, there was plainly a direct link between the exchange services provided and the consideration the bank received. In contrast, in the

present case there was no such legal relationship, agreement, charging provision or even understanding (on the Judge's factual findings). I agree with that analysis.

103. In *Breitsohl*, the taxpayer retained the right to recover input tax in relation to goods and services received at a time when she still had the prior intention to make taxable supplies. The present case is entirely different as Norseman has failed to establish on the evidence that it had ever had a sufficiently concrete intention to make future taxable supplies in the first place. Ms McCarthy submits that the Judge was entirely correct in his observations at Decision [52]. I agree; and see paragraph 122 below.

104. In *Town and County Factors*, (see paragraph 63 above), the obligation to pay the prizes in the "Spot the Ball" competition was expressly said to be binding in honour only, because gambling debts are unenforceable in English law. In practice, however, the promoter always paid them. Accordingly, the CJEU concluded that there was sufficient reciprocity between the participant's payment of an entry fee and the promoter's obligations, making the observation that if it were otherwise a taxable person could avoid paying VAT by including a similar term in his contracts. The decision is distinguishable from the present case for the reasons given by the Judge, again at [52]. It needs to be remembered, in addition, that the case was concerned with actual payments and not an intention to make future taxable supplies. Again I agree with the Judge's analysis.

105. I have touched on the facts of *INZO* at paragraph 73 above. It was because of the profitability problems identified in the study that INZO never embarked on the activity envisaged and was put into liquidation. The tax authority, which had

initially registered INZO as a taxable person, on discovering that INZO had not carried out any taxable transactions, claimed repayment of the VAT recovered. The CJEU ruled that the taxpayer was entitled to recover input tax on the basis that the tax authority had previously accepted the company's declared intention to commence an economic activity giving rise to taxable transactions. This can be distinguished from the present case given that Norseman has (on HMRC's reading of the Decision) failed to establish on the evidence that it ever had the requisite intention.

106. As to the reliance placed by Mr Lall on *Fuchs*, Ms McCarthy accepts the general proposition put forward by Mr Lall which I have recorded at paragraph 87 above. In the present case, however, she contends that there is no factual basis for a suggestion that the services in the present case could only have been performed for a consideration. The services were made between a holding company and its subsidiaries. Even if it is wrong to take judicial notice of the fact that services between parents and subsidiaries are often provided for no consideration, I am certainly entitled to reject, and do reject, the contrary proposition (namely, that services between a parent and subsidiaries are never (or even hardly ever) provided for no consideration) without evidence to establish it.

107. *Fuchs* concerned supplies of electricity between a householder and an electricity company in circumstances where solar panels fitted onto his roof produced electricity supplied to the network for consideration and on the basis of a contract and then bought back by him. Mr. Fuchs consumed more electricity overall than he supplied. The question therefore arose as to whether he was carrying on an economic activity. The CJEU concluded that he was. The facts of

Fuchs are far removed from the present case. In particular, as the CJEU observed at [24]:

> "…it is clear from the order for reference that (i) the electricity produced by the photovoltaic installation at issue in the main proceedings was supplied to the network and (ii) under the contract granting access to that network, remuneration was provided as consideration for that supply."

108. In contrast, the very issue in the present case is whether or not remuneration is provided as consideration (or was intended to be provided as consideration).

109. In relation to the Regulation 90 Point, Ms McCarthy refers to Article 73 PVD which provides, materially, that the taxable amount "shall include everything which constitutes consideration obtained or to be obtained by the supplier". Article 73 presupposed that there is a supply for consideration and is designed to include within the taxable amount the entirety of that consideration. It says nothing about how that consideration is to be ascertained. The same point can be made, she says, in relation to Regulation 90. The purpose of regulation 90 was considered by the Court of Appeal in *Esporta v HMRC* [2014] STC 1548. At [28], Vos LJ held that:

> "28. …Regulation 90 provides that where services are supplied for a period for a consideration payable periodically, those services 'shall be treated as separately and successively supplied' at certain designated times. As Ms McCarthy submitted, that merely has the effect of modifying the tax point for VAT purposes by deeming the services to be separately and successively supplied at the earlier of the time that payment is received or a VAT invoice issued. It delays Esporta's obligation to account for output tax to HMRC until it actually receives the payments. It says nothing about the nature of the services in exchange for which the payments are made, but seems instead to throw attention back to the contract under which the services are supplied."

110. Just as regulation 90 says nothing about the nature of the payment, it says nothing, on Ms McCarthy's case, about identification of the consideration. In

other words, regulation 90 presupposes that there exists a supply of services for consideration where that consideration is determined (or payable) periodically. It does not do away with the need for there to have been consideration, being consideration which is determined at some point, before there can have been a taxable supply for VAT purposes.

Discussion and conclusions

Edwards v Bairstow

111. Before addressing the competing submissions, I return at this stage to the *Edward v Bairstow* grounds of appeal. Mr Lall's challenge is rather more limited than in some challenges of this nature. He does not seek to go back to the evidence in order to assert that the Judge could not, on the basis of the evidence, have reached the conclusions which he did. He wants to do no more than say that certain of the Judge's conclusions cannot stand consistently with his findings of primary fact.

112. And so Mr Lall points to the following paragraphs of the Decision:

    a. [9] is said to be important because it sets out what happened before Norseman's registration for VAT. Mr Lall relies particularly on the Q&As set out at paragraph 15 above and the suggestion that running costs will be re-charged to the subsidiary company.

b. [10] is said to be important because HMRC registered Norseman and must therefore have been satisfied from those replies that Norseman would be making taxable supplies.

c. The last sentence of [16] is said to be important because it shows that there was an intention to charge all along. However, it is to be noted that this sentence is not making a finding of fact but is recording the evidence of GS. But even if it is to be taken as a finding of fact that Norseman was not intending to provide its services free of charge, it demonstrates, I consider, two things: first, that there was no intention to charge until profits within the operating subsidiaries were available which might or might not happen and secondly, that it is not possible to take from that evidence as recorded, that payment, had been intended to be made at any particular level or time. In particular, it cannot be taken as evidence that Norseman intended to charge for its services in relation to the relevant period.

d. The email recorded in [19] (see paragraph 24 above) is heavily relied upon. It is said to demonstrate that, all along, it was intended that a charge would be levied. But again it is not possible to take from that email that payment had been intended to be made at any particular level or time.

e. Reliance is placed on the early part of [20] where the Judge said this:

> "That email led to others over the next few days. They addressed the questions, when charges should be raised, and their amount. On 4 February 2008 Mr Bottomley indicated that he was meeting David Steinepreis the following day, when he would discuss the matter with him, but if he did the outcome of the discussion is not apparent. [[20] then continues as set out at paragraph 25 above.]

113. Mr Lall's criticisms about the Judge's findings appear to focus on alleged ambiguities in the eventual findings. First, there is the reference in [48] to the "absence of any agreement about payment for what was provided". Mr Lall suggests that the Judge himself was vague about what he meant by an agreement about payment. I detect no vagueness at all. It is quite clear that the Judge found, as in my view he was clearly entitled to find on the evidence before him, that there had been no agreement at all about payment other than what he described as the vague intentions referred to in [49] which I come to next.

114. In [49], the Judge referred to the correspondence between Mr Bottomley (not a director of Norseman or any subsidiaries) and HMRC prior to registration. The Judge was prepared to accept that Mr Bottomley genuinely believed, when corresponding, that it was the intention that fees would be payable. But this intention was not formulated in any detail. Thus the Judge referred to it as "a rather vague intention to levy an unspecified charge, at some undefined time in the future". He expressly stated that Mr Lall had been unable to show that there was any more than that. And the fact that Norseman could have imposed a charge did not lead to the conclusion that it should be treated as if it had done so.

115. Mr Lall contends that the reference to a "vague intention *etc*" is ambiguous. If it means vagueness as to the amount of the charge, he does not disagree but says it does not matter in the light of section 6 VAT 1994 and Regulation 90. [This is the Regulation 90 Point which I come to next.] If it means vagueness about whether there would be any charge at all, it was not a conclusion which the Judge was entitled to reach. I do not consider that there is anything in that last point. The Judge was quite clearly referring to the intention which he was willing to accept

that Mr Bottomley believed was the case. It was the intention that fees would be payable that he regarded as vague, not because there was a total absence of intention in the sense that the point had never been considered at all or, if considered, had been rejected as a possibility. Rather, it was that whatever intention had been formed about fees, it went no further than the vague intention described by the Judge.

116. A separate point is whether, contrary to what the Judge said, Mr Lall was able to, and did indeed show him something more. Mr Lall relies first, on the second answer in the Q&As set out in Decision [9] where, in reply to a question designed to elicit the nature of the intended supplies, Mr Bottomley answered "Recharging of costs incurred which are to be borne by the subsidiary company and recharged by way of management charge" and secondly, on the conclusion in [10] that HMRC were evidently satisfied with the replies, proceeding to register Norseman. However, that, in my view, is only a partial picture. The Judge received oral evidence as well as having the witness statement on behalf of Norseman. He was aware that, when Mr Bottomley subsequently asked some time later about charging, it does not appear that he was told that it had always been intended that the amount to be paid would be cost or cost-plus. Instead, (see Decision [20]) there was, or was intended to be, a meeting at which the question would be discussed but, if it was discussed, the outcome was not apparent. And in fact we know that nothing was done by way of issuing invoices until much later and even then the amounts do not appear to have related to cost and therefore do not reflect the intention which Mr Lall submits had existed all along.

117. It seems to me, therefore, that the Judge was entitled to make the findings of fact which he did. I would not, therefore, give Norseman permission to appeal so as to raise an *Edwards v Bairstow* challenge. But even if such a challenge is open because I am wrong in my interpretation of the scope of the permission which Judge Berner gave, I would reject such a challenge. Norseman's appeal must be determined on the basis of the findings of fact made by the Judge.

The main grounds of appeal

118. Turning to the grounds of appeal which are open and in the light of the submissions which I have addressed at length, I start with the Regulation 90 Point to get it out of the way. In my judgment, it adds nothing at all to Norseman's case. I accept Ms McCarthy's argument as set out at paragraphs 109 and 110 above. I do not think it is necessary to rely on *Esporta* although for my part I think it does support her argument. It is not to be ignored as irrelevant, as I think Mr Lall suggests, simply because Vos LJ saw Regulation 90 as a red-herring in that case. Where a taxpayer relies on an intention to make future taxable supplies, as in the present case, and seeks to rely on section 6 and regulation 90, it would need to be shown that the future continuous supplies will be for a consideration which is determined or payable periodically. To do that, the taxpayer will need to show the necessary link between the periodical payments and the supplies. In establishing that link, it does not assist the taxpayer to show that there will be periodic payments unless the necessary link is shown in relation to each periodic payment. Whether the Norseman can do that in the present case depends on the other arguments presented by Mr Lall.

119. In relation to the central issue concerning the necessary link between payment and supplies, there are two logically distinct questions, although the answers to each go together. The two questions address the separate limbs of paragraph 9 of Schedule 1 to VATA 1994 and reflect the requirements of EU law. The first question is whether the supplies actually made by Norseman in the relevant period were made for consideration and were thus taxable supplies when made. The second question is whether there was, before or during the relevant period, an intention to make future supplies (whether in the relevant period or thereafter) for consideration so that such supplies would constitute taxable supplies.

120. The answer to the first question is, in my view, that the supplies were not made for consideration; they were made gratuitously. Test the matter this way. Suppose that the evidence had established that, before any supplies at all had been made, Norseman had formed the clear intention to charge the full cost of the supplies to its subsidiaries. Clearly, Norseman would then be an intending trader and the supplies, when actually made and paid for on that basis, would be taxable supplies. Credit of input tax, even if incurred in a period before the first of those supplies was made, could be claimed. But suppose that the actual supplies were made without payment, it being agreed at the time with the recipient of the supplies that they would be free of charge for some good reason. I do not consider that it could possibly be maintained that the actual supplies were made for consideration simply because there had, at an earlier stage, been an intention (not in fact implemented) to make the supply for consideration. The case is *a fortiori* where there was, as held by the Judge, only the vague intention to levy the unspecified charge identified in the Decision. Mr Lall suggests, contrary to the hypothesis of the example which I have just given, that the intention to make a

charge for the supplies which had actually been made in the relevant period continued after those supplies had been made. That, he says, is enough to result in those supplies being made for consideration. I do not consider that the factual basis for that suggestion is made out:

a. First, I have already concluded that the Judge's acceptance of Mr Connell's submission included an acceptance of the proposition that a charge would be made only when the subsidiaries could afford to pay.

b. Secondly, no charge was made for any services until the invoices referred to above, all of those invoices relating to services provided after the relevant period. Even then, there was no attempt to levy a retrospective charge; indeed, that has never been done. Mr Lall submits that the invoices demonstrate a continuing intention that payment should be made. I do not agree that they demonstrate a continuing intention that payment should be made for services provided in the relevant period, prior to the periods to which the invoices relate.

c. In any case, there is nothing in the findings of the Judge or, as far as I am aware, in the evidence before him to suggest that there was ever any intention, once the supplies had been made in the relevant period without payment, that they would later be paid for. The subsequent events suggest to the contrary since there has been no invoice or actual payment in respect of those supplies.

d. So, although the Judge made no finding either way about this, it would be surprising to me if he had decided (had he been asked to decide) that,

when providing services during the relevant period, Norseman intended at some time in the future to charge for those supplies (in contrast with its intention, at some time in the future, to charge for supplies provided after a decision to implement charges). Mr Lall has relied on entries in the subsidiaries' accounts showing a liability for (unpaid) charges; but those entries, as I understand it, relate to services provided after the relevant period in relation to which invoices have been issued.

121. Mr Lall suggests that the mutual understanding, when a supply is made, that a charge would be made for that supply – even the vague intention identified by the Judge – itself gives rise to a non-monetary consideration. One difficulty which I see with that proposition is ascertaining the value of that mutual understanding. As Ms McCarthy points out, so far as the relevant period is concerned, there is no evidence as to the amount of consideration purportedly understood to be charged or even the basis on which consideration was understood to be charged. She says that if Norseman is correct in its assertion that consideration **has actually been given** for the services performed in the relevant period, it must be possible to identify its amount; and yet Norseman is unable to do so, the reason being that no such consideration has in fact been given. I agree.

122. If, contrary to that analysis, the factual basis for Mr Lall's suggestion were made out, the first question could only be answered in the affirmative if the second question is also answered in the affirmative. If the answer to the second question is in the negative because Norseman's intentions concerning payment were not enough to establish that future supplies would be taxable supplies, I do not perceive any argument which can sensibly be raised that the supplies made

during the relevant period were in fact taxable supplies. The only argument in favour of that conclusion would be that the intention to make payment in the future in respect of past supplies gave rise to the necessary consideration: but if the intention is enough in relation to past supplies, surely it must be enough in relation to future supplies in which case the answer to the second question could not be in the negative, contrary to the hypothesis here under consideration.

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].

124. Accordingly, Norseman needs to establish that, when it incurred input tax in the relevant period, it had either already made supplies for a consideration (the first question) or that it had the intention of making at some time in the future supplies for a consideration (the second question). If it is right to conclude that Norseman had not already made such supplies and that it had failed to establish such intention, then it is right also to conclude that it was not entitled to recover input tax. It is clear from the decision in *Finland* that the mere receipt of payment does not, *per se*, mean that a given activity is economic in nature: thus payment does not *per se* amount to consideration. What needs to be established is a direct and immediate link between the services supplied and the charges levied or to be levied.

125. I have noted Ms McCarthy's submission (see paragraph 100 above) that the aim of recovering at least the cost of making the supplies (as to which see paragraph 86 above) asserted by Norseman is directly contradicted by the Judge's findings of fact at Decision [20] that the difference between the output tax declared and the input tax recovered was "not consistent with Norseman's position that it was recharging the costs incurred". Mr Lall submits that there is no inconsistency. He submits that the basis of the re-charging was always cost (although he did from time to time say that it was cost plus, without identifying what the plus was) and that once it is established that consideration was to be payable, it does not matter how or when the charge is made. I am bound to say that I do not understand how his argument meets the Judge's point that a claim for input tax of £8,287 was inconsistent with an output tax return of £2,250 if the basis on which charging was made was recovery of cost. I add that Norseman's submission concerning the aim does not sit comfortably with the Judge's finding

at Decision [52] that the supplies "were made without even an understanding of what would be paid for them".

126. As to Mr Lall's submission recorded at paragraph 84 above, it is of course the case that Norseman intended to make supplies. But that does not mean that it intended to make taxable supplies. The question is whether the payment which Norseman intended should be made amounted to consideration. Thus an intention to charge the full cost would be likely to demonstrate an intention to make supplies which would be taxable. In contrast, if the intention had been to charge a nominal amount of, say £100 per annum, that would be unlikely to satisfy the requirements of EU law necessary to establish consideration. Accordingly, I reject the submission recorded in paragraph 84(c) that, because Norseman intended to make supplies, the Judge was **for that reason** wrong to conclude that the failure to determine the amount of the charge was fatal. I also reject the submission that, because **some** payment was intended, it necessarily follows that the intention was to make supplies which would be taxable supplies.

127. So far as *Fuchs* is concerned, the rival contentions are set out at paragraphs 87 and 107/108 above. I do not accept Mr Lall's submission that it was clear that the services provided or to be provided by Norseman were not, or were not intended to be, gratuitous. As Ms McCarthy points out by reference to the passage quoted at paragraph 107 above, remuneration was actually provided as consideration for the supply (and the case had nothing to do with intentions to make taxable supplies). In contrast, the issue in the present case is whether there is consideration in the first place.

128. In the end, the result of this appeal turns on the answer to a narrow question. It is whether Norseman had the intention, when the input tax was incurred, of making a charge for the services which it had or would in the future provide to its subsidiaries, being a charge which would constitute consideration for the purposes of EU law. The Judge held Norseman had not made taxable supplies during the relevant period. This was because the payments which it intended to make did not amount to consideration. His reasoning for reaching that conclusion applies as much to Norseman's intention, at the time when the relevant input tax was incurred, in relation to supplies to be made after the end of the relevant period as it does to the actual supplies made during the relevant period. In saying what he did in Decision [53], he answered the first of the questions which I have raised in paragraph 119 above. His reasoning leading to that answer also provides the answer to the second question which I have raised, namely that Norseman has not established an intention to make supplies which would be taxable supplies when made. The point to bring home is that the inevitable conclusion of what the Judge said at Decision [49] to [52] is that the direct and immediate link between the supplies and intended supplies on the one hand and any payment in respect of those supplies on the other hand was absent at the time when the input tax was incurred.

129. The Judge did not address the prior question whether the supplies made during the relevant period might not be taxable supplies because in fact they were provided gratuitously. I have addressed that question at paragraph 120 above. Whether I am right or wrong does not matter, since if I am wrong, the answers to the first and second questions must be the same – either the payment which Norseman was intending to make amounts to consideration or it does not.

130. In assessing whether the primary facts were sufficient to give rise to taxable supplies, the Judge had to carry out an evaluative function. His critical findings in Decision [52] were that the supplies were made without even an understanding of what would be paid for them and that what was lacking was any common understanding of what was payable, when and in what circumstances. Although he does not use this language, his decision that there were no taxable supplies involved shows that he did not consider that the direct and immediate link required by EU law (and of which he was well aware as his reference to the EU cases demonstrates) was present. As I see it, he carried out an evaluation of the evidence leading him to a conclusion which necessarily meant that the required link was absent.

131. Although the result of that evaluation might be described as a matter of law, an appellate court should, as Ms McCarthy submits, be slow to interfere with the fact-finding tribunal's multi-factorial evaluation based on its assessment of a number of primary facts. She relies on *HMRC v Procter & Gamble* [2009] STC 1990 at [9] - [13]. This caution is repeated in the opinion of the court delivered by Lord Drummond Young in the Inner House of the Court of Session in *A-G for Scotland v Murray Group Holdings Ltd* 2015 Scot (D) 2/11, [2015] CSIH 77 at [45]. [41] to [48] of that decision contain an instructive analysis of the types of case where an appeal on a point of law arises. The present case is one which is a mix of the first and second categories described in [42] (first, appeals on the general law: the content of its rules and second, the application of that law to the facts as found). Mr Lall has made submissions which go to the third and fourth categories (thirdly, where the tribunal has made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory to it, and

fourthly where the tribunal has made a fundamental error in its approach). These submissions go, essentially, to the *Edwards v Bairstow* issue which, for reasons already given, is not one of the grounds of appeal open to Norseman and which, even if it were, is one I would reject.

132. As to evaluation and judgment, the Inner House said this at [45] to [47]:

> "[45] Decisions of the First-tier Tax Tribunal frequently involve elements of evaluation and judgment. In general, a court, or the Upper Tribunal, should be slow to interfere with the decision of the First-tier Tribunal in cases of this nature. This is explained by the Court of Appeal in *Proctor & Gamble UK* v *HMRC*, [2009] STC 1990; [2009] EWCA Civ 407, a case on VAT. Food is generally zero rated for VAT purposes, but there is an exception for "potato crisps… and similar products made from the potato, or from potato flour, or from potato starch…". The question that arose was whether a savoury snack product known as "Regular Pringles", with a potato flour content of approximately 40%, was subject to that exception. The Value Added Tax and Duties Tribunal, the predecessor of the First-tier Tribunal, held that it was, and this was upheld on appeal. Toulson LJ, at paragraphs [47]-[49], stated that the question of whether Regular Pringles should be classified as falling within the exception required a combination of fact finding and evaluative judgment; in particular the question of similarity to potato crisps and other potato products required an evaluative judgment. Parliament had created a specialist tribunal to determine these matters, and in reviewing the decision of such a tribunal he thought it right to bear in mind remarks by Baroness Hale in *AH (Sudan)* v *Secretary of State for the Home Department*, [2008] 1 AC 678. She referred to the fact that the Immigration Tribunal was "an expert tribunal charged with administering a complex area of law in challenging circumstances"; consequently the ordinary courts should approach appeals from them with appropriate caution, because it is probable that the tribunal will have reached the right decision. Similar remarks were made by Jacob LJ in *Proctor & Gamble* at paragraphs [9]-[15], in which he cited a range of statements in earlier cases regarding the need for appellate caution in reversing a judge's evaluation of the facts.
>
> [46] We agree with the general proposition advanced by Toulson LJ. Nevertheless, it appears to us that evaluative decisions cover a wide spectrum. At one end is the sort of decision that is typically made by an immigration tribunal: it has a high factual content, frequently dependent on detailed information about the country from which the would-be immigrant has come. The same can be said of the question in *Proctor & Gamble*: it was in essence whether Regular Pringles were a potato product in the same category as potato crisps. That is an evaluative exercise in which the factual component is clearly dominant. Yet another example would be where a First-tier Tax

> Tribunal one of whose members was, as here, a chartered accountant reaches a conclusion on the application of accounting principles. It is common sense that in such a case an appellate court should be very slow to interfere, unless the case falls into the third or fourth of the categories discussed above where the First-tier Tribunal has misunderstood the evidence or proceeded without evidence or has made a fundamental error in its method of reasoning.
>
> [47] In some tax appeals, however, the evaluative exercise contains a much smaller factual component; an example would be a case such as the present where the transaction that must be evaluated involves legal institutions such as trusts or contracts or assignations. In a case of that nature it is much easier for an appellate court to interfere; the legal element is identifiable, and clearly raises a point of law. In an extreme case, for example if the First-tier Tribunal misconstrued the rights of the parties under a trust, that would be a straightforward error of law. In a slightly less extreme case, where the Tribunal had assessed the overall effect of a series of transactions, there is a greater element of evaluation, but we still consider that in such a case the courts might properly interfere if they considered that the transaction or the legal concepts involved in it had been misconstrued. It is a matter of degree: the higher the factual component in the evaluative exercise, the slower the court should be to interfere, but correspondingly if the factual component is relatively low and the legal component is high the court may properly interfere. As we have indicated, we consider that the present case falls into the latter category."

133. In the present case, once the challenge under the third and fourth categories is rejected (as I have rejected it), one is left with the central question which is whether the facts as found do or do not lead to the conclusion that there is to be found the immediate and direct link which EU law requires. The Judge carried out the appropriate evaluative exercise. Placing the present case in the range of cases contemplated by the Inner House in [47] of its opinion, that evaluation is one with which I can properly interfere if I consider that the Judge has misconstrued the transaction or the legal concepts. But I should be slow to interfere: I need to be sure that the Judge has got his evaluation wrong.

134. Far from thinking that he got his evaluation wrong, I consider that his evaluation is correct and is the one which I would reach were I making the decision afresh. Even if it is correct to say, on the evidence, that there was an

intention, before any services were provided, that they would be made for payment, and even if it is correct (contrary to my own view) that an intention to make payment for the services provided during the relevant period continued into the future, I reject Mr Lall's submission that that is enough to demonstrate an intention to make **taxable** supplies or to demonstrate that the services provided during the relevant period were in fact **taxable** supplies.

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

136. On the facts found by the Judge, Norseman is reduced to reliance on a vague and general intention that payment would be made. This is not a case where the payment could be particularised in any way. Thus, on the facts found, it cannot be said that the intended payment would be full cost recovery (although I remark that, even if the intention was full cost recovery, there would still remain uncertainty about whether payment would be made at all, let alone about exactly when). Since payment *per se* is not enough to establish consideration, Norseman has failed to establish that it had an intention, during the relevant period, to make taxable supplies at any time in the future. And it has failed also to establish that

consideration was given for the services actually provided during the relevant period. I have not, in reaching this conclusion, relied on the decision in *African Consolidated Resources*. I would, however, say that I see no reason to doubt that it is correct and do not accept Mr Lall's criticisms of it.

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

138. I add that, if I am right in my view that Norseman has failed to establish a continuing intention to charge, retrospectively, for services provided during the relevant period, then there is clearly no relevant link because there is no intended

payment to which the supply could be linked. It is not necessary, however, to rely on this conclusion to reach the ultimate conclusion that the input tax incurred in the relevant period cannot be claimed by Norseman.

Disposition

139. Norseman's appeal is dismissed.

Mr Justice Warren

Release Date: 4 February 2016