**[2021]UKUT 0123 (TCC)**

**Appeal number: UT/2019/0134**

VALUE ADDED TAX – holding company providing services to subsidiaries – whether FTT failed to make complete findings of fact – whether supplies were made for consideration – whether supplies amounted to an economic activity

**UPPER TRIBUNAL TAX AND CHANCERY CHAMBER**

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

**-and-**

**TOWER RESOURCES PLC** **Respondent**

**TRIBUNAL: THE HONOURABLE MRS JUSTICE BACON**
**JUDGE JONATHAN CANNAN**

**Sitting in public by way of remote video hearing on 20–21 April 2021**

**Ms Hui Ling McCarthy QC and Mr Edward Hellier, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants**

**Mr Michael Firth for the Respondent**

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**DECISION Introduction**

1. This is an appeal by HMRC against a decision (the "Decision") of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 8 July 2019. The central issue in the appeal is the question of whether a parent company that charges its subsidiaries for management, logistical and technical services is making a taxable supply for consideration, in the course of an economic activity, where the cost of the services is added to intercompany loan accounts, and where although the loans are repayable on demand the parent company has in practice not demanded repayment.

2. In a decision dated 25 April 2016, and upheld on 24 October 2016 following a review, HMRC considered that the appellant ("Tower") was not making taxable supplies for consideration to its subsidiaries. HMRC therefore denied Tower credit for input tax in the amount of £613,169.96 for VAT periods 12/14 to 12/15, and issued an assessment for input tax previously claimed in the amount of £842,850 for VAT periods 06/12 to 09/14.

3. On appeal by Tower to the FTT, HMRC maintained that Tower was not making taxable supplies for consideration. In the alternative, HMRC argued that if Tower was making such supplies then it was not doing so in the course of an economic activity. The FTT rejected both arguments and held that Tower was both making taxable supplies for consideration and doing so in the course of an economic activity. Tower's appeal was therefore allowed.

4. HMRC now appeals to the Upper Tribunal with the permission of the FTT (for two of its grounds of appeal) and the Upper Tribunal (for the remaining ground of appeal).

**Relevant legislative provisions**

5. There was no dispute as to the applicable legislative provisions and all submissions were made by reference to the Principal VAT Directive, EU Directive 2006/112/EC ("PVD"). Article 2(1) provides that:

> "The following transactions shall be subject to VAT: […] (c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such".

6. Article 9(1) PVD provides:

> " 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
>
> Any activity or producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

7. Article 168 PVD provides for the deduction of input VAT, as follows:

> "In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;"

8. Article 169(a) PVD extends that right of deduction to goods and services that are used for transactions relating to the activities described in the second subparagraph of Article 9(1), but carried out outside the Member State in which the input VAT is sought to be deducted. 9. Those provisions have been transposed into domestic law by the Value Added Tax Act 1994 ("VATA"). Section 4(1) VATA provides:

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

10. Section 5(2)(a) and (b) VATA define "supply" as follows: "(a) 'supply' in this Act includes all forms of supply, but not anything done otherwise than for a consideration;

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

11. Sections 24–26 of the VATA contain detailed provisions on input tax, transposing Articles 168 and 169 PVD. It is not necessary to set these out for the purposes of this decision. **Factual background**

12. The FTT had before it 12 bundles of documentary evidence, and heard from four witnesses on behalf of Tower. On the basis of that evidence the Decision set out a full description of the background facts. For present purposes the following summary suffices, with references to the paragraph numbers of the Decision.

13. Tower is a UK holding company incorporated in December 2004 and listed on the Alternative Investment Market ("AIM"). Its business is to acquire licences to explore for and produce oil and gas in sub-Saharan Africa. Those operations generally take up to 10 years before the first production of oil (§§7–8).

14. When a licence is obtained, there is an expectation and belief that oil production will succeed. In relation to genuine exploration wells, however (as opposed to appraisal or development wells) the average success rate of a particular well is 20% (§9).

15. Tower's exploration and production activities are conducted through local subsidiaries. Tower funds the local costs of those subsidiaries and provides what are described as management services to its subsidiaries, as well as the bulk of the technical services (e.g. geological and geophysical work). The local costs and the costs of provision of technical services by Tower are charged to the subsidiary through the addition of the relevant sums to the intercompany loan account. Before April 2015, those charges were at cost. From April 2015, when written agreements were introduced, a 5% mark-up was added (§§13–14).

16. Other than certain amounts in relation to particular farm-in agreements (which we understand is where a third party agreed to pay a share of the drilling costs in return for an interest in the oil production) in Namibia and Madagascar, Tower had not, by the time of the
FTT hearing, demanded repayment of any of the intercompany loan accounts of its subsidiaries.

The evidence of Tower's Chairman Mr Asher was that Tower was acting in its own interests by not demanding repayment, because it wanted the subsidiaries to go forth and develop their assets (§§16–17).

17. The loans were treated as assets in the financial statements of Tower and were treated for accounting purposes as repayable on demand. The evidence of Mr Wright from Tower's auditors was that the loans would not have been treated as such if there was a contingent as opposed to an immediate liability of the subsidiary to repay (§§19–20).

The loans were reviewed annually for impairment, including declines in market value (§§21–22).

18. There were no written loan or services agreements before April 2015. From April 2015, written agreements were entered into. Those set out the services to be provided by Tower to the subsidiaries, the charges for those services, and the terms of the intercompany loans. The services agreements provide for Tower's charges to be paid on the last business day of each year. The loan agreements include a stipulation that the loans are repayable on demand (§§24– 27).

19. Since the place of supply of Tower's services to its subsidiaries was outside the UK, no output tax declarations would be required for those supplies even if the supplies were taxable. Tower did, however, claim credit for input VAT in respect of those services. An HMRC investigation in 2015 led to the denial of input tax and assessment for previous input tax that are the subject of the present appeal.

**The FTT Decision**

20. The issues before the FTT were whether Tower made supplies for consideration within the meaning of Article 2 PVD, and whether those supplies were made in the course of an economic activity within the meaning of Article 9 PVD. Before deciding those issues, however, the FTT addressed a preliminary issue as to the terms of any agreement between Tower and its subsidiaries before April 2015, and (in relation to both the position before and after April 2015) whether the terms of the agreements reflected the commercial and economic reality of the transactions.

21. In particular, the FTT considered HMRC's arguments that there was a common understanding that the subsidiaries would only repay Tower if they could afford to do so:

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

22. The FTT rejected those arguments:

> "53. However, I agree with Mr Firth that the evidence of Mr Asher and particularly that of Mr Wright the audit partner … confirms that, although not in writing, agreements did exist between Tower and its subsidiaries under which Tower provided services and met expenses of the subsidiaries for which they were charged, at cost, with the sum concerned being added to the intercompany loan which was repayable on demand and that this reflected the commercial and economic reality of the relationship between them.
>
> 54. While I accept that the accounting treatment of the loans cannot be determinative, the accounts of Tower and its subsidiaries, which have been prepared in accordance with IAS and IFRS, supports such a conclusion as do the unqualified Audit Reports over the period in question.

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

23. Having made that determination, the FTT went on to find that Tower did indeed make supplies to its subsidiaries for consideration, on the basis that there was a legal obligation on the subsidiaries to make payment on demand, and that the fact that the loans had not yet been repaid did not mean that there was no consideration for the supply (§65). The FTT considered that the addition to the intercompany loan account would in any event amount to "payment", if actual payment was required for there to be a supply for consideration (§73). It also considered HMRC's argument that the consideration was contingent, and that the contingency broke the link between the supply and the consideration (§§75–78).

24. The FTT went on to find that a holding company supplying services to its subsidiaries for consideration for the purposes of Article 2 PVD "must lead inexorably" to the conclusion that Tower was carrying on an economic activity for the purposes of Article 9 PVD (§96).

**The grounds of appeal**

25. HMRC advances three grounds of appeal:

(1) That the FTT erred by misunderstanding HMRC's case and thereby failing to make complete findings of material fact as regards the agreement between Tower and its subsidiaries.

(2) That the FTT erred by holding that Tower was making supplies for consideration for the purposes of Article 2 PVD.

(3) That the FTT erred by holding that Tower was making supplies in the course of an economic activity for the purposes of Article 9 PVD.

26. Permission was given by the FTT in relation to grounds (2) and (3), and (following an application for oral reconsideration) by Judge Raghavan in the Upper Tribunal in relation to ground (1).

**Ground (1): characterisation of the agreement between Tower and its subsidiaries**

27. It is well-established that in analysing a transaction for the purposes of VAT, while the contractual arrangements are the starting point they are not determinative, and it is necessary to consider whether those terms reflect the economic and commercial reality of the transaction. The correct approach was described by the CJEU in *HM Revenue & Customs v Newey* (Case C-653/11) EU:C:2013:409, [2013] STC 2432:

> "42. As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case law of the court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT …
>
> 43. Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration

> when the supplier and the recipient in a 'supply of services' transaction within the meaning of Articles 2(1) and 6(1) of the Sixth Directive have to be identified.
>
> 44. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
>
> 45. That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions."

28. Ms McCarthy QC for HMRC did not suggest that in the present case the contractual agreements between Tower and its subsidiaries represented an artificial arrangement or sham. Her submission was, however, that reference to the economic and commercial realities of the transaction is not confined to cases where the contract is an artificial arrangement. Rather, in her submission, it requires the court to consider whether the contract fully describes the agreement between the parties.

29. Specifically, in her skeleton argument, Ms McCarthy contended that while the written agreements provided that the balances of the intercompany loans were repayable on demand, and while that also reflected the accounting treatment of the loans, there was "a common understanding (i.e. an agreement)" between Tower and its subsidiaries that payment would not be demanded unless the subsidiaries had the funds to pay or Tower found itself in severe financial difficulties such that it required the subsidiaries to pay. She said that this was the evidence of Tower's auditor Mr Wright and its chief executive officer Mr Asher in crossexamination and should, therefore, have been a finding of fact made by the FTT.

30. It is not disputed that there may be circumstances in which the Upper Tribunal may decide that the FTT failed to make factual findings which, if made, fundamentally undermine the decision that the FTT has reached. However, before the Upper Tribunal will overturn a decision of the FTT on that basis it must be satisfied that it can properly make those findings. In that regard the Upper Tribunal is not in a position to adjudicate upon disputes about what a witness said in unrecorded oral evidence; nor can it reconsider all of the evidence before the FTT in order to make its own factual findings: *Brander v HMRC* [2010] STC 2666, §§56–57.

31. With that in mind, we do not consider that it is open to us to make the findings sought by HMRC. That is because they are findings that HMRC asked the FTT to make, in relation to the economic and commercial reality of the agreement between Tower and its subsidiaries, but which the FTT rejected.

32. That is apparent from the parties' submissions to the FTT on the findings of fact that should be made on the basis of the evidence before it, including the oral evidence of the witnesses at the hearing. HMRC's suggested findings of fact before the FTT included the following:

> "[Tower] understood that the subsidiaries would not be required to pay unless and until they had funds to do so.
>
> The subsidiaries understood that although the loans were payable on demand, as a matter of economic reality, payment would not be demanded unless they had the funds to pay."

33. Tower's submissions on the evidence agreed that Tower would not, as a commercial matter, demand payment without good reason, which would include the subsidiary

having free cash available to pay or the parent needing the money. Tower disputed, however, that the evidence disclosed any agreement or "understanding" that repayment would be contingent on one of those events. Its submissions on the evidence commented that HMRC had repeatedly attempted to press the witnesses to agree that the subsidiaries were not required to pay for the services as long as they lacked the means, but that this proposition had been "firmly rejected" by the witnesses. In particular, Mr Asher had explained that it was important commercially that the loans were *not* subject to a contingency based on the subsidiaries' means, because if Tower had given any such undertaking that would affect other negotiations for future contracts. Mr Wright, Tower's auditor, had also pointed out that if the repayment of the loans was subject to such a contingency the loans could not have been recognised as assets in Tower's accounts unless and until the contingency was satisfied.

34. The FTT found in favour of Tower on this point at §§52–55 of the Decision, cited above, expressly referring to and rejecting HMRC's contention that the subsidiaries' obligations to repay Tower were contingent on the subsidiaries' means, and finding that the loans were instead repayable on demand. As the FTT had already found (at §§19–20 of the Decision, noted above), the evidence of Tower's auditor was that the loans could not have been treated for accounting purposes as repayable on demand if there was a contingent as opposed to an immediate liability to repay.

35. It is not open to us to go behind these findings of fact, which were reached on the basis of the FTT's consideration of all the evidence before it.

36. Implicitly recognising this problem with the submission as put in her skeleton argument, at the hearing before us Ms McCarthy put the case in a different way and said that her argument was not that there was a legally enforceable agreement between Tower and its subsidiaries. Rather she relied upon the case of *Town and County Factors v HMCE* (Case C-498/99) EU:C:2002:494, [2002] STC 339 for the proposition that the characterisation of the legal relationship between the parties must include what happens "in practice". In practice, she said, it was accepted that Tower did not demand repayment unless the subsidiaries could afford to repay or Tower needed the money, and the subsidiaries knew that to be Tower's position because of the common directors as between Tower and the subsidiary companies. Those were, she said, key facts that should have been taken into account in the application of Article 2(1) PVD.

37. That is, however, not an argument that the FTT failed to make findings of fact, since the FTT *did* find as a fact that in practice Tower did not demand repayment because it was acting in its own interests in not doing so (§§16–17), and that Tower had at least one director in common with each of its subsidiaries (§13). Plainly it was in Tower's interests not to demand repayment if the subsidiaries could not afford to repay and Tower did not need the money. The Decision therefore already contains, in substance, the factual findings that Ms McCarthy relied upon for her reformulated submission. Ms McCarthy's submission was therefore in reality a legal submission that Article 2(1) of the PVD should be applied by reference not only to the agreement between the parties, but also by reference to their conduct "in practice" as found by the FTT even if the conduct in question fell short of an agreement.

38. That is a new argument, not advanced in the FTT or in HMRC's grounds of appeal or skeleton argument for this hearing, and no permission to appeal has been given for this version of HMRC's case.

39. Moreover, the authorities cited to us do not in any event support HMRC's reformulation of this ground of appeal.

40. *Town and County Factors* concerned a competition for which the participants paid entry fees. Prizes were awarded to the winners, but the rules of the competition specified that the obligations to pay prizes were "binding in honour only" and it was therefore common ground that there was no legally enforceable agreement to pay the prizes indicated. It was, however, also common ground that during the relevant period the organiser of the competition always did pay out the specified prizes to the winners.

41. In those circumstances one of the questions before the CJEU was whether the supply of prizes, while not legally enforceable, nevertheless constituted a supply of services for consideration within the meaning of Article 2(1) PVD. The Advocate General and the CJEU both considered that it did.

42. Both the Advocate General and the Court referred to the Court's judgment in *Tolsma* (Case C-16/93) EU:C:1994:80, [1994] STC 509, where the Court held that a supply of services was effected for consideration within the meaning of Article 2(1) PVD only if there is "a legal relationship between the provider of the services 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".

43. Applying that test, the Advocate General said that the relevant question was "whether the components of reciprocal performance are exchanged in the framework of agreements – even ones that are binding in honour only – from which it is apparent that there is a direct link between them" (opinion §39). She considered that in this case there was indeed "a type of agreement" under which the entry fee was paid for the service provided by the competition organiser. Since the service and payment were therefore exchanged in the framework of agreements from which it was apparent that there was a direct link between them, there was a legal relationship in the *Tolsma* sense, even if the agreements were not legally enforceable (§§41–44).

44. The CJEU likewise pointed out that on the facts of the case the impossibility of seeking enforcement derived from an agreement between the provider of services and the recipient, "such an agreement constituting the very expression of a legal relationship" in the *Tolsma* sense (§23). It also noted that a requirement for the obligations of the service provider to be legally enforceable would compromise the effectiveness of the PVD (§21). On that basis the Court concluded that the supply of services (i.e. the prizes) by Town and County was a transaction subject to VAT notwithstanding the agreement that the provider was bound in honour only (§24).

45. The basis of both the CJEU's judgment and the Advocate General's opinion in *Town and County Factors* was therefore the conclusion that the reciprocal obligations were set out in an agreement between the parties, even if that agreement was not legally enforceable. There is no indication in the judgment that the existence of consideration could be determined solely by reference to the "practice" of the organiser of the competition.

46. The evidence of what the parties did in practice may of course, in an appropriate case, constitute evidence of the economic and commercial reality of the agreement between them. That was *prima facie* the case in *Newey* (although the CJEU said that it was for the referring court to determine whether the contractual terms did not reflect the

economic reality, on all of the evidence before it). We were not, however, referred to any authority suggesting that the legal relationship for the purposes of Article 2(1) PVD can be defined by a "practice" on the part of the supplier of services, which is known to the recipient of those services, but which differs from the economic and commercial reality of the agreement between them.

47. It is, moreover, easy to see why the authorities place emphasis on the legal relationship of the parties as determined by the agreement between them, whether or not that agreement is a legally enforceable one. As Mr Firth rightly noted, the question of whether there is a taxable supply falling within Article 2(1) requires an assessment of the nature of the transaction at the time of the potential chargeable event. That can only sensibly be determined on the basis of the agreement between the parties (construed, of course, by reference to the economic and commercial realities of the transaction): it would be unworkable for the question of whether there is a taxable supply to depend on the subjective and quite possibly changeable conduct of one of the parties to the transaction. That is why the CJEU at §41 in *Newey* commented that the concept of a supply of services is:

> "objective in nature and applies without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person".

48. The fact that Tower did not, in practice, demand repayment from its subsidiaries therefore does not change the characterisation of its agreements with subsidiaries for the purposes of Article 2(1) PVD, in circumstances where the agreements provided for repayment to be made on demand without any contingency, and where the FTT found as a matter of fact that this reflected the economic and commercial reality of the relationship between the parties.

49. It follows that even if permission to appeal had encompassed the version of the first ground that was advanced at the hearing, we do not consider it to be well-founded.

50. We therefore dismiss the first ground of appeal.

**Ground (2): whether Tower made supplies for consideration**

51. In its second ground of appeal, HMRC contends that since as a matter of economic reality there was a "common understanding (i.e. an agreement)" between Tower and its subsidiaries that Tower would not demand payment unless the subsidiaries had the funds to pay or Tower needed the money, the requisite direct link between the supply and consideration was broken and no taxable supplies were made for the purposes of VAT.

52. It is well established that, for the purposes of Article 2(1) PVD, there must be a direct link between the service supplied and the consideration received: *Lebara v R&CC* (Case C520/10) EU:C:2012:264, [2012] STC 1536, §27. This direct link may be broken if there is no more than a "vague intention to levy an unspecified charge, at some undefined time in the future" by way of consideration for services supplied by a parent company to its subsidiaries: *Norseman Gold v HMRC* [2016] UKUT 69 (TCC), [2016] STC 127, §§94 and 119–121.

53. Likewise in *Bastova* (Case C-432/15) EU:C:2016:855 the CJEU held that the supply of a horse by its owner to the organiser of a horse race for the purposes of the horse's participation in the race did not amount to a supply for consideration, because in such a case it was not the supply of the horse to the organiser that gave rise to the award of prize money,

but rather the achievement of a certain result at the end of the race. The uncertainty of that result precluded the existence of a direct link between the supply of the horse and the prize money (§37).

54. The FTT has also, on several occasions, considered the situation where the fees charged by a parent company to its subsidiary were conditional on the subsidiary having the means to pay. In *African Consolidated Resources* [2014] UKFTT 580 (TC) where management fees were provided by the parent to its subsidiary for an annual fixed fee of £10,000, which was set at a level which the subsidiary could afford to pay rather than by reference to the value of the services provided, the FTT considered that there was insufficient evidence of an economic link between the value of what was provided and the price being charged. On that basis it held that those services were not provided for valuable consideration and so should not be treated as taxable supplies by the parent company (§§64–65).

55. More recently in *W Resources* [2018] UKFTT 746 (TC) the FTT considered a situation where the parent company was only entitled to invoice its subsidiaries once they had started to generate revenue. After referring to the decision in *African Consolidated Resources* (as well as the *Norseman* and *Bastova* judgments), the FTT held that:

> "the case law in this area clearly demonstrates that any contingency which has the result that the recipient of a supply will not be required to pay for the supply if it lacks the means to do so is enough to mean that there is no 'reciprocal performance' by the parties and therefore breaks the 'direct link' which is required in order for the relevant supplies to be 'for a consideration'."

56. Ms McCarthy argued in her skeleton argument that the above line of decisions is applicable in the present case, in circumstances where (she said) there was an agreement between Tower and its subsidiaries that repayment would only be required if one of two contingencies was satisfied.

57. In our view the authorities do not go so far as to suggest that there is no consideration if the payment of contractual consideration is subject to any contingency at all. We do not, however, have to resolve whether the contingencies relied upon by Ms McCarthy in this case are such as to break the link between the service supplied and the consideration received, because it is apparent that the argument under HMRC's second ground of appeal falls at the first hurdle: namely the FTT rejected HMRC's submission, on the facts, that the agreement between the parties was that Tower would demand repayment of the loans only in the event of certain contingent events.

58. The same point answers Ms McCarthy's reliance by analogy on *Inventive Tax Strategies v HMRC* [2019] UKUT 221 (TCC), in which the question was whether credit notes issued for the refund of fees charged by ITC amounted to a price reduction for the purposes of Article 90 PVD, such that the taxable amount obtained for the supplies under Article 73 PVD was reduced. The Upper Tribunal held that the commercial reality was that "there neither has been, nor will be, any refund of the price … The purported reduction is just a paper one in the circumstances with no commercial substance."

59. Ms McCarthy's argument was that the same is true in the present case where as a matter of economic reality there was a common understanding that Tower would not demand payment unless certain limited events occurred. Again, however, that conflicts with the factual findings of the FTT. On the basis of those findings, the economic and commercial reality was that payment by the subsidiaries was due on demand, without any understanding

or agreement that demand would be contingent on certain events. It was therefore not the case that Tower charged "paper" fees with no commercial substance.

60. HMRC's second ground of appeal thus fails for the same reasons as the original formulation of the first ground of appeal: the obligation to pay was, on the facts found by the FTT, neither contingent nor uncertain, and the case-law set out above is therefore not relevant. Indeed, when pressed on this point at the hearing, Ms McCarthy was unable to identify any basis on which the second ground of appeal could survive if the first ground of appeal was rejected.

61. That is sufficient to dismiss the second ground of appeal, and it is not necessary to go further and consider HMRC's remaining arguments under this ground, which related to the way in which the subsidiaries' debts were added to the intercompany loans. In our view the FTT was right to find (at §65) that once it is established that Tower's subsidiaries had a legal obligation to make payment on demand in relation to the intercompany loans (in circumstances where the FTT had found that this reflected the commercial and economic reality of the relationship and rejected HMRC's contention of any contingency prior to that demand), that is sufficient to demonstrate that Tower's services were supplied for consideration. Ms McCarthy rightly did not seek to argue that payment had actually to be made by the subsidiaries in order for consideration to exist.

62. We therefore do not reach any conclusion on the question of whether the addition to an intercompany loan account might amount to "payment" by the subsidiaries. That question, it seems to us, should properly be looked at – if it arises – in the context of a case in which it is necessary to determine the issue.

**Ground (3): whether Tower made supplies in the course of an economic activity**

63. By its third ground of appeal HMRC submits that even if there was a supply of services by Tower to its subsidiaries for consideration for the purposes of Article 2(1) PVD, Tower was not a taxable person because it was not carrying out an economic activity within the meaning of Article 9(1) PVD.

64. There were two strands to Ms McCarthy's submissions on this point. The first was that the FTT did not properly consider all of the relevant circumstances in which Tower supplied services to its subsidiaries, but simply concluded (in §96) that the requirement for economic activity in Article 9(1) PVD was "inexorably" satisfied on the basis of the determination that Tower's services were supplied for consideration under Article 2(1) PVD. On that basis Ms McCarthy said that the Upper Tribunal should remake the decision of the FTT, evaluating all the objective circumstances in which the services were supplied.

65. Secondly, Ms McCarthy submitted that in making that substantive assessment and considering the various different factors referred to in the case-law the correct conclusion should be that Tower was not engaged in an economic activity, but rather that the services supplied to its subsidiaries formed part of Tower's investment in and support for the business of those subsidiaries.

66. We do not consider that either of those submissions is well-founded.

67. As to the first point, the FTT's conclusion at §96 was made on the basis of the FTT's analysis of the case-law on the question of whether a person is carrying out an economic activity. In that regard the FTT expressly acknowledged, at §§79–81, that the

existence of a supply for consideration does not give rise to a presumption that the supply constitutes an economic activity. Rather, it is necessary to examine the objective circumstances in which the goods or services are supplied: *Wakefield College v HMRC* [2018] EWCA Civ 952, [2018] STC 1170, §§53 and 55.

68. The overarching test has been expressed in different ways in the case-law. Picking up on the language of Article 9(1) PVD (and its predecessors), some cases refer to the question of whether the supply is made for the purposes of obtaining income on a continuing basis: see e.g. *Wakefield* §54. As the CJEU explained in *Götz* (Case C-408/06) EU:C:2007:789, §18, a different way of putting the same point is to ask whether the activity "is permanent and carried out in return for remuneration which is received by the person carrying out the activity". That formulation has been applied in various subsequent judgments of the CJEU, including *Commission v Finland* (Case C-246/08) EU:C:2009:671, §37, *MVM Magyar Villamos* (Case C-28/16), EU:C:2017:7, [2017] STC 452, §25 and *Marle* (Case C-320/17) EU:C:2018:537, [2018] STC 1904, §22.

69. However the test is expressed, what is important is that there is not a checklist of factors that must be considered in each case; rather, it is for the court to assess the relevant facts of each case: *Wakefield* §59.

70. The *Wakefield* case concerned the question of whether a further education college was carrying on an economic activity in the supply of courses to students paying subsidised fees. That case necessarily involved an analysis of different factors to those relevant to the involvement of a holding company in the management of its subsidiaries. In relation to the latter, there is a well-established line of CJEU case law in which the Court has held that direct or indirect involvement of a parent company in the management of its subsidiaries must be regarded as economic activity where that entails carrying out transactions that are subject to VAT under what is now Article 2(1) PVD, such as the supply of administrative, financial, commercial and technical services by the parent company to its subsidiaries. That was made clear in the cases cited by the FTT at §§44–46 of the Decision: *Cibo Partipations* (Case C16/00) EU:C:2001:495, [2002] STC 460, §§20–22; *Larentia & Minerva* (Case C-108/14), EU:C:2015:496, [2015] STC 2101, §21; and *MVM* §32.

71. Ms McCarthy submitted that the CJEU's statements in those cases must be interpreted by reference to the analysis by the Court in its earlier judgments in *Polysar* (Case C-60/90) EU:C:1991:268, [1993] STC 222 and *Floridienne* (Case C-142/99) EU:C:2000:623, [2000] STC 1044. We do not consider that those cases assist HMRC.

72. In *Polysar* the CJEU confirmed at §13 that the mere acquisition of financial holdings in other undertakings does not constitute an economic activity, but went on to note at §14 that "It is otherwise where the holding is accompanied by direct or indirect involvement in the management of the companies in which the holding has been acquired …" That set the foundation for the ruling in *Floridienne* at §§18–19 that direct or indirect involvement in the management of subsidiaries must be regarded as an economic activity where that entails carrying out transactions that are subject to VAT, such as the supply of administrative, accounting and IT services to the subsidiaries.

73. Ms McCarthy suggested that the question of whether the holding company was carrying on an economic activity was not directly in issue in *Floridienne*. In fact, however, the existence of an economic activity was one of the specific relevant factors identified by

the CJEU in that case, in its consideration of whether dividends distributed and loan interest paid by a subsidiary to its holding company fell within the scope of VAT for the purposes of calculating the deductible proportion of input tax (see *Floridienne* §§11–12).

74. Ms McCarthy also referred to §28 of *Floridienne*, where the Court indicated that the activity of making capital available to subsidiaries would not constitute an economic activity unless it was carried out with a business or commercial purpose characterised by a concern to maximise returns. That cannot, however, imply that this requirement applies to every type of activity, particularly management activities for which the Court had found that it was sufficient to show that those activities involved transactions subject to VAT within the meaning of what is now Article 2(1) PVD, without any requirement to demonstrate an intention to maximise the returns from the management services provided.

75. In our view that point was put beyond doubt in *Marle* which concerned the letting of a building by a holding company to its subsidiaries and whether that amounted to an economic activity. The Court referred to the earlier judgments referred to above and confirmed the nonexhaustive nature of the various examples of activities constituting involvement of the holding company in the management of its subsidiaries (§§31–32). It concluded at §45:

> "In the light of the foregoing, the answer to the question referred is that the VAT Directive must be interpreted as meaning that the letting of a building by a holding company to its subsidiary amounts to 'involvement in the management' of that subsidiary, which must be considered to be an economic activity, within the meaning of Article 9(1) of that directive, giving rise to the right to deduct the VAT on the expenditure incurred by the company for the purpose of acquiring shares in that subsidiary, where that supply of services is made on a continuing basis, is carried out for consideration and is taxed, meaning that the letting is not exempt, and there is a direct link between the service rendered by the supplier and the consideration received from the beneficiary."

76. We therefore consider that the position was correctly summarised by the FTT in *W Resources* at §55, as cited and adopted by the FTT in the present case at §47, as being that the involvement of a holding company in the management of its subsidiaries will be regarded as an economic activity for the purposes of Article 9(1) PVD if the management services provided by the holding company are supplied for consideration within the meaning of Article 2(1) PVD. As set out in the case-law of the CJEU, those services may include administrative, financial, commercial and technical services, but that is not an exhaustive list.

77. We do not, therefore, consider that the FTT erred in its conclusion at §96 of the Decision. In the present case, having concluded that Tower involved itself in the management of its subsidiaries by providing management and technical services to them, for consideration within the meaning of Article 2(1) PVD, it followed from the settled case-law of the CJEU that those services constituted an economic activity for the purposes of Article 9(1) PVD. For the sake of completeness, we would add that we are satisfied on the facts as found by the FTT and for reasons previously given that the supplies of services by Tower to its subsidiaries were made on a continuing basis, for consideration and that there was a direct link between the services supplied and the consideration received.

78. For the same reasons the factors referred to by Ms McCarthy under the second limb of her submissions on this point are not apposite in this case. Factors such as whether the activities are ancillary to the principal activities of the service provider, whether earnings from the activity by reference to actual receipts cover the cost of the services, whether the charges were fixed by reference to the means of the recipient of the services, whether the services are supplied to the general market, and whether the services are provided in comparable circumstances to those of a commercial provider may be relevant in particular contexts (see e.g. the comments at §§30–31 and 35 of *Borsele)*. It is clear from the case-law set out above, however, that they do not form a relevant part of the assessment of whether the involvement of a holding company in the management of its subsidiaries constitutes an economic activity.

79. We also note that in any event it became clear during the course of Ms McCarthy's submissions that HMRC's objection to the "economic" nature of the services provided by Tower turned not on the nature of those services, but rather on the fact that the subsidiaries paid for those services through the intercompany loan accounts. The paradox in that submission was that Ms McCarthy had to accept that services purchased from third parties using funds drawn down from the same loan accounts constituted economic activities. Her submission was therefore that a service ceased to be an economic activity when it was provided by a company that was also the provider of the relevant loan facilities.

80. There is in our view no logical or principled basis for such a distinction, nor is it supported by the case-law. As the case-law makes clear, the test for an economic activity requires an objective consideration of the nature of the activity and the extent to which it is remunerated. In the words of the CJEU in *Finland* §37, "the activity is considered per se and without regard to its purpose or results".

81. Whether or not a supplier of services is also a person who provides a loan facility to the recipient of the services is thus purely incidental and cannot affect the characterisation of those services as an economic activity. The provision of funding by a parent company to its subsidiaries through debt and/or equity is standard commercial practice, and indeed in *Floridienne* the CJEU explicitly considered the fact that the parent company was providing capital to its subsidiaries through loan finance (see e.g. §§24–30). There was, however, no suggestion that this had any relevance to the question of whether the management services provided by that same parent company were to be regarded as economic activities.

82. We therefore dismiss the third ground of appeal.

**Disposition**

83. For all the reasons given above the appeal is therefore dismissed.

Signed on original

**MRS JUSTICE BACON UPPER TRIBUNAL JUDGE CANNAN**

**Release date: 20 May 2021**