TC07947

Value Added Tax – deduction of input tax – services supplied from holding company to subsidiary financed by debt from holding company – whether supplies for consideration – held yes – whether carrying on economic activity – held yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/00987
TC/2018/06090

BETWEEN

BLUEJAY MINING PLC **Appellant**

-and-

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

TRIBUNAL: JUDGE PHILIP GILLETT

The hearing took place on 9, 10 and 11 November 2020. The form of the hearing was a video hearing with all parties attending remotely via the Tribunal Video Platform. A face to face hearing was not held because this was not considered appropriate during the pandemic.

The documents to which I was referred were contained in three electronic bundles consisting of a total of 2,589 pages and an electronic authorities bundle of 885 pages.

Michael Firth, counsel, instructed by PKF Littlejohn LLP, for the Appellant

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

DECISION

INTRODUCTION

1. This is an appeal against HMRC's decisions to deny the Appellant ("Bluejay") credit for input VAT for the following VAT accounting periods:

(1) 04/12 to 09/15, totalling £255,492 (HMRC decision of 12 April 2016), and

(2) 12/15 to 12/17, totalling £296,757.13 (HMRC decisions of 28 September 2016 and 20 February 2018).

2. Additional appeals were notified to the Tribunal in February 2020 against HMRC decisions in relation to the VAT accounting periods 03/18 to 09/19 totalling £274,274. These decisions were issued on 9 August 2018, 19 November 2018, 14 February 2019, 17 May 2019, 3 September 2019 and 9 December 2019. It was however agreed between the parties that these additional appeals should be stood over behind the two initial appeals.

3. The essential basis of HMRC's decisions was that Bluejay, a holding company, was not making taxable supplies to its subsidiaries for consideration and/or that there was no economic activity being carried on by Bluejay.

THE FACTS

4. I received witness statements and oral evidence from Rod McIllree, Chief Executive of Bluejay, and Garth Palmer, who is a partner in Heytesbury Corporate LLP (Heytesbury), which provides back office support, company secretarial, corporate advisory and accounting services to Bluejay. Mr Palmer is also a non-executive director and Company Secretary of Bluejay. I found both to be credible and reliable witnesses.

5. Mr McIllree joined the company in mid-2015 and could not therefore give evidence as regards matters before this time, but Mr Palmer had been involved with the company from the beginning of its activities.

6. The basic facts were not in dispute between the parties and I find the following as matters of fact.

Outline Facts

7. Bluejay is a UK incorporated holding company which is listed on the Alternative Investment Market ("AIM"). It operates in the mineral exploration and mining industry. It was re-admitted to AIM on 12 November 2012 following its acquisition of the Mitterberg Copper mine project in Austria and the shares were again re-admitted to AIM in December 2013 following acquisition of its Finish assets. Bluejay was the same company throughout this period but because the new assets acquired were worth more than its existing assets, AIM rules required the company to apply for readmission.

8. The decision to incorporate Bluejay in the UK and seek admission to AIM was based upon a number of considerations.

(1) First, the regulation of AIM and the London Stock Exchange provides a sound forum for raising capital in the industry. The degree of regulation means that investors know that a consistent standard is being applied as regards the quality of the information provided by the company.

(2) Second, although the UK itself has little domestic mining activity, it is a major presence globally and provides a pool of professionally trained geologists and mining engineers. These persons are in general based and taxed in the UK. The success of the junior mining industry in the UK, as described in more detail below, has seen numerous

public offerings on AIM and the full LSE exchange. This has attracted further capital and expertise from Australia, Canada and the USA.

(3) Thirdly, the transparency of the taxation regime.

9. The activities over time were set out in the company's accounts and can be summarised as follows:

(1) February 2012 – the company, then known as Centurion Resources plc, was taking steps towards acquiring a licence for the Mitterberg Copper mine in Austria and re-admitting the shares to AIM.

(2) February 2013 – Completed the acquisition of the Mitterberg Copper project (through Centurion Resources GmbH) and re-admission to AIM.

(3) June 2014 – the company acquired interests in various Finish projects which then became the primary focus of its activity. This portfolio was acquired by way of a reverse takeover of Finland Investments Plc (formerly FinnAust Mining Plc) in December 2013, from Western Areas Limited ("Western Areas"), who controlled 84% of that company, together with some minority Finnish investors who controlled the remaining 16%. Western Areas is an ASX 200 company which had experienced management personnel. The company then changed its name to FinnAust Mining Plc

(4) December 2015 – the company acquired assets in Greenland through the acquisition of the Pituffik Titanium Project.

(5) December 2017 – the company was focussed on bringing its projects into production, in particular, the Greenland project. Its Austrian activities were discontinued. A particular focus was the Dundas Ilmenite Project, in North-West Greenland, which it considered to be the world's highest-grade ilmenite. Ilmenite is regarded as the most important ore of titanium. During this year the company changed its name to Bluejay Mining plc

(6) December 2018 – the company continued to focus on bringing its projects into production, in particular those in Greenland.

The Business Model

10. The company's business model is and was to acquire licences to explore for minerals, inter alia, in the territories referred to above (Austria, Finland and Greenland), and then to undertake the work required to prepare for extracting those minerals.

11. The licences are held by local subsidiaries of Bluejay. It is frequently a requirement of the exploration licence that it is issued to a legal entity incorporated in the local jurisdiction and this is always required when the project moves into its exploitation, ie, actual mining, phase.

12. When considering whether to take on a project, Bluejay initially assesses whether there is a potentially commercially viable ore deposit with sufficiently clear data to raise capital through the markets by looking at:

(1) The available geological survey data for the target mineral at the relevant mining department including previous sampling/drilling reports and assay results.

(2) The potential market value of the deposit.

(3) The costs of exploration.

(4) The costs of extraction.

13. The company then conducts a field season to carry out exploration, which requires considerable logistical planning and close supervision of in-country personnel. For Greenland, for example, there were no adequately experienced or qualified technical personnel available in-country. Bluejay therefore needed to engage the technical and management resources necessary to carry out the survey operations and then supplied those services to each subsidiary on an as-needed basis.

14. Following the grant of a licence, Bluejay would determine the initial targets within the areas of interest and establish an exploration program. It would also consider the impact on the environment of any proposed mining or refining operations, the infrastructure requirements and what other permits might be required. The exploration program is almost always spread over a number of field seasons, during which time the environmental impact studies would also have commenced.

15. At the end of each field season the exploration results are reviewed and the data and analysis considered by the board of Bluejay. At this point Bluejay determines whether or not its initial assessment has been borne out by the exploration results. This is to determine whether the deposit can still be considered commercially viable. If the board approve continued exploration operations, a budget is then drawn up for the following field season.

16. Once there is evidence of a viable quantity of mineral, the task of exploration is to identify with increasing accuracy the size and extent of the ore body and the grade of the ore. This process will involve drilling and other sampling and the assay of the results. Further exploration will enable the calculation of a reserve and the establishment of a mining plan.

17. At each stage of the development of a mine a review of the viability of the project is carried out to ensure that it is still worth further research.

18. Following completion of exploration, Bluejay would draw up a pre-feasibility study which, inter alia, estimates the costs of the construction of the mine and related infrastructure. The study requires significant technical support from a wide range of engineering and mining specialists. This is followed by a bankable feasibility study which is intended to provide a more accurate estimate of the costs. Getting to this stage can take 8 years or more. Interestingly, the market value of the ore/metal tends to become a relevant factor at a fairly late stage in the process.

19. At this point Bluejay has the option to either develop and operate the mine itself, sell the project to a major company or enter into a joint venture to develop the mine. It is in the nature of such activities that there is a substantial capital layout during the exploration phase in the expectation that there will be substantial profits if deposits are found and/or a mine is successfully developed. It may also be possible for the subsidiary to sell the licence, together with the accumulated research, at other stages in the exploration process. As an example of a possible development strategy, during the hearing, Bluejay announced a potential joint venture deal with Rio Tinto Zinc involving its Finnish assets.

20. Although services were not provided to subsidiaries before December 2013 it was always the intention of the company to operate in this manner and the work carried out during this phase was always with this intention in mind.

Detailed Structure

21. As set out above the overall structure of the Bluejay business model is:

(1) Having identified a possible mining project, Bluejay raises funds, usually from its shareholders,

(2) The necessary exploration licence is acquired by a locally resident subsidiary,

(3) Bluejay puts together the necessary technical team to carry out the required field work to investigate whether or not the project might be commercially viable,

(4) Bluejay provides the technical services to the local subsidiary,

(5) Bluejay loans the funds to pay for these services to the local subsidiary, and

(6) If and when the project is successful or the licences and relevant assets are sold to another company which is willing and able to take the project to exploitation, the intra-company debt is repaid.

22. I was provided with copies of the various documents between Bluejay and its subsidiaries. The key documents are:

(1) A contract for the company to provide services to its subsidiary, and

(2) A loan agreement covering the terms of the loan from Bluejay to the subsidiary.

23. The key terms of the service agreements, which are broadly identical across all the subsidiaries, are:

(1) Bluejay will provide services consisting of advisory, consulting, marketing, accounting, financial services and technological support and development services and any services necessary for the successful delivery of a mineral resource by the subsidiary.

(2) Bluejay shall be paid for these services by the subsidiary at a fee equal to 115% of the costs and expenses incurred by the company, including an appropriate proportion of any overheads incurred by the company.

(3) Bluejay will invoice the subsidiary on a quarterly basis and the subsidiary will pay the invoice within 30 days of the invoice being served.

24. The key terms of the loan agreements, which again are broadly identical across all the subsidiaries, are:

(1) The loan is of an amount up to EUR10,000,000,

(2) The loan may be drawn down in instalments and on such dates as agreed in writing between the company and the subsidiary,

(3) Interest is payable on some loans but not others,

(4) The loan is repayable on the giving of 30 days' notice by Bluejay, but in any case no later than 10 years after the date of the loan agreement.

(5) The loan agreement also defines standard events of default, which cause the loan to become immediately due and payable.

25. In addition, and very importantly in the view of HMRC, these loans are described in the company's accounts as being repayable "when sufficient cash resources are available in the subsidiaries". HMRC argued that this wording in the accounts effectively meant that there was an additional, unwritten, provision in the loan agreements which stated that the loans were only repayable when the subsidiaries had sufficient cash resources. Mr McIllree and Mr Palmer strongly denied that this was the case but Mr Fell did challenge their evidence firmly on this issue.

26. I cannot agree with Mr Fell on this point. Given the evidence from Mr McIllree and Mr Palmer, my view is that the words in the accounts are merely a correct description of the commercial reality of these loans. This is of considerably more assistance to the readers of the accounts than the more anodyne, but legally accurate description, that the loans were

repayable on demand. The words are simply a description of the commercial position and I cannot read them as adding anything more nor less than that. I therefore find as a matter of fact that there was no such additional legal provisions attached to the loans.

27. The loans were also subject to an annual impairment review and, if it was decided that the assets held by the subsidiary could not support the outstanding loan then the loan was written down to its net realisable value. This is a reflection of the normal accounting standards. It does not mean that the loan was necessarily released or forgiven. It is important that in cases where the subsidiary held more than one licence, even if one of the licences was abandoned the impairment review was carried out by reference to all the assets held by that subsidiary.

28. Up to 2017, the amount of any invoice was simply added to the loan account, and no cash changed hands. After that date, following the commencement of the enquiries by HMRC, the company changed its practice and thereafter it loaned funds to its subsidiaries, which then used those funds to pay the invoices and to pay for services from third party providers. Both parties agreed that this did not change the fundamental analysis of the transactions.

THE LAW

29. The relevant law is set out in Articles 2(1) and 9 of Directive 2006/112, the Principle VAT Directive ("PVD"), as follows:

> "**Article 2(1)**
>
> The following transactions shall be subject to VAT:
>
> (a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;
>
> (b) …
>
> (c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such…"
>
> **"Article 9**
>
> 1. Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.
>
> 2. In addition to the persons referred to in paragraph 1, any person who, on an occasional basis, supplies a new means of transport, which is dispatched or transported to the customer by the vendor or the customer, or on behalf of the vendor or the customer, to a destination outside the territory of a Member State but within the territory of the Community, shall be regarded as a taxable person."

30. Article 168 of the PVD then provides:

> **"Article 168**
>
> 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;
> (b) the VAT due in respect of transactions treated as supplies of goods or services pursuant to Article 18(a) and Article 27;
> (c) the VAT due in respect of intra-Community acquisitions of goods pursuant to Article 2(1)(b)(i);
> (d) the VAT due on transactions treated as intra-Community acquisitions in accordance with Articles 21 and 22;
> (e) the VAT due or paid in respect of the importation of goods into that Member State."

31. I was also referred to a number of cases:

Polysar Investments Netherlands (C60/90)

Floridienne SA & Berginvest SA (C-142/99)

Cibo Participations SA (C-16/00)

Newey (C-653/11)

Portugal Telecom SGPS SA (C-496/11)

Larentia + Minerva mbH & Co KG (C-108/14)

MVM Magyar Villamos Muvek zrt (C-28/16)

Ryanair Ltd v HMRC (C-249/17)

Marle Participations SARL (C-320/17)

African Consolidated Resources Plc v HMRC [2014] UKFTT 580 (TC) [458]

Norseman Gold Plc v HMRC [2016] UKUT 69 (TCC) [657]

U-Drive v HMRC [2017] UKUT 112 (TCC)

Tower Resources plc v HMRC 2019 UKFTT 442 (TC)

W Resources Plc v. HMRC [2018] UKFTT 746 (TC) [823]

Wakefield College v HMRC [2018] EWCA Civ 952

HMRC v. Northumbria Healthcare NHS Foundation Trust [2020] EWCA Civ 874

All Answers Limited v. HMRC [2020] UKUT 236 (TCC)

DISCUSSION

32. In essence, HMRC's arguments for disallowing the input tax are:

(1) Bluejay's central activity is to make a return through investing by buying shares in foreign mining companies. It also supplies technical services to its foreign subsidiaries. In reality whether any payment is made by these subsidiaries to Bluejay is inextricably linked to their success or failure.

(2) In order to be able to claim input tax in relation to supplies of the services to the subsidiaries, Bluejay needs to be able to show that those services are supplied in return for a consideration. It also needs to show that those services are provided for the

purpose of generating income on a continuing basis from the provision of those services, ie, that it is carrying on an economic activity.

(3) Because the invoices for the services are payable if and only if Bluejay's equity investment in the subsidiaries is commercially successful in one form or another, the future payments Bluejay points to as a price are not a genuine agreed price in return for the services. They are really just part of the overall return Bluejay obtains from its equity investment in the subsidiaries if they are successful.

(4) In addition, the role of the services is not to generate income on a continuing basis for Bluejay from payments provided in return for the provision of those services.

33. These arguments involve a significant recharacterization of the contracts between Bluejay and its subsidiaries. In particular HMRC is arguing that:

(1) The contract for services and the loan agreement should be considered as a single agreement which effectively provides that the payments for invoices will only be made if and only if the project is successful, and

(2) The purpose of the provision of the services is not to generate income on a continuing basis but is to enhance the value of its investment in the subsidiary, and, as such, does not amount to an economic activity.

Analysis of Contracts

34. It is well known that in order to categorise a transaction for VAT purpose it is necessary for me to ascertain the true economic and commercial nature of the transactions in question. The CJEU, in *Newey*, at [41] to [45] said:

"41 It is also apparent from the case-law of the Court that the term supply of services is therefore 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 (see, to that effect, *Halifax and Others*, paragraphs 56 and 57 and the case-law cited).

42 As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case-law of the Court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, Joined Cases C-53/09 and C-55/09 *Loyalty Management UK and Baxi Group* [2010] ECR I-9187, paragraphs 39 and 40 and the case-law cited).

43 Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of Articles 2(1) and 6(1) of the Sixth Directive have to be identified.

44 It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.

45 That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions."

35. There has been no suggestion from HMRC in this case that the transactions in question are in some way artificial, but nevertheless, HMRC argue that the contracts as drafted do not represent the economic and commercial reality of the situation.

36. In *U-Drive*, at [36] to [38], the Upper Tribunal stated:

> "36 Mr Conlon submitted, by reference to *Redrow* and *Aimia,* that the test of economic reality is not based, as the FTT stated in [92], on whether final consumption is taxed but on whether the contractual terms constitute a purely artificial arrangement. UDL's case was that the FTT conflated economic reality with final consumption and that was an error of law. Mr Conlon submitted that the CJEU's decision in *Newey* showed that economic reality was only lacking where there was some artificiality. He argued that the FTT were wrong to say that the provisions of the contract were trumped by economic reality in this case and contended that the FTT should have said that there was no scope for applying economic reality in the absence of artificiality. We do not accept that submission. As the CJEU observed in *Newey* at paragraphs 43 – 45, the contractual position normally reflects the economic and commercial reality of the transactions but will not do so where, in particular, those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions. It was common ground in this case that the contracts between UDL and the Repairers were not artificial but we do not consider that to be the end of the inquiry. As the use of the words "in particular" by the CJEU in *Newey* show, artificiality is not the only test of economic reality.
>
> 37 The fourth principle, namely that regard must be had to all the circumstances in which the transaction or combination of transactions takes place, is not controversial. Where there are multiple contracts and participants, it is necessary to look at the transactions as a whole in order to determine their economic reality. HMRC's position is that the FTT did have regard to all the circumstances in this case.
>
> 38 In conclusion, we consider that it is clear from *Airtours* and the cases referred to in that case that determining who is receiving a supply is a two-stage process. The starting point is to consider the contractual position and then consider whether, taking account of all the circumstances, the contractual analysis reflects the economic reality of the transaction."

37. It is therefore clear that even if the contracts are not artificial it is still incumbent on me to consider whether or not the contracts do indeed reflect economic and commercial reality. It is also clear that this is an objective test and not a subjective test to be considered in the light of the parties' intentions.

38. *U-Drive* concerned a tri-partite arrangement, which made this task particularly challenging in that case. Fortunately, this case concerns only two parties, but I do not think that means that I can simply follow the contractual position.

39. For Bluejay, Mr Firth submitted that, having raised the external funds, it could have advanced those funds to its subsidiaries in a number of different ways. It could have injected the funds by way of additional share capital or it could have made loans to the subsidiaries. In both cases the subsidiary could have paid the invoices out of the funds in its possession.

40. Analogies such as this are not always useful, but, in this case, I have come to the conclusion that there is nothing in the contracts as they stand which contradicts the evident economic and commercial reality of the transactions. In my view therefore the contracts do reflect the underlying economic and commercial reality of the transactions. Importantly therefore the contract for services provides that invoices are to be settled within 30 days of

the invoice being submitted and I cannot see this as anything other than consideration for the services rendered. There is nothing contingent about the payments to be made under this contract.

41. For the sake of clarity, I would add that it is well established that charging the value of an invoice to a loan account is the equivalent of payment. The change in practice after 2017, under which Bluejay made cash advances to its subsidiaries, which then paid the invoices, made no difference in this respect.

42. Mr Fell also raised the argument that even if the wording in the accounts fell short of meaning that there was an additional unwritten term in the loan agreement the principle of estoppel meant that Bluejay could not demand payment until the subsidiary had sufficient cash resources. Again, I consider that this is reading far too much into those words. They are simply a description of the commercial reality and are no more than that.

Implication of Contingent Payment

43. Having decided that the payments for services are not contingent upon the success or otherwise of the project I could decide that HMRC's main argument fails and dispose of the appeal on that basis. However, in case I am wrong on this point, I will also consider the implications of the payment of the invoices being contingent on the success of the project, as HMRC argue.

44. Mr Fell referred me to a number of cases, in particular *African Consolidated Resources v HMRC* and *W Resources v HMRC*, which both considered situations which were commercially very similar to Bluejay's operating structure.

45. In *African Consolidated Resources* the Tribunal considered, inter alia, whether the provision of services by a holding company to mining subsidiaries was supported by consideration. In that case the fees were clearly stated to be based on what the subsidiaries could afford and were rolled up into loans after services were provided. The Tribunal held that because the fees charged by the holding company were based on what the subsidiaries could afford, and not on the value of the services, they did not establish the necessary link needed for the fees to be regarded as consideration. Importantly, the Tribunal's reasoning was approved by the Upper Tribunal in *Norseman*.

46. In *W Resources* the Tribunal considered, inter alia, whether the provision of services by a holding company to mining subsidiaries was supported by consideration. Over some time periods, the obligation to pay fees was not crystallised, it being a condition of crystallisation of the obligation that an invoice be issued when the subsidiary started to generate revenues. The Tribunal held in relation to those time periods that the services of the holding company were not supported by consideration.

47. The Tribunal considered that the sums to be received were uncertain at the time of provision of the service, because payment was subject to a contingency, such that the obligation to pay only crystallised when an invoice was issued following the generation of revenues. The Tribunal therefore held that this broke the necessary link between the services provided and the consideration which was paid.

48. It is however very important in my view to consider the reasoning of Judge Beare in that case. He set this out very fully at [115] to [117] as follows:

> "115 Left to my own devices, I would have been inclined to conclude that, because the necessary degree of reciprocity between the relevant supplies and the payments will exist as long as the contingency is satisfied and the parties intended at the outset that the contingency would be satisfied, this should be treated in the same way as any other

situation where a person intends to make future supplies which will definitely be for a consideration. If that is right, then I would necessarily conclude that, in the period prior to the Threshold Date, the Appellant was carrying on an economic activity by virtue of its intention to make supplies for a consideration in the future even though it was not making supplies for a consideration during that period.

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

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

49. I cannot therefore simply accept the approach of Judge Beare without considering in detail the decision of the Upper Tribunal in *Norseman*.

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

51. As Warren J in the Upper Tribunal noted, at [94] to [96]:

"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 (in the FTT) 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'.

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."

52. The words in the decision in *Norseman* to which Judge Beare was referring are contained in [136] of Warren J's decision as follows (emphasis added):

"136 **On the facts found by the Judge**, Norseman is reduced to reliance on a vague and general intention that payment would be made. This is not a case where the payment could be particularised in any way. Thus, **on the facts found**, it cannot be said

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

53. I cannot read these words as referring to anything other than the facts found by the FTT in *Norseman*. With due respect to Judge Beare, he seems to have interpreted them as being a more general statement that where there is uncertainty about a payment then there is no valid consideration. I do not regard those words as having any more general reference. In my view they are only a reference to the situation of the particular facts of *Norseman* and should not be interpreted as having a wider effect.

54. *Tower Resources* was another FTT decision (Judge Brooks) but with facts very similar to those in this case. In his decision, at [65] Judge Brooks states:

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

55. Judge Brooks did not consider it appropriate to follow the approach taken by Warren J in *Norseman* because he considered the facts to be sufficiently different. In *Norseman* there was what was described as a vague intention for payments to be made, which is very different from the current appeal.

56. In this case it is quite clear that there was a very specific intention that the payment should be made and, **at the time the supplies were made**, a very clear expectation that payment of the loans would be made. Indeed, as Mr McIllree said many times during his evidence, it would have been in dereliction of his duty as a director of Bluejay if he had continued to supply services to its subsidiaries if he did not expect the loans to be repaid. The fact that some of those loans, ie, those to Centurion Resources GmbH, were not in the end repaid is not relevant.

57. Therefore, even if I accept the proposition put forward by Mr Fell that payment of the actual invoices was contingent upon there being a successful outcome to the projects, I consider that there was still proper consideration for the services supplied by Bluejay.

Economic Activity

58. I must now turn to the question as to whether or not Bluejay was carrying on an economic activity.

59. At one stage, Mr Fell argued that the provision of services to its subsidiaries was merely ancillary to its main activities of making profits out of the exploitation of the licences held by its subsidiaries. This may well have been so, but neither Mr Fell nor Mr Firth directed me to any authority which indicated that this would have been fatal to Bluejay's claim for input VAT.

60. The CJEU has considered the position of a holding company providing services to its subsidiaries on a number of occasions. In *Polysar*, the CJEU stated, at [13] to [14]:

> "13 It does not follow from that judgment, however, that the mere acquisition and holding of shares in a company is to be regarded as an economic activity, within the meaning of the Sixth Directive, conferring on the holder the status of a taxable person. The mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis because any dividend yielded by that holding is merely the result of ownership of the property.
>
> 14 **It is otherwise** where the holding is accompanied by direct or indirect involvement in the management of the companies in which the holding has been acquired, without prejudice to the rights held by the holding company as shareholder."

61. Much has been made of the words "it is otherwise", particularly as regards the use of the word "is". The Court does not say "may be", but "is". It has been suggested in other cases that this means that if a holding company is providing any services to its subsidiaries then this automatically means that the economic activity test is fulfilled. This has been referred to as the Automatic Satisfaction Contention, However, given that in other cases involving holding companies, the CJEU has been careful to analyse the nature of any services provided to a subsidiary, such as *Cibo*, *Floridienne* and *Marle*, it is clear that it is essential in such cases to examine the actual services provided to a subsidiary to establish if the holding company is carrying on an economic activity. In my view, there is no automatic satisfaction of this test.

62. In this context Mr Fell referred me to *Wakefield*, and in particular [55] of that judgement.

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

63. Mr Fell also placed significant weight on the words in Art 9 of the PVD:

> "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."

64. Mr Fell then sought to argue, as I understand it, that because the end objective of Bluejay was not to make a profit from the provision of technical services, but to make a profit from the onward sale of its exploration licences, then this did not amount to obtaining income therefrom "on a continuing basis", and thus Bluejay was not carrying on an economic activity.

65. I am not sure that this is what Art 9 says. In a separate sentence, prior to the sentence quoted above, Art 9 says:

> "Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'."

66. There is no qualification in this sentence as to obtaining income therefrom "on a continuing basis". This qualification only therefore appears to apply to the exploitation of tangible or intangible property.

67. Nevertheless, Mr Firth argued that in any case what was meant by these words was that an activity which was only a one-of would not normally qualify, but that if the activity were carried on in a more regular fashion, such as in the current case, then that would qualify.

68. No authority was quoted to me as regards the need for or the meaning of "on a continuing basis", but in my view it is clear that Bluejay did obtain an income stream from these activities, which continued for many years, given the time taken for these projects to come to maturity.

69. In my view therefore, Bluejay was carrying on an economic activity as regards the technical services it was providing to its subsidiaries.

Summary

70. In summary therefore I have made the following findings:

(1) Bluejay was providing services to its subsidiaries for a specified consideration of 115% of the cost of providing those services.

(2) The loan agreements and the contracts for services were two separate contracts and therefore payment of the invoices for those services was not contingent on the successful outcome of the projects. The invoices should be considered to have been paid when they were added to the loan account.

(3) Even if the invoice payments were contingent on the successful outcome of the projects, on the basis that the loan agreements and the services contracts should be treated as single documents, then the fact that the payments were contingent on the successful outcome of the projects does not mean that the services were not provided for consideration.

(4) Bluejay was carrying on an economic activity when supplying technical services to its subsidiaries.

(5) During the period prior to issuing its first invoices, in December 2013, Bluejay was at all relevant times intending to make supplies of services to its subsidiaries.

71. For the reasons set out above therefore I have decided that this appeal should be ALLOWED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

PHILIP GILLETT

TRIBUNAL JUDGE