TC02431

Appeal number: TC/2009/14936

VAT – statutory body funded by government under performance agreement – whether supply for consideration – whether economic activity - no

FIRST-TIER TRIBUNAL
TAX CHAMBER

SOUTH AFRICAN TOURIST BOARD **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE
GILL HUNTER

Sitting in public at Bedford Square, London on 22, 23, 24, and 25 May 2012

M Hall QC and F Mitchell, Counsel, instructed by VATit (Pty) Ltd, for the Appellant

S Singh, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. The appellant South African Tourist Board ("SATB") appeals against a decision of HMRC dated 8 September 2009 that 95% of the VAT incurred on supplies to it was irrecoverable on the grounds that the appellant's activities are not business activities. HMRC later issued a ruling accepting that only 85% of the VAT on supplies to the appellant should be disallowed. The appellant considers that 100% of the VAT on supplies to it should be treated as input tax attributable to taxable supplies and fully recoverable.

2. The only issue in front of the Tribunal was to what extent the appellant carried on business activities: it was agreed by the parties that the VAT on expenses incurred by SATB was properly attributable to SATB's activities and that those activities would be taxable if they were business activities.

3. SATB had, in summary, two sources of income. Income from the South African Government and income from other persons and entities. HMRC's second ruling, as mentioned above, accepted that the latter but not the former was consideration for taxable supplies, and this gave rise to the 85%/15% split, as some 85% of its funds were from the South African Government.

4. SATB gave two grounds of appeal in its Notice of Appeal. By the time of the hearing it elected to pursue only the first of these, which was that in its opinion HMRC's ruling was incorrect because it made wholly taxable supplies of marketing and other similar services to the South African Government and that such a supply would be taxable in the UK if made in the UK.

5. The second ground which it no longer pursued was that if it was wrong on this, then HMRC was wrong to disallow 85% of the input tax and that no more than 40% should be disallowed. At the start of the hearing the parties appeared agreed that if SATB lost on this appeal then it would be entitled to recover 15% of the VAT on its expenses. We will refer to this point again in paragraph 291.

Index

6. This decision is rather long and for ease of reference we have created an index:

THE FACTS

7. The facts were not in dispute. Mr Johan Van Der Walt was Chief Financial Officer of SATB responsible for its finances, compliance and risk management. He gave evidence for the appellant and was not cross examined. Mr M Wilkison, officer of HMRC, also gave an unchallenged witness statement setting out the correspondence between SATB and HMRC.

8. From the evidence we were given we find as follows:

Creation of SATB

9. The appellant was established in South Africa by South African domestic legislation, the Tourism Act 1993. The preamble to that Act stated that its purpose was:

> "To make provision for the promotion of tourism to and in the Republic; to further regulation and rationalization of the tourism industry; measures aimed at the maintenance and enhancement of the standards of facilities and services hired out or made available to tourists; and the co-ordination and rationalization, as far as practicable, of the activities of persons who are active in the tourism industry; with a view to the said matters to establish a board with legal personality which shall be competent and obliged to exercise, perform and carry out certain powers, functions and duties; ……."

10. In that Act, the aim of SATB was stated to be:

> **"Section 3 Object of the Board**
>
> The object of the Board shall be to promote tourism by encouraging persons to undertake travels to and in the Republic, and with a view thereto to take measures in order to attempt to ensure that services which are rendered and facilities which are made available to tourists comply with the highest attainable standards."

11. This was amended by the Tourism Act 1996 to read as follows:

> **Section 3 Object of Board**
>
> The object of the board shall be, with due regard to the sustainability of environmental resources, to promote tourism by encouraging persons to undertake travels to and in the Republic and with a view thereto –
>
> (a) to take measures in order to attempt to ensure that services which are rendered and facilities which are made available to tourists comply with the highest available standards;
>
> (b) to manage information and conduct research relating to tourism;

(c) to advise the Minister on tourism policy, either of its own volition or when requested to do so by the Minister."

12. From this we find that the SATB was a statutory body established to promote tourism in South Africa.

13. There was a dispute over the meaning of Section 3. SATB's position was that it had a *power* to promote tourism in South Africa: s 3 as amended, said Miss Hall, gave SATB three objectives (ie (a), (b) and (c) as set out above) but it did not *compel* SATB to carry them out; HMRC's position was that SATB had a *duty* to promote tourism in South Africa.

14. We were not given any evidence on the legal status of SATB under South African law. We presume that statutes in South Africa would be interpreted in the same way as under English and Welsh law. We find SATB was a statutory body set up with stated objectives: it could have no objectives other than what were set out in s 3 of the Act. In doing anything, it was by law only able to act in pursuance of its objectives. And indeed there was no suggestion that SATB acted beyond its statutory remit. It was, therefore, in whatever it did, carrying out its statutory objectives. We agree with HMRC that SATB had a duty to promote tourism in South Africa: there is no other sensible interpretation of the Act. While it might be true to say that if SATB did not have resources, it was not compelled to act, it is also true to say that while it did have resources, it was compelled to use them to promote South Africa as a tourist destination in accordance with the Act.

15. The Department of the South African Government referred to in the Tourism Act changed its name over time. We will, for convenience, refer to it as the Department of Environmental Affairs and Tourism and "the Department" for short and we will refer to the Minister of the Department as simply "The Minister".

Powers of SATB

16. Section 13 of the Tourism Act set out SATB's powers. It had the power to do a great many things, and could act as an independent legal entity in respect of most things, such as entering into contracts. However, certain things it could only do with the consent of the Minister and these were to:

- Lease, buy or sell real property;
- Enter into agreements for the promotion of tourism with other bodies;
- Borrow money.

In practice, however, we find the Minister's prior approval was not always sought before entering into these specified contracts. So that, for instance, SATB bought property without referring to the Minister. It acted with considerable independence from the Department.

Management of SATB

17. Section 4 of the Tourism Act dictated that SATB would have between a minimum and maximum number of board members (the numbers changed at various times). It specified that these board members would be appointed by the Minister for Tourism.

18. The Chief Executive Officer was appointed by the Minister for Tourism but we find that, since about 2000, SATB has advertised for other board members in national newspapers whenever it wished to make an appointment. It decided which of the applicants it wished to appoint and recommended its chosen candidate to the Minister. The Minister in practice always accepted SATB's recommendation.

19. The result has been that while at inception in 1993 SATB's board comprised mostly representatives from government and regional tourism boards, since about 2000 the majority of its board members have been businessmen, albeit we find many with other public appointments. We accept Mr Van Der Walt's evidence that SATB's policy on appointment is to find people suitable for the role irrespective of whether they have connections with the South African Government.

20. The board of SATB delegated many of its decisions to sub-committees and management committees. The South African Government had no input into who sat on these committees.

21. In conclusion, we find that the South African Government did not control the day to day management of SATB as this was in the hands of SATB's board and, although legally the Government could control who sat on SATB's board, in practice the Government chose not to do so. In practice, SATB had a great deal of autonomy from the South African Government.

Financial oversight of SATB

22. SATB was bound by the Public Finance Management Act 1999 of South Africa ("PFMA"). This Act required SATB (as well as the many other public bodies to which it applied) to maintain adequate accounting records and to produce externally audited financial statements in accordance with South Africa's GAAP.

23. SATB therefore kept full accounts, submitted full accounts to the Minister, and published audited financial statements. We were shown examples of these. The auditor was the Auditor-General.

24. The PFMA also contained restrictions on what the public bodies could do, so that, for example, by law SATB needed the approval of the Minister before it could open a bank account or buy property. In practice, as we have said, we find, SATB carried out such transactions without approval from the Minister.

Government policy

25. Mr Van Der Walt explained that growing tourism to South Africa was a very important part of the South African's government's strategy for economic growth and job creation. This explained the very large sums provided to SATB to carry out its activities.

26. There was also a dispute between the parties whether SATB was bound to carry out the Government's policy on tourism. We find that there was no such express obligation in the Act as enacted or amended. Indeed, s 3 of the amended Act only required SATB to have regard to the "sustainability of environmental resources" and required SATB to advise the Government on tourism policy, rather than follow it.

27. But we find it too simplistic a view to say that in practice SATB operated independently of South African Government policy. Under the Tourism Act SATB was obliged to cooperate with the Government:

> **S13A Relationship of board with Department**
>
> In the exercise of its powers, the performance of its functions and the carrying out of its duties the board shall –
>
> (a) cooperate closely with the Department in order to realise the object of the board and to promote efficiency by eliminating a duplication of their functions and activities; and
>
> (b) through the agency of the Department, liaise with other State departments."

28. Further, the Government controlled the greater part of SATB's budget and ultimately had power to control appointments to the board: were it significant to our decision, we would say SATB had not proved that in practice it acted independently of government policy but in law we find it could have done so.

Activities of the SATB

29. In carrying out its objectives, SATB entered into many different activities, many of which can be conveniently grouped under the following headings:

- Production of a free magazine giving information on areas of South Africa, and distribution of other "freebies" promoting South Africa;
- Publishing advertisements;
- Holding exhibitions and trade shows (see paragraph 37);
- Articles in newspapers and magazines;
- Joint marketing ventures;

- Incidental revenue generation eg sale of images from SATB's database or renting out excess office space. HMRC accepted that this category was a business activity which would be taxable if the place of supply was the UK.

Funding

30. The Tourism Act provided for SATB's funding as follows:

> "**Section 16 Funds of board**
>
> (1) The funds of the board shall consist of:
>
> (a) money appropriated by Parliament for the purpose;
>
> (b) income derived in terms of the provisions of this Act;
>
> (c) donations or contributions received by the board from any source."

31. The dispute in this appeal was whether the funds received under s 16(1)(a) above were consideration for supplies made by SATB (or what would have been supplies if made in the EU).

32. The Government grant was the greater part of SATB's funds, but it also received income as per s 16(1)(b) & (c). As an example we were shown SATB's Strategic Plan for 2005/6. We find that SATB's principle sources of income were (approximately) as follows by percentage (rounded) of total income:

Government grant	80%
TBCSA levy	12%
Interest and FOREX	4%
Indaba and other trade shows	4%
Campaign partners	0.5%

33. We find that the Government grant was split into two figures: one for "operational" and one for "marketing". In other words, we find that the grant was calculated by reference to what funds SATB would need in order to operate (eg staff costs) and what funds it would need to pay external providers of marketing services. However, this was merely a method of calculation. The funds were not earmarked to be used for one or other of these costs and expenses: s 16(2) allowed SATB to use its funds for any expense, except to the extent they were donations given to SATB conditional upon their use for a particular purpose. Of course, as we have said above in paragraphs 10 and 11, SATB was obliged generally to use its funds to promote South Africa as a tourist destination in accordance with the Act.

34. The amount of the government grant and when it would be paid was set out in the Performance Agreement and we explain this in more detail below.

35. The TBCSA levy we deal with separately below at paragraph 298.

36. The third entry in the above table is a reference to the interest and foreign currency exchange gains that SATB was able to earn on money that it held in its various accounts.

37. The fourth entry is a reference to income from trade shows. In terms of income, the most important was Indaba. This was a four day annual event sponsored by SATB and organised by a third party to showcase South Africa's best tourism products. SATB received 50% of the profits from it while the organiser kept the other 50%. The show made a profit from sponsorship fees and from attendance fees paid by exhibitors and delegates. HMRC accepted that this source of income would be taxable if the supply was made in the UK.

38. The fifth entry is a reference to what were seen as cost sharing arrangements with "campaign partners" and we refer to this in more detail below. HMRC originally accepted that this source of income would be taxable if the supply was made in the UK and we refer to this point again at paragraph 291.

Economic risk

39. Mr Van Der Walt's evidence was that the Board of SATB bore the responsibility for ensuring that SATB's expenses did not exceed its income. Indeed the Tourism Act specifically provided that SATB should not incur expenditure which would mean the funds approved by the Government would be exceeded.

40. In practice we do not find that SATB ever exceeded its budget or needed to ask for extra funds because it would exceed its budget: we find it did ask for (and receive) extra funding occasionally, such as in 2010, when it saw a marketing opportunity (the FIFA World Cup) for which it had not budgeted.

Annual budget and business plan

41. Each year SATB drew up budgets and business plans. Its "strategic plan" was a business plan covering the next 3 years and its "strategic framework" was a business plan covering the next 5 years. The plans set out SATB's objectives and how it intended to achieve them. The Minister was only asked to approve the plan once it had been drawn up.

42. SATB's objectives included a set number of tourist arrivals in South Africa and a specified average amount of money spent in South African by each tourist. It also included making South African the "most preferred tourism brand." The various high level strategies it intended to implement to achieve this included promoting the brand; sharing SATB's "vision" with its "key shareholders" and getting the best out of their staff and improving operational efficiency.

43. Each year SATB delivered an Annual Tourism Report which reviewed the number of tourists visiting and how much they spent, and therefore to what extent SATB had actually met its targets. It also delivered Quarterley Performance Reports to the Government at the end of each quarter, reviewing its progress.

Performance Agreement

44. Each year SATB entered into a performance agreement with the South African Government. We find that there was nothing in the Tourism Act that obliged it to do so, but it had the power to do so.

45. We were given the Performance Agreement for 2005/06 as a representative sample. We find it was very detailed. It incorporated SATB's budget and business plan. It set out headline obligations and headline funding.

46. The preamble provided as follows:

> **"Preamble**
>
> Whereas
>
> A. DEAT is a public sector department of the Government of South Africa
>
> B. [SATB] is a statutory body established under the Tourism Act of 1973 as amended and listed as a public entity under the PFMA. [SATB] has developed an approach to market South African tourism generically to Primary and Secondary markets in order to contribute towards sustainable employment opportunities, GDP growth and transformation.
>
> C. The DEAT has agreed to transfer funds in accordance with the PFMA to [SATB] to implement international tourism marketing and other activities so agreed."

References to DEAT were references to the Department of Environmental Affairs and Tourism.

47. The Performance agreement recorded that SATB would "aim" to achieve the specified targets (of number of tourists and the average amount of spend). Clause 4.1 said that

> "the project shall attain the targets specified in Schedule 1"

In summary, we find that SATB had an obligation to the Government under this Performance Agreement to achieve its targets on increasing tourism.

48. The Performance Agreement set out how much the Government would fund SATB over the forthcoming year and when and how much the instalments would be:

> **"5.1** It is hereby recorded that the DEAT is committed in principle to support the project to the extent of R 346,969 million during the 2005/6 financial year, payable as follows….[clause setting out payment by instalments]."

49. We find that the language of the Performance Agreement was to talk of "grants" but we agree with Miss Hall that we should look at its substance and not the labels used.

50. Clause 11 allowed DEAT to take action if the funds it provided to SATB were not utilised in achieving SATB's aims: it could cancel the project.

51. Clause 5.3 provided that

> "all interest accrued on this funding will be applied by [SATB] to fund additional marketing activities"

52. And clause 5.5 provided that:

> "the parties agree that if there are any uncommitted funds available at the end of the duration of the agreement, such funds shall be refunded to DEAT."

53. In practice SATB did not always get the funding it asked for in its budget. If the Department would not provide the full finding, SATB would have to revise its plans and cut back on the activities it was planning to carry out. We were shown a letter to the Department from SATB explaining that a reduction in funds announced by the Department would result in a cut back of SATB's activities.

TBCSA levy

54. We find that the TOMSA was a voluntary levy on the sale of hotel accommodation and rental cars to tourists collected by those tourist service providers who chose to do so. The levy was paid to the Tourism Business Council of South Africa ("TBCSA") who paid it to SATB under a Memorandum of Understanding ("MOU").

55. The MOUs with TBCSA were very similar to the ones attached to the annual Performance Agreement. They set out the detail of how SATB would promote South Africa as a tourist destination in return for the levies.

56. The preamble to the MOU we were shown read as follows:

> **PREAMBLE**
>
> WHEREAS
>
> A Voluntary levies, referred to as TOMSA levies, are collected by various tourism product owners from tourists in South Africa and paid over to the TBCSA;
>
> B TBCSA, whose main object is to optimize and grow the private sector tourism industry in South Africa, administrates these levies of which the main purpose is to market South Africa as a preferred tourist destination to potential tourists both inside and outside South Africa;
>
> C TBCSA pays these levies minus administration expenses over to [SATB] who has developed an approach to market South Africa tourism generically to Primary and Secondary overseas markets as well as the domestic tourism market in order to contribute towards sustainable employment opportunities, GDP growth and transformation; and

> D. [SATB] has agreed to apply these levies fully towards the marketing of South Africa.

57. The agreement recorded that SATB would "aim" to meet a specified target number of tourist arrivals, and to achieve various other obligations such as executing its business plans. SATB was also obliged to favour TOMSA levy collectors when promoting tourist services.

58. Unutilised funds in any particular year had to be carried forward and applied to marketing activities in future years:

> **5.5** "[SATB] shall pay the amounts received from TOMSA into its normal operational bank account to fund its marketing operational activities. All interest accrued on this funding will be applied by [SATB] to fund additional marketing activities across all territories.
>
> **5.6** …
>
> **5.7** The parties agree that if there are any uncommitted funds available at the end of the duration of the agreement, such funds shall be carried forward to the next financial year of [SATB] and exclusively utilised to fund marketing activities."

Cost sharing arrangements

59. SATB was permitted by the Tourism Act to enter into partnerships with the private sector, and we find it was clearly anticipated by the South African Government that it would do so, and we find that it did so.

60. We were shown an example of an agreement with Emirates, but this was merely one of many similar agreements. The agreement was to share the costs of promoting flights to South Africa. SATB and Emirates had a mutual interest in this as SATB wanted to encourage tourism and Emirates wanted to sell flights. In the agreement each party paid £200,000 towards cost of marketing materials, although we find in practice Emirates paid SATB £200,000 and SATB paid for the marketing campaign.

61. We find that the contract between SATB and Emirates was a typical commercial contract. As we have said, HMRC's ruling accepted that the payment by Emirates and other third parties to SATB under such costs sharing arrangements was in consideration of a supply that would be taxable if made in the UK. We refer to this point again in paragraph 295.

Commercial approach

62. Mr Van der Walt emphasised that SATB was a business orientated organisation with a very commercial and professional approach. In his words, SATB had moved away from the "spray and pray" approach and adopted targeted strategies and performed cost/benefit analyses.

63. SATB's was a data driven strategy measuring how effective various campaigns and activities carried out by SATB were at increasing tourism to South Africa. He also said part of SATB's new approach had been to create a brand image of South Africa as a desirable tourist destination.

64. Part of its commercial approach was to produce the business plans to which we have already referred. It also had in place risk management strategies. SATB's case was that it used the language and approach of business. It operated like a business.

65. We were directed to a great deal of material to demonstrate SATB's commercial approach. Indeed it was apparent that it was part of the South African Government's strategy that SATB would have a commercial approach. For instance, in a Governmet debate in 2000 on an amendment to the Tourism Act, Mr Moosa, the then Minister for Environmental Affairs and Tourism said, in respect to the strategy to improve South Africa's share of the global tourism market:

> "a leaner, more focused, professional and efficient board is therefore required in line with this overall strategy …"

66. We accept that SATB was fully commercial and professional in its approach to what it did. But whether its main activities, for which it received the funding from the South African Government, was, as a matter of law, a business activity is the question we are asked to decide. SATB's case is that its commercialism was relevant to the answer to this question: the extent to which we find it to be relevant is discussed in paragraph 89-91.

UK branch

67. A branch of the SATB was established in the UK. It is the VAT incurred by that branch that is at stake in this appeal. There was no suggestion that the UK branch of SATB was in any way a distinct entity from SATB as a whole, and in this appeal we consider the activities of SATB as a whole.

Summary of the appellant's case

68. SATB's case is that it was not like a government department; it was entrepreneurial and target-focused with considerable autonomy from the South African Government. It acted like a public company, just one which happened to have the South African Government as its major customer (and shareholder).

69. In so far as the South African Government either did or could control SATB under the terms of the Tourism Act, this , on the appellant's case, was irrelevant. The appellant's view is that although SATB was a statutory body, the legal relationship between the Government and SATB which matters was the Performance Agreement. This was, or was like, a contract. SATB was not obliged to enter into a Performance Agreement but chose to do so. The funds paid by the South African Government to SATB were paid under the Performance Agreement and not the Tourism Act. Therefore, on the appellant's case, the Performance Agreement provided for reciprocal performance and amounted to an economic activity by SATB.

70. HMRC disputes whether there was sufficient "direct link" between SATB's activities and the funding provided by the Government for the latter to be consideration for the former.

THE LAW

71. The only issue before this Tribunal is whether SATB is entitled to recover VAT on supplies to it. And that depends on whether SATB makes supplies itself. It is accepted by all that if this Tribunal finds that SATB does make supplies to the South African Government then they are not taxable as they were not made in the UK but that they would have been taxable had they been made in the UK. And this is enough to entitle SATB to recover VAT as input tax under Regulation 103 VAT Regulations 1995.

72. So although there is no question of SATB having a liability to account for VAT on the funds received from the South African Government, we are nevertheless concerned with the question whether the funds from the South African Government were in consideration for what would have been taxable supplies if made within the EU.

73. VATA 1994 provides:

> **Section 4 Scope of VAT on taxable supplies**
>
> (1) VAT shall be charged on any supply of goods or services made in the UK, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
>
> (2) ….

74. We must interpret s 4 VATA 1994 consistently with the provisions of the VAT Directives it was intended to implement. Lord Slynn giving the unanimous judgment of the House of Lords in the *Institute of Chartered Accountants of England & Wales* [1999] STC 398 (referred to hereafter as "*ICAEW*"), to which we refer in more detail below, said:

> "[page 402e-f] …there is a difference in the wording between s 4 of the 1994 Act and arts 2 and 4 of the Sixth Directive…..The 1994 Act must so far as possible be construed so as to give effect to the Sixth Directive (see *Marleasing SA* ... (Case C-106/89 [1990] ECR 4135). It does not seem to me that there is any difficulty here in doing that and one would expect the same result to follow from the application of either approach"

75. We are concerned with the provisions of the Principal VAT Directive 2006/112/EC ("PVD") as HMRC's decision was given in 2009. However, there is no material difference for these purposes to the provisions in its predecessor the Sixth VAT Directive ("6VD") to which Lord Slynn referred. Article 4 6VD is now comprised in Articles 9 to 13 PVD.

76. Article 2 PVD provides:

> **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;
>
> (d) ….

It was not in dispute and we find that only taxable persons acting as such can make taxable supplies.

77. Article 9 of the PVD provides the definition of a taxable person:

> " 'taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity."
>
> …..

78. Therefore, in line with interpreting VATA consistently with the PVD, we find that acting "in the course or furtherance of any business" in s 4 VATA means "independently carrying out in any place any economic activity, whatever the purpose or results of that activity." We recognise that the latter phrase comes from the PVD's definition of "taxable person" and the former phrase from the VATA's definition of a "taxable supply". Nevertheless, with the intention of interpreting the English law consistently with European law, it is clear that the expression in the English statute must be taken as intended to enact the concept of economic activity.

79. The test propounded in the case of *Lord Fisher* [1981] STC 238 (High Court) of whether a person is acting in the course of a business, was recited by the House of Lords in the *ICAEW* decision:

> "(page 404e)…was it (a) a 'serious undertaking earnestly pursued', (b) pursued with reasonable continuity; (c) substantial in amount; (d) conducted regularly on sound and recognised business principles; (e) predominantly concerned with the making of taxable supplies to consumers for consideration; and (f) such as consisted of taxable supplies of a kind commonly made by those who seek to make profit from them….."

80. As we have said, the VATA test of "in the course or pursuance of a business" must be interpreted as consistent with the VAT Directives. And it seems to us that this test is consistent. Questions (a) to (d) look at whether the activity is an commercial one in the sense of whether it is truly a business rather than what might be termed a hobby.

81. Question (e) looks at whether the activity fundamentally concerns supplies made for consideration. Question (f) looks at whether they are intrinsically economic activities in the sense of whether they are comparable to those activities undertaken

by entities seeking to make a profit. So question (e) appears to be looking at Art 2 matters ("taxable supplies") and question (f) at Art 9 matters ("taxable person"). But it is not so easy to distinguish between these two matters, because only a taxable person acting as such can make taxable supplies: and taxable supplies can only be made by a taxable person acting as such. This is because to be within Article 2 a supply must be made by a "taxable person acting as such" and to be a taxable person, the person must be carrying on an economic activity (Art 9). In other words, there can only be a taxable person acting as such, or taxable supplies, where there is economic activity.

82. This explains why Counsel for the appellant chose to take us through the cases in date order rather than rigidly distinguishing between cases concerning Art 2 and those concerning Art 9.

83. HMRC consider that SATB was a taxable person: it is not in dispute that at least some of SATB's activities would be taxable if made in this country (eg sales of images from their database). HMRC chose to base their case on Article 2 and the issue whether receipt of money from the South African Government was in return for a taxable supply.

84. While it is not in dispute that SATB was a taxable person, we consider both Article 2 (whether a supply for consideration is made by a taxable person acting as such) and Article 9 (the definition of taxable person) in deciding whether there was a supply for consideration.

85. Indeed, asking whether a person is making taxable supplies for consideration is virtually the same as asking the question whether a person is acting as a taxable person. If there is economic activity, it presupposes supplies are made for consideration; and if supplies are made for consideration it presupposes there is economic activity.

86. With this in mind, we move on to consider the question in detail. We are able to deal with the appellant's case on (a)-(d) quickly and do so first. The rest of the decision notice looks at (e) & (f) and whether SATB made supplies for consideration.

A serious undertaking conducted on sound business principles?

87. So far as questions (a)-(d) are concerned we find that SATB acts in a commercial and efficient manner; its undertaking is a serious one earnestly pursued, conducted with continuity, substantial in amount and conducted regularly and on sound and recognised business principles.

88. We note that the Tribunal in *ANTO* (1998) VATTD 15561, which is a case we refer to in more detail below, in part based its decision on ANTO's professionalism.

89. But we agree with HMRC that professionalism is irrelevant in the sense that no one is suggesting that SATB conducted its activities in anything other than a commercial and efficient manner. SATB is clearly in receipt of very large sums of

public money from the South African Government. It is no surprise that it was, and by law was required to be, accountable for that money. It is no surprise that it conducted its business in a professional manner nor that the South African Government measured SATB's performance against targets and wanted value for money. It is to be expected that SATB had a risk management strategy and used the language of business.

90. It is accepted there is no issue with questions (a) to (d) of Lord Fisher's test. So SATB's professionalism is not in issue. But for SATB to succeed in its appeal, questions (e) and (f) must also be answered positively. It must be making supplies for consideration. That it was professional in what it did does not tell us whether it was undertaking an economic activity.

91. It may be true that Government departments and public bodies have at least the reputation of being less efficient and less concerned with value for money than private enterprise. This may in part be a reason why the South African Government gave SATB a great deal of autonomy. But, once an entity meets the minimum requirements of (a)-(d), whether it is carrying on an economic activity is not measured by the degree of professionalism it employs.

92. So we move on to consider questions (e) and (f) of Lord Fisher's tests and Art2 and Art 9 of the PVD. Although recognising that whether there are "supplies of services for consideration" is largely the same question as whether there is an "economic activity", we consider them separately:

(1) Were the services carried out by SATB on behalf of the South African Government supplies for consideration?

(2) Was SATB a taxable person acting as such in carrying out such services?

Supplies for consideration?

93. Supplies must be for consideration. So far as this appeal is concerned, the focus of many of the cases to which we were referred was on the meaning of the word "for": were the supplies *for* consideration? Nevertheless we start with a case which concerned absence of consideration rather than the meaning of "for" in this context. This happens to be the earliest case and the first case to which we were referred but we deal with it here as without consideration of it, it is difficult to follow the references to it in the cases which do deal with the meaning of "for".

Hong Kong Trade Development Council C- 89/81 CJEU

94. The Council was formed in Hong Kong in 1966 with the objective of promoting trade between Hong Kong and other countries. It opened an office in Amsterdam in 1972 from which it provided information and advice to traders free of charge about trading with or from Hong Kong. Its income was a fixed annual grant from the Hong Kong government and the proceeds of a 0.5% levy on products imported to or exported from Hong Kong.

95. The Dutch tax authority refunded to the Dutch branch of the Council VAT charged on services and goods the branch purchased in the Netherlands. Then the tax authority decided the branch was not a taxable person and reclaimed the repaid VAT. The case was referred to the CJEU. The case was decided under the Second VAT Directive but no one suggested the principles were any different to those that prevail in the 6VD and PVD.

96. The Court ruled:

> "[10] Where a person's activity consists exclusively in providing services for no direct consideration, there is no basis of assessment and the free services in question are therefore not subject to VAT. In such circumstances the person providing the services must be assimilated to a final consumer because he is at the final stage of the production and distribution chain. In fact, the link between him and the recipient of the goods or service does not fall within any category of contract likely to be the subject of tax harmonization giving rise to neutrality in competition; in those circumstances, services provided free of charge are different in character from taxable transactions which, within the framework of the VAT system, presuppose the stipulation of a price or consideration…..
>
> [13] ….a person who habitually provides services for traders, in all cases free of charge, cannot be regarded as a taxable person….."

97. So while it is well established that the absence of a profit motive does not prevent supplies being economic (they are, after all, for consideration), the habitual absence of consideration is fatal.

98. This ruling by itself has little relevance to this case: SATB clearly received sums of money from the South African Government under the terms of the Performance Agreement. Whether those sums were paid as consideration for supplies is an issue we proceed to deal with, but it did not act for free.

99. The relevance of the case, at least from HMRC's point of view, is what it did not decide. HMRC's case is that the CJEU assumed that the Council was not making supplies for consideration to the Hong Kong Government, and they compare SATB's position vis-à-vis the South African Government to the Council's position vis-à-vis the Hong Kong Government. We return to this point in paragraps 137-141.

"For" and the requirement for a direct link

100. Now we consider the meaning of "for". The supply must be *for* consideration. That leads us to another of the earlier cases to which we were referred: *Apple & Pear Development Council* C-102/86 [1988] STC 221

101. In that case, the Council had powers under a statutory instrument to raise a levy on apple and pear producers to enable the Council to meet administrative and other expenses incurred in the exercise of its functions to research and promote the apple and pear industry. HMRC claimed that the levy raised was subject to VAT.

102. The CJEU did not agree. It found that the mandatory charge was not in consideration of the exercise of the council's function to promote the apple and pear industry: there was no direct link from one to the other. It said:

> [11] …. for the provision of services to be taxable…., there must be a direct link between the service provided and the consideration received.
>
> [12] It must therefore be stated that the concept of the supply of services effected for consideration within the meaning of art 2(1) of the Sixth Directive presupposes the existence of a direct link between the service provided and the consideration received.
>
> [13] The question then arises whether there is a direct link between the exercise of its functions by the Council and the mandatory charges which it imposes on growers.
>
> [14] It is apparent …that the Council's functions relate to the common interests of the growers. In so far as the Council is a provider of services, the benefits deriving from those services accrue to the whole industry. If individual apple and pear growers receive benefits, they derive them indirectly from those accruing generally to the industry as a whole…..
>
> [15] Moreover no relationship exists between the level of the benefits which individual growers obtain from the services provided by the Council and the amount of the mandatory charges which they are obliged to pay under the 1980 Order. The charges, which are imposed by virtue not of a contractual but of a statutory obligation, are always recoverable from each individual grower as a debt due to the Council, whether or not a given service of the Council confers a benefit upon him.
>
> [16] It follows that mandatory charges of the kind imposed on the growers in this case do not constitute consideration having a direct link with the benefits accruing to individual growers as a result of the exercise of the Council's functions. In those circumstances, the exercise of those functions does not therefore constitute a supply of services effected for consideration within the meaning of art 2(1) of the Sixth Directive."

103. In other words, for consideration to be "for" supplies, there must be a direct link between the consideration and the supplies. And the CJEU said that charges (the alleged consideration) were not directly linked to what the Council did (the alleged supplies).

104. So what is a direct link? In *Apple & Pear*, the CJEU gave two reasons why there was no direct link:

- there was no provision of services to individual contributors: just benefits for the industry as a whole (paragraph 14);

- there was no link between the amount of the levy and benefit received. The levy had to be paid by an individual even if they would receive no benefit (paragraph 15).

105. What the CJEU seemed to be saying was that since the levy had to be paid even if there would be no benefit to a particular payer then the "consideration" was not *for* the "supply". The 'supply' and the 'consideration' did not have a sufficient link for one to be in consideration of the other.

106. We were referred to the High Court decision in the *Institute of Leisure* [1988] STC 602 which considered the *Apple & Pear* case. Pill J said at 606a:

> "…in *Apple & Pear*, the mandatory nature of the charge was a compelling consideration in the decision that the necessary link between the payment and the benefit did not exist."

107. We were also referred to the analysis of the case in the Tribunal's decision in *British Field Sport Society* [1998] STC 315 at paragraph [57] where it reads:

> "We do not feel able to go along with Mr Park in saying that it was the mandatory nature of the charges which was the core and ratio of the Court's judgment in *Apple & Pear* so that absent that element, the transactions are taxable. …. In *Apple & Pear* any kind of contractual arrangement between provider and payer which, where those parties are brought together by agreement, would determine what is to be provided, how it is to be provided and how it is to be paid for, was completely absent. The mandatory obligations imposed by the Orders upon the Council and upon the growers in that case shaped everything. Explained in that way, we do, however, agree that the absence of any consensual element lay at the heart of the judgment or, to put it at its lowest, provided the most compelling reason for the Court's conclusions."

108. We note that the lack of mutuality was also the view of the Advocate General in *Apple & Pear* where he said:

> "(page 234g) the fact that the levy is obligatory may not be conclusive against it being consideration, but the absence of any consensual element in the payment and the lack of control by individual growers over what the Council does for them are pointers to the levy not being in any real sense a payment for particular services."

Later cases have emphasised mutuality in the meaning of "for". In the decision in *Tolsma* C-16/93 [1994] STC 509 the CJEU said:

> "[14] It follows that a supply of services is effected 'for consideration' within the meaning of Art 2(1) of the Sixth Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient."

109. Miss Hall also saw the absence of consent from and the lack of control by the growers as the key reasons for the CJEU's decision in *Apple & Pear*. And, in her view, this distinguished SATB's case as SATB and the South African Government chose to enter into the Performance Agreement each year. There was no lack of connection between the funds paid and benefits received because the performance agreement spelt out in great detail what SATB must do in return for the specified funding.

110. HMRC does not agree that there was mutuality. Its point is that under the Tourism Act, SATB had to promote tourism to South Africa and the South African Government had to fund SATB (see paragraphs 10 and 11 above). In HMRC's view, these were mandatory obligations and therefore there could be no question of reciprocity, even though the level of funding and level of service was discretionary. HMRC's case was that SATB had a choice in *how* it carried out its duty to promote South Africa but no choice *whether* it carried out its duty. The Government had choice in *how* much it paid to SATB but no choice *whether* to fund it or not.

111. We return to this in paragraph 254

112. This brings us to consideration of cases on for the meaning of "for" and whether there is a direct link between government funding and the activities of the tourist board (or other body) to which it is given. This has been considered in a number of cases and we look at these below:

- *The Netherlands Board of Tourism;*
- *Turespaña;*
- *British Field Sports Society*
- *ANTO*
- *Bath Festivals Trust.*

Netherlands Board of Tourism (1995) VATTR 12935

113. The Nederlands Bureau voor Tourisme ("NBT") was a non-profit making organisation established in 1967 by the Government of the Netherlands. Its board was appointed and dismissed by the Dutch Minister for Economic Affairs. Its object was to promote tourism into Holland.

114. As in this case, the UK branch of the tourist board appealed a decision made by (what is now) HMRC that it was not entitled to recover all the input tax it incurred in the UK.

115. Its operations were similar to those of SATB with the obvious exception that it was the Netherlands and not South Africa that was being promoted. Its main activities were consumer advertising, joint promotions, exhibitions, free supplies to the travel

trade and sales to the public. For many activities, it was able to persuade commercial sponsors to contribute to the cost.

116. The funding of the UK branch was mostly from commercial sponsors and indeed it was a condition of it attracting commercial sponsorship in order to receive funding from the Dutch Government. In practice each year, its funding was only about 25-33% from the Dutch Government.

117. The Tribunal, relying on the *Imperial War Museum* VAT Tribunal case [1992] VATTR 346, decided that NBT carried on only one activity which was the promotion of tourism. As that is not an issue in this case, we say no more about this part of the analysis. Nevertheless, the Tribunal divided up the supplies by NBT into various types.

118. In respect of consumer advertising [9.16] and free distributions and free workshops [9.22], the Tribunal concluded that NBT made supplies to the commercial sponsors with the shortfall being funded by the Dutch Government by way of subsidy.

119. In respect of joint promotions [9.18] and supplies of exhibition space [9.20], the Tribunal concluded that NBT made supplies to both commercial sponsors and the Dutch Government. In respect of these supplies the Tribunal said:

> "[9.25] …..These supplies are not of administrative services but of public relations and advertising and promotion services such as the Bureau and the Dutch Government could have commissioned from an independent agency."

120. The Tribunal went on to consider the issue whether these supplies to the Government were made in the course or furtherance of a business. And it is on this part of the decision which SATB relies. The Tribunal considered the *Apple & Pear* case and distinguished it on many grounds, in particular, that unlike the NBT case [9.35]:

- The charge in *Apple & Pear* was mandatory;
- The charge in *Apple & Pear* did not relate to services supplied;
- No quid pro quo in *Apple & Pear;*
- No consensual element in *Apple & Pear;*
- No direct benefit to growers in *Apple & Pear;* and
- In *Apple & Pear* it was not possible to identify services relating to any particular grower.

121. In summary, in *Apple & Pear* the growers had no choice but to pay and the benefits (if any) they received were not specific to any particular grower and not geared to what they paid, whereas the contrary was true as regards the funds the NBT received for joint promotions and supplies of exhibition space. The Tribunal decided:

> "[9.36] I therefore conclude that there is a direct link between the supplies received by the Dutch Government from the Appellant through the bureau and the money paid to the Appellant through the Bureau. The money paid for such supplies is, therefore consideration for those supplies. It follows that the supplies are taxable supplies."

The appeal was allowed in full.

122. SATB aligns itself with this case and states that in as much as there was a direct link, for the reasons given, between the provision of promotions and exhibitions and the funds received from the Government in the *NBT* case, then there is a direct link in SATB's case between its activities and its funding and for the same reasons.

123. SATB says that funds cannot be "grant" income where there is reciprocity in agreeing how much is paid and for what services. In the *NBT* case, the Tribunal found reciprocity in respect of the provision of promotions and exhibitions and therefore this was a supply for consideration.

124. HMRC do not agree that reciprocity is the only issue. Mr Singh criticised the decision in the *NBT* case because it did not consider the question of whether a direct link was made out where the "supplier" had a statutory duty to do what it did. HMRC bases its case on its view that there is no direct link between the activities of SATB and the funding received from the South African Government because SATB did not (says HMRC) enter into a consensual relationship with the Government but had a statutory duty to do what it did.

125. Miss Hall points out that it ill suits HMRC to say a decision they chose not to appeal was wrongly decided, and we agree with Miss Hall that this is an unattractive position for HMRC to adopt. Nevertheless, it is one that HMRC can adopt and we have to agree with Mr Singh that the *NBT* case is simply not a persuasive authority on the question of whether a statutory body receiving government funding to carry out its statutory functions was making a supply for consideration because the Tribunal did not consider the issue. This may be because it was not relevant because NBT was not a statutory body or because the issue was simply not brought to the attention of the tribunal. Either way, the decision is not authoritative on this point.

126. We return to the question of statutory bodies below but in the meantime continue to consider the question of direct link in the context of tourist boards funded by the Government of the country they promote.

Turespaña (1996) VATTR 14568

127. Turespaña was the name by which the Institute for the Promotion of Spanish Tourism was known. Similarly to this case and the *NBT* case, Turespaña's case was

that the payments it received from the Government (in this case the Spanish Government) were in consideration for supplies to the Government of its services of promoting tourism in Spain.

128. Turespaña was established by Royal Decree in 1988. This Royal Decree established the Secretariat General for Tourism, the main function of which was "the execution and development of the Government's tourism policy". The Decree also stated that two commercial autonomous organisations were to be attached to the relevant Government Department via this Secretariat. One of these was Turespaña.

129. As with this case, it was accepted that where Turespaña was paid by third parties for supplies such as making exhibition facilities available, it was making taxable supplies to those third parties.

130. The case followed *Omnicom UK Plc* [1994] VATTR 465 in which a VAT Tribunal had held that the supply of advertising services to Turespaña was taxable in the UK because, although Turespaña was registered for VAT in Spain, it did not receive the supplies for the purpose of a business carried on by it.

131. The *Turespaña* case was therefore a re-run of this question, but this time with Turespaña as a party to the appeal and able to put its case. At stake (as with this case) was the question of whether Turespaña could recover input tax on the expenses it incurred in the UK.

132. Turespaña was governed by the law that governed autonomous state entities. Its accounts were audited by a government body and by an external body. There was a specific obligation to carry out government policy on promotion of tourism abroad in accordance with instructions received from the Secretariat.

133. Each year Turespaña prepared a detailed budget which was negotiated with the Ministry. The Ministry might cut the down the proposed expenditure. Ultimately it was up to Parliament to approve the budget.

134. In practice, half of Turespaña's funding came from the Government. The rest came from a levy and from earnings at exhibitions and fairs and others. Turespaña was able to use balances from previous years to meet any shortfall in a current year.

135. Some of its board members were political appointments and half of its staff were civil servants.

136. The Tribunal declined to reach a conclusion on the exact relationship between the State and Turespaña (para 41) as this was unnecessary to its conclusion. What it said on the "direct link" point was as follows:

> [50] There is unquestionably tough bargaining between the spending departments and the Treasury when the Budget is being prepared. No one would suggest that such negotiations constitute the necessary consensual element for a supply for consideration in VAT terms. It seems to me that the position is no different in the negotiations

> conducted by Turespaña with the Budget office. In the final resort if the Budget is not approved by the [Spanish Parliament], Turespaña can do nothing except curtail or cease its activities.
>
> [51] Even if the budgetary payments might otherwise be payments for services it seems to me that the necessary direct link would be absent. There was no evidence that any particular level of services is bought or that defined activities are specified in each budget. The substantial balances built up by Turespaña indicate that either considerable sums voted in the budget were underspent in the past or that there was a conscious decision to build up a contingency reserve.
>
> [52] I hold that, in respect of the promotion of tourism and the performance of its other statutory duties, there were no supplies by Turespaña to the State, no consideration was received by Turespaña from the State as quid pro quo for such supplies, and there was no direct link between payments from the budget and such activities.
>
> …
>
> [54] I am conscious that this decision may be regarded as inconsistent with the *Netherlands Board of Tourism* case. In the present case the Tribunal was provided with copies of the decrees under which Turespaña operated. There was no such reference to such evidence or to the statutory duties of the board in the *Netherlands* case. Furthermore, it seems to me that if [the submissions on behalf of the appellant] were correct, the *Hong Kong Trade* case was argued and decided by the Court of Justice on a false basis. I do not accept that it was. It is to be noted that neither the *Hong Kong Trade* case nor *Omnicom* were referred to in the *Netherlands Board of Tourism* case.
>
> [55]. The appeal is dismissed."

137. The appellant considers the case wrongly decided because, it says, the tribunal relied on the *Hong Kong* case: the appellant says it was wrong of the Tribunal to rely on something that was not decided in that case. We mentioned this point at paragraph 99 above.

138. HMRC agrees with the Tribunal in *Turespaña* that the *Hong Kong* case would have been decided on a false basis if, had the CJEU been asked the question, they would have said that the Council made, in return for the funding from the Hong Kong Government, supplies to the Hong Kong Government of the distribution of free promotional material and advice to interested third parties. This is because this would have meant that the VAT on the Council's expenses was attributable to these supplies and recoverable, contrary to the actual ruling of the CJEU in that case.

139. The appellant points out that in the *Hong Kong* case, a significant part of the Council's funding appeared to come from a compulsory levy, rather like the levy in *Apple & Pear*. If the CJEU did make an assumption that the distribution of free promotional material was not a supply in return for the funds it received, this may have been because they analysed the position as in *Apple & Pear* and the lack of "direct link" between the activity and the funding rather than because they did not consider the Council to be carrying on an intrinsically economic activity.

140. We agree with the appellant that the CJEU's failure to consider this issue is not authority that the issue was so obvious it did not need to be stated: but we agree with the Tribunal in *Turespaña* that it is difficult to see why the CJEU arrived at the decision it did unless it made an assumption that the Council did not make taxable supplies to the Government which was the source of at least some of its funding. If the CJEU considered it was asked the wrong question, it can (and often does) change the question. However, the reason the CJEU made such an assumption is not made apparent (it is even possible the point was overlooked) and so this case is not authority on this point.

141. Does this mean that *Turespaña* was wrongly decided? We do not think so for the reasons given in paragraph 243-258 below.

British Field Sports Society

142. The question for the Tribunal in this case was whether the campaigning, lobbying and related public relations activities of the BFSS, in respect of which its members paid their subscriptions, were business activities.

143. The case was compared to *Apple & Pear,* in that the members all paid their subscriptions in return for lobbying by the BFSS. It was argued that there was no direct link between the BFSS's activities and the subscriptions, thus leading to paragraph [57] of the decision cited above in paragraph 107. The Tribunal found that there was a direct link because the members chose to pay subscriptions:

> "[58]….[that the BFSS is benefiting all sportsmen] does not convert what is contrived and bargained for as a direct benefit to the members into something aimed to benefit all participants in field sports so that the members derive their benefits only indirectly as being amongst that number.
>
> ….
>
> [60] If one does regard the membership collectively, as Mr Park would have us do, then the analogy with the *Netherlands Board of Tourism* case becomes very close. On our findings, instead of the one client, the members collectively commission the services of the Society, receive them and pay for them.
>
> [61] Accordingly we allow the appeal."

144. The decision was upheld in the High Court and Court of Appeal.

145. The case on the surface does not appear to be directly relevant to this appeal as it forms no part of HMRC's case that what SATB does is for the benefit of South Africa as a whole and that therefore there is no direct link. HMRC is not disputing that the South African Government could commission an independent body to carry out the services carried out by SATB. Its case is that there is no direct link because SATB was a statutory body carrying out its statutory duties, and this was not an issue in *BFSS*. However, we refer to the case again when looking at decisions on Article 9.

Austrian National Tourist Office

146. The Austrian National Tourist Office ("ANTO") had a London branch registered for VAT in UK. ANTO was a non-statutory non-profit making organisation which had as its objective the promotion of tourism into Austria.

147. Approximately 9/10^{ths} of its funding came from membership subscriptions. Its members were the Federal and State governments of Austria and the Austrian National Chamber of Commerce. In practice, of these subscriptions approximately 60% came from the Federal Government, 20% from the various regional governments, and 20% from the Chamber of Commerce.

148. Its governing board was appointed by its members and its members exercised its power to appoint largely civil servants to the board.

149. HMRC accepted that ANTO made taxable supplies to third parties in return for various payments received. The question for the Tribunal was whether ANTO made supplies to its members in return for the membership fees.

150. The Tribunal made no distinction between ANTO and its London branch and considered that ANTO made one supply of the promotion of tourism to Austria. It said:

> "[53] Looking at the nature of ANTO's activities, it is plain that they are conducted in a truly professional way which in the variety and method of conception and execution are of the kind which a person in business to provide promotion of the tourist trade generally could be expected to carry out in return for fees. It does not follow that because the promotion of tourism generally is part of what Governments do it cannot be a business if carried on by an organisation which, despite these links, is nevertheless outside Government. It is in our view very relevant how that is done and here in the intensity and in the direction in which it is carried out the activities of ANTO do amount to the carrying on of a business for VAT purposes….
>
> [54] …Thus by agreement the members determine what ANTO is to do and what fees shall be paid therefore. We find that there is the necessary direct link between the services which ANTO supplies to its members and the consideration which it receives from them for those services as membership fees….
>
> [55]….[the members] have a direct interest in what ANTO does in return for their membership fees and thus *British Field Sports Society* is not distinguishable…..
>
> [56] …. we do regard the *Turespaña* and *Hong Kong* cases….as being distinguishable. The whole issue in *Turespaña* …was about those activities carried out by the Institute for the Promotion of Spanish Tourism for which it made no charge to third parties but which were financed by the Spanish Government out of the State Budget."

151. The Tribunal explained and distinguished the decisions in *Turespaña*. It distinguished *Hong Kong Trade* on the basis the decision (as we have already noted) did not address the question of whether the Council made supplies to the Government. It allowed the appeal. The basis of the decision in *ANTO* was therefore that the Tribunal considered the case as distinguishable from *Turespaña* but indistinguishable from *British Field Sports Society*.

152. The grounds of distinction with *Turespaña* appear in paragraph [56] and were in essence:

> "…Turespaña was simply discharging its statutory duties…it was unrealistic to regard the payments out of the Budget as being consideration in VAT terms, and, even if the budgetary payments might otherwise be payments for services, the necessary direct link was absent in that there was no evidence that any particular level of services was bought or that defined activities were specified in each budget."

153. Both *Turespaña* and *ANTO* therefore appear to support the appellant's case that SATB should be distinguished from *Turespaña* on the basis SATB entered into the Performance Agreement each year and that therefore it could be said that a "particular level of services was bought" and "defined activities were specified". We will return to this point in paragraphs 267-279.

154. SATB's case is of course distinguishable from ANTO's in that ANTO was not a statutory body.

155. The last case we consider in relation to "direct link" is the Tribunal decision in *Bath Festivals Trust.*

Bath Festivals Trust (2008) VATTR 20840

156. In this case, the Appellant was an incorporated charity. It owned the rights to the Bath International Music Festival and indeed had been set up to run the Festival. Bath Council had an interest in continuation of Festival, as the Festival promoted Bath. By statute, Bath Council had the right to promote social well-being in the area and it was accepted that its funding of the festival was within its statutory powers. The Trust and the Council entered into a service agreement which set out what the Trust would do and what the Council would pay. The Council was not the Trust's only source of funding: for instance, it received a grant from the Arts Council.

157. The decision of the Tribunal was that the Trust did not receive the grant from the Council, outside the scope of VAT: it decided that under the service agreement, the Trust made supplies for consideration to the Council.

158. The appellant relies on this case. It sees the position of the Trust as comparable to that of itself.

159. We agree that supplies of the nature of the things that SATB agreed to do in the Performance Agreement could be taxable supplies: but the distinction between *Bath*

Festivals and this case is that the Trust was not a statutory body and had no statutory duty to promote the Festival. Is this a distinction that matters?

160. To answer this, we need to consider what is meant by "economic activity" and we look at this below. This question was not considered in *Bath Festivals* as it was not relevant because, although the Trust's objective was to promote the Festival, the Trust was not a statutory body and was not acting in accordance with any statutory duty.

161. We note in passing, though, that the appellant considered the case as authority that the presence or absence of a statutory duty was irrelevant. This is because the Tribunal said that:

> "[58] We accept….that this case falls into line with the decision in *Edinburgh Leisure* and that that case is not to be distinguished on the basis of the presence of a statutory duty. We accept that the presence or absence of a statutory duty is irrelevant as to the question whether the requisite 'direct link' between the 'thing done' and the 'consideration received' can be said to exist. ….
>
> It appears therefore that the Commissioners accept that agreeing to take over a job previously undertaken by the local authority can amount to a supply of services…..

162. However, this was said in a context of two cases (*Edinburgh Leisure* as well as *Bath Festivals)* which involved Trusts which were not statutory bodies. In both these cases the statutory duty to which the Tribunal referred was the statutory obligation (or power) of the local Councils to undertake something, which they were paying an independent trust to undertake. The Councils were outsourcing the performance of their obligations to trusts which had no such statutory obligation. We agree with the Tribunal that the *Councils'* statutory obligations were irrelevant to the question of whether the *trusts* were making supplies for consideration.

163. The case is therefore authority that the presence of a statutory duty on the part of the *would-be recipient* of a supply is irrelevant. But it is not authority that the presence of a statutory duty on the part of the would-be *supplier* is irrelevant. The question in SATB's case is whether SATB, as the putative supplier, is making a supply for consideration when promoting South Africa, even though it has a statutory obligation to promote South Africa as a tourist destination. *Bath Festivals* is not an authority on the relevance of whether the putative supplier is a statutory body with statutory duties and we do not refer to this case on this issue again.

Summary of "direct link" cases

164. None of these five cases considered the question whether what the appellant did was intrinsically an economic activity. They addressed the issue from the perspective of "direct link" and whether the consideration was "for" a supply. We consider the question of the meaning of "economic activity" below before reaching a conclusion on the question of "direct link" in the context of SATB's appeal.

165. While HMRC's case was based on "direct link", we have said in paragraph 226 above that this is not easily distinguished from the question of whether SATB was a taxable person *acting as such* when making the alleged supplies for consideration. Not surprisingly, therefore, the appellant addressed us on the question of both direct link and whether it was a taxable person acting as such.

166. So we move on to the second of the two issues as outlined in paragraph 92 above. Was SATB acting as a taxable person when it received the funding from the South African government and carried out its activities of promoting South Africa as a tourist destination? After considering this, we return to the question of direct link.

Economic activity?

167. As cited above, Article 9 defines taxable person as:

> " 'taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity."

168. So we look at this definition in three parts. We consider the meaning of:

(1) "Whatever the purpose or results of that activity";

(2) "Independently"; and

(3) "Economic activity"

Whatever the purpose or results of that activity

169. It is well established that supplies can be supplies even if they are made without realising profit, or even having the intention of realising a profit. The fact SATB was non-profit making is not relevant. As Beldam LJ said in the Court of Appeal decision in *ICAEW* [1997] STC 1155 at page 1166c:

> "From these cases I conclude that the concept of an economic activity is an activity which typically is performed for a consideration and is connected with economic life in some way or another. But it is not an essential characteristic that it should be carried on with a view to profit or for commercial reasons but it must be an activity which is analogous to activities so carried on."

170. This is also reflected in test (f) from the *Lord Fisher* case which we have already mentioned. Are the claimed business activities:

> "of a kind commonly made by those who seek to make profit from them"?

171. Miss Hall's point is that, although SATB did not seek to make a profit, what it did could have been done by a commercial profit making entity. The South African Government could have outsourced the promotional and other activities undertaken by SATB to a commercial entity and the charges paid by the Government to that body would have been subject to VAT (if the place of supply were the UK).

172. Therefore, say SATB, because what it did could have been done by a commercial entity making supplies for profit, it was making supplies for consideration.

Independently

173. Lastly, before getting on to the cases which considered the meaning of "economic activity" and whether the presence of a statutory duty is relevant, we consider the meaning of the word "independently" as used in Article 9:

> " 'taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity."

174. What does this mean in the context of Article 9? Miss Hall's case is that this means that a body cannot contract with itself, but a wholly owned subsidiary company could enter into taxable contracts with its parent. For the former proposition, the cases of *NBT* and *ANTO* can be cited as, at least in the latter, it was a finding that a branch could not make supplies to the head office of the same entity. For the second proposition there scarcely needs to be authority as there have been many cases in which it is apparent that this is the position (eg *Polysar).* Miss Hall also drew our attention to the decision of the CJEU in *Heerma* C-23/98 [2001] STC 1437 in which it was made clear a partner could make taxable supplies to a partnership of which he was a member.

175. Art 10 of the PVD provides that employees are not independent of their employer in so far as:

> "they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability".

176. Art 11 of the PVD allows Member States (with permission) to treat legally independent persons as a single entity if in practice they are:

> "closely bound to one another by financial, economic and organisational links".

177. Therefore, while we find that "independently" in Article 9 would normally mean legal independence, we find it is not just a question of legal independence. It is clear that, at least in so far as employees and employers are concerned, the fact that two persons are separate legal persons does not mean that they can in all circumstances make supplies one to another within Article 9. Similarly Article 11 also shows that in some cases legally independent bodies would not be treated as taxable persons vis-à-vis each other.

178. There is no question but that SATB is a separate legal entity from the South African Government. It was created as such by the Tourism Act.

179. Miss Hall's view is that it is implicit in the decisions of *Apple & Pear*, *Turespaña* and *Bath Festivals* that merely being a creature of statute does not prevent an entity acting independently of the government.

180. We agree. Indeed this is apparent on the face of the PVD itself. What was Article 4 is now Articles 9-13. Article 13 provides (as set out in full in paragraph 302 below) an exception to Article 9. With certain exceptions, a public authority body or other public body cannot make supplies when acting as such. We deal with the relevance of Art 13 to this case below in paragraphs 302-311. But the point here is that the drafters of the VAT directives anticipated that public bodies discharging statutory duties *could* be a taxable person when doing so, or else there would have been no need for Article 13 to exempt them from the definition of taxable person.

181. This is beyond argument as the CJEU said in the *Hutchison* decision to which we refer in more detail below:

> "[42] Even if such a regulatory activity could be classified as an economic activity, the fact still remains that the application of Art 4(5) of the Sixth Directive [now Art 13 of the PVD] implies a prior finding that the activity considered is of an economic nature."

182. However, the question in this case is whether a statutory body is acting independently of the government when receiving funding from the Government to do its statutory duty. This question did not arise in *Apple & Pear* as in that case the funding received was from the growers and not the Government, although it was the funding that statute had provided for the Council in order for it to carry out its statutory functions.

183. And in any event in that case the CJEU did not consider the question of whether the Council was a taxable person and whether it was acting "independently" in what is now Article 9: they looked at the meaning of "the supply of goods or services effected for consideration" in Article 2. And, as we have said, the CJEU decided the necessary direct link did not exist between the monies received and the services rendered. It was therefore not implicit in their decision that the Council acted independently. The CJEU could have reached the conclusion they did whether or not they considered the Council acted independently.

184. However, the CJEU did record at paragraph [8] that the Council was a taxable person. But what it does not record is why it agreed that this was the case; nor did it find that the Council was acting as a taxable person in respect of the alleged supplies at the heart of the hearing. It is accepted that SATB is a taxable person: the question is whether it acted as such when receiving the funds from the South African Government. Indeed, irrespective of the question of "independently", it is implicit in the CJEU's decision in *Apple & Pear,* that the Council's activities were not economic activities. Therefore, we are unable to agree with Miss Hall that it was implicit that the CJEU considered that the Council acted independently.

185. Similarly in *Turespaña*, the Tribunal did not consider the question of independence in what is now Article 9 and could have come to the conclusion at which they did arrive whether or not they considered the Council acted independently.

186. So far as *Bath Festivals* and *ANTO* are concerned, the point was irrelevant as, as we have said, the appellants were not creatures of stature. It is not entirely clear whether the NBT was a creature of statute. In any event, none of these cases considered the meaning of "independently" and are therefore not authority on it.

187. The appellant also says that the existence of Article 13 can only be because the drafters of the VAT Directive considered that without it, supplies by government bodies even when acting as a government body would be subject to VAT. Therefore, suggests Miss Hall, it must be assumed that the drafters perceived government bodies as acting "independently". While we do not disagree with this logic as far as it goes, it is not applicable. Article 13 is dealing with supplies made by government bodies to third parties: it has nothing to say on whether, when government bodies receive funding from the government, they are acting independently of that government.

188. As we understand it, Miss Hall's position is that she accepted that *Turespaña* was not acting independently because it had a close relationship with the Government and was charged to implement Government policy. Monies were just voted to it. Her position is that on the facts SATB was acting independently of the South African Government, as, although the Government has some degree of control over SATB, it was at a high level and often not exercised. The Government did not control the day to day running of SATB.

189. HMRC choose to take no point on SATB's independence. Our conclusions on this are set out below in paragraph 289 after we have considered the question of intrinsically economic supplies.

Intrinsically economic supplies

190. "Economic activity" is the last of the three questions arising from the definition of taxable supply in Art 9. It is we have said analogous to question (f) in the *Lord Fisher* test which is whether the person's activities were:

> "of a kind commonly made by those who seek to make profit from them"

191. As we have said, this reflects the requirement that supplies have to be analogous to the sort of supplies made by profit making businesses in order to be economic. But merely showing that a private profit making entity could have carried out the activity in return for remuneration is not necessarily sufficient. Case law, which we consider below, indicates that some activities are intrinsically not economic.

Activities only a Government could undertake

192. In *T-Mobile Austria GmbH* [2008] STC 184 the Austrian Government, as required by an EU Directive, granted licences to commercial operators to use

bandwith. *Only* the Austrian Government could grant such licences in Austria. The CJEU held that this was not an economic activity:

> "[42] Thus, an activity such as that at issue in the main proceedings constitutes a necessary precondition for the access of economic operators such as the applicants in the main proceedings to the mobile telecommunications market. It cannot constitute participation in that market by the competent national authority. Only the operators, who are the holders of the rights granted, operate on the relevant market by exploiting the property in question for the purpose of obtaining income therefrom on a continuing basis"

193. The CJEU came to the same conclusion in the similar case of *Hutchison 3G UK Ltd and others* [2008] STC 218. It also pointed out that Article 13 (discussed below) only applied where the activity would otherwise be an economic activity. Its decision was that the grant of the licences by the state was *not* an economic activity (paragraphs [40]-[42]).

Regulatory activities which only a government could sanction

194. The Institute of Chartered Accountants of England and Wales ("ICAEW") was authorised by statute to issue practising licences to persons carrying on investment business, auditors and insolvency practitioners. It charged fees to those it licensed, as it was permitted by statute in order to cover its costs. HMRC contended that the fees were not consideration for taxable supplies and won at all levels from the Tribunal to House of Lords.

195. In *ICAEW* [1999] STC 398 Lord Slynn gave the decision of the unanimous House of Lords. He referred to the *Netherlands* C-235/85 case in which the CJEU held that notaries and bailiffs were carrying on an economic activity even though they were appointed by the state and carrying out a function regulated by state. He also referred to the *Recaudadores de las Zonas Primera y Segunda* C-202/90 [1993] STC 659 case, which concerned what is now Article 13, but in which the implication of the decision of the CJEU was that state appointed and regulated tax collectors were subject to tax on the commission they charged to the state. He also noted that there were CJEU cases on competition law in which certain activities were found not to be economic activities, in particular *Diego Cali & Figli Srl* C-343/95 (anti pollution surveillance) and *Eurocontrol* C-364/92 (air traffic control).

196. Lord Slynn's conclusion was:

> "…it is thus not sufficient that what is done can be described as an activity of the professions for the purposes of art 4(2), nor that it was a supply of services for consideration for the purposes of art 2(1). It must still be an economic activity." Page 404 b.

> "…The institute is carrying out on behalf of the state a regulatory function in each of these three financial areas to ensure that only fit and proper persons are licenced or authorised to carry out the various activities and to monitor what they do. This is essentially a function of the state for the protection of the actual or potential investor, trader or

> shareholder. It is not in any real sense a trading or commercial activity which might justify it being described as 'economic' and the fact that fees are charged for the granting of the licences …does not convert it into one." Page 404c

197. In other words, a body carrying out regulatory activities on behalf of the Government is not carrying out an economic activity even when charging the regulated persons for its "services." This also appears to be the explanation of the decisions of the CJEU in *Diego Cali & Figli Srl* and *Eurocontrol.*

Other activities?

198. Are there other activities which are intrinsically not economic activities within the meaning of Article 9 (or (f) of the *Lord Fisher* test)?

199. *SPŐ* C-267/08 concerned a non–profit making body which was a section of the labour party disseminating free information promoting the labour party. Its only regular income was from government subsidies (which the Government was obliged to pay by law to the various political parties) and subscriptions from local labour parties.

200. The CJEU found that SPŐ was not in business as there was no market for what it did. This decision might be thought to call into question the correctness of the earlier decision of the Court of Appeal in *British Field Sports Society*. As we have already discussed in paragraphs 142-144 this case was whether subscriptions to a society to promote field sports could be consideration for a supply. *Apple & Pear* was distinguished on the basis that, unlike in that case, there was a direct link between the subscriptions and the promotional work undertaken by the Society. The case did not consider whether BFSS was a taxable person acting as such, but must be assumed to have concluded that it was as that is the only assumption consistent with the appeal being allowed.

201. SPŐ's subscribers wanted SPŐ to carry out its promotional activities, just as the subscribers in *BFSS* wanted the Society to carry out its promotional activities. So why was one intrinsically not economic while the other was?

202. The case of *SPŐ* suggests funding a section of a political party carrying out political promotion activities is not consideration for a supply as such activities are not economic activities. But although the case was analysed by the CJEU on the basis of "economic activity", reading the decision, especially paragraphs [22] and [23], the problem for SPŐ was how it was funded:

> "[21] In this connection, it should be pointed out that, the activity at issue in the main proceedings….is advertising. In the present case, that exploitation does not allow the generation of revenue on a continuing basis.
>
> [22] It must be held that, in order to ensure its continuity, the SPO is financed by subsidies form public funds in accordance with the

> Austrian national legislation on the financing of political parties, by various donations and subscriptions paid by the members of that party.
>
> [23] Therefore, the only income obtained on a continuing basis comes from public funding and the party's contributions, that income having been raised in particular to cover losses made by the activity at issue in the main proceedings.
>
> [24] By such activities, SPO is therefore carrying out a communication exercise in keeping with attainment of its political objectives and which seeks to spread its ideas as a political organisation. More specifically, the SPO's activity…is the development of informed political opinion with a view to participation in the exercise of political power. In carrying out that activity, the SPO does not however participate in any market.
>
> [25] Consequently, the activity at issue in the main proceedings cannot constitute an "economic activity" within the meaning of Article 4(1) and (2) of the Sixth VAT Directive.
>
> [26] In the light of the foregoing, the answer is that Article 4(1) and (2) of the Sixth VAT Directive must be interpreted as meaning that external advertising activities carried out by the section of a Member State's political party are not to be regarded as an economic activity."

203. It seems to us that the case could have been analysed on the basis of a lack of direct link between the "supplies" and "consideration". SPŐ received grants and subscriptions to make up the shortfall. The amount paid by the local parties was not, at least in advance, linked to any particular level of service.

204. A failure to make supplies for consideration is a failure to engage in economic activity. But paragraph [24] makes it clear this was not the only reason for the CJEU's decision as the CJEU also pointed out that SPŐ was doing what it was set up to do and that was political and not economic.

205. It is true that SPŐ was a non-profit making body whose objective was to promote the labour party. But the CJEU has often said that the lack of profit motive is irrelevant, and Article 9 itself states the "purpose" of the activity is irrelevant.

206. At root, we think the reason for the decision in *SPŐ* was that what SPŐ did was not analogous to an activity that could have been done for profit. While a profit-making body could have been engaged by the subscribers to carry out the advertising activities carried out by SPŐ, and no doubt its charges for doing so would be subject to VAT, the way SPŐ was funded indicated that the funds it received were earmarked for a particular, non-economic purpose (political promotion) and could only be used for that purpose. Therefore, SPŐ's activities in respect of which it received these funds were not activities analogous to ones that could be done for a profit: it was not an economic activity.

207. Civil law does not recognise trusts but we would suggest an approximate comparison in English law to an activity similar to SPŐ's that would not be an economic activity, would be where trustees of a trust received funds to be used for a

particular purpose. When the trustees receive or use the funds for that purpose, the trustees are not making a supply for consideration to the donor. (While a professional trustee might charge for his services, and those services be subject to VAT, the *receipt* by the trustee of the trust fund is not consideration for a supply).

208. With a grant or transfer of funds to a trustee, although the funds and their use by the donee are linked, it is not the "direct link" of the kind envisaged in *Apple & Pear* and *Tolsma*. There is not the link between the funding and a particular level of service. The situation could also be analysed by saying that the funds are not consideration in that they are not paid for a particular level of service: the entire fund is simply earmarked to be used for a particular purpose.

209. It cannot have been the CJEU's decision in *SPŐ* that simply promoting politics per se cannot be an economic activity, because if this were the case, wherever promoting politics was outsourced to an independent advertising agency, its charges would be outside the scope of VAT, which is clearly not right. Therefore we consider that the basis of the CJEU's decision in *SPŐ* was that the way SPŐ was funded (subsidies with grants to make up the shortfall) indicated that what it did was not economic.

210. This distinguishes the *SPŐ* case from the decisions in *British Field Sports Society* and *Bath Festivals.* These two cases each involved a non-profit making trust set up for a single purpose of promoting an activity. But in both cases a direct link between the "supply" and the "consideration" was found because the funds were linked to the level of service. It was not grant income.

Conclusions on the authorities on intrinsically economic activities

211. To recap, it is not necessary for the supplier to have a profit motive in order for the supply to be economic. But the activity must be analogous to one that could be done for a profit.

212. So it appears that doing something that could only be done by the Government is something that cannot be done for profit. So the grant by the Government of licences that only the Government could grant is not an economic activity: *T-Mobile* and *Hutchison*

213. But the concept of intrinsically uneconomic activities applies to more things than things done by the Government itself. It applies to things done by persons standing in the shoes of the Government. In *ICAEW,* carrying out a regulatory function on behalf of the Government was found to be an intrinsically non-economic activity. ICAEW was not a part of the Government but by statute it had been appointed the regulator.

214. This also seems to be the explanation of the cases mentioned in *ICAEW* of *Diego Cali & Figli Srl* (anti pollution surveillance) and *Eurocontrol* (air traffic control). These bodies were statutory, but not state, bodies, which had been entrusted

by various governments with regulating functions that ultimately could only be sanctioned by governments.

215. The Lords in *ICAEW* considered that the CJEU's decision in *Recaudadores de las Zonas Primera y Segunda* was consistent with these authorities and its own decision in the case. But the implications of that decision is that the activity of tax collecting *was* subject to VAT even though it is difficult to think of an activity less inherently economic in that it is one that can only be carried out by the state.

216. We think the distinction between this case and the others is the direction of the "consideration". In *ICAEW*, *Diego Cali & Figli*, and *Eurocontrol*, the three statutory bodies stood in the shoes of the government: the government had delegated to them a state regulatory function of one kind or another. The regulated persons, such as the insolvency practitioners having to pay the licence fee in *ICAEW*, or the port users paying the fees in *Diego Cali*, or the airlines paying fees for air traffic control services in *Eurocontrol*, had to pay the charges in order to operate. Vis-à-vis the regulated persons, the regulatory bodies were acting as the Government. Their activity (regulation) was inherently one only the government could do or authorise and it was not economic and therefore, in making their charges to the regulated persons they were not acting as taxable persons.

217. It was quite a different situation in *Recaudadores de las Zonas Primera y Segunda*. Vis-à-vis the tax*payers*, the tax collectors were no doubt standing in the shoes of the Government, and the tax collected was not in consideration for an economic supply. But vis-à-vis the Government itself, the tax collectors were merely persons to whom the Government had outsourced a task. They could (and did) supply their tax collecting services to the Government at a profit and in competition with each other. So where a Government chooses to outsource work, as between the Government and outsourcer there is an economic activity, even if the work outsourced is inherently not economic (such as tax collecting).

218. We can speculate that in *ICAEW* if the Government had paid the ICAEW for carrying out its regulatory function on behalf of the Government then such charges would have been subject to VAT, as the ICAEW was doing something that could be done by a profit making body (if so authorised by statute). The point was that the licence fees paid to the ICAEW by the regulated professionals, though, were not in consideration for an economic activity, as the activity of regulation vis-à-vis the regulated person is not an economic activity, as it can only be authorised by the Government.

219. Another example would be where local government, liable to provide local services, chooses to do so by outsourcing the work to a non-government body. Although the case was not analysed in this way by the Tribunal deciding it, we can analyse *Edinburgh Leisure* in this way. In that case, the local Government outsourced the community leisure services to the appellant (a trust) and therefore the payments by the Government to the trust were in consideration for an economic activity. While it is true that the trust was non profit-making this was irrelevant because the local council could have outsourced the work to a profit making body. Similarly, in *Bath*

Festivals, Bath Council outsourced the provision of the Festival to a trust. The trust was non-profit making but the Council could have chosen to outsource to a profit making enterprise. So its charges were subject to VAT.

220. The *SPŐ* case at paragraph [24] may suggest that non-economic activities encompass more than activities of the State acting as a regulator, or the activities (vis-à-vis the regulated person) of a person to whom the State has delegated the power to regulate. There may be a conflict between the CJEU's decision that promoting a political party is a non-economic activity, and the Court of Appeal's decision in *BFSS* that promoting field sports is an economic activity: we think the conflict is avoided if the CJEU's decision is understood as being based on the manner in which SPŐ was funded.

221. So where does this analysis leave SATB? There is no suggestion by HMRC that the South African Government does not have a direct interest in the promotion of tourism to the country. It is accepted that if SATB were an independent advertising agency, providing services to the South African Government of promoting South Africa as a tourist destination, those services would be within the scope of VAT if made within the EU. Promoting a country as a tourist destination is not an intrinsically uneconomic activity. But the question is whether the payment by the Government of funding to a statutory body in order that it might carry out its statutory objective is an intrinsically uneconomic activity and we move on to consider this.

DECISION

Economic Activity - conclusion on law

222. The appellant's case is that as a profit making company could have been retained by the South African government to do what SATB did. It sees itself in the position of an outsourcing provider to the South African Government. The Government wanted to promote South Africa as a whole as a tourist destination, and it chose to do this by outsourcing the work to SATB.

223. Although it did not express itself this way in the hearing, we see it as comparing itself to the tax collectors in *Recaudadores de las Zonas Primera y Segunda* and the trusts in *Bath Festivals* and *Edinburgh Leisure*. Vis-à-vis the Government, outsourcing the promotion of a country is something that could be done for a profit, even though in fact SATB was non-profit making. Therefore, runs the appellant's argument, the charges paid by the Government to SATB were in consideration for an economic supply.

224. The appellant relies on the decisions in *NBT* and *ANTO* but we do not find them authoritative on this point. The question of whether what the appellants were doing was an economic activity was simply not considered in those cases. And we are not persuaded that the failure of the tribunals in those cases to consider the question of economic activity was because the answer was obvious. Although *Hong Kong Trade* is not actually authority for the view that payments from a Government to a statutory body are outside the scope of VAT, nevertheless, as we have said, the apparent

assumption in that case that that was so, does at least mean that the contrary view is not obviously the case either. Moreover, the chairman in *NBT* did not have the decisions in *Hong Kong Trade* or *Omnicom* [1994] VATTR 465 (discussed below) drawn to her attention.

225. In any event it is not even clear that NBT was discharging a statutory obligation or function. The issue was also not considered in the *ANTO* case: at paragraph [48] the Tribunal considered that ANTO was similar to an unincorporated association in English law and in paragraph [49] concluded that ANTO was in no way part of the Austrian Government even in the widest sense. There was no finding that ANTO had a statutory duty to promote tourism. And indeed the Tribunal distinguished the *Turespaña* case on the basis that Turespaña, but not ANTO, was discharging a statutory duty in return for a grant.

226. The Tribunal in *Turespaña* did not analyse the question as one of whether there were 'intrinsically economic supplies' but looked at the question of whether there was a 'direct link' and this was the basis of Mr Singh's submissions to us. However, in our view whether a taxable person is acting "as such" is part and parcel of the same question: if what is done is not intrinsically an economic activity, it cannot be a supply for consideration. The chairman said:

> "[43] It is in my judgment clear beyond argument that in carrying out its activities Turespaña was discharging its statutory duties under the Decrees. Apart from the fact that Turespaña could not discharge its duties without finance, it does not seem to me that it had any choice as to whether it performed its duties. Those duties were set out in Article 6 of the 1988 and 1994 decrees….. Turespaña had no option; it was the creature of statute and that statute set out its responsibilities.
>
> ….
>
> [46] It is clear that the government could control Turespaña's activities. Its functions could be altered by Decree at any time and its resources distributed accordingly.
>
> [47] Even before one comes to look at the nature of the payments by the State, the activities performed by Turespaña for the State appear far removed from the usual concept of supplies.
>
> [48] The payments by the State form part of the General State Budget. On the evidence before me they are a direct part…..
>
> [49] A British Parliament would speak of Parliament voting supplies. He would not however mean a VAT supply. Nor would he regard the annual appropriations as consideration for supplies by the Department to which they are made. In my judgment the concept is equally unrealistic in Spain.

The Decision then continued as cited in paragraph 136 above.

227. *Omnicom* was the case which preceded and presumably precipitated the case of *Turespaña*. Omnicom supplied Turespaña. The facts found in this earlier decision were very similar to those found in the decision of Turespaña, although expressed

differently. The legal position considered in *Omnicom* was that The Place of Supplies of Services Order 1992 No 3121 Article 16(b) required the Tribunal to be satisfied that the recipient of the appellant's supply (Turespaña) received the supplies of the appellant (Omnicom) for the "purposes of a business carried on by it". The Tribunal concluded:

> "[35]….We accept that Turespaña had a business of, for example, selling publications, promoting conferences and conventions. But those apart, the advertising services here were used by the Spanish Tourist Board to promote tourism in Spain and the Board/Turespaña is a government body. Its promotion of tourism in Spain is not an economic activity or a business in the VAT sense of those expressions."

228. Although the Tribunal went on to consider what is now Article 13 (to which we revert below) in paragraph [39] of its decision in a different context, that was not the basis of its decision in paragraph [35]. The basis of its decision was that Turespaña did not undertake economic activities on behalf of the Spanish Government.

229. *Turespaña* looked at Turespaña's statutory duty as relevant to the question of "direct link" but did not explicitly consider the question of whether what Turespaña did was an economic activity. *Omnicom* did consider the question of whether what Turespaña did was an economic activity and concluded it was not, it seems, on the combined basis that Turespaña was a government body and the promotion of tourism to Spain as a whole was not an economic activity.

230. *Omnicom* was therefore the only case involving tourist boards which addressed the issue of whether what a tourist board does is an economic activity. It concluded that it was not and that conclusion appears to be based on the statutory nature of Turespaña.

Conclusion on whether a statutory body receiving funds to carry out its statutory objectives is carrying on an economic activity

231. Our conclusion is that there is a very significant distinction between a state outsourcing to an independent third party, which could be profit making, whether or not it actually is, and the state creating and funding a statutory body specifically to carry out a task on behalf of the Government.

232. In our view, such a statutory body, when receiving the Government funding, could in no way be seen as carrying on an economic activity. It cannot do it for profit: on the contrary all the funds it receives must be utilised for the purpose for which it was established. Where a government establishes a statutory body to carry out a specific task, it would be impossible for that statutory body to make a profit at the expense of the government. It is not at all in the same position as an independent entity to which the Government has outsourced a task, as such an entity is free to make a profit, or carry on other activities.

233. If we are wrong it would mean that when a Government funds a statutory body established for a particular government purpose, those funds should be subject to VAT on the basis the statutory body is carrying on an economic activity in receiving statutory funds. It only has to be stated like this for it to be apparent that it is not right. The receipt by a statutory body of funds from the Government in order to carry out the purpose for which it was established cannot be an economic activity.

234. It follows that we cannot agree with the appellant that its statutory nature is irrelevant: we think it is crucial in a case where it is receiving funds from the Government in order to carry out the purpose for which it was established. We also cannot agree with the appellant that it should be compared with a wholly-owned subsidiary company making supplies of services to its parent company. The more apt comparison would be to the provision of funds by the parent to its subsidiary to carry out its objectives: and provision of capital by shareholders is outside the scope of VAT. But in any event, we base our decision on the statutory nature of SATB and the statutory nature of its duties for which it was funded: and therefore it cannot in any way be compared to a private company making supplies to its parent company.

235. We agree with Miss Hall that the mere fact a body is discharging its statutory function or obligation does not make its activity inherently uneconomic. This follows logically and because the CJEU has said that Article 13 only applies where the statutory body is engaging in an economic activity (See paragraph 181 (Hutchison). So *discharging* statutory functions can be an economic activity. But the point is here that SATB was not discharging its statutory functions in receiving the funds: it was only discharging its statutory functions when it spent the funds that it received on its statutory objective of promoting South Africa. So while the *discharge* of statutory obligations might involve making a supply for consideration, which is subject to VAT if not exempt and if Article 13 does not provide otherwise, the *receipt* of funding in order to discharge statutory obligations is by its very nature something that is not economic.

236. We note in passing, although it is not in any way authoritative, but from the outline of the facts given in the three tourist board cases (*NBT*, *Turespaña* and *ANTO)* it appears that none of the funds provided by the respective governments to their tourist boards were subject to VAT in the home EU country. This is consistent with our analysis of the law.

Economic Activity – conclusion on facts

237. We have said that a statutory body receiving funds from the Government in order to carry out its statutory objectives is not, in law, in so receiving the funds, undertaking an economic activity. The receipt of the funds is outside the scope of VAT.

238. But as a matter of fact, was the funding received by SATB from the South African Government in order to discharge its statutory obligations?

239. SATB was a statutory body: this is not in dispute. There was a dispute over whether promoting South Africa as a tourist destination was a compulsory duty of SATB. We have recorded our view in paragraps 13-14 that it was a statutory duty. In any event we do not think the distinction between a "duty" and an "objective" matters for these purposes. It is enough that it received funds for its statutory objective.

240. Irrespective of this point, a major part of SATB's case was that it should be distinguished from the *Turespaña* case on the facts. It says statute and Parliament controlled what Turespaña did whereas in this case SATB was controlled by an independent and commercially minded board. Turespaña did not enter into a performance agreement with the Spanish Government whereas all that SATB did was dictated by its consensual performance agreement. Turespaña's budget was allocated to it whereas SATB negotiated its level of funding.

241. We agree that it appears that in practice (if not in law) SATB had more autonomy than Turespaña in that some of Turespaña's board were political appointments whereas (except for the CEO) SATB was allowed by the Government to make its own appointments. None of SATB's employees were civil servants.

242. It also appears to be the case that Turespaña may have implemented rather than necessarily formed Government policy on tourism, whereas the evidence we had pointed to SATB having a large degree of control over implementation of tourism policy. This follows from the fact that it was SATB, and not the Government, who put forward the 3 year and 5 year plans. SATB also advised the Government on its policy (see paragraph 11).

243. However these differences of fact are, on our analysis of the law as set out above, irrelevant. Both Turespaña and SATB were creatures of statute discharging their statutory objectives and the differing degrees of autonomy from the respective Governments make no difference to the question of whether the receipt of government funding in such a situation could be said to be consideration for a supply.

244. The position might be different if SATB was wholly autonomous from the Government, but it is difficult to see how a statutory body could be wholly autonomous. And we are satisfied that SATB was not: it is clear that Government did decide how much funding SATB actually received, and it could if it wished appoint its controlling Board.

245. But as we understand it, the main distinction on which SATB relies is the existence of the Performance Agreement. Miss Hall's case is that we should look at the "commercial reality" of the performance agreement and ignore the "high level" position of the Tourism Act. SATB's case was that its statutory functions were high level and general. It discharged them by entering into the performance agreement.

246. SATB compared itself to a commercial body to whom the Government had chosen to outsource the execution of its policy on tourism. It does, it says, discharge its statutory objectives, but it does it by entering into economic activities and in particular by entering into the Performance Agreement with the Government.

Statutory bodies are entitled to discharge their statutory obligations through private law agreements. So we should only look at the Performance Agreement and ignore the Tourism Act.

247. On the question of delegation, it is of course true that responsibilities can be delegated. But SATB did not delegate its responsibilities in the Performance Agreement. This argument is circular: it would amount to saying SATB delegated its responsibilities under the Tourism Act to *itself*. The Tourism Act obliged it to promote tourism: the Performance Agreement obliged it (in much greater detail) to promote tourism. To *discharge* its statutory liability, SATB had to *execute* the performance agreement: it was not enough to enter into the Performance Agreement. So SATB is wrong to say it was delegating its duties by entering into the Performance Agreement.

248. We agree that the Tourism Act was high level and general. The Performance Agreement was detailed and renewed each year. The Tourism Act obliged SATB to promote tourism but gave little indication how this was to be done. The Tourism Act required the Government to fund SATB but did not say by how much and when. The Performance Agreements both set out SATB's promotional activities in detail and precisely how much funding it would receive and when.

249. We cannot see any reason in law why a detailed agreement between the statutory body and the Government on exactly what the former was to do when discharging its statutory duties and how much the latter was to give it in funding should alter the position that the payment of funding to a statutory body to carry out its statutory duties is not an economic activity.

250. We would expect the details of funding and operation to be decided after the initial Act of Parliament in establishing the statutory body. We would expect the Act establishing the statutory body to be high level and general. It would stultify Government if the precise duties and amount of funding had to specified when the Act was passed, rendering it necessary to constantly revise an Act of Parliament every time something changed.

251. Whether the Government votes funds as in *Turespaña* or an agreement is negotiated on a departmental basis, seems to us to make no difference.

252. What would make a difference would be if the Performance Act related to different activities to those contemplated by the establishing Act of Parliament. But in this case (and we presume in all cases of statutory bodies), SATB could only do what it was established by Parliament to do. In discharging the Performance Agreement, it carried out its objectives under the Tourism Act.

253. We also consider irrelevant Miss Hall's point that SATB was set up by the South African Parliament, but entered into the Performance Agreement with the Department. This is a distinction without a difference. While Parliament passes the statutes, it is for government departments to implement them.

254. Another point Miss Hall makes is that, in her opinion there was reciprocity between SATB and the Government in the Performance Agreement but no reciprocity in the Tourism Act. We do not agree there was reciprocity sufficient for there to be a supply "for" consideration in the Performance Agreement. In entering into the Performance Agreement, SATB was doing what it was obliged to do. That it had choice over how it promoted tourism makes no difference to the analysis. The Government was obliged to fund SATB although it had choice over how much. The Performance Agreement did no more or less then record exactly what SATB would do in discharging its statutory obligation and how much money it would be given to do it.

255. Miss Hall urged us to consider the case of *Beynon* [2005] STC 55 [31] and warned us against an approach that would

> "involve the kind of artificial dissection of the transaction….In my opinion the level of generality which corresponds with social and economic reality is to regard the transaction as…(and on to detail of case)

256. We understand her point is that the appropriate "level of generality" is the Performance Agreement and not the Tourism Act. Whereas we think looking at the Performance Agreement outwith its context of SATB's statutory duty would be to artificially dissect the situation.

257. SATB's case appears to be predicated on the basis that *unless* SATB was paid a grant without any strings attached, then it could not be a grant. But we do not agree. It is normal, although not essential, for grants to be paid with strict conditions on how the funds are used. The fact the Government had agreed to a certain level of funding in return for specified services did not convert the money from grant to contractual income. The question is whether the payment was consideration for a supply, and the funding of a statutory body by the Government is simply not an economic activity, even where the statutory body and Government agree a document which sets out the services and the level of funding: the funding cannot therefore be consideration for a supply.

258. Our conclusion is that, irrespective of the question of "direct link", SATB was not a taxable person acting as such when receiving Government funding to carry out its statutory duties as detailed in the Performance Agreement. By itself that is sufficient to dismiss the appeal at least in respect of the funding from the Government.

259. Neverthelesss, for completeness, we go on to consider the question of "direct link", the authorities on which we have already considered at paragraphs 113-163 above.

Supplies for consideration – conclusion on law & facts

260. The structure of Articles 2, 4 & 9 PVD is such that the question of whether there is a supply for consideration is a separate question to whether a taxable person is

"acting as such" when making the supply. Nevertheless, it is difficult to see how someone who is not engaging in economic activity could be making a supply for consideration. And again it is difficult to envisage a scenario where someone is acting as a taxable person but the direct link between the supply and consideration is missing.

261. Nevertheless the cases as set out above in this decision notice have separated the question and some have considered Article 2 and "direct link" and others have considered "economic activity" under what is now Article 9.

262. HMRC's case was that there was no direct link between SATB's activities and its government funding sufficient for it to be making supplies for consideration. As we see the two questions as virtually the same we agree: SATB did not act as a taxable person when receiving the government funding it was therefore not making a supply for consideration to the Government.

263. But we go on to consider the case in detail.

Reciprocity

264. HMRC's case was that there was no direct link because of a lack of reciprocity between SATB and the South African Government because SATB was obliged by law to promote South Africa as a Tourist destination and the Government was obliged to fund it.

265. We see the question of "direct link" as a question of whether the would-be supply is linked to the alleged consideration. In *Apple & Pear* there was no such link. Each supplier had to pay even if it would receive nothing in return. There was a lack of reciprocity. *Tolsma* shows that the reciprocity must be agreed in advance: there must be a price (ascertained or ascertainable) for which services are to be performed.

266. However, the funds which SATB received had to be used by it to carry out its statutory purpose. This is not reciprocity but an obligation which existed from the moment SATB was created and before any particular Performance Agreement was entered into. As a matter of law, we find this is not reciprocity of the sort required in order for the putative supply to be "for" the putative consideration.

Price linked to level of service

267. In Turespaña, we have mentioned it was a finding that there no direct link because the level of service was not linked to the amount paid. We mentioned that it was part of the appellant's case that the Performance Agreement distinguished SATB's case from Turespaña because a particular level of services, says SATB, was agreed.

268. Looking at this as a question of law and fact, we are unable to agree.

269. Turespaña was funded by a process akin to the Spanish Government voting it supplies. There was no Performance Agreement, and as we have said, the *Turespaña* decision indicates that this would make a difference. This is because, as already cited, the Tribunal said:

> "[51] Even if the budgetary payments might otherwise be payments for services it seems to me that the necessary direct link would be absent. There was no evidence that any particular level of services is bought or that defined activities are specified in each budget……"

270. If the Tribunal meant that agreeing a specific level of service would, irrespective of reciprocity and in particular the statutory body's obligation by statute to use funds given to it for its statutory purposes, convert what was not a direct link to a direct link, we could not agree for the reasons given above in paragraphs 231-235. We think in Turespaña the Tribunal looked at both elements together and its decision is not to be read like this.

271. But if we are wrong on this as a matter of law, would we find there to be a direct link because of the Performance Agreement as a matter of fact? In other words, putting aside the question of statutory duties, were the activities carried out by SATB directly linked to the money given by the Government?

272. We find that the language of the Performance Agreement was to talk of "grants" and payment "in principle" but we agree with Miss Hall that we should look at its substance and not the labels used.

273. Looking at the substance, we find that the payment made by the Government to SATB was, on Mr Van Der Walt's evidence, calculated by reference to SATB's expenses, including premises, equipment, human resources and other operational costs (see paragraph 33) We do not find that this would be a normal provision in a contract between independent entities, which would simply have a price. It looks like the Government is ensuring that SATB has enough money to do what it wishes it to do.

274. Even more significantly, Clause 5.3 provided that

> "all interest accrued on this funding will be applied by [SATB] to fund additional marketing activities"

275. And clause 5.5 provided that:

> "the parties agree that if there are any uncommitted funds available at the end of the duration of the agreement, such funds shall be refunded to DEAT."

276. This is not the language of a contract: it reads more like a trust. If the monies paid by the Government to SATB were payment in return for a supply, the money would be for SATB to keep. The Government would not be able to tell it to use any interest earned on it for a specific purpose or to refund unused monies.

277. We were also shown a letter to the Tourism Department from SATB setting out that a reduction in funds announced by the Department would result in a cut back of SATB's activities. This does not read to us like the sort of letter a business would write to a customer which had announced that it would no longer be paying what was promised in the contract: it reads like what it is, a statutory body explaining to the Government that it will have to cut back on services if its funding is reduced.

278. SATB suggested that it might have entered into the Performance Agreement even if the Tourism Act had not existed. This is of course entirely hypothetical. And in any event we do not agree that the evidence supports the suggestion: the Performance Agreement itself, with the clauses cited above, only makes sense as the detailed implementation of the earlier general obligation imposed by the Tourism Act on SATB, being the semi-autonomous statutory body it created as a fundamental part of the South African Government's policy to increase jobs in South Africa.

279. In conclusion, we do not accept that the Performance Agreement was a reciprocal legal relationship within *Tolsma* rather than a funding arrangement. The price paid was not directly linked to the "services" provided.

Conclusions on direct link

280. As we have said repetitively, it is difficult to distinguish questions of "direct link" from questions of economic activity.

281. We have said that, particularly because of clause 5.5 of the Performance Agreement, as a matter of law and fact there was no direct link between the "price" and the "services". But fundamentally our view is that there was no supply at all between the South African Government and SATB.

282. We see SATB's position as analogous to that of SPÖ or a trustee receiving funds on trust: the receipt of government funds by a statutory body to carry out its objectives could not be an economic activity. SATB received funds earmarked for a particular purpose and was obliged by law to use those funds for that purpose. If any funds were left over, it had to hand them back. It is impossible to envisage a commercial operation on this basis. It simply cannot be analogous to the sorts of things done by a profit making enterprise. The *receipt* of funds which can only lawfully be used for a specified purpose cannot be consideration for a supply.

283. This takes us right back to *Hong Kong* case: where there is no consideration there is no supply. Earmarked funds are not consideration. There is no direct link because there is no consideration: there is a distinction between being paid to do a job and receiving funds which must be used for a particular purpose. Although with earmarked funds there is a clear link between the money and the "services", it is not the sort of link envisaged by *Apple & Pear*. With monies provided for a particular purpose, the funds must be used for the specified purpose. There is no possibility of there being a surplus which could be a profit, as the funds do not truly belong to the recipient. The funds must be used up on the specified service, retained to be used for that purpose in the future, or returned: so there is no absolute link between the

amount of the "services" provided and the amount of the money paid. And where this is the case, irrespective of whether the recipient has a profit motive or not, we do not see how there can be said to be a direct link.

284. Earmarking funds, the alleged "price" for services, for a particular use is the antithesis of commercial activity. Commercial activity requires there to be a price, whether ascertained or ascertainable, directly linked to the activity carried out in return. It is an obvious corollary that the "price" paid is for the supplier to apply to its own purposes. It is up to the supplier whether or not it uses all or some or none of the price paid in providing the services. The receipt of funds in such a case is not comparable to receiving a trust fund or earmarked funds.

285. The appellant compared SATB's situation to one of a road contractor employed by a local council to mend roads. But the price paid by the Council to the road contractor, whether paid before or after the work was carried out, would belong to the road contractor. It would not be earmarked for a particular purpose. It would not be unlawful for the road contractor to spend all the money on something other than mending the roads. The local Council could not insist the money was spent on road repairing materials and the wages of the men employed to do the physical work. All the Council could do would be to insist the roads were repaired or sue for breach of contract.

286. But as a matter of South African law, as stipulated in the Tourism Act, SATB had to use the funds from the Government for its statutory objectives. It was not in an analogous situation to an outsourcer or commercial enterprise.

287. If the facts at issue in *NBT* and *ANTO* were to arise again and the Tribunal to consider the matter again, we believe that a different answer might be given. Even if neither body were a statutory body, if the funds provided by the respective governments were earmarked for a purpose and could not be used for anything else, it would be difficult to see that there was an economic activity, or a direct link between "supply" and "consideration".

288. We therefore also decide the case against SATB on the basis we find it was not making supplies for consideration within Article 2, and that there was no direct link between the "supplies" and the "consideration".

289. On the question of independence, we also consider that for the same reasons that SATB cannot be said to be engaging in an economic activity when receiving the Government funding, that it cannot be said to be independent of the Government when so doing, although we recognise this was not part of HMRC's case.

290. This largely concludes the appeal against SATB.

SATB's other sources of income - conclusions

291. Originally HMRC's position was that SATB would be entitled to recover 15% of its input tax on the basis it related to supplies made to persons other than the South

African Government. Its position on that changed during the hearing, so that by the end HMRC did not consider anything other than SATB's incidental activities, such as selling know-how or images or sub-letting excess property, could be considered as economic activities.

292. HMRC saw all other activities of SATB as a question of SATB discharging its statutory duty.

293. However, we have based our decision on the grounds that where a statutory body is receiving Government funding in order to discharge its statutory duties it is not (in receiving those funds) acting as a taxable person and not making a supply for consideration. The same cannot be said where it receives funding from third parties.

Incidental activities

294. We agree with both parties that SATB's incidental activities, such as selling know-how, would be sold under a legal relationship as envisaged in *Tolsma*: there would be a price linked to a specific level of service. While the funds once received must be held by SATB for its statutory purposes, that is because of its establishing Act and not because the payer of the funds has earmarked them for that purpose. Unlike the funds from the Government, there would be a direct link between the services and the consideration paid.

Joint marketing initiatives

295. We do not see the promotion of a single country as a whole as an inherently non-economic activity in any event and that is certainly the case where what SATB was paid to do was to promote South Africa in connection with the business of a "partner". An example is where SATB was paid 50% of the cost of advertisements under an agreement in which SATB was to promote South Africa as a whole in conjunction with flights to South Africa sold by Emirates.

296. It would depend on the exact facts of the case but it seems to us that either SATB would be making an on-supply to its partner of services purchased from the advertising agency or the advertising agency would be making a supply to both parties, and SATB would just act as a paymaster.

297. Again it seems to us that where SATB on-supplied services received from an advertising agency to its partner, the funds paid by its partner would be directly linked to a specific level of service and between SATB and its partner there would be the sort of legal relationship envisaged in *Tolsma.* Further, the funds paid to SATB would not be earmarked to be used for a particular purpose but would be paid in consideration for an agreed supply.

TBCSA funding

298. The TBCSA funding is rather different. Although SATB was obliged, when promoting South Africa, to favour the businesses which collected the levy from their

customers (see paragraph 58), it is less easy to see a link between the amount of levy paid to SATB to a particular level of service provided to the levy collectors.

299. Similarly to funds provided under the Performance Agreement, SATB was not free to use the TBCSA funds as it wished. The MOU provided (paragraph 59) that unused funds in one period had to be carried forward against marketing activities in the next period.

300. Therefore, we agree with HMRC that in respect of the TBCSA levy, SATB no more made supplies for consideration within the meaning of the VAT Act (or would have done if within the EU) than it did in respect of the funding from the South African Government.

301. It is for the parties to agree the appropriate level of input tax refund bearing in mind the principles in this decision or to revert to the Tribunal if they are unable to agree.

Footnote - Article 13

302. We have referred to Article 13 in our decision. Where does Article 13 fit into our analysis? It provides:

> **Article 13**
>
> (1) States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.
>
> However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable person would lead to significant distortions of competition.
>
> In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible."

303. HMRC did not put its case against SATB on the basis that Article 13 was engaged. In other words, it did not argue that SATB was a public body acting as a public body in receiving the funds from the South African Government. Its position was that there was no direct link between SATB's activities and the funding. It did not even suggest Article 13 applied as a secondary argument.

304. Nevertheless, some relevant points arise. Miss Hall's view appeared to be that Article 13 was not in issue as it was not part of the law of the UK as it was not enacted into VATA. And it is true that there is no provision in VATA which entirely corresponds with the first paragraph of Article 13.

305. However, we consider that Article 13 is part of the law of the UK. In the House of Lords decision in *ICAEW at* page 400h-j Lord Slynn (who gave the leading and only judgment) said:

> "..two questions have been raised in this appeal. The first is whether s 4 of the Value Added Tax Act 1994 and art 4 of [the 6VD] make chargeable to VAT certain activities carried on by [ICAEW]….If the activities are chargeable to tax, then the second question arises s to whether the institute is a body governed by public law and whether it engages in these activities as a public authority, in which case the institute is not considered as a taxable person in respect of these activities. If they are not so chargeable to tax ….then the second question does not arise for decision."

306. The explanation for this view was given later (at page 402 e f) where he said:

> "there is a difference in the wording between s 4 of the 1994 Act and arts 2 and 4 of the Sixth Directive…..The 1994 Act must so far as possible be construed so as to give effect to the Sixth Directive (see *Marleasing SA* ... (Case C-106/89 [1990] ECR 4135). It does not seem to me that there is any difficulty here in doing that and one would expect the same result to follow form the application of either approach"

307. In other words, Article 13 is part of the law of the UK. Technically, Lord Slynn's views were obiter but in view of the later decision of the Court of Appeal in *EB Central Services* [2008] EWCA Civ 486 we do not think it could be maintained that his view was wrong.

308. Therefore, on the basis Art 13 is part of UK law, why is it not relevant to this appeal? As we have said (see paragraph 181), for a supply by a public law body to fall within Article 13, it must be an economic activity, involving a supply for consideration. If it is not, Article 13 is simply not engaged.

309. Therefore, as we have concluded that (in respect of its funding from central government), SATB was not engaging in an economic activity or making a supply for consideration, Article 13 does not fall to be considered.

310. It seems likely to us that Article 13 is intended to capture interactions between public bodies and third parties: it is not apt to capture interactions between public bodies and the government itself because by their very nature these are not economic activities.

311. Nevertheless, were we wrong on our conclusions in this case, it seems that Article 13 would have to be considered.

312. 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.

313. Cases also cited but not mentioned in decision:

Gus Merchandise Corporation [1981] STC 569
Telemed Ltd [1992] STC 89
Westmoreland [1998] STC 431
Mirror Group C-409/98 [2001] STC 1453
Lex Services [2003] UKHL 67

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 13 December 2012