# TC03698

**Appeal number: TC/2011/03716**

***VALUE ADDED TAX — input tax — whether appellant carrying on economic activity — whether expenses attributable to onward taxable supply — UK resident company providing management services to overseas subsidiaries — no agreement on amount of consideration to be paid by subsidiaries — no — whether taxable supplies made — no — whether assessments in time — yes — appeal dismissed***

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

**NORSEMAN GOLD plc** **Appellant**

**- and –**

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

**TRIBUNAL: JUDGE COLIN BISHOPP**

**Sitting in public in London on 3, 4 and 5 December 2013**

**Tarlochan Lall, counsel, instructed by Keystone Law, for the Appellant**

**Luke Connell, presenting officer, for the Respondents**

## DECISION

1. This is an appeal against six assessments made on 12 August 2010 pursuant to s 73 of the Value Added Tax Act 1994 ("VATA"). The purpose of the assessments was to recover input tax of, in all, £81,068 which the appellant, Norseman Gold plc ("Norseman"), had claimed in its VAT returns for the periods from 10/07 to 01/09. I am not asked to consider the detail of the assessments, but only to deal with matters of principle. The outcome of the appeal will also be relevant to Norseman's position in respect of other periods, but again I do not need to deal with them.

2. The underlying reason for the assessment was HMRC's belief that at the relevant time Norseman was not carrying on an economic activity and accordingly was not making any taxable supplies. In the alternative they asserted that the expenditure in respect of which the input tax was incurred was not attributable to any taxable supply Norseman might have made. Both of those contentions are disputed. The parties also disagree about whether some of the assessments were made within the applicable time limit.

3. Norseman was represented before me by Mr Tarlochan Lall of counsel and HMRC by a presenting officer, Mr Luke Connell. I had the witness statements of Norseman's company secretary, John Bottomley, and of one of its directors, Gary Steinepreis, both of whom also gave oral evidence. Mr Bottomley, who is a Fellow of the Institute of Chartered Secretaries and Administrators, acts as company secretary to many companies, and not exclusively for Norseman. He provided a corporate history in some detail, which I summarise below, and gave evidence about Norseman's activities. Mr Steinepreis lives in Australia and takes an active role in the activities of Norseman's subsidiaries, all of which carry on business exclusively in Australia. I also had the written and oral evidence of the assessing officer, Mr Andrew Melbourne.

### The evidence

4. Many of the facts were undisputed and I set them out below, together with the evidence given on matters which were the subject of some contention. I set out my findings on those matters later in this decision.

5. It is convenient to begin with the corporate structure. Norseman is a UK-registered company, at the relevant time listed on the Alternative Investment Market ("AIM") of the London Stock Exchange. It is a holding company, whose operating subsidiaries carry on gold mining activities in Australia. It has two principal subsidiaries: Davos Resources Pty Ltd ("Davos"); and Norseman Gold Pty Ltd ("PTY"), also a holding company and the parent of Central Norseman Gold Corporation Ltd ("CNGC"), which is in turn the parent of Pangolin Resources Pty Ltd. That company does not feature further in what follows. I was told that CNGC is the company of the group which undertakes most of its operating activity. The beneficial ownership of all of the subsidiaries, which are Australian-registered companies, rests with Norseman.

6. Mr Bottomley told me that Norseman was incorporated in March 2005 as a "shell" company (then called Davos plc) with only two issued shares, one held by

Mr David Steinepreis (who is Gary Steinepreis's brother) and the other by himself. In August 2006, using capital provided by David Steinepreis by way of loan, Norseman acquired Davos, which owned a licence to explore an area of Australia's Northern Territory known as Pine Creek Tenement for minerals. Mr Steinepreis then set about raising capital by persuading investors to purchase shares in Norseman, to enable it to finance the exploration work at Pine Creek and to float on AIM.

7. Norseman was admitted to AIM in October 2006. At that time the group's activities were limited to the operations at Pine Creek. However, in early 2007, Norseman decided to acquire CNGC, which had entered into administration in June 2006. It owned two underground gold mines, some open workings and various facilities in Western Australia. CNGC had been making losses but the then board of Norseman considered that CNGC's operations could be returned to profitability. It was decided that PTY should be incorporated to act as the vehicle for the acquisition, which was funded by a share placing in the United Kingdom. The funds raised were then transferred to Australia. Immediately after the acquisition was complete Norseman assumed control of CNGC, in particular by appointing its directors. At about the same time Norseman changed its name from Davos plc to Norseman Gold plc.

8. Mr Bottomley explained that there was a considerable amount of activity in the months after the acquisition, designed to put the operations back on a sound footing. CNGC became the group focus, and work at Pine Creek ceased. He also said that while it was CNGC which undertook the mining operations, it was Norseman, as the ultimate holding company, which directed what was done, provided working capital (by way of interest-free loans), ensured it was used properly and took care of shareholders' interests. Further operating capital was raised when Norseman was additionally listed on the Australian stock exchange in June 2009.

9. In the meantime Norseman became registered for VAT on 2 October 2007, but with effect from 27 October 2006. In its application for registration it stated that its business was gold mining, but it is accepted that this was an error: Mr Bottomley told me he had inserted the core group activity, rather than Norseman's activity. However, before Norseman was registered, HMRC made some enquiries as a result of which Norseman's description of its intended business activity was amended to "management charges to be made by the company to the operating subsidiary in Australia". HMRC than made a further request for information. The questions and answers were as follows:

> Q "What specific services does this company supply or intend to supply? Are these services supplied, or will they be supplied SOLELY by the directors of the company? If so, are all the directors who are supplying the services also all directors of the companies receiving the services?"
>
> A "The company incurs running costs which will be re-charged to the subsidiary company in the form of a management charge. The directors of the subsidiary company are not the same as the parent company apart from one."
>
> Q "Describe the nature of any goods or non service-based supplies (if any) which this company supplies, or intends to supply."

A "Recharging of costs incurred which are to be borne by the subsidiary company and recharged by way of a management charge."

10. HMRC were evidently satisfied by those replies since they proceeded to register Norseman for VAT with the trade classification "management consultancy".

11. Between September 2006 and the hearing of the appeal in December 2103 Norseman and its principal subsidiaries, PTY and CNGC, have had some directors in common, and some directors who have served on only one or two boards. Mr Bottomley has not been a director of any of the companies. Gary Steinepreis is, and has for much of the relevant period been, a director of all three, as has Mr Kevin Maloney. David Steinepreis is a director of Norseman and CNGC, and was but no longer is a director of PTY. Two members of Norseman's board are not and have not been directors of any subsidiary, three others have been but no longer are members of the boards of all three companies, and one was but no longer is a director of Norseman and CNGC, but not of PTY. One other individual was but no longer is a director of PTY, but of no other group company. All of the directors are Australian-resident, save for one who is UK-resident and David Steinepreis, who divides his time between the two countries. In some cases directors have left one or other board for a short interval before re-appointment, but that factor does not seem to be of any present significance. What is clear is that there is considerable overlap between the various companies in the composition of their boards, and that the answer given to the first of the questions I have set out above was not entirely correct, as indeed Mr Bottomley (who had provided the answers) accepted.

12. However, the manner in which the directors were remunerated shows that it was Norseman which bore the cost. Four directors—Gary and David Steinepreis, Mr Michael de Villiers (the UK-resident director) and Mr Scott Spencer—are, or were, indirectly remunerated by Norseman, through service companies, but have or had service contracts with Norseman. Mr Spencer was a director of CNGC but resigned when Norseman acquired it. Thereafter Mr de Villiers and he were directors only of Norseman. David Steinepreis, although he is or has been a director of the subsidiaries, has and has had a service contract only with Norseman. Two other directors of Norseman, Mr Barry Cahill (who is or was its chief executive officer) and Mr Vincent Pendal (its chairman), were at the relevant time also directors of PTY and CNGC, and were remunerated through service companies whose fees were paid by Norseman, although it seems that Mr Cahill also received a separate fee for his role as a director of Norseman.

13. I was provided with copies of the agreements between Norseman and the various Australian service companies which provided for the supply to Norseman of the directors' services (save that Mr de Villiers used a UK service company). The agreements were similar in form, though there were some minor differences of detail between them. Gary Steinepreis, for example, was required to accept appointment as a director of Norseman, to work in that capacity for at least five days a month, and to do so primarily in Perth, Western Australia, although some travel was also contemplated. The precise nature of his duties was not spelt out. The agreement in respect of David Steinepreis (with the same service company) differed in that the geographical requirement was omitted, but differences of that kind seem to me to be immaterial.

14. The evidence showed (and it was uncontroversial) that the day-to-day management of the subsidiaries all took place in Australia. In addition, and despite the incomplete overlap of directors, Norseman, PTY and CNGC held joint board meetings; as most of the directors were in Australia the meetings were, necessarily, there and I understand that Mr de Villiers usually joined by telephone, as did David Steinepreis if he happened to be in the UK. Norseman's statutory meetings have, however, taken place in the UK (at Mr Bottomley's office, since Norseman has none of its own in the UK) and they have been attended by David Steinepreis, Mr de Villiers, Mr Bottomley and Mr Cahill if he was in the UK at the time.

15. I was shown the minutes of two board meetings, one of (according to the heading) Norseman alone, on 7 May 2007, and the other a joint meeting of Norseman and CNGC, held on 13 February 2009. The first was conducted entirely by telephone. The minutes record discussion about Norseman's own affairs, but also of mining operations at Pine Creek and elsewhere. The second of the meetings took place in Australia and was attended by Mr Pendal, Mr Cahill, and the Steinepreis brothers. Again, some matters discussed related only to Norseman's interests, but several related to the mining operations and their future as well as their past performance. There is no mention in the minutes of either meeting of the raising of management charges by Norseman to any of its subsidiaries.

16. Gary Steinepreis told me that his main role within the group was to manage CNGC, whose operational activities were run by Mr Cahill and Mr Pendal, both of whom are experienced mining engineers while Mr Steinepreis is an accountant. He also attended Norseman's board meetings. The purpose and main business of those meetings, he said, was to determine the group's objectives and the strategy for achieving them, and in particular to determine the operating subsidiaries' financial requirements and the means of meeting them. In the years when CNGC was making losses that was done by the making of loans, financed by the share issues to which I have referred. Most of the money had been raised in London as UK capital markets are stronger than those in Australia. Norseman's function, Mr Steinepreis said, was to control the subsidiaries, and to do so actively; it was not, he insisted, merely a holding company. It was not intended, he said, that Norseman should provide its services to the subsidiaries free of charge, but until they were consistently generating profits there was little purpose to raising invoices whose payment Norseman would effectively fund itself.

17. It was put to Mr Steinepreis that he and his brother have, between them, interests in a great many companies, and that each of them spent only a modest part of their working time on the group's business, a proposition which he accepted. He did not, however, accept that Norseman was in reality an investment company; it was, he insisted, engaged in actively managing its subsidiaries, and trying to turn them, and in particular CNGN, into profitable concerns. The aim was to generate revenue which would convert into income for Norseman; it was not to raise management charges for their own sake. Nevertheless, Norseman incurred costs in providing management services and it aimed to recover them by making charges.

18. Mr Bottomley completed the relevant VAT returns. He included in them claims for the input tax Norseman had incurred, and provided a list and copies of the relevant invoices. The repayment claims were met. No output tax was declared because, Mr Bottomley said, although it had been intended that Norseman would charge management fees to the subsidiaries, that did not happen during the relevant period. If it had made charges it would have been required to provide the money to pay them, as the subsidiaries were making losses (it was not until the year to 30 June 2009 that the group returned a profit); thus there seemed to be little purpose in sending invoices.

19. The subject was, however, broached in an email Mr Bottomley sent on 30 January 2008 to the company which provided the Steinepreis brothers' services as directors. The material part of it read:

> "You will recall that when we prepared our application for VAT registration, one of the points we made to the H M Customs and Excise [*sic*] was that there would be a management charge from the parent company to the operating subsidiary in Australia. This establishes a trade by Norseman Gold plc on which VAT would be charged.
>
> Could you please give consideration to the raising of a quarterly management charge by Plc."

20. That email led to others, over the next few days. They addressed the questions, when charges should be raised, and their amount. On 4 February 2008 Mr Bottomley indicated that he was meeting David Steinepreis the following day, when he would discuss the matter with him, but if he did the outcome of the discussion is not apparent. What is apparent is that nothing was done by way of agreeing on the amount to be charged, the frequency with which invoices would be sent, to which subsidiary they were to be sent, and the detail of the services to be provided in exchange for the charge. Mr Bottomley said he had made some rather tentative enquiries about the form of a possible agreement but nothing was in fact done until April 2009, when the first invoice was sent, by Norseman to PTY, for £15,000 plus VAT. That invoice was reflected in Norseman's VAT return for period 04/09, by declaration of the output tax due of £2,250. At the same time, Norseman claimed credit for input tax of £8,287.27. The difference between those two figures is not consistent with Norseman's position that it was re-charging the costs it incurred, but I leave that factor out of account for present purposes. Further invoices (also for rather less than the cost actually incurred) have followed, at roughly quarterly intervals, although it seems that none have been paid because the return to profit which CNGC achieved in 2008-09 was short-lived. There was, however, some evidence (which was not disputed) that the invoiced amounts were recorded as debts in the books of PTY. Despite the declaration of output tax liabilities HMRC have continued to take the view that Norseman is not undertaking an economic activity and making taxable supplies, and have continued to disallow the input tax claims.

21. The enquiries which led to the disputed assessment began in January 2009. Mr Melbourne, who was then a VAT assurance officer, told me that his enquiries were prompted by the selection for verification by HMRC's computer system of Norseman's VAT return for period 01/09. He did not explain precisely what was the reason for selection, but as this was the sixth successive repayment return

without any declared output tax liability I do not think it a matter for surprise that enquiries were made.

22. Mr Melbourne was not provided in advance with a copy of Norseman's VAT registration certificate but instead examined its application for registration. The application, he said, usually gave fuller information than the classification which appeared on the certificate. Unfortunately he did not realise that Mr Bottomley had corrected the application, and assumed Norseman was operating a gold mine; his letter of 21 January 2009, by which he began the enquiry, posed questions suitable for a gold mining company rather than one engaged in management consultancy. Mr Bottomley, who naturally assumed Mr Melbourne had seen the pre-registration correspondence, inadvertently added to his confusion by his (Mr Bottomley's) reply of 13 February 2009, in which he said

> "The company operates a gold mine at Norseman in Australia which has been in operation for 71 years producing over 100,000 ounces of gold a year.
>
> Following the completion of the year end audit the company is making its first management charge to the operating subsidiary in Australia which will be made during the current quarter."

23. Mr Bottomley went on to provide answers to Mr Melbourne's remaining questions. Further correspondence followed, during the course of which Mr Bottomley also said that "I confirm that Norseman Gold plc delivered unrefined gold bars", a statement which can only have reinforced Mr Melbourne's mistaken understanding that Norseman was itself undertaking mining operations. There was then an interval before arrangements were made for Mr Melbourne to visit Mr Bottomley (who held Norseman's UK records); the visit took place on 20 August 2009. There was no further development, at least from Mr Bottomley's perspective, until Mr Melbourne wrote to him on 29 June 2010 indicating that he intended to disallow all of the input tax for which credit had been claimed in the relevant returns. By this time, as a result of what he learnt at the meeting, Mr Melbourne was aware that Norseman was not itself operating a gold mine, but was making, as Mr Melbourne thought, only "activities we would consider exempt, eg share dealing, earning interest etc." The assessment was made, as I have said, on 12 August 2010, and was followed by a notification of the imposition of misdeclaration penalties (one for each of the periods assessed) of, in all, £12,158. I am not asked to deal with the penalties as a discrete issue.

24. Mr Bottomley asked that the assessment be reviewed, and a review was undertaken by another officer, Mr David Appleyard, from whom I had no evidence. However, his letter of 11 April 2011, written following his review, shows that he too was of the view that Norseman was not making any supplies of management services. He dealt also with Mr Bottomley's rather tentative contention that the assessment was made out of time, only to reject it. Norseman then instructed its accountants to appeal to the tribunal (which they did) and also to continue the debate with HMRC in correspondence, but the parties' respective positions remained unchanged.

25. The disputed input tax was incurred on the supply to Norseman of the services of the UK-resident director (engaged as I have said via a service company), on accountancy and audit fees, on fees incurred in raising finance, on fees for Mr Bottomley's services, on registrars' and Stock Exchange fees and on

fees for public relations services and website design. Norseman had no offices of its own in the UK, and no employees other than (if they were employed at all) its directors. The Australian-resident directors' services, including those of David Steinepreis, were provided by Australian service companies and therefore the fees paid for them did not carry any potentially deductible input tax.

26. I should add that it is common ground that if Norseman was making supplies of management services to the subsidiaries those supplies would have been taxable supplies until the end of 2009, when s 7A of VATA came into effect and the rules on place of supply were changed. I do not, therefore, need to explore those rules.

**Norseman's submissions**

27. Mr Lall's submission was that the first issue between the parties, namely whether Norseman was carrying on an economic activity, boils down to the question whether, on the one hand, it was a passive holding company or, on the other, was actively managing its subsidiaries in a manner which brought it within the definition of "taxable person" set out in art 9.1 of the Principal VAT Directive (2006/112/EC), which reads:

> "'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
>
> Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity' …."

28. Guidance on the application of the earlier equivalent provision, art 4 of the Sixth VAT Directive (77/388/EEC), was provided by the European Court of Justice ("ECJ"), as it then was, in *Finanzamt Goslar v Breitsohl* (Case C-400/98) [2001] STC 355. At [34] the Court said:

> "… a person who has the intention, confirmed by objective evidence, to commence independently an economic activity within the meaning of art 4 of the Sixth Directive and who incurs the first investment expenditure for those purposes must be regarded as a taxable person …."

29. While the taxing authority may require the person claiming to be a taxable person to provide evidence to support the claim, the status of taxable person is to be determined on objective grounds, and is not dependent on acceptance by the taxing authority: see [38] of the judgment. The question whether economic activity is being carried on is essentially one of fact.

30. In *Cibo Participations SA v Directeur régional des impôts du Nord-Pas-de-Calais* (Case C-16/00) [2002] STC 460 the Court said, at [21], that

> "direct or indirect involvement in the management of subsidiaries must be regarded as an economic activity within the meaning of art 4(2) of the Sixth Directive where it entails carrying out transactions which are subject to VAT by virtue of art 2 of that Directive, such as the supply by a holding company such as Cibo of administrative, financial, commercial and technical services to its subsidiaries."

31. In *BAA Ltd v Revenue and Customs Commissioners* [2013] STC 752 Mummery LJ, with whom Patten LJ and Parker J agreed, observed, at [23], that

> "Merely acquiring and holding shares is not regarded as an economic activity for VAT purposes. The economic activity position is different where the acquisition and holding of shares is also accompanied by direct or indirect involvement in the management of the companies in which the holding has been acquired."

32. Services of that kind, said Mr Lall, were precisely what Norseman was supplying to its subsidiaries: it provided strategic direction as well as active management. It was immaterial that charges had not been made. In *Belgium v Ghent Coal Terminal NV* (Case C-37/95) [2001] STC 260 the taxpayer incurred input tax on developing land it intended to use for making taxable supplies. It recovered that input tax in the ordinary way. However, before it had made any supplies it was required by the local authority to exchange the land for a different plot, and therefore never used the land in respect of which it had incurred the input tax to make any taxable supplies. The Court nevertheless decided that the intention to use the land for making taxable supplies was enough, and once the right to deduct the input tax had been acquired it was not lost if the original intention was frustrated. In *Breitsohl* the taxpayer began to develop vacant land with the intention of using it, when developed, for making taxable supplies. Unfortunately she ran out of money and was forced to make an exempt sale of the land to a third party. She nevertheless retained the right to recover the input tax.

33. Here, said Mr Lall, there was not only clear evidence of the making of supplies, but also of an intention to charge for them (thus the requirement of s 5(2) of VATA of consideration was satisfied). The reason charges had not been levied in the relevant period was that the subsidiaries did not have the means to pay; but the evidence showed that there was an intention to charge, and charges had in fact been raised later even though, as he was compelled to concede, they had not been paid.

34. During the course of the investigation HMRC had raised an argument, based on the ECJ's judgment in *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) [1994] STC 509, to the effect that the charges represented voluntary payments, rather than the consideration for supplies of management services. In *Tolsma* the question was whether donations by passers-by to a street musician amounted to the consideration for a taxable supply of services; the Court decided that the entirely voluntary nature of the payments had the consequence that they could not be regarded as consideration. That was not this case: there was nothing voluntary about a charge when both parties knew that one was to supply services and the other to pay for them.

35. It was not, however, necessary for that arrangement to be reduced to formal terms. In *Town and County Factors Ltd v Customs and Excise Commissioners* (Case C-498/99) [2002] STC 1263 the Court was required to consider a "Spot the Ball" competition in which prizes were awarded to successful participants. The obligation to pay the prizes was expressly said to be binding in honour only, because gambling debts are unenforceable in English law, although in practice the promoter always paid them. The Court concluded nevertheless that there was sufficient reciprocity between the participant's payment of an entry fee and the

promoter's obligations, making the observation that if it were otherwise a taxable person could avoid paying VAT by including a similar term in his contracts.

36. Mr Lall pointed out that the question whether the supplies to Norseman on which it had incurred the disputed input tax were attributable to its onward supplies to the subsidiaries of management services had not been raised in the pre-assessment letter sent by Mr Melbourne to Mr Bottomley in June 2010, or in HMRC's statement of case. The argument was first raised only in October 2013, in a letter from Mr Connell to Norseman's solicitors. He did, however, address it both in his skeleton argument and orally. His argument was that the expenditure was either directly attributable to Norseman's supplies of management services, for example in respect of the cost of the directors' services obtained from a UK-based service company, or less directly, in that what was obtained in exchange for the payments enabled Norseman to put itself in a position to make the supplies.

37. For the latter he relied on the judgment of the Court in *Kretztechnik AG v Finanzamt Linz* (Case C465/03) [2005] STC 1118, in which it held that costs incurred by a taxpayer in increasing its capital for the benefit of its economic activity formed part of its overheads, and were correspondingly cost components of the price of its products. The necessary direct and immediate link between receipt and supply was therefore present.

38. If, contrary to Norseman's case, I should accept that it was not making taxable supplies, Mr Lall added, I should allow the appeal against the assessments in relation to periods 10/07, 01/08, 04/08 and 07/08 because they were out of time. The assessments were made in accordance with s 73(2) of VATA, which provides the mechanism by which HMRC may recover a VAT credit which has been paid to a taxable person but which was not due. The time limit for making such an assessment is prescribed by s 73(6):

> "An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge …".

39. It is common ground that s 77 is not material in this case. Although at first he had asserted that all the assessments were out of time Mr Lall accepted at the hearing that those for periods 10/08 and 01/09 were made within the time limited by s 73(6)(a). The critical question is whether, in respect of the earlier periods, s 73(6)(b) is offended.

40. Mr Lall's argument was that HMRC had all of the information they needed to make the assessment more than a year before they did so. Mr Melbourne's claim that the information did not come into his possession until the meeting with Mr Bottomley on 20 August 2009 (a few days less than a year before the assessment was made) was not borne out by the evidence, since Mr Melbourne had not identified any piece of information which he received on that occasion which he did not already have. Had he examined the correspondence between his

colleagues and Mr Bottomley between the submission of the original application and the date on which registration was effected he would have seen that Norseman was not operating a gold mine but providing management services to its subsidiaries; if he had taken that step he would probably not have felt it necessary to visit Mr Bottomley at all. In particular, the information that (assuming Mr Melbourne was right in this view) Norseman was not carrying on an economic activity was based on the material which had already been produced by Mr Bottomley, during the course of the pre-registration correspondence, and nothing he said or provided at the meeting added to it in a significant manner.

**HMRC's submissions**

41. I have hesitated before making the observations which appear in the next paragraph, but have decided to do so in the hope that they will be taken for the constructive criticism they are intended to be, rather than as pure criticism.

42. Mr Connell's written submissions, erudite though they undoubtedly are, do not amount to a skeleton argument as that term is generally understood. They more closely resemble an academic treatise; and by straying into all manner of by-ways and exploring authorities of, at best, marginal relevance they lose sight of what is really in issue in what is, in truth, a fairly straightforward case. As a result they are much longer than necessary, trying of patience and difficult to follow and I have, to be candid, found them of very limited assistance. In what follows I have drawn much more from Mr Connell's oral submissions, but even then I have eliminated a good deal which, in my view, was simply irrelevant, and have distilled what remains.

43. His first point was that it was necessary to identify what, if anything, was supplied to the subsidiaries. It was not enough to re-charge the cost of expenses; there had to be a supply of some service in exchange for a payment. Simply having directors in common was not enough; the directors of Norseman had to be shown to be playing a significant part in the management of the subsidiaries. Various internet searches, the results of which Mr Connell produced but which I do not think it necessary to describe, show that the directors all have other interests and it must be questionable, regardless of what Gary Steinepreis said in his evidence, of their capacity to provide a significant contribution to the management of the subsidiaries.

44. That there must be an obligation to pay was evident from the Court's judgment in *Tolsma*; but neither Gary Steinepreis nor Mr Bottomley had been able to demonstrate any agreement for payment beyond a professed but ill-defined intention to charge at some time in the future. The context of Mr Bottomley's email raising the question of a charge was revealing: it indicated an awareness of the need to charge if the input tax Norseman had incurred was to be recoverable, rather than an intention to charge for commercial reasons. In addition, the evidence showed an intention to charge only when the subsidiaries could afford to pay; that fact was an indication that the charge would be optional, or voluntary. In the absence of any clear agreement for a charge this case was very close to *Tolsma*.

45. The services in respect of which Norseman had incurred the disputed input tax were in any event all, or almost all, attributable to its listing on AIM and its

performance of statutory and Stock Exchange requirements. They had no connection with any management services Norseman might have provided to its subsidiaries. Its capital-raising activities were related to its onward, interest-free loans to the subsidiaries, which could never amount to a taxable supply; thus the input tax incurred in procuring those supplies was not attributable to a taxable supply and was not recoverable.

46. Mr Connell also addressed me on the argument that some of the assessments were out of time, but it is more convenient to deal with that issue in my conclusions—in which I agree with him—than here.

**Discussion and conclusions**

47. In my opinion what was said by Mummery LJ in the extract from his judgment in *BAA* which I have set out at para 31 above (and which in essence reflects what was said in *Cibo Participations*) provides a clear answer to the first of the issues I must decide. I am satisfied, as a matter of fact, that the directors of Norseman played an active part in the direction of the subsidiaries, particularly CNGC. I accept, in particular, that although the directors were engaged, by agreements between Norseman and their respective service companies, as directors of Norseman, in practice the greater part of the time they collectively devoted to the group's business was expended in managing or directing the subsidiaries, even though the proportion no doubt differed from one director to another. It is true, as Mr Connell said, that they have a great many other interests, but I am satisfied from what I was told by Gary Steinepreis and Mr Bottomley, and from the service agreements I have mentioned, that the directors could, and did, spend material amounts of time on the subsidiaries' activities. Thus the "direct or indirect involvement" to which Mummery LJ referred is established and it follows that what Norseman provided to its subsidiaries was, in principle, capable of amounting to a taxable supply.

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

49. Mr Connell, as I have said, relied on *Tolsma*. The factual situation in that case, as I see it, was a little different, but I agree that the judgment is of assistance. Mr Tolsma hoped, and in the light of experience may have expected, that passers-by would make donations. The critical element in the Court's decision was that, however willing some of them may have been to do so, the passers-by had no obligation to pay. Here, Norseman could have enforced the payment of any charge it chose to impose, even if it had to provide the money used for payment itself. There is, therefore, a difference between the cases. Their similarity lies in the fact that Norseman could not enforce an obligation it had not imposed. In his correspondence with HMRC prior to Norseman's registration for VAT Mr Bottomley indicated that it was the intention that fees would be payable, and I am

willing to accept that he genuinely believed it to be the case. It does not, however, seem to me that a rather vague intention to levy an unspecified charge, at some undefined time in the future, is enough. Mr Lall could not show me that there was any more than that. The fact that Norseman could have imposed a charge does not, in my view, lead to the conclusion that it should be treated as if it had done so.

50. In *European Commission v Finland* (Case C-246/08) [2009] ECR I-10605 at [23] the Court said:

> "… it is clear from the case-law of the Court that, within the framework of the VAT system, taxable transactions presuppose the existence of a transaction between the parties in which a price or consideration is stipulated. Thus, where a person's activity consists exclusively in providing services for no direct consideration, there is no basis of assessment and the services are therefore not subject to VAT (see Case 89/81 *Hong Kong Trade Development Council* [1982] ECR 1277, paragraphs 9 and 10; and Case C-16/93 *Tolsma* [1994] ECR I-743, paragraph 12)."

51. I accept Mr Lall's argument that payment is not a requirement as long as there is an obligation to pay, and I am willing also to accept, at least in principle, that as long as a charge has been determined it does not matter that no invoices have been sent. I understand, too, that there was little commercial rationale for raising charges the subsidiaries could not pay without subvention from the parent. But it seems to me, from what the Court said in *Commission v Finland*, that the failure in this case to agree on or stipulate any price or consideration at all can lead only to the conclusion that there was no obligation to pay for the supplies at the time they were made. It was not until after the last of the assessed periods that an ascertained price was agreed. That later agreement does not, in my view, help Norseman; what matters is the position at the time the supplies were made. At that time the payment of a charge was, if not voluntary, certainly unenforceable; in that I agree again with Mr Connell. The failure to determine the amount of the charge beforehand is in my view fatal to Norseman's case.

52. It does not seem to me that what was said in *Breitsohl* is relevant. There, the preparation for the future making of taxable supplies had been undertaken. There was no reason to doubt that, if supplies were eventually to be made, they would be taxable. Here, it is the supplies themselves which were made; what excluded them from the definition of taxable supplies was the absence of an agreement on the consideration to be paid for them. They were made without even an understanding of what would be paid for them; thus there was no reciprocity of obligation. I do not accept that what was said in *Town and County Factors* affects that conclusion. It is true that, in that case, the payment could not be enforced, but there was nevertheless a clear understanding on both sides of what was payable and in what circumstances, and an undertaking, albeit binding only in honour, on the part of the taxpayer to pay. What was lacking here was any common understanding of what was payable, when and in what circumstances; there was nothing to enforce.

53. For those reasons, in my judgment, what Norseman provided to its Australian subsidiaries during the period covered by the six disputed assessments did not amount to taxable supplies, and the input tax for which it claimed credit was not properly allowable. The appeal on that ground must be dismissed.

54. In the light of that conclusion I do not need to deal with the question of attribution but, as I heard argument on the point, I shall make some brief observations. It will be apparent from the description I have provided at para 25 above that most of the expenses incurred by Norseman within the UK related to its own position, in that they were incurred in its performance of statutory or Stock Exchange requirements, or related to its ability to raise the money it was to lend to the subsidiaries. Only the cost of securing the services of Mr de Villiers, the UK-resident director, could be said to have any direct connection to the provision of management services, though even then some of what Mr de Villiers did must have related to Norseman's, rather than the subsidiaries', activities.

55. In those circumstances, and in the light of my conclusion that Norseman was providing management services to its subsidiaries and was not merely a holding company, it seems to me that Mr Lall is right to argue, following *Kretztechnik*, that the input tax in issue is to be treated as having been incurred in performing Norseman's ordinary economic activity and is thus residual input tax (or, at least, would be residual input tax if Norseman were making taxable supplies). Were this a live issue before me, I would so conclude.

56. I can deal with the contention that the assessments for the first four of the relevant periods were out of time fairly briefly. In my judgment Mr Lall's argument that Mr Melbourne obtained no new information at his meeting with Mr Bottomley in August 2009 is simply wrong, as a matter of fact. On this point I accept Mr Melbourne's evidence, and Mr Connell's submissions about it, though I do not entirely accept (for reasons it is unnecessary to explore) his submissions about the relevant law.

57. I have already said that Mr Melbourne went to the August 2009 meeting still thinking that Norseman was operating a gold mine. It is quite true that, had he looked at the correspondence that followed the initial application for registration, he would have realised that he was mistaken. It is also true that what is in issue, as s 73(6)(b) makes clear, is what it was that the Commissioners, rather than an individual officer, knew. Thus, although what Mr Bottomley said in his replies to Mr Melbourne's initial enquiries would have misled Mr Melbourne, starting as he did from an incorrect understanding, an officer in possession of all of the correspondence might well not have been misled by the answers.

58. However, it does not seem to me that any officer, even one in possession of all the facts available to HMRC in early 2009, when Mr Melbourne began his enquiry, knew enough to make the disputed assessments. It will be recalled that in answer to one of the questions Mr Melbourne asked Mr Bottomley replied "The company incurs running costs which will be re-charged to the subsidiary company in the form of a management charge." By this time, some two and a half years had elapsed since Norseman's effective date of registration, but as yet no output tax had been declared. In those circumstances it is difficult to see any ground for criticising Mr Melbourne for his decision to visit Mr Bottomley: the question why substantial input tax had been incurred but no output tax liability had arisen demanded an answer.

59. On the occasion of the visit Mr Melbourne learnt that Norseman was not in fact operating a gold mine. As I have said, I recognise that this was information already available to HMRC, even if not to Mr Melbourne. His discovery of that

fact led Mr Melbourne, as his evidence made clear, to ask Mr Bottomley various questions about the arrangements between Norseman and the subsidiaries, and he learnt in that process, among other things, that there were no agreements in place between Norseman and its subsidiaries specifying the nature of the services to be provided and the charges to be paid in return. He learnt other things in addition, some of which contributed to his decision to make the assessments. The conclusions he drew from what he was told were not, in my view, correct in every respect; but that, as it seems to me, is unimportant. What is clear beyond doubt is that it was not until this meeting that Mr Melbourne could have known the critical fact, that there was no agreement about the amount of any charge to be paid by the subsidiaries to Norseman. That was not the only reason for his raising the assessment, but it was one of the reasons, as his pre-assessment letter of 29 June 2010 to Mr Bottomley explained. Mr Melbourne agreed as he gave oral evidence, consistently with that reasoning, that, had he been considering it, he might have taken a different view about period 04/09, in which an invoice was raised, for the very reason that by then there was evidence of an agreement about the amount of the charge.

60. I am satisfied from this evidence that, whether or not Mr Melbourne also took into account material which I have not found relevant, or reached conclusions which I do not share, his learning that no charge had been agreed upon was an important factor in his reaching an opinion that he had "evidence of facts … sufficient to justify the making of the assessment" and that this evidence came to his knowledge only at the meeting. It is not altogether clear why it took Mr Melbourne nearly a year more to raise the assessment, but the time limit is a year and in my judgment it was not offended.

61. For those reasons the appeal is dismissed.

62. 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.

**COLIN BISHOPP**
**TRIBUNAL JUDGE**

**RELEASE DATE: 12 June 2014**