[2015]UKUT 0368 (TCC)
Appeal number: FTC/139/2014
New Appeal Number UT/2014/0088

VAT – proposed reference to the CJEU – Art 267, Treaty on the Functioning of the European Union – whether questions of EU law should be referred to the CJEU – principles to be applied – ex p Else, Littlewoods considered – whether satisfied that tribunal determining EU law issues on the appeal could not do so with complete confidence – no – decision not to refer

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

CAPERNWRAY MISSIONARY FELLOWSHIP OF TORCHBEARERS **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 19 May 2015

Laurent Sykes, instructed by Vinson & Elkins, for the Appellant

Raymond Hill, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an application, jointly made by the Appellant, which I shall call Capernwray, and the Respondents, HMRC, for an order that a reference be made to the Court of Justice of the European Union ("CJEU") for a preliminary ruling on certain questions that arise on this appeal. The application has been made in the course of this appeal by Capernwray against the decision of the First-tier Tribunal (Judge Hellier and Mrs Akhtar) ("FTT") dismissing Capernwray's appeal against the ruling of HMRC that supplies in the course of construction of a conference hall used by Capernwray for its activities were not zero-rated, wholly or partly, because the building was not used solely for a relevant residential or charitable purpose within the meaning of Item 2 of Group 5 of Schedule 8 to the Value Added Tax Act 1994 ("VATA").

2. Before the FTT, Capernwray argued its case with respect both to relevant residential purpose and relevant charitable purpose. Its appeal to this Tribunal is, however, confined to the question whether the FTT made an error of law in dismissing Capernwray's case that the conference hall was used for a relevant charitable purpose on the basis that it was not used "otherwise than in the course or furtherance of a business" in the terms of Note 6(a) of Group 5.

3. It was common ground before the FTT, and it is common ground before this Tribunal, that "business" in Note 6(a) has the same meaning as "economic activity" in the definition of "taxable person" in Article 9 of the Principal VAT Directive (Council Directive 2006/112/EC of 28 November 2006). The parties say that, in the context of this appeal, the concept of economic activity which, as they rightly point out, is one which underpins the whole of the system of VAT, is unclear and gives rise to unsatisfactory doubt. In those circumstances, the parties jointly submit that this Tribunal should, at this stage and before a substantive hearing of this appeal, refer certain questions to the CJEU for a preliminary ruling.

Refusal of application

4. For the reasons I shall now explain, I have decided to refuse the parties' joint application, and not to make a reference to the CJEU at this stage in the proceedings. It will of course remain open to the Tribunal that hears the substantive appeal itself to make a reference if it decides that such a course is appropriate, but in my judgment that will first require the Tribunal to have heard all the arguments on the appeal, and to be in the position that it cannot with complete confidence determine the issues of EU law that must be decided in order to decide the outcome of the appeal. As I am not satisfied, at this stage in the proceedings, that that is, or will be the position, I decline to make the reference sought by the parties.

5. I am conscious that in not making a reference at this stage I am taking a different view of the position than that taken by the parties, no doubt after the most careful and thorough examination by experienced counsel and those instructing them. I also understand that the fact that it remains possible that the Tribunal that hears the

substantive appeal will in the end decide that there are questions that should be referred to the CJEU would mean, if that were to be the outcome, that the parties would have been required to participate in an additional layer of these proceedings, with the consequent delay and cost. But that does not to my mind represent a factor that should weigh in the consideration at this stage whether the necessary conditions for the making of a reference are met. Where questions of EU law are concerned, the parties will always face the possibility of a reference being made by a court or tribunal. It may be possible, in an appropriate case, for the court or tribunal to determine at an early stage, and before the substantive case is considered, that the circumstances are such that a question should be referred to the CJEU, but where that is not the case, the time and expense of the issues being argued on consideration of the substantive case does not weigh in the exercise of the discretion to make a reference at the earlier juncture.

The applicable principles

6. Before turning to the basis on which this application is made, I turn first to the principles to be applied in determining whether a reference should be made. The starting point is Article 267 of the Consolidated Version of the Treaty on the Functioning of the European Union (1 December 2009; OJ C83, 30 March 2010, p 47). As relevant to this Tribunal, that Article provides:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon …"

7. As the parties recognised, if a question is to be referred to the CJEU, it will be the court or tribunal before which the question has been raised that has the power to refer a relevant question to the CJEU. It is the referring court or tribunal that must determine whether it requires the guidance of the CJEU, and it is to the referring court or tribunal that the CJEU will address its response. The fact that the parties are agreed that a reference should be made in this case, whilst a factor that must be carefully considered by the Tribunal, is not determinative of the need for a reference. That is something for the Tribunal itself to determine.

8. Article 267 itself requires that a question should be referred to the CJEU only if a decision on it is *necessary* in order that the referring court or tribunal can give judgment. That was emphasised by Lord Denning MR in his classic statement of the criteria for the making of a reference in *H P Bulmer Limited v J Bollinger SA* [1974] Ch 401. But, as Lord Denning also made clear, it is a matter of discretion of the Tribunal whether such a reference is made (see, for example, *Grattan plc v Revenue and Customs Commissioners* [2011] STC 2342). Thus, although the Tribunal will

pay careful regard to the views of the parties on an application where the parties are themselves agreed that a reference should be made, it is for the Tribunal to satisfy itself that, on the basis of the relevant principles, that is the correct course to take, and where that question falls to be determined on an application, is the correct course to take at the stage at which the application is made.

9. The proper approach to be adopted by courts and tribunals in considering such a question has been authoritatively summarised by Sir Thomas Bingham MR in *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd ex parte Else (1982) Ltd and another* [1993] QB 534, at p 545:

> "… I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer. I am not here attempting to summarise comprehensively the effect of such leading cases as *H. P. Bulmer Ltd. v. J. Bollinger S.A.* [1974] Ch. 401, *C.I.L.F.I.T. (S.r.l.) v. Ministry of Health* (Case 283/81) [1982] E.C.R. 3415 *and Reg. v. Pharmaceutical Society of Great Britain, Ex parte Association of Pharmaceutical Importers* [1987] 3 C.M.L.R. 951, but I hope I am fairly expressing their essential point."

10. As Proudman J, sitting in this Tribunal, observed in *Revenue and Customs Commissioners v The Bridport and West Dorset Golf Club Limited* [2012] STC 2244, there is a distinction between the jurisdictional criterion, that of there being a question which requires to be resolved in order that the national court or tribunal can give judgment, and matters of discretion. Those matters of discretion are encompassed, in Sir Thomas Bingham's formulation, by the "complete confidence" test. In assessing whether it can with complete confidence resolve the matter itself, a court or tribunal must have regard to the factors outlined by Sir Thomas Bingham, factors derived essentially from *CILFIT*.

11. *CILFIT* itself was concerned with the discretion that could be exercised by a supreme court, one from which no further judicial remedy is available under national law, but the judgment of the ECJ in that case applies equally to the exercise of discretion by inferior courts and tribunals. The ECJ recognised, at [13] *et seq*, that no purpose might be served by the making of a reference where the question raised is materially identical to one that has already been the subject of a preliminary ruling in a similar case, or where previous decisions of the Court have already dealt with the point of law in question, even though the questions at issue are not strictly identical. The national court or tribunal may also take the view that the correct application of

Community law is so obvious (*acte clair*) as to leave no scope for any reasonable doubt as to the manner in which the question is to be resolved; but in reaching such a view (and in so doing, refraining from submitting the question to the CJEU and taking upon itself the responsibility for resolving it) the national court or tribunal must have regard to the particular characteristics of Community law and the particular difficulties of its interpretation, which are summarised by Sir Thomas Bingham in the passage from his judgment in *ex parte Else* to which I have referred. In particular, courts and tribunals should exercise great caution in relying on the doctrine of *acte clair* (*Bridport*, at [33]), and in taking the view that the meaning of the English language version of an EU instrument is clear (*Henn and Darby v Director of Public Prosecutions* [1981] AC 850, per Lord Diplock at p 906B).

12. One case in which discretion was exercised not to make a reference was *Customs and Excise Commissioners v Littlewoods Organisation plc and others* [2001] STC 1568. Having considered the guidance afforded by Sir Thomas Bingham in *ex parte Else*, the Court of Appeal made the point that it was also important to bear in mind the observations of Advocate General Jacobs in *Wiener S I GmbH v Hauptzollamt Emmerich* (Case C-338/95) [1998] CMLR 1110, where in his opinion he urged self-restraint on the part of national courts, in particular (at [20]) in cases where there is an established body of case law that may readily be transposed to the facts of the case, or where the question turns on a narrow point considered in the light of a very specific set of facts and the ruling is unlikely to have any application beyond the particular case. The *Wiener* case was one of customs classification, but the Advocate General included amongst his examples of where self-restraint might be appropriate the area of VAT, referring in particular to cases involving the use of vouchers where the taxable amount is to be determined.

13. In light of those observations, the Advocate General suggested to the Court that the answer to the question before it should essentially be to refer the case back to the referring court with a direction to determine the case itself on the basis of the objective characteristics and properties of the products in question. The Court, on the other hand, declined to follow that approach. It resisted the invitation of the Advocate General, at [21], to declare that the task of uniform interpretation had been substantially performed and to state that the essential principles or rules of interpretation had been set out sufficiently to enable national courts to decide matters themselves. It essentially ignored the lengthy analysis of the Advocate General in favour of national self-restraint, focusing instead on answering the question before it, whilst at the same time marking out the areas where it was for the national court to reach a determination based on the objective characteristics of the products.

14. In view of this, I do not consider that the arguments in favour of self-restraint, whilst advocated with powerful reason by the Advocate General in *Wiener*, have added any further constraint on the making of a reference than the "complete confidence" test as set out in *ex parte Else*. The question for me is whether, at this stage of the proceedings, I am satisfied that this Tribunal will not be able, with complete confidence, to resolve the issues of EU law before it, issues that are necessary to enable the Tribunal to decide this appeal. In considering that question I must have regard to the factors described in *ex parte Else*, the nature of the issues,

whether they are likely to have universal or at least wider application beyond the particular set of facts in this case, and the existence or otherwise of an established body of case law of the CJEU by reference to which the relevant principles can be applied to those facts.

15. I put the question in that way having regard to the fact that this application is made at a preliminary stage in the appeal process, and accordingly without the Tribunal having had the benefit of a substantive hearing on the issues. I accept that counsel for both parties have developed the arguments on the issues very fully, setting out not only where they consider there is a lack of clarity in the jurisprudence of the CJEU but also their own respective submissions on the EU law. That is not, however, the same as being in the position of a Tribunal on the substantive appeal which will have heard all the arguments in a different context, namely that of deciding the appeal, with the sharp focus that necessarily provides. It would not, in those circumstances, in my view be appropriate for the test to be that a reference should be made at this stage *unless* I am satisfied that the Tribunal hearing the appeal *will* be able to determine the matter with complete confidence. That, it seems to me, would tip the balance too far in favour of making a reference at an early stage, and would encourage such applications without the case proceeding to a substantive hearing, and without the Tribunal being in the best position to judge the degree of confidence it actually has. I have therefore taken the approach that for a reference to be made at this stage I need to be satisfied that this Tribunal *will not* be able to resolve the relevant issues with complete confidence.

16. I should also say, in case there is any doubt, that the analysis I have conducted of the relevant case law for the purpose of this application, and any views I have expressed, are necessarily provisional and should not be regarded as decisions of this Tribunal on the underlying issues of law which I have discussed. As I have indicated, I have concluded that no reference to the CJEU should be made at this stage in the proceedings. Subject to the discretion of the Tribunal that hears the substantive appeal itself to refer questions to the CJEU if it considers that is the appropriate course in order for it to reach a decision, the determination of those issues will be a matter for that Tribunal.

Background

17. Before moving on to consideration of the EU law issues on which it is submitted a reference would be appropriate, I should set the scene with a few background facts.

18. Capernwray is a UK charity whose first object is to advance the Christian faith. For about 30 weeks a year Capernwray runs a Bible School for full-time students. There is a Winter Bible School, which operates over two 11-week terms, and a Spring Bible School, which occupies a single 8-week term. The aim, for both schools, is not merely to obtain knowledge, but also to encourage the spiritual and moral renewal of the participants.

19. Out of Bible School time, Capernwray runs a number of shorter Christian courses and conferences lasting up to a week. These typically blend Christian teaching and worship with a choice of recreational activities. Examples include archery, kayaking, sketching and pottery among others. Although the Bible School is limited to adult participants, the guests for the shorter course and conferences are of all ages, including families with children. Although in part recreational, these shorter courses, like the Bible Schools, have an evangelical core, centred on the Bible. Participants are strongly encouraged to attend all the teaching sessions, and agree to do so when applying. Younger participants are "rounded up" to ensure attendance. From Capernwray's perspective, the prime reason for the events is to provide biblically-based Christian instruction and spiritual enrichment.

20. The FTT made the following key findings with respect to Capernwray's organisation:

> (a) Capernwray sets its fees to recover its costs (which include historic cost depreciation but no more). If (which is not the intention when the fees are set) Capernwray achieves a surplus of income over expenditure, this is reinvested into the facilities which it uses to deliver the Bible School and the shorter conferences and courses.
>
> (b) Capernwray relies on three sources of help to maintain its operation and keep its fees low; the work of unpaid volunteers, the requirement that Bible School attendees assist with the daily chores, and donations. It is donations that cover the cost of capital expenditure, such as the new conference hall, although bank loans may be needed whilst donations are collected.
>
> (c) The level of remuneration of the 27 staff employed by Capernwray is in all cases below comparable market rates.
>
> (d) Volunteers come to Capernwray from a desire to serve and live within the Christian community and contribute to its objectives. The numbers of volunteers ranges from about 17 during the Bible School to about 60 for the shorter conferences and courses.
>
> (e) Without volunteer support Capernwray's continued operations might well become financially untenable.

The EU law

21. The relevant EU law is contained in Article 9 of the Principal VAT Directive. That relevantly provides:

> "1. 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
>
> Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income

> therefrom on a continuing basis shall in particular be regarded as an economic activity."

The FTT's decision

22. On the question whether the conference hall was intended for use solely for a relevant charitable purpose, the question before the FTT was whether Capernwray was carrying out an economic activity within the meaning of Article 9 of the Principal VAT Directive. There was no argument that the fees paid by the participants in the Bible School or the shorter course and conferences amounted to consideration. It was argued by Capernwray that it was not performing an economic activity having regard to the inherently uncommercial nature of its activities.

23. The FTT decided, at [44], that in the instant case consideration of business purpose was irrelevant. It took the view that purpose was relevant only to consideration of whether the exploitation of tangible or intangible property was to be regarded as an economic activity; the reference to the purpose of obtaining income being confined to that part of Article 9(1).

24. The FTT found that there was a general rule that permanent activity for remuneration is economic activity, but that there were exceptions to that rule. It rejected the argument for HMRC that the only exceptions were those where the supply is not made for consideration. Having reviewed the UK case law, the FTT concluded, at [61], that the exceptions to the general rule arise where the inherent nature of the activity is not economic, that the circumstances and nature of an organisation may be relevant to this, and that what it described as the *Lord Fisher* indicia remain a useful tool in deciding whether or not an activity is economic.

25. The *Lord Fisher* indicia are those advanced in *Customs & Excise Commissioners v Lord Fisher* [1981] STC 238, as summarised in the judgment of Gibson J. Those factors have been considered, and applied, by the courts and tribunals in determining whether an activity is a business or economic activity in many subsequent cases. The FTT, at [47], summarised them as follows:

> "(1) whether [the activity] was a serious undertaking earnestly pursued;
>
> (2) whether it was pursued with continuity;
>
> (3) whether it has a certain measure of substance measured by the value of supplies made;
>
> (4) whether it was conducted in a regular manner on sound and recognised business principles;
>
> (5) whether the activity is predominantly concerned with the making of supplies to consumers for consideration; and
>
> (6) whether the supplies are of a kind which, subject to differences in detail, are commonly made by those who seek to profit by them."

26. Having made these findings, the FTT described, at [139], the question it had to resolve as being whether the intrinsic nature of what Capernwray does prevents it

from carrying on that activity. In accordance with its prior analysis, at [143] the FTT disregarded Capernwray's purpose for which it provided the services. It disregarded too, as not affecting the intrinsic nature of the supply, Capernwray's reliance on volunteers and gifts to subsidise its fees; that reliance, the FTT found, was not such that participants were merely asked to make a contribution rather than being required to pay for the services.

27. The FTT found, at [140], that some parts of Capernwray's activities, namely the provision of religious worship and evangelism, did not seem to be of an economic nature. This, reasoned the FTT, was because those activities were not predominantly concerned with making supplies for consideration; their intrinsic nature was not economic. However, at [145], the FTT decided that the provision of worship and evangelism did not change what would otherwise be an economic activity into one which was not. Focusing on the supplies made by Capernwray of board and lodging, activities, surroundings and teaching for payment, the conclusion of the FTT was that the provision of those services for payment was, applying the general rule, on the face of it an economic activity and that, applying the *Lord Fisher* indicia, the provision of those services was intrinsically an economic activity and consequently those activities of Capernwray were not an exception to the general rule.

Draft questions for reference

28. It is convenient at this point to set out the draft questions for reference which the parties have put forward. If I were to decide that a reference should be made in this case, it is accepted that the form of the questions would need to reflect the Tribunal's own view of the issues on which a reference should be made, but the draft questions provided by the parties do provide a helpful framework in considering the issues on which it is said that the guidance of the CJEU is required.

29. The draft questions are:

(1) In deciding whether an activity is an economic activity is it sufficient for the activity to be permanent and carried out in return for remuneration which amounts to consideration for the activity concerned?

(2) Is it relevant to consider whether the activities are carried on for the purposes of obtaining income therefrom on a continuing basis (even if not limited to the exploitation of tangible or intangible property) or other economic and commercial purposes?

(3) Is it appropriate in determining whether activities amount to an economic activity to have regard to:

(a) the function of the entity (for instance if it is a charity) and, in the case of a charity, whether the activities are carried out in fulfilment of the provider's charitable objects;

(b) the manner in which the activities are organised, in particular the extent to which the activities are carried on in a way similar to those of a commercial organisation making analogous supplies;

(c) whether the activities have economic and commercial substance;

(d) whether the income sought to be derived from the activities is such as only to cover the entity's costs, which are not otherwise covered by donations, so as to increase the number of participants and so further the charity's charitable objects;

(e) whether the activities can only be carried on on a continuing basis by reliance on third party volunteers, and/or money given by donors, who in both cases wish to further the entity's charitable objects;

(f) whether staff accept lower than market remuneration in order to advance the charity's objects?

(4) Is it relevant whether the activities are inherently not of the kind provided on a market? In answering this question, is it necessary to look at the components of the activity individually (e.g. accommodation and religious instruction) to see whether they are market activities or does one look at the overall combination of things which are provided (e.g. accommodation on condition that a specific course of religious instruction is followed)?

The issues

30. It is important to draw a distinction between an issue which concerns the construction of an EU directive, and an issue of the application of the directive, as properly construed, to the facts of a particular case. That latter task is not one that should properly be abrogated by a national court or tribunal to the CJEU. The parties in this case say that the issue is one of construction and not of mere application.

Question 1 - Permanence and consideration: the general rule

31. Question 1 essentially reflects HMRC's argument that, in order to find that an activity is an economic activity, it is sufficient, save in exceptional cases, that the activity is permanent and carried out for remuneration which amounts to consideration. That proposition is said to be derived from the judgment of the CJEU in *Commission for the European Communities v Republic of Finland* (Case C-246/08) [2009] ECR I-10605, where the Court said, at paras 37 and 38:

> "37. An analysis of those definitions [the definitions of 'taxable person' and 'economic activities' in what were Articles 4(1) and (2) of the Sixth Directive] shows that the scope of the term economic activities is very wide and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results (see, inter alia, *Commission v Greece*, paragraph 26; and Case C-223/03 *University of Huddersfield* [2006] ECR I-1751, paragraph 47 and the case-law cited). An activity is thus, as a general rule, categorised as economic where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity (*Commission v Netherlands*, paragraphs 9 and 15; and Case C-408/06 *Götz* [2007] ECR I-11295, paragraph 18).

> 38. However, it follows from the case-law that the receipt of a payment does not, per se, mean that a given activity is economic in nature (see *Hutchison 3G and Others*, paragraph 39 and the case-law cited; and *Götz*, paragraph 21)."

32. In *Finland* itself, the factual context was that of legal aid services provided by public offices in legal proceedings in return for a part contribution from the recipient of those services. Having set out the principles in paras 37 and 38, the Court went on, at para 40, to state that the fact that the activity of the public offices consisted in the performance of duties conferred and regulated by law, and was in the public interest and without any business or commercial objective was, in view of the objective character of the term, irrelevant. As the public offices provided the services in question on a permanent basis it was appropriate to ascertain whether those services could be regarded as provided in return for remuneration.

33. At para 44, the Court then referred to the case law on the basis of which the question was whether there was a legal relationship between the provider of the service and the recipient pursuant to which there was reciprocal performance, and a necessary direct link between the service provided and the consideration received. In light of the fact that the part payment for the services was calculated otherwise than solely on the basis of the fees but depended also on the income and assets of the recipient, the Court determined, at para 51, that the link between the legal aid services and the payments made by the recipients was not sufficiently direct for those payments to be regarded as consideration for those services and, accordingly, for those services to be regarded as economic activities. It was the absence of the necessary reciprocity, and thus of consideration for VAT purposes, that prevented the activity in *Finland* from constituting economic activity.

34. In *Hutchison 3G UK Ltd v Customs and Excise Commissioners* (Case C-369/04) [2008] STC 218, the Court had to consider whether an activity of issuing licences by the Secretary of State by auction, for which substantial licence fees were paid, constituted an economic activity. It cited, at para 29, the same settled case law principle as did the Court in *Finland* at para 37 set out above. Immediately before that, however, it had noted that, notwithstanding that the Article gave a very wide scope to VAT, it was "only activities of an economic nature" that were covered by Article 4 of the Sixth Directive (now Article 9 of the Principal VAT Directive).

35. This requirement that the activities be of an economic nature has led to certain activities being excluded from the scope of VAT, despite those activities having the necessary quality of permanence and being carried out in return for remuneration. Thus, in *Hutchison 3G* itself, the activity of issuing the licences was found to constitute a necessary precondition for the access of economic operators to the mobile communications market, but it could not constitute participation in that market by the competent national authority. The activity could not, by its very nature, be carried out by economic operators. The activity was one of controlling and regulating the use of the electromagnetic spectrum and not the exploitation of property (*Hutchison 3G*, at paras 36 to 38). The same conclusion was reached in *T-Mobile Austria GmbH and others v Republic of Austria* (Case C-284/04) [2008] STC 184. In both of those cases

the Court made it clear that the mere fact that the grant of rights gave rise to a payment could not affect the legal status of the activity.

36. The mere acquisition and holding of shares is not regarded as an economic activity because it does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis. The dividend yielded by that holding is merely the result of ownership of that property and not the product of any economic activity within the meaning of the Directive (see, for example, *Banque Bruxelles Lambert SA (BBL) v Belgium* (Case C-8/03) [2004] STC 1643).

37. On the other hand, it was held in *Empresa de Desenvolvimento Mineiro SGPS SA v Fazenda Pública (Ministério Público intervening)* ("*EDM*") (Case C-77/01) [2005] STC 65 that interest received in consideration of loans made to subsidiary companies and placements in bank deposits or securities such as Treasury notes or certificates of deposit do not arise from simple ownership of an asset but constituted the consideration for making capital available to a third party. The annual granting of loans by a holding company of interest-bearing loans to companies in which it had a shareholding, and certain other finance-related activities, constituted economic activities. However, although the Court found, at para 65, that in the case of such loans the necessary condition that there be consideration for the relevant activity (in that case, the making of capital available for the benefit of a third party) that alone did not determine whether the activity was an economic activity. It is clear from the Court's judgment, at paras 66 and 67, that it was necessary to consider other factors, such as whether the transactions constituted an extension of other taxable activity, or whether they were carried out with a business or commercial purpose characterised, in particular, by the wish to maximise returns from capital invested.

38. In *Kretztechnik AG v Finanzamt Linz* (Case C-465/03) [2005] STC 1118, the CJEU considered the question whether the issue of shares by a company may be regarded as an economic activity. It founded its decision on an analysis of the nature of the transaction consisting of the issue of new shares. The Court held, at para 26, that the aim of the activity of the issue of new shares is to raise capital and not to provide services, and that from the shareholder's point of view payment of the sums necessary for the increase of capital is not a payment of consideration but an investment or an employment of capital.

39. Thus it can be seen that there are two basic criteria for an activity to be an economic activity, namely permanence and the receipt of remuneration in consideration for the activity, each of which must be present in order that the activity may be regarded as an economic activity (see, for example, *Götz*, at para 22). But the mere receipt of remuneration is not enough. It is necessary to have regard to the nature or status of the activity; the activities must be of an economic nature in order to be covered by Article 9(1). That enquiry may result in it being found that the remuneration is not consideration in the sense required for VAT purposes (as for example, *Finland*), or that the activity is, or is not, such as to constitute an economic activity for another reason (as for example, *Hutchison 3G*).

40. The principles to be applied are, in my judgment, comprehensively and consistently set out in the existing case law of the CJEU. I consider that, on the basis of that body of jurisprudence, it is more likely than not that the Tribunal hearing the substantive appeal will be able itself with complete confidence to decide the answer to Question 1. I do not consider it would be appropriate to refer Question 1 to the CJEU.

Question 2 - Income on a continuing basis and economic and commercial purpose

41. The second proposed question has two limbs. The first concerns whether there is a general requirement, before any activity can be considered to be an economic activity, that it be carried on for the purpose of obtaining income therefrom. That requirement is, of course, specifically referred to in Article 9 in relation to whether the exploitation of tangible or intangible property is to be regarded as economic activity. The question is whether the requirement goes wider than that. The second is whether economic or commercial purpose is a relevant consideration.

42. This question is not directed to whether Capernwray receives income; it clearly does. It is directed to whether Capernwray's purpose in carrying on its activities militates against a finding that its activities are economic activities. The purpose in question is not a subjective purpose. That, it is recognised, is not a relevant factor. But Capernwray seeks to argue that the "objective purpose of the activities", by which I understand it to mean the purpose of the activities as ascertained by reference to objective factors only, is relevant in determining whether the activities are economic.

43. The case of *Floridienne SA and another v Belgian State* (Case C-142/99) [2000] STC 1044 concerned holding companies that were directly or indirectly involved in the management of their subsidiaries. The Court said (at para 28):

> "Where a holding company makes capital available to its subsidiaries, that activity may of itself be considered an economic activity, consisting in exploiting that capital with a view to obtaining income by way of interest therefrom on a continuing basis, provided that it is not carried out merely on an occasional basis and is not confined to managing an investment portfolio in the same way as a private investor (see, to that effect, *Wellcome Trust Ltd v Customs and Excise Comrs* (Case C-155/94) [1996] STC 945 at 959–960, [1996] ECR I-3013 at 3042, para 36; and *Enkler v Finanzamt Homburg* (Case C-230/94) [1996] STC 1316 at 1332, [1996] ECR I-4517 at 4544, para 20) and provided that it is carried out with a business or commercial purpose characterised by, in particular, a concern to maximise returns on capital investment."

44. As I have referred to earlier, a similar analysis was carried out in *EDM*.

45. *Floridienne* and *EDM* were concerned with cases of the exploitation of intangible property. In *Finland*, which was not, the Advocate General (Ruiz-Jarabo Colomer) considered, at para 39 of his opinion, the extent to which the test employed in *Floridienne* to distinguish cases of economic activity from those of management of an investment portfolio by a private investor, namely whether the activity was carried out with a business or commercial purpose characterised, in particular, by a concern

to maximise returns on capital investment, cut across the clear principle that the making of a profit is not a necessary feature of economic activity. The Advocate General said:

> "In my view, this passage seeks to specify the circumstances in which there is an economic activity of 'exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis' but it cannot be extended to all the other situations covered in Article 4(2) [of the Sixth Directive]. Any other interpretation would undermine the objective nature of the concept. The receipt of income is also essential in the other cases, not as a requirement of productivity, but of 'reciprocity of services …"

46. There is a distinction between income and profit, and it is one that the CJEU has made clear. Thus, as a general matter, as Advocate General Colomer said in *Finland*, the case law has consistently held that the making of profit, or the intention to make a profit, is not required for an activity to be an economic activity. On the other hand, it is necessary for there to be income, in the form of remuneration received by the person carrying out the activity. In *Götz*, at para 18, the CJEU referred to the cross-over between the criteria set out in the Directive in relation to the exploitation of property and those applicable more generally. Thus, in general the requirement that the income be received is reflected in the need for there to be remuneration and that it be received on a continuing basis is reflected by the condition that the activity is permanent. But the Court in *Götz* made no reference either to profit or to purpose.

47. Furthermore, despite the misgivings of Advocate General Colomer in *Finland*, the CJEU has made it clear more recently, in *Finanzamt Freistadt Rohrbach Urfahr v Unabhängiger Finanzsenat Außenstelle Linz in the presence of Fuchs* (Case C-219/12) [2014] STC 114, at para 25, that profit motive is equally irrelevant to a finding that the exploitation of tangible or intangible property is carried out for the purpose of obtaining income therefrom. The concept of "income" must be understood as meaning remuneration received as consideration for the activity carried out (para 23). In the circumstances of that case, the objective fact that a photovoltaic installation on the roof of a dwelling house was used by its operator, the householder, to produce electricity which was fed into the network in return for remuneration led to the conclusion that the exploitation of that installation was carried out for the purpose of obtaining income therefrom.

48. In making that finding, having emphasised in the usual way the objective character of the term "economic activities" and that the activity had to be considered per se and without regard to its purpose or results, the Court had referred, at paras 19 and 20, to the need to have regard to all the circumstances of the case:

> "19. The issue of whether that activity is designed to obtain income on a continuing basis is an issue of fact which must be assessed having regard to all the circumstances of the case, which include the nature of the property concerned (see Case C-263/11) *Rëdlihs* [2012] ECR, paragraph 33).

> 20. That criterion must also make it possible to determine whether an individual has used property in such a way that his activity is to be regarded as 'economic activity' within the meaning of the Sixth Directive. The fact that the property is suitable only for economic exploitation will normally be sufficient for a finding that its owner is exploiting it for the purposes of economic activities and, consequently, for the purpose of obtaining income on a continuing basis. By contrast, if, by reason of its nature, property is capable of being used for both economic and private purposes, all the circumstances in which it is used will have to be examined in order to determine whether it is actually being used for the purpose of obtaining income on a continuing basis (see Case C-230/94 *Enkler* [1996] ECR I-4517, paragraph 27, and *Rëdlihs*, paragraph 34).

49. In *Rëdlihs v Valsts ieņëmumu dienests* (Case C-263/11) [2013] STC 144, the CJEU, having decided that supplies of timber made by a natural person for the purpose of alleviating the consequences of a case of *force majeure* came within the scope of exploitation of tangible property, left it to the national court to determine, on an assessment of all the circumstances of the case, whether that exploitation had been carried out for the purpose of obtaining income on a continuing basis.

50. One of the objective factors that may be considered is the nature and source of the income derived by the person carrying on the activity. In *SPÖ Landesorganisation Kärnten v Finanzamt Klagenfurt* (Case C-267/08) [2010] STC 287, a case outside the sphere of exploitation of property, the organisation in question was the provincial organisation of a political party. It organised for its subordinate groups a variety of publicity and advertising activities in connection with elections in Austria. It acquired advertising material which was subsequently passed on to district and local groups. The charges were passed on only to a limited extent, and it appeared that the subordinate groups were at liberty to decide for themselves, according to their financial resources, whether to contribute to the expenditure of the provincial organisation. The provincial organisation also received state funding.

51. The CJEU held that the activity of advertising did not allow the generation of income on a continuing basis. The only income that was generated on a continuing basis was the subsidies from public funds, donations and subscriptions from party members. The provincial organisation was carrying out a communication exercise in keeping with the attainment of its political objectives and was not participating in any market.

52. Finally, on the question of the relevance of business or commercial purpose to the question whether an activity is an economic activity, the CJEU in *Finland*, in the passage at para 40 to which I referred above, said:

> "It must first of all be stated that, in view of the objective character of the term 'economic activities', the fact that the activity of the public offices consists in the performance of duties which are conferred and regulated by law, in the public interest and without any business or commercial objective, is in that regard irrelevant. Indeed, Article 6 of the Sixth Directive expressly provides that certain activities carried on

> in pursuance of the law are to be subject to the system of VAT (*Commission v Netherlands*, paragraph 10, *Commission v Greece*, paragraph 28).

53. In my judgment, the established case law of the CJEU provides the foundation on which the Tribunal can determine the relevance or otherwise of purpose, including, if relevant, how such purpose is to be ascertained. In my view the Tribunal will be well-placed too to consider the relevance or otherwise of profit motive, subsidies, and business and commercial purposes. It seems to me likely that the Tribunal will be able to determine these matters with complete confidence, and that accordingly it would not be appropriate at this stage to refer Question 2 to the CJEU.

Question 3 – Economic activity: relevant factors

54. By the third question, the parties are looking to obtain guidance from the CJEU as to whether certain factors, applicable to the facts of Capernwray's case, are relevant to the issue of whether Capernwray's activities are economic activities. The question implicitly assumes that a negative answer has been given to Question 1.

55. It is not appropriate to examine individually each of the factors set out in the question. The discussion of the case law in considering Questions 1 and 2 is in my view sufficient to show that the nature and scope of any relevant enquiry, and the relevance or otherwise of individual factors, can readily be determined by the Tribunal on the basis of established CJEU authority. Furthermore, in my judgment, the Tribunal will be able to determine the effect, if any, of the CJEU jurisprudence on the application of the approach developed, in the context of EU law principles, through the UK case law, in cases such as *Lord Fisher*, *Customs and Excise Commissioners v St Paul's Community Project Ltd* [2005] STC 95 and *Customs and Excise Commissioners v Yarburgh Children's Trust* [2002] STC 207.

56. I have no reason to consider that the Tribunal will be unable to make a determination of that nature with complete confidence. I do not therefore consider that it would be appropriate at this stage to refer Question 3 to the CJEU.

Question 4 – Activities inherently of a kind provided on a market

57. In *Hutchison 3G*, the CJEU drew a distinction between the economic activity of those it described as the economic operators, who were the holders of the rights granted by virtue of the grant by the UK of the 3G licences, and who operated on the relevant market by exploiting the licences, and the granting of the licences themselves by the national authority, which constituted only the necessary pre-condition for the access of those economic operators to the market and not participation in the market by the national authority.

58. In *SPÖ*, as I have set out above, the CJEU concluded that the provincial organisation of a political party was not, in its activities of carrying out a communication exercise, or in developing informed political opinion, participating in any market.

59. Capernwray points to the uniqueness of the overall service it provides, and argues that, taken as a whole, and not by reference to the individual and general elements of board and lodging and teaching, the activity of Capernwray is of a specific kind that is not marketable, and incapable of being provided on a market.

60. In my judgment, on the basis of the CJEU's jurisprudence generally, on the issue of economic activity this Tribunal will be capable of determining the extent to which it is necessary to identify a relevant market on which the particular activity in question may be carried on. It will be capable of ascertaining, first, the extent to which there needs to be an enquiry into the inherent nature of the activity, and secondly whether the ability to carry out that activity on a market is a factor which informs that inherent nature, or is a consequence of it. Further, in doing so, it will be able to determine the extent to which the uniqueness of the service provided by Capernwray should be taken into account.

61. In making each of these determinations, I consider that the Tribunal will be in a position to do so, guided by existing authority, with complete confidence. Accordingly, I do not consider that it would be appropriate at this stage to refer Question 4 to the CJEU.

Decision

62. For the reasons I have given, and as I indicated at the beginning of this decision, I refuse the joint application of the parties, and I decline to make a reference to the CJEU of each of the questions proposed.

ROGER BERNER
UPPER TRIBUNAL JUDGE

RELEASE DATE: 27 June 2015