



TC03315

Appeal number: TC/2012/01156

*VAT –was appellant charity making a taxable supply to local authority
under services agreement – yes – appeal allowed.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WOKING MUSEUM AND ARTS AND CRAFTS CENTRE Appellant

- and -

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

**TRIBUNAL: JUDGE ALISON MCKENNA
 SONIA GABLE**

Sitting in public at Bedford Square on 14 and 15 January 2014

Roger Thomas of counsel, instructed by Kingston Smith LLP, for the Appellant

P Shepherd, Officer of HMRC, for the Respondents

DECISION

5 1. This matter concerns an appeal by Woking Museum and Arts and Crafts Centre (“WMACC”) against a decision of HMRC dated 9 December 2011 to the effect that its service agreement with Woking Borough Council (“WBC”) falls outside the scope of VAT. As a result of that decision, HMRC issued an assessment which is the subject of a separate appeal, currently stayed behind this matter.

10 2. The Tribunal received into evidence an agreed bundle containing a large number of documents and several witness statements. Three witnesses attended the hearing on behalf of the Appellant and were cross examined. The Tribunal is grateful to both parties’ representatives for their helpful written skeleton arguments and oral submissions.

Background

15 3. WMACC is a registered charity (1073543), incorporated as a company limited by guarantee on 16 July 1998. It registered for VAT with effect from 1 March 2003. Its object is “to advance the education of the public in local national and international history and arts and crafts” and under the terms of its Memorandum of Association it has certain powers which may be exercised in furtherance of that object but not otherwise.

4. On 16 September 2003, WMACC entered into an agreement with WBC whereby it agreed to provide certain services. WBC agreed to make an annual payment to WMACC. Further details of this agreement are set out at paragraphs [12] to [21] below.

25 5. HMRC wrote to WMACC’s previous advisers in April 2004 with a decision that the arrangements under the agreement did not constitute a business supply by the charity and so fell outside of the scope of VAT. WMACC filed an appeal against that decision with the VAT Tribunal (as it then was) but withdrew the appeal prior to a hearing. Following correspondence with WMACC’s present advisers, HMRC
30 undertook a visit to WMACC’s premises in September 2011, at which visit HMRC discovered that WMACC had been charging output tax on its invoices to WBC notwithstanding HMRC’s earlier decision. HMRC then wrote to the charity in December 2011 to state that its earlier view of the arrangements had not changed. That is the decision letter which is now the subject of this appeal.

The Facts

35 6. The Tribunal heard that WBC is the owner of a collection of artefacts, mainly derived from local archaeological digs. Unlike other towns in the area, Woking did not have a museum and so in the early 1990s WBC proposed the establishment of a museum at which the collection could be displayed.

7. The Tribunal was shown the minutes from WBC committees and Council meetings over a period of several years, from which it was clear that plans gradually developed for WBC to acquire premises and let them to a local charity which would run a museum in which it would display the collection.

5 8. After many years of discussions, and after a number of properties had been considered but then rejected as not suitable, WBC finally identified a site which it already owned and on which a purpose-built museum could be constructed. In July 2002 WBC paid to WMACC a capital contribution of £3 million (plus £500,000 development funding) towards the cost of construction of the museum building, now
10 known as “The Lightbox”. WBC also at that time formally resolved to negotiate a service agreement with WMACC which was duly discussed, drawn up and entered into on 16 September 2003.

9. By the time the service agreement was finalised, it included the provision by WMACC not only of a museum but also of WBC’s Visitor Information Service. (The
15 Tribunal expressed some puzzlement as to how the provision of the Council’s Visitor Information Service could be said to further the charity’s object set out at paragraph [3] above, but HMRC took no point on that and it is not a matter we need consider further here).

10. WBC granted a 99 year lease of the Lightbox premises to WMACC in 2005.
20 The rent was set at £1.00 per annum. We were told that there had been an agreement to lease which preceded the 2005 lease, but no copy of that document was available. We were also told that WBC entered into a separate agreement to loan its collection to the charity, but we have not seen that document.

11. It was undisputed that since 2007, when the newly-constructed Lightbox opened
25 to the public, WMACC has conducted itself in accordance with the agreement and WBC has made the payments which it had agreed to make under the agreement. We heard that WBC has also, in the intervening years, made some one-off grants to the charity in respect of activities not covered by the service agreement. The charity’s accounts show that it has also received a loan from WBC.

30 *The Agreement*

12. We have considered the service agreement entered into by the parties very carefully. We note that it was drawn up by WBC’s solicitor, but we heard from Mr Morgan (see paragraph [24] below) that the charity was separately represented in that
35 process. We assume that the agreement was duly executed by the charity. The agreement is called “Contract for provision of arts museum cultural and visitor information services in the Borough of Woking”. The terms of the agreement are as follows.

13. The Recitals provide at 1.2 that

40 The Council has identified a need for arts museum cultural and public information services to be provided within the Borough and desires to provide those services for the benefit of the Borough of Woking

and at 1.4 that

5 In the premises the Council wishes to engage WMACC to provide arts museum and cultural services and a public information service within the Borough of Woking on the terms contained in this Contract and WMACC has agreed to provide these services in consideration of the annual payments to be made by the Council to WMACC as hereinafter provided

14. Clause 2 (still within the Recitals of the agreement) sets out the statutory authority under which WBC enters into the agreement. This is described as follows:

10 This Contract is made pursuant to section 2(1) Local Government Act 2000 sections 111 and 142 Local Government Act 1972 section 12 and 14 Public Libraries and Museums Act 1964 and all other enabling powers.

15 15. Clause 3 is the definition and interpretation clause within the main body of the agreement. It defines “Services” as

20 (i) the provision of a museum and temporary exhibition facilities and arts crafts and cultural activities and other cultural services primarily for the benefit of the community comprised within the Borough of Woking and (ii) the provision of such visitor information services for members of the public including visitors to Woking as the Council shall reasonably require”.

16. Clause 4 deals with the obligations of WMACC under the agreement. It provides that

25 in consideration of the annual payment to be made by the Council to WMACC...WMACC shall provide the Services to the reasonable satisfaction of the Council until this Contract is determined...

30 17. Clause 4 sets out the manner in which the Services are to be provided and the location of those services. WMACC is obliged to permit free public access to a specified amount of museum space and at specified times. Clause 4.3.1 provides that WMACC must indemnify the Council against any loss or liability caused to it by WMACC’s breach of its obligations under the agreement.

35 18. Clause 5 of the agreement sets out WBC’s obligations, which are to make the following payments “*in consideration of the provision of the Services by WMACC under this Contract*”... (i) on the first day of January 2006, a payment of £224,000; (ii) on the date on which the centre opens to the public and WMACC commences providing the Services a further £224,000 and (iii) thereafter on each anniversary of the date in (ii) above, a further payment of £224,000. Payments (ii) and (iii) are to be increased in line with the Retail Prices Index.

40 19. Clause 6 provides a reporting framework between the parties during the life of the agreement, including an annual report from WMACC to WBC which must include a statement summarising how WMACC has met its obligations under clause 4 of the agreement.

20. Clause 7 provides for the termination of the agreement. This would take place on the date on which the charity's lease expires or is terminated; the date on which the agreement is terminated; twelve months after a written notice of termination is served by either party but "*not earlier than the date upon which WMACC shall have provided the Services under this Contract for a period of fourteen years*". Clause 7.3 provides that WBC may terminate the agreement in a number of circumstances, including the charity going into liquidation and if WMACC fails to comply with its obligations under the agreement (subject to a procedure for giving notice and allowing WMACC to remedy the breach). In the event of termination WMACC is required to make a pro rata refund of the annual payment to WBC.

21. Clause 7.6 provides that in the event of termination of the agreement WMACC is obliged to provide WBC with free advice and assistance for a period of three months following termination, to allow it "*to provide or procure the provision of the Services*" in other words, to take over the running of the museum itself or to find someone else to do so. WMACC gives an indemnity in respect of any liability falling onto WBC in the event that it fails to pass on key information in this situation.

The Witness Evidence

22. The Tribunal heard oral evidence from Mr Morgan, the Chief Executive of WBC. He had sworn a witness statement dated 7 November 2013 in which he described the strategic approach taken by WBC towards the provision of certain services in the Borough. This was that, wherever possible, services were to be provided by third parties who entered into commercial contracts with WBC. He commented that "*engaging not-for-profit organisations on a commercial basis to provide services carries particular attractions. These organisations can often access third party funding which would not be available to a local authority. Because they often have access to enthusiasts in the relevant subject area they can often procure employees more cheaply than the Council could. They can also access volunteers in a way that would be difficult for Woking BC...Finally Woking BC recognises that certain services are of most benefit to the community when they are provided by organisations which are genuinely engaged with the local community (sometimes to a greater extent than is possible for local authorities)*".

23. Mr Morgan also explained that the promotion of the arts (including a theatre, a dance festival and the museum) was part of the Cultural Strategy for stimulating the local economy in Woking, which had enjoyed cross-party support in WBC from as long ago as the early 1990's, but which had taken a long time to reach fruition. With this underlying policy aim in mind, WBC had repeatedly rejected the idea of establishing the museum in a building only large enough to display the core collection, and had waited until larger premises, with room for touring exhibitions which would attract visitors from a wider area, could be found.

24. Mr Morgan described the development of the service agreement between the parties as involving "*intense negotiations*" between 2002 and 2003. He said that WMACC had been represented by its own solicitor and its own business plan had set the level of required annual funding at £350,000. Mr Morgan explained that most

local authorities run their museums in-house, so that it had been difficult for WBC to benchmark the likely cost to WMACC of running the service. In the hope and expectation that WMACC could, as a charity, run the museum at a lower cost than a local authority could, WBC had resolved to make annual payments of only £224,000 per annum, which sum was intended to cover the composite cost of providing all the services identified in the agreement. Unfortunately, WMACC has not been able to attract the commercial sponsorship it had hoped for and it was clear from the most recent accounts produced to the Tribunal that the charity is currently in a parlous financial position with its overheads exceeding its income.

25. Mr Morgan explained that the usual local authority tendering process had not been adopted in this case because WBC had worked closely with WMACC (and with its predecessor unincorporated association) to develop the specification of services to be provided and that *“there was only ever one (not-for-profit) potential provider of the services required by the Council”*. He explained that WBC does make grants to charities and said he was clear that there is a difference between the terms on which grants are made and the terms of commercial contracts. In particular *“...a recipient of a grant who failed to use it for its projected purpose could only be required to repay it, whereas WMACC is contractually obliged to render services to Woking BC for the whole of the contract period; if it failed to perform these the contract could be terminated and if the Lightbox ceased to operate the lease would be forfeited”*. He explained that WMACC had recently asked for permission to reduce opening hours in order to cut costs but that WBC had required it to observe the terms of the service agreement and to continue with its present opening hours. He observed that, if WMACC were unable to comply with the service agreement, another service provider would have to be found to do so.

26. Mr Morgan explained in his witness statement that WBC had made savings as a result of its arrangements with WMACC, through the transfer of the Visitor Information Centre to the Lightbox in 2007. Previously, this service had been provided in dedicated WBC premises and run by WBC employees, but these were closed down when the service transferred to the Lightbox and WMACC took over the provision of the service under the terms of its agreement with WBC. Mr Morgan also detailed how in 2011 WBC had commissioned an independent report on its arrangements with WMACC, stating that *“The purpose of this exercise was to obtain an independent opinion as to whether the commercial arrangement with WMACC provides good value for money for Woking BC, having regard to Woking BC’s objectives relating to museum provision”*.

27. With the permission of the Tribunal Mr Morgan answered supplemental questions in chief from Mr Thomas. He emphasised that the aim of the Cultural Strategy was not only to stimulate the local economy, as WBC’s view was that the development of cultural activities in Woking would *“give the town a heart”* and contribute to the vitality of the town. His concern was that, if there were not cultural activities, Woking could become a dormitory town. He explained that WBC’s collection (of archaeological artefacts and works of art) was loaned to WMACC in a separate agreement which was not before the Tribunal. He explained that the decision to enter into the service agreement with WMACC, rather than to make a grant to it,

was in part informed by the need to demonstrate to other potential grant funders (such as the Heritage Lottery Fund) that WMACC was a sustainable entity. He explained that WBC's continuing commitment to WMACC was evident in its recent decision not to foreclose on its loan to the charity.

5 28. Mr Morgan was cross-examined by Mr Shepherd and was asked to describe
how the annual payment figure of £224,000 had been arrived at. Mr Morgan
explained that WBC had funded the development of a business plan for the museum
project, and it had suggested this figure was needed on top of the fee-income from
10 paid-for exhibitions, income from trading and the likely level of commercial
sponsorship. He acknowledged that the figure was less than WMACC had suggested
and said that there had been hard commercial negotiations. Mr Shepherd also asked
why no other potential service providers had been considered and Mr Morgan replied
that WBC's soft market testing had suggested that no other body would have wanted
15 to take on this contract. Finally he explained that WBC had wanted the service
agreement to run for 15 years as it is a similar term to comparable contracts to which
WBC is a party and members of the Council are comfortable with contracts of that
duration.

29. The Tribunal also heard evidence from Marilyn Scott, the Director of WMACC
since 2001. She had sworn a witness statement on 11 November 2013. She stated
20 that she had previously been a trustee of WMACC and of its predecessor body, so had
in fact been involved in the development of the museum project since 1997. She
described the development of the plan for WMACC to run the museum for WBC.
She explained that, although in the early planning stages a number of Councillors had
also sat on WMACC's board, this had not been the case since 2003 when the status of
25 WMACC changed to that of service provider. She described how the relationship
with WBC had become "*an arms' length commercial one*" under the service
agreement. Ms Scott described the negotiations between WMACC and WBC in
relation to the agreement, and WMACC's realisation that if WBC paid only £224,000
annually then there would be an income deficit. However, she said that "*There was a*
30 *strong feeling that this was the only chance to secure a museum for Woking; although*
WMACC would obviously have preferred to be paid more generously by Woking BC,
it was prepared to try to make the deal work on the terms available".

30. In cross examination, Ms Scott was referred by Mr Shepherd to a 2003 letter
sent by WMACC's former advisers to HMRC, in which the annual figure of £224,000
35 was described as "*the anticipated full cost*" of providing the services under the
agreement with WBC. She said that was thought to be an accurate figure at the time,
but things had changed when the Lightbox opened in 2007 and the recession began
soon afterwards. She said that WMACC had accepted £224,000 in the knowledge
that it would inevitably temper the services that it would be able to deliver in addition
40 to those in the agreement with WBC.

31. Mr Shepherd drew Ms Scott's attention to the 2004 letter from HMRC which
advised that the payments under the agreement fell outside the scope of VAT. She
confirmed that she had been aware of the letter but said she had thought that the issue
for HMRC was about the percentage of the building which was used for a trading

purpose. On further questioning it was clear that she had not appreciated the import of the letter with regard to the payments to WMACC from WBC. She said that she had been unaware that VAT had been added to the invoices issued to WBC until HMRC had raised it as an issue.

5 32. The Appellant’s final witness was Martin Bowman, who had sworn a witness
statement on 10 November 2013. He described himself as a patron of WMACC who
had in the past been on the board. He had also been involved with the local history
society which preceded the incorporation of WMACC. He explained in his witness
10 *statement that “The directors of WMACC...wanted the company to be paid by Woking
BC on a commercial, rather than a grant, basis. We were particularly wary of grant
funding because of its inherent unreliability; grant funding is generally provided on a
very short term basis, and is very vulnerable to changes in the political priorities of a
local authority. We therefore felt that the museum would be able to operate from a
much more stable financial position if a long term commercial agreement was put in
15 place. This was achieved in the 2003 contract. However, the relative financial
security of course came at a price. Although we feel relatively free to run the
Lightbox as we wish, organisations which are funded on a grant basis do not owe
obligations to their funders in the same way that providers of services under
commercial contracts do”.*

20 33. In cross examination, Mr Bowman confirmed that the details of on-going
contract negotiations with WBC had been put before WMACC’s board and that
although they wanted a higher income, they were delighted to get the contract. He
said that he had not understood the issue about VAT and had personally been more
concerned with the human resources issues.

25 *The Law*

34. The applicable legislation was not in dispute in this appeal. Section 1 of the
Value Added Tax Act 1994 (“VATA”) provide that VAT shall be charged on the
supply of goods or services in the UK. Section 4 of VATA provides that

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

(2) A taxable supply is a supply of goods or services made in the
United Kingdom other than an exempt supply.

35 35. Section 5 (2) of VATA provides that

(a) “supply” in this Act includes all forms of supply, but not anything
done otherwise than for consideration;

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

40 36. The Principal VAT Directive 2006/112/EC provides at Article 2 that the supply
of services for consideration shall be subject to VAT and “supply of services” is

defined in Article 24 as “...any transaction which does not constitute a supply of goods”. Article 73 of the Directive provides that

5 In respect of the supply of goods or services...the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.

37. Article 9 (1) of the Directive provides that

10 “Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

38. The parties’ representatives also referred the Tribunal to a significant volume of case law, which we describe in the context of summarising their respective submissions at paragraphs [40] to [55] below.

15 39. It was agreed between the parties that WBC had both the legal power and the discretion (but no obligation) either to provide the museum itself or to arrange for another person to provide it on its behalf. The statutory framework pursuant to which WBC entered into the services agreement is set out in the Recitals to the Agreement (noted at [14] above) and is as follows. Section 2 of the Local Government Act 2000
20 empowers a local authority to do anything which it considers likely to achieve the promotion of the social well-being of the area. It includes power to enter into agreements to this end. Section 111 of the Local Government Act 1972 confers on a local authority power to do anything which is calculated to facilitate the discharge of any of its functions and section 142 of the same Act permits a local authority to make
25 arrangements whereby the public can readily obtain information concerning the services available in the local authority’s area. Finally, section 12 of the Public Libraries and Museums Act 1964 empowers a local authority to provide and maintain museums within its area and section 14 of the same Act permits a local authority to contribute towards the expenses incurred by another person in maintaining a museum
30 in its area.

The Parties’ Submissions

The Appellant’s Case

40. Mr Thomas provided a helpful skeleton argument for the Tribunal, in which he argued that the question for decision in this case is whether or not the Appellant was
35 and is correct to charge VAT on the services it has supplied and continues to supply to WBC, as output tax under section 24(1) VATA 1994, on the basis that it does ‘[something] for a consideration’. He submitted that WBC pays money to the Appellant in consideration of and as consideration for its undertaking the relevant activity (the provision of museum and arts and craft centre together with the provision
40 of a visitors’ information service in the Borough of Woking).

41. Referring to the case law, Mr Thomas submitted that a supply of services for consideration requires a “*direct link between the services provided and the consideration received*” (*Apple and Pear Development Council v C&E Commissioners* [1988] STC 221) and that the necessary direct link was illustrated in
5 *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509, which decision concerned a Dutch busker who played music on streets and in other public places. He was given money by passers-by. Although he sometimes solicited donations, there was no agreement that passers-by or those who stopped to listen to the music would pay the musician. The Court found that the necessary ‘direct link’ between the sums given to
10 the musician for the music played by him was absent in that case, there being no agreement between the parties, and thus no necessary link between the music and the payments. The passers-by did not request that music be played, and the sums paid did not depend on the music but on subjective motives, such as sympathy.

15 42. After confirming the need for a ‘direct link’ the ECJ stated at [14] that

“...a supply of services is effected ‘for consideration’ within the meaning of art 2(1) of the Sixth Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the
20 remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.”

43. Mr Thomas’ summary of the case law was that a ‘direct link’ will be established if the service provided is ‘requested’ by the recipient, the amount paid by the recipient is dependent upon the service or benefit being provided, and there is a reciprocal
25 relationship between the parties.

44. He referred the Tribunal to the decisions in *Edinburgh Leisure and Others v Customs and Excise* (2004) VAT Tribunal 18784 and *Bath Festivals Trust Ltd v HMRC* (2008) VAT Tribunal 20840, which are both first instance decisions by which we are not bound, but which are of interest because they concern factually similar
30 arrangements involving the outsourcing of local authority services to third parties through the legal medium of service agreements. In the *Edinburgh* decision, the Tribunal found that the Trusts were providing services to the Councils for consideration in circumstances where the consideration was calculated in advance under the terms of the agreement. It took into account the fact that “...*but for the Council’s payment the facilities could not be operated in the way the Council desire*”.
35 In the *Bath* decision, HMRC had argued that the benefit of the services provided under the contract was to the local residents and thus that any benefit to the Council was incidental and not a “supply” for VAT services. The Tribunal found for the Trust in that case, noting that it provided to the Council a core component of its Cultural
40 Strategy and was of direct benefit to the Council in improving the local economy. In those circumstances the Tribunal held that it was immaterial that the Council was exercising a discretionary function rather than discharging a statutory obligation.

45. Mr Thomas referred the Tribunal to the evidence before it that WBC had for many years followed a Cultural Strategy which involved the creation of a museum

and arts and crafts centre relating to the history of the Borough of Woking. He submitted that WBC had sought to progress that strategy in its agreement with WMACC, as shown in the Recitals to the Agreement. In addition, WBC had a need to provide visitor information services to the local community and to visitors to the Borough. In return for payment, the Appellant had agreed to undertake both those activities for WBC as shown by Recital 1.4 and clause 4.1 of the Agreement. In his submission WMACC thus supplied services to the Council for consideration. He further submitted that this was not a case where payment would only be made provided that the payee undertook a particular activity. Rather, this was a case where WMACC would be liable to WBC in the event that it failed to undertake the activity. Accordingly, he argued, there is a direct link between the payment and the activity: that link being evidenced in the promises of the parties to each other under the Agreement, which are mutually enforceable.

46. In supplemental oral submissions, Mr Thomas emphasised that, in his submission, a proper reading of the arrangements between the parties confirmed that they had entered into a legal contract under which reciprocal obligations arose. This was inconsistent with HMRC's argument that the arrangements should be construed as a grant. Mr Thomas also emphasised that under the terms of the Agreement there is no obligation on WMACC to spend the money it receives from WBC on any particular activity. This means that if it were able to raise the funds to cover the cost of service provision from other sources, it could spend the funds received from WBC under the agreement on other activities (or not at all). This, Mr Thomas submitted, illustrated the fundamental difference between these arrangements and a grant. Similarly, it was worthy of note in his submission that a grantee who breaches the terms under which a grant is made is liable to repay the grant funds. In this case, WMACC would be liable to pay damages in contract if it breached the terms of the Agreement, thus illustrating that the arrangements in this case are not to be construed as a grantor/grantee relationship.

47. Mr Thomas also referred us to the decision of a differently constituted panel of the First-tier Tribunal (Tax Chamber) in *South African Tourist Board v HMRC* [2013] UKFTT 780 (TC). Once again this is a first instance decision which turns on its own facts (and one which, incidentally, we understand has been appealed and is due for a hearing in the Upper Tribunal (Tax and Chancery Chamber) shortly). It involves a rather different situation to the one we must consider, where the services were to be provided by a statutory agency which was found to be obliged to provide them for reasons outside those of its obligations under the service contract. Mr Thomas referred us particularly to the consideration by the Tribunal in that case of the requirement for mutuality of obligation in any agreement which is properly to be construed as a contract for the supply of services and to the Tribunal's thorough analysis of the type of services which may be said to be intrinsically non-economic in nature.

The Respondent's Case

48. Mr Shepherd provided a helpful skeleton argument for the Tribunal, in which he summarised HMRC's submissions as follows:

5 (1) To establish that it is providing services for consideration within the scope of VAT, the Appellant must show that WBC received a specific benefit for itself for the monies that it pays. Alternatively, it must show that the benefit is to specific persons and WBC supply third party consideration.

10 (2) The Appellant has a contract with WBC for it to provide the facility of the Woking Museum. The contract has certain features that are found in service contracts but these are also found in agreements for grants which are not consideration for services. For example, the contract included clauses for a limited time (in this case, 15 years), arbitration, claw backs for not providing facilities, restrictions on subcontracting, a monetary sum paid by WBC to WMAcc to provide those facilities and the index linking of monies payable. Therefore, these cannot be conclusive.

15 (3) A possible benefit would be the provision by the Appellant of services that the Council are required to provide under their statutory duties, thus relieving them of that duty. However there is no evidence of these specific benefits or any other being provided to the Council. Equally, there are no specific services for particular individuals or other legal persons provided specifically in consideration of the grant moneys. Without those benefits all the facilities provided are for the benefit of the local community generally, a key characteristic of grants which are not consideration for supplies. That provision is therefore outside the scope of VAT.

25 49. Mr Shepherd submitted that the Tribunal must look at all the surrounding circumstances in deciding this case. His detailed analysis of the arrangements between the parties referred to the fact that Council papers from 2001 and 2002 referred to WBC providing “annual revenue support” to the Galleries Project (an earlier working name for the Museum) rather than to a decision to make payment for specific services supplied to WBC. He also pointed to the fact that WBC had not undertaken its standard tendering procedure before entering into the agreement with WMAcc as tending to support HMRC’s analysis that the arrangements between the parties were not properly to be viewed as a commercial contract. Also on this point, he referred the Tribunal to the review of the arrangements commissioned by WBC (referred to at [26] above) in which report the services provided by WMAcc were described as “loosely defined” because there is no specification over and above the definition of services in clause 3 of the Agreement (see [15] above).

40 50. Mr Shepherd also argued that, looking at all the circumstances of the case, WMAcc could not be said to be operating in a market and that its activities did not therefore constitute “economic activity” for the purposes of Article 9 (1) of the Principal Directive. He referred the Tribunal to the decision of the ECJ in *SPO Landesorganisation Karnten C-267/08* in which it was held that a contract to provide advertising for political objectives did not constitute economic activity. He argued that because WMAcc was pursuing charitable objectives it was not participating in an economic market and he relied upon the decisions in *Donaldson’s College* [2006]

BVC 2224, *Quarriers* [2008] BVC 2366 and *St Paul's Community Project Limited* [2004] EWHC 2490 (Ch) as supporting this analysis.

51. Mr Shepherd also submitted that there was no direct link in this case between the benefit provided by WMACC to WBC and the payment it received from WBC.
5 He argued that the annual payment constituted a general contribution to WMACC's running costs and was not a subsidy "*directly linked to the price of supplies*", as in the case of *Keeping Newcastle Warm Ltd*, ECJ, C-353/00 in which free advice was provided to householders, for which a third party paid £10 to Keeping Newcastle Warm Ltd for each recipient of the advice. This arrangement was held to constitute a
10 sufficient direct link between the payment and the supply of the advice. Mr Shepherd argued that, in that case, the Advocate-General had distinguished between the payment of a global subsidy for operating costs and a subsidy granted by a donor to the recipient to enable a third party to obtain a specific service. In that case the only taxable transaction was held to be the one which took place in the context of a
15 tripartite relationship. In this instance, he submitted, there is no tripartite relationship so the payment to WMACC should be viewed as a non-taxable supply in the nature of a subsidy towards operating costs.

52. Mr Shepherd also referred the Tribunal to two first instance decisions, namely *Hillingdon Legal Resources Centre Ltd* (1990) VAT Tribunal 5210 (in which the
20 monitoring conditions under which a citizens' advice centre received a grant from the local authority were held to be good housekeeping only, so that the grant was held not to constitute a taxable supply) and to *Wolverhampton Citizens Advice Bureau* [2000] VAT Tribunal 16411 (which adopted a similar analysis despite a written agreement between the Appellant and the local authority, which was found to have existed solely
25 because the local authority required it). He concluded on this point by submitting that that there is no link between the payments made by WBC and the services supplied by the Appellant because the payment is increased in relation to the retail prices index only and bears no relation to the quantity or the value of any services provided.

53. HMRC's analysis of the arrangements between WMACC and WBC was that
30 they were a grantee and grantor. Mr Shepherd invited the Tribunal to dismiss the appeal on the basis that the Appellant is engaged in business and non-business activities and that the grant income from WBC is received in support of these activities but without a direct link to its payment so that the grant is not a taxable supply.

35 54. In his supplemental oral submissions, Mr Shepherd emphasised his point that the services described in the Agreement are for the benefit of the public at large rather than for the benefit of WBC and that the benefit to WBC is not described in the Agreement. In relation to Mr Thomas' argument that the benefit to WBC lay in the delivery of its Cultural Strategy, Mr Shepherd pointed out that the Museum was only
40 mentioned three times in the Cultural Strategy document adopted by WBC in 2004 and said he would have expected it to have featured more prominently if it was significant.

55. Mr Shepherd also asked the Tribunal to consider the evidence that the annual payment figure of £224,000 had not varied over the year of pre-contract negotiations and that WBC's use of the term "revenue support" to describe that payment could have resulted in a wide range of potential arrangements. He submitted that the amount WBC would pay had effectively been determined a year before the Agreement was entered into and that the payments never vary according to the level of service provided over the term of the Agreement. He pointed out that the level of the payment had not risen to take account of the increased overheads of WMACC and that, on the evidence, WBC's payment does not even meet the charity's running costs. He suggested that this "lack of commerciality" meant that the arrangements were more properly described as a grant than a contract. He also pointed to a "closer than normal" relationship between the parties as demonstrating non-commerciality.

56. Mr Shepherd additionally relied in his oral submissions on the point that if there is no correlation between the payment for the services and the cost of providing them, then there can only be said to be a part-payment which has been held not to constitute consideration. He referred the Tribunal to the decision in *EC v Finland* (2009) C-246/08 in which the ECJ had found that part-payment only (for legal services provided under a Legal Aid system) did not constitute consideration.

Conclusion

57. We have taken on board both representatives' submissions that we must look at all the circumstances in the round in this case. We have considered not only the black letters of the Agreement between WMACC and WBC but also the history of the Museum project, WBC's statutory powers, its policy initiatives, the financial reality of the relationship between the parties, WMACC's status as a charity, and the context within which the Agreement was signed.

58. We have also considered carefully the European and domestic law governing the VAT treatment of the arrangements between the parties and the case law to which we were referred by the parties' representatives. Taking all these factors into account, we have concluded that the arrangements between WMACC and WBC are properly to be regarded as constituting a taxable supply for the following reasons.

59. Firstly, we find that the "Contract for provision of arts museum cultural and visitor information services in the Borough of Woking" described at [12] to [21] above is, as a matter of law, to be construed as a contract between the parties and not a grant from WBC to WMACC. We take this view not because of the formal appearance of the agreement but because it contains at its heart the mutuality of obligation which is characteristic of a contract. This feature was found to be lacking in the *Hillingdon* and *Wolverhampton* decisions to which Mr Shepherd referred us.

60. In reaching this conclusion we take into account the fact that WMACC would be liable to WBC for breach of the contract if it failed to perform the services specified at clause 3 of the Agreement. We also take into account the fact that, as Mr Thomas correctly submitted, WMACC is under no contractual obligation to do anything in particular with the payment received from WBC. The payment is said in

clause 4 of the Agreement to be made as consideration for the provision of the services and there are no further provisions regarding its application during the life of the contract.

5 61. We reject Mr Shepherd's submission that the payment is properly to be viewed as a grant. We do have some sympathy with Mr Shepherd's point that the services to be provided by WMACC to WBC are not well-defined in the contract. However, we find that there is sufficient description of the services in clause 3 of the Agreement for both parties (and indeed the Tribunal) to know what is required of them in the performance of their obligations to each other and we find that there is a direct link
10 between the supply of those services by WMACC and the consideration paid by WBC. Referring back to the decision in *Tolsma* (referred to at [42] above) we find that that WMACC makes a supply of services to WBC for consideration and that there is a legal relationship between them pursuant to which there is reciprocal performance.

15 62. Secondly, we find that the delivery of the services by WMACC provides a direct benefit to WBC. Taking into account the whole history of the development of the museum project, we note that WBC owned a collection of artefacts and art work which it had decided as a matter of policy should be displayed to the public in a museum. It had the power (but not a statutory obligation) to open a museum in which
20 to display them or to pay a third party to do so. It adopted a lawful policy (the Cultural Strategy) which was given effect, inter alia, through its arrangements with WMACC. We find that its engagement of WMACC to provide the museum space for the core collection provided WBC with a benefit. We note that under clause 7.6 of the Agreement it is intended that if WMACC did not deliver the museum service then
25 WBC would either provide it itself or procure another person to do so. Mr Morgan confirmed this in his evidence. In relation to the Visitor Information Services, WBC closed down its own service and transferred it to the charity. We find that the engagement of the charity (at a cost saving to WBC) to run this existing service clearly provided WBC with a benefit. In those circumstances we reject Mr
30 Shepherd's submission that there is no direct benefit to WBC but rather that the benefit is to the local community and/or that there would only be a benefit if there were a defined tripartite relationship as in the *Keeping Newcastle Warm* case. We find that the intention of the contracting parties was to deliver WBC's Cultural Strategy as set out at Recitals 1.2 and 1.4 to the Agreement and that that Strategy was
35 a lawful exercise of discretion by WBC under the legal framework set out at Recital 2 of the Agreement.

63. Thirdly, we reject Mr Shepherd's submission that the arrangements between the parties are non-commercial in nature and so do not constitute a taxable supply. We acknowledge that there is a special relationship between the parties in this case, but
40 we are not persuaded that the arrangements between them are a sham. The special relationship has advantages and disadvantages on both sides but it certainly seems to us that WBC has derived a significant commercial advantage from the arrangements. It is less clear that the arrangements will be sustainable from the charity's point of view and, with the benefit of hindsight, WMACC might well enter into a different sort
45 of contract with WBC. But we accept Mr Morgan's evidence that charities provide

5 intangible benefits in terms of their relationship with the local community which makes them attractive to local authorities as service deliverers. In these circumstances we note Mr Morgan's evidence that there was only ever one potential party to this contract so as to obviate the need for a formal local authority tendering process.

10 64. Many charities provide local authorities with services, and we do not accept Mr Shepherd's submission that the simultaneous pursuit of a charitable objective by a service provider renders the relationship non-economic for the purposes of the Directive. We take into account the wording of Article 9 (1) of the Directive which provides that the purpose or results of an economic activity are immaterial. We are not persuaded that the delivery of services by a charity to a local authority may be said to be intrinsically non-economic in nature. We note that the same services could be provided by a non-charity. The supply of services by a charity to its own beneficiaries is an entirely distinct issue and we distinguish the decisions in 15 *Donaldson's College, Quarriers* and *St Paul's Community Project Limited*, to which Mr Shepherd referred us, for that reason.

20 65. Finally we turn to the issue of part-payment which Mr Shepherd raised for the first time in his oral submissions. We note that the arrangements considered by the ECJ in the *Finland* case involved the making of a payment which varied according to the means of the individual recipient. We find that the payments made by WBC under the Agreement were never intended to represent a part payment for the services provided by WMACC. The figure was agreed upon, as Mr Morgan told us, in the hope and expectation that WMACC would derive additional earnings from other activities, from donations and commercial sponsorship. But the contract is clear in 25 providing that all of the specified services must be provided and that the annual payment is by way of consideration for those services. The fact that the bargain reached between the parties has proved to be disadvantageous to one party is entirely distinguishable from a contract which provided only for part payment at the outset.

30 66. For all of the above reasons we allow this appeal. We find that WMACC was correct to charge VAT on the supply of services because it was making a taxable supply to WBC under s. 4 VATA.

35 67. 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.

40 **ALISON MCKENNA**
TRIBUNAL JUDGE

RELEASE DATE: 10 February 2014