



[2021] UKFTT 0096 (TC)

**TC08079V**

*VALUE ADDED TAX – supplies of management services made between two VAT groups within the same corporate group – whether supplies made at less than open market value – in the absence of comparable supplies, open market value was to be determined by reference to the full cost of making the supplies – that full cost included the costs incurred on goods and services used in making the supplies and also general overhead costs the input tax in respect of which had been recovered – it also included the remuneration paid to the executive directors to the extent that that remuneration related to activities performed by the executive directors in making the supplies of the management services - appeal against the output tax assessments dismissed - whether input tax on general overhead costs incurred by a holding company carrying on only the economic activity of making supplies of management services recoverable - yes*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2014/03366**

**BETWEEN**

**JUPITER ASSET MANAGEMENT GROUP LIMITED                      Appellant**

**-and-**

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

**TRIBUNAL:    JUDGE TONY BEARE  
                    MR CHRIS JENKINS**

**The hearing took place on 16, 19, 20 and 21 October 2020, 25 and 26 February 2021 and 1, 2 and 3 March 2021. With the consent of the parties, the form of the hearing was by way of a video hearing on Teams. A face-to-face hearing was not held because of the COVID 19 pandemic and because the matters at issue were considered appropriate to be dealt with by way of a video hearing.**

**Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.**

**The documents to which we were referred included various bundles – a documents bundle of 3057 pages (the “DB”), an additional documents bundle of 1377 pages and an authorities bundle of 1012 pages. Together, these contained the written evidence, legislation and case law relevant to the hearing.**

**Mrs A Brown QC and Mr M Brady, of KPMG, for the Appellant**

**Mr M Jones QC and Mr N Macklam, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.**

# DECISION

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### INTRODUCTION

1. This decision relates to appeals made by the Appellant as the representative member of a value added tax (“VAT”) group which, at the times material to the appeals, comprised itself and several other companies, one of which, from 1 June 2010, was Jupiter Fund Management Plc (“PLC”). The VAT group of which the Appellant was the representative member from time to time is referred to in the rest of this decision as the “JAMG group”.
2. The Appellant is also a member of the corporate group which, from 1 June 2010, was headed by PLC. The corporate group headed by PLC and, prior to that, a company called Jupiter Investment Management Holdings Limited, another member of the JAMG group (“JIMHL”), is referred to in the rest of this decision as the “Jupiter Group”. The Jupiter Group provides clients with a wide range of asset management products.
3. At the times material to the appeals, there was another VAT group in addition to the JAMG group within the Jupiter Group. The representative member of that group (the “JIMG group”) was Jupiter Investment Management Group Limited, a subsidiary of the Appellant (“JIMG”). A number of other companies within the Jupiter Group were also members of the JIMG group.
4. The appeals which are the subject of this decision relate to the VAT input tax and output tax consequences for the JAMG group of certain strategic and operational management services (the “Management Services”) which were provided by members of the JAMG group to members of the JIMG group over a number of years. The precise identity of which company in each group provided and received the Management Services at any particular time is not of particular relevance to this decision given that the companies

comprising a VAT group from time to time are effectively treated as a single person for VAT purposes.

5. However, the terms on which those services were provided is of considerable relevance to this decision and it is therefore necessary to explain the following:

(1) on 11 July 2007, an agreement was executed between the Appellant and Jupiter Asset Services Limited, a company in the JIMG group (“JASL”), pursuant to which, with effect from 19 June 2007, the Appellant agreed to provide the Management Services to JASL (the “First MSA”);

(2) the First MSA provided that, in return for the payment by JASL to the Appellant of a service fee which was equal to the costs incurred in the provision of the Management Services plus 10% or as agreed between the parties from time to time, the Appellant would provide the Management Services to JASL. The parties agreed on 11 July 2007 that the fee for the Management Services would in fact not be based on the actual costs incurred in the provision of the Management Services but would instead be £105,000 per annum (excluding VAT);

(3) the Management Services were defined in the First MSA as “the various strategic and operational management services, including but not limited to the following: a. development of group strategies and policies; b. support for the implementation of group strategies and policies; c. oversight and monitoring of the operation and management of group companies; and d. maintenance and support for relationships with key stakeholders of the group, including regulators”;

(4) on 3 January 2012, the Appellant, JASL and Jupiter Asset Management Limited, a company in the JIMG group (“JAML”), entered into an agreement pursuant to which, with effect from 1 January 2012, the rights and obligations of JASL under the First MSA were novated to JAML;

(5) on 6 December 2012, JAML sent a letter to the Appellant, pursuant to which JAML terminated the First MSA with effect from midnight on 31 December 2012;

(6) also on 6 December 2012, an agreement was executed between PLC and JAML, pursuant to which, with effect from 1 January 2013, PLC agreed to provide the Management Services to JAML (the “Second MSA” and, together with the First MSA, the “MSAs” and each an “MSA”);

(7) the Second MSA provided that, in return for the payment by JAML to PLC of a service fee which was equal to the cost to PLC of providing the Management Services from time to time (which was stated to be £340,000 per annum (excluding VAT) as at the date when the Second MSA became effective), PLC would provide the Management Services to JASL;

(8) the Management Services were defined in the Second MSA in more or less identical terms to the way in which they were defined in the First MSA. They were described as follows:

“Various strategic and operational management services, including

- development of group strategies and policies;
- support for the implementation of group strategies and policies;
- oversight and monitoring of the operation and management of group companies; and

- maintenance and support for relationships with key stakeholders of the Jupiter Group, including regulators”; and

(9) both the First MSA and the Second MSA stipulated that the relevant MSA constituted the whole agreement between the parties and could be modified or amended only by the written agreement of the parties.

6. The only other structural matter which we should mention at this stage in this decision is that, as mentioned in paragraph 2 above, over the period between 11 July 2007 (when the First MSA was executed) and 31 May 2010, the parent company of the Jupiter Group was JIMHL. However, with effect from 1 June 2010, as a result of an initial public offering (or “IPO”) on the London Stock Exchange, PLC became the ultimate parent company of the Jupiter Group.

## **OUTLINE OF THE DISPUTE**

7. The dispute which has led the parties to the First-tier Tribunal began when, following visits to the Appellant, the Respondents concluded that the Appellant had over-recovered input tax which the JAMG group had paid, particularly in relation to the IPO. However, in the course of the dispute, the Respondents’ initial focus on the input tax recovery position of the JAMG group expanded to include the JAMG group’s output tax liabilities. In that regard, on 23 May 2013, the Respondents issued, pursuant to paragraph 1 of Schedule 6 to the Value Added Tax Act 1994 (the “VATA”), a Notice of Direction of Open Market Value (the “OMV Direction”) in relation to any supplies which had been or would be made by the JAMG group on or after 31 May 2010 for a consideration in money which was less than its open market value to all persons with whom the JAMG group was connected within the meaning of paragraph 1(4) of Schedule 6 to the VATA and who were not entitled to full VAT input tax recovery.

8. On 22 November 2013 and 12 February 2014, the Respondents issued the decisions and initial assessments which are the subject of the present appeals. Those decisions and the assessments were upheld on review by a letter from the Respondents dated 16 May 2014. On 11 June 2014, the Appellant appealed against the assessments. Those appeals were initially listed under two separate numbers before being consolidated into the number set out at the start of this decision.

9. The Respondents’ approach has been to proceed on the basis of alternative assessments. Their preferred approach initially was to restrict the Appellant’s entitlement to recover input tax on the basis that the supplies to which the input tax related were being used to carry on a non-economic activity. Their alternative approach initially was to assess the Appellant for under-declared output tax on the basis that the JAMG group was charging the JIMG group for its supply of the Management Services an amount which was less than the open market value of those services. Subsequently, the Respondents decided to reverse that order of preference and to prefer the output tax assessments over the input tax ones. The output tax assessments relate to each VAT period from, and including, 08/10 until, and including, 02/14. The input tax assessments relate to each period from, and including, 08/09 until, and including, 02/14. Details of the assessments are set out in Appendix 1 to this decision.

10. For completeness, we should add that subsequent alternative assessments have been issued to the Appellant in relation to VAT periods from and including 08/14 to and including 05/18. The appeals against those assessments have been stayed pending the outcome of the appeals which are the subject of this decision.

## **THE ASSESSMENTS AND THE BURDEN OF PROOF**

11. The appeals in this case have been made to the best judgment of the Respondents and pursuant to Section 83(1)(b) and Section 83(1)(c) of the VATA.

12. The Respondents have said that they are seeking only the upholding of the output tax assessments and, failing that, the input tax assessments and do not wish any such assessments to be increased. They have also made it clear that the output tax assessments are their preferred assessments and that they do not wish to pursue an input tax assessment to the extent that the related output tax assessment is upheld.

13. The Appellant has said that it is not seeking to challenge any of the assessments on the ground that the assessment in question was not made to the best judgment of the Respondents at the relevant time. Instead, it is merely challenging the input tax assessments on the ground that they were made on the basis of an erroneous view of the law and the output tax assessments on the ground that they were made on the basis of the wrong methodology, as a result of an erroneous view of the facts and the law.

14. It is common ground that the Appellant has the burden of proof in relation to the appeals. Accordingly, each output tax assessment or input tax assessment must be upheld unless the Appellant is able to show, on the balance of probabilities:

- (1) that it is incorrect;
- (2) if so, whether it should be discharged entirely or merely reduced; and
- (3) in the latter case, the amount to which it should be reduced.

15. The parties have also indicated that they are content to receive a decision which deals with the assessments in principle, with liberty to reapply in the event that it is not possible subsequently to resolve matters between themselves.

#### **THE RELEVANT LEGISLATION**

16. The legislation which is relevant in this case is set out in Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the “Directive”) and the VATA.

17. In the case of the output tax assessments, the relevant legislation may be found in Articles 72 and 80 of the Directive, Section 19(5) of the VATA and paragraph 1(1) of Schedule 6 to the VATA.

18. In the case of the input tax assessments, the relevant legislation may be found in Articles 168 and 173 of the Directive and Sections 24 to 26 of the VATA.

19. For ease of reference, the relevant legislation is set out in Appendix 2 to this decision.

#### **THE ISSUES TO BE ADDRESSED**

20. The parties have agreed that the two sets of assessments which are in issue in the appeals give rise to the following issues which need to be determined:

- (1) what is the “open market value” of the supplies of Management Services which have been made by the Appellant (as the representative member of the JAMG group) to JIMG (as the representative member of the JIMG group) for the purposes of Article 80 of the Directive and paragraph 1 of Schedule 6 to the VATA? This involves the determination of the following sub-issues:
  - (a) how is a comparable service (i.e. one made under conditions of fair competition by a supplier at arm’s length) in the specific context of management services provided by a holding company as required for the purposes of the first paragraph of Article 72 of the Directive to be determined?

(b) can a supply of services comparable to the supplies of the Management Services be ascertained for the purposes of Article 72 of the Directive and Section 19 of the VATA?

(c) if the answer to the question set out in paragraph 20(1)(b) above is in the affirmative, what and by reference to what methodology is the full amount that a customer would have to pay for such a service?

(d) in determining the answer to the question set out in paragraph 20(1)(c) above, is the concept of an “open market value”, as relevantly defined in Article 72 of the Directive and Section 19 of the VATA, synonymous with the concept of an “arm’s length price” for transfer pricing purposes (the “ALP”) (thereby incorporating the approach adopted in the OECD Transfer Pricing Guidelines (the “Guidelines”) to the question of valuation)?

(e) if the answer to the question set out in paragraph 20(1)(d) above is in the negative, are the Guidelines nevertheless relevant in determining an “open market value”, as defined in Article 72 of the Directive and Section 19 of the VATA?

(f) if the answer to either the question set out in paragraph 20(1)(d) above or the question set out in paragraph 20(1)(e) is in the affirmative, then:

(i) to what extent are the Guidelines relevant;

(ii) if relevant, how are the Guidelines to be used; and

(iii) what modifications, if any, need to be made to them to make them compatible with European Union (“EU”) law and/or Article 72 of the Directive?

(g) if the answer to the question set out in paragraph 20(1)(b) above is in the negative, what is the amount of the full cost of providing the supplies of the Management Services?

(h) in determining the answer to the question set out in paragraph 20(1)(g) above, and in the context of the purpose of the provisions of Articles 72 and 80 of the Directive, should the full cost include or exclude non-VAT bearing inputs?

(2) to what extent were the goods and services in respect of which the Appellant has deducted input tax “used for the purposes of” the Management Services (as required by Article 168 of the Directive)? and

(3) is there any relationship between the right to deduct arising under Article 168 of the Directive and the determination of “open market value” under Article 72 of the Directive for the purposes of Article 80 of the Directive and paragraph 1 of Schedule 6 to the VATA? In particular, is it permissible, as a matter of EU law, for a taxable person to claim to deduct input tax on the basis that it uses particular costs in order to make taxable supplies of management services, while at the same time accounting for output tax in respect of those supplies on the basis that a proportion of the same costs should be disregarded in arriving at an “open market value”?

21. For the purposes of the rest of this decision, we will use the term “OMV” to refer to open market value when it is used in the context of Articles 72 and 80 of the Directive and Section 19(5) of, and paragraph 1 of Schedule 6 to, the VATA and the term “open market value” to refer to open market value when it is used in its more general sense.

## **THE EVIDENCE**

### **INTRODUCTION**

22. Before discussing in detail the issues of law with which this decision is concerned, we should summarise the evidence with which we were provided for the purposes of the appeals. In addition to the two MSAs, which we have summarised in paragraph 5 above, we were provided with the testimony of six witnesses – four individuals with a present or former connection to the Jupiter Group whose role was to explain the circumstances in which the Management Services were provided and the basis on which the consideration for the Management Services was calculated, and two experts, whose role was to assist us in determining how the OMV for the supplies of the Management Services would fall to be determined in the event that, as contended by the Appellant, the OMV fell to be determined by reference to the ALP and pursuant to the Guidelines – and a copy of the employment contracts for a number of the executive directors of PLC (the “EDs” and, each, an “ED”).

23. The four individuals with a present or former connection with the Jupiter Group were:

(1) Mrs Elisabeth Airey, a non-executive director (or “NED”) of PLC from May 2010 (shortly before the IPO referred to above) to March 2020 and chairman of PLC (“Chairman”) from September 2014 to March 2020;

(2) Ms Charlotte Jones, the Chief Financial Officer (or “CFO”) of PLC between September 2016 and early 2019;

(3) Mr Edward Bonham Carter, the joint Chief Executive Officer (or “CEO”) of PLC’s predecessor, JIMHL, from May 2000 to June 2007 and the sole CEO of JIMHL, and then PLC, from June 2007 to 2014 and who has since then acted as vice chairman of PLC (the “Vice Chairman”); and

(4) Mrs Sarah Filbee, head of tax of the Jupiter Group between October 2012 and October 2013 and then again since January 2016.

24. The two experts were:

(1) Dr John Neighbour, the Appellant’s expert, (“JN”); and

(2) Mr Stephen Denyer, the Respondents’ expert, (“SD”).

## WITNESSES OF FACT

### Mrs Airey

25. The key points arising out of Mrs Airey’s testimony were as follows:

(1) the board of directors of PLC (the “Board”) was a single unit comprising the EDs and the NEDs. All of the directors on the Board, both the NEDs and the EDs, had the same responsibilities under company law. The Board had three committees – the Audit and Risk Committee (the “ARC”), the Remuneration Committee (the “RemCo”) and the Nominations Committee (the “NomCo” and, together with the ARC and the RemCo, the “Committees”);

(2) the ARC reviewed and challenged the integrity of the Jupiter Group’s financial disclosures and monitored enhancements to the internal risk and control environment. Its role was to oversee the Jupiter Group’s financial reporting processes. The only members of the ARC were NEDs (other than the Chairman) although the Chairman and CFO were both standing invitees and nearly always attended. Depending on the matters to be discussed at particular meetings, the chair of the RemCo, members of the executive team and external advisers would also attend from time to time;

(3) the RemCo determined the overarching policy for the remuneration of the Jupiter Group’s employees so as to ensure that it both rewarded individual and corporate performance and was aligned with appropriate risk, compliance and conduct standards.

This committee also determined her fees as Chairman and the remuneration packages of the EDs and other important members of the executive team. The only members of the RemCo were NEDs, including herself as Chairman. The RemCo had fewer non-member attendees than the ARC but the chair of the ARC, members of the executive team and external advisers would also attend from time to time;

(4) the NomCo was responsible for ensuring that the Board and each Committee comprised individuals with the correct balance of skills, knowledge, experience, diversity of thought and perspective to enable it most effectively to discharge its duties. It led the search and selection process for new Board appointments and oversaw the succession planning for the members of the Board and the EDs. The only members of the NomCo were NEDs, including herself as Chairman. The process of recruiting NEDs was very much led by her as chair of the NomCo. The NomCo would draw up a detailed specification and then she would brief head-hunters to find the appropriate potential candidates to fulfil that specification. She would then review the list of potential candidates and be fully involved in the short-listing process, the interview process and the decision to appoint;

(5) in addition to the Committees, which were committees of the Board, the group had what was called an “executive committee” (the “ExCom”). The ExCom wasn’t a committee of the Board, or of the board of any other member of the Jupiter Group, as such. It was simply a group of people within the organisation who were tasked with running the businesses of the operating companies. As such, it comprised the CEO, the CFO (both of whom sat on the Board as well) but also other senior members of the executive team, such as the chief investment officer and the chief risk officer. The ExCom was the organ within the Jupiter Group which was responsible for managing the operations of the group on a day-to-day basis. The ExCom was also responsible for initiating the process of developing the strategies for the Jupiter Group (see paragraph 25(9) below). The Board determined which members of the executive team were members of the ExCom but no NEDs were members of the ExCom;

(6) her role as Chairman involved, on average, two days a week over the course of each year, although that could go up to five or even seven days a week during busy periods for the Jupiter Group. The commitment at any particular moment would depend on the reporting cycle and the timing of Board, Committee and strategy day meetings. Her contractual commitment was to spend up to eighty-five days each year on the role;

(7) as Chairman, she had wide-ranging obligations and responsibilities, consistent with the fact that PLC was a public listed company. Thus, she was fully accountable to the stakeholders in the business for ensuring that the Jupiter Group was run effectively. The stakeholders included primary stakeholders such as the shareholders in PLC and the clients of, and staff in, the operating companies within the group and wider stakeholders, such as state authorities, regulators, business partners and society as a whole;

(8) her working time was split between those matters which related to PLC’s position as a holding company and those matters which related to the activities of the operating companies within the Jupiter Group. The former category included meeting and communicating with the stakeholders in PLC whilst the latter category included supporting the executive team in the execution of their duties to the operating companies in the group;



(9) there were various strands to her activity in the latter category. One was her activities at the various meetings of the Board and the Committees. In that context, she was required to attend annual strategy day meetings which ran over two days each time, at which key strategic issues facing the group were discussed. The procedure was that the Excom, in its meetings, would come up with potential alternative strategies for the operating group and then those strategies would be tested by way of challenges from the NEDs at the annual strategy days. Then, the Board would decide which of those strategies to pursue. The pursuit of the chosen strategies would then be monitored and assessed at Board and Committee meetings throughout the year. It was effectively an iterative process;

(10) another important feature of her work in the latter category would be regular one-to-one meetings with the CEO and other members of the ExCom to discuss and monitor the business and assess whether the Jupiter Group was able to fulfil its strategic obligations. In those meetings, she would play the role of challenger and brainstorm new ideas and agendas. During the period when she was Chairman, the group had operated a pairing system under which each NED would be paired with a member of the ExCom to ensure that the NEDs were in touch with the challenges facing the executive team and how the operating companies were doing. It also enabled the executive team to benefit from the NEDs' experience and skills. She also met regularly with Mr Bonham Carter, as Vice Chairman, to discuss all aspects of the business;

(11) thus, a fair summation of the process relating to strategy was that it took place both formally, through the strategy days and Board and Committee meetings, and more informally – though the one-to-one conversations mentioned in paragraph 25(10) above. The informal conversations were an invaluable part of the strategy development process as it enabled the executive team to benefit from the fresh perspective and diverse experience of the NEDs;

(12) PLC, and hence for the purposes of these appeals, the JAMG group, incurred a variety of different expenses including legal and professional costs, audit costs, IPO expenses, public relations consultancy costs and external report costs. In addition, PLC, and hence the JAMG group, incurred the costs of paying the NEDs. Some of those costs were effectively “outward facing”. That is to say that they related to PLC's own needs and obligations as a public listed company – such as those relating to the IPO or a major acquisition or disposal and PLC's ongoing obligations to its stakeholders. On the other hand, others were effectively “inward facing”. That is to say that they related to PLC's obligations to the operating companies within the group (in other words, the JIMG group). The “inward facing” role was the role to which each MSA was referring when it described the Management Services which were being supplied by the JAMG group to the JIMG group under that MSA. In short, PLC was unable to fulfil its obligations to its shareholders without providing the necessary governance and strategic challenge to the operating companies in the Jupiter Group and it did this through the MSAs;

(13) the above meant that, in determining how much of the costs incurred by the JAMG group were ultimately to be borne by the JAMG group or how much of those costs were to be passed on to the JIMG group, an apportionment was required to be made. In the case of the costs of the NEDs, the precise detail of the split was a matter to be determined by the CEO and the head of tax but she was in high-level agreement with the method adopted in this respect by Ms Jones and Mrs Filbee;

(14) NEDs received an annual fee determined by the EDs and the Chairman based on the market. The NEDs played a valuable role in advising and adding value to the

operating companies. Whilst the CEO was ultimately accountable for how management responsibilities were exercised, the Board provided the necessary support and challenge to the CEO in his exercise of those responsibilities and the NEDs were a crucial part of the Board's role in that process. If the NEDs were not available to fulfil that role, then the operating companies would need to source their own NEDs to fulfil that role;

(15) although the EDs had their employment contracts with PLC, those contracts provided that the EDs could be required to carry out duties for other companies within the Jupiter Group in addition to PLC and for one or more of those entities to discharge the EDs' remuneration. In practice, all of the EDs' remuneration was paid by an entity within the JIMG group;

(16) each Committee played a significant role in relation to the activities of the JIMG group. The ARC was responsible, inter alia, for ensuring that internal financial controls were adequate and for monitoring risks embedded in fund management operations, fraud and matters such as cyber-security. As such, the bulk of its work related to the JIMG group. Similarly, the RemCo was responsible for determining the overarching remuneration policy within the group and, as everyone within the group apart from the NEDs were remunerated by the operating companies, it performed a key management function in relation to the JIMG group. Finally, the NomCo's responsibility was to ensure that the NEDs collectively had the right blend of experience, skills and diversity to provide entrepreneurial leadership and manage the Jupiter Group as a whole most effectively. As such, the identification and recruitment of the right NEDs was of great value to the JIMG group. However, it was perhaps fair to say that, in the earlier years of the years in question, the focus of the NomCo was more on finding the right NEDs for PLC as a holding company whereas, over time, that focus had shifted to the requirements needed for the operations of the Jupiter Group and had therefore become more JIMG group-focused; and

(17) although each Committee played a significant role in relation to the activities of the JIMG group, the performance of the Committees' duties also meant that the Board was able to comply with its fiduciary obligations and responsibilities to PLC's stakeholders.

#### Ms Jones

26. The key points arising out of Ms Jones's testimony were as follows:

(1) she confirmed that all of the costs associated with remunerating the EDs were borne by a member of the JIMG group. Although she agreed that part of the work carried out by the EDs was for PLC, she said that that was only a small component of the overall work carried out by the EDs and that, in any event, if PLC had reimbursed the JIMG group for the portion of the EDs' remuneration which related to the EDs' activities for PLC, most of the reimbursement amounts would simply have been re-charged down to the JIMG group. The process would therefore have been almost entirely circular;

(2) she took the lead in preparing and monitoring the financial plan and budget relating to the strategy of the Jupiter Group. It was a process primarily led by the ExCom but supervised by the Board, largely through the challenges made at the annual strategy day meetings and ongoing Board and Committee meetings;

(3) she was responsible for the work done by the finance department within the JIMG group. Her work, and the work of that department, including tax and finance

compliance and reporting and monitoring matters such as insurance, counterparty credit risk and the capital and reserves position within the JIMG group. The finance department would prepare the relevant material and then she would present it to the Board or the relevant Committee. She also had responsibilities to stakeholders in the Jupiter Group, such as the end-of-year and half-year results' roadshows and attending conferences;

(4) she always attended the ARC meetings (as an invitee and not as a member of the Committee) and she had monthly meetings with Ms Polly Williams, the chair of the ARC ahead of the ARC meetings. Following the ARC meetings, she would then debrief the relevant member of the ExCom or the finance department. Effectively, she was the conduit between, on the one hand, the ARC committee and Ms Williams and, on the other hand, the operating companies;

(5) she explained that she had approved of the methodology adopted by Mrs Filbee in seeking to allocate costs in the JAMG group between the JAMG group and the JIMG group. The time at Board meetings allocable to "outward facing" matters was considered to be a JAMG group cost, whilst the time at those meetings allocable to "inward facing" matters was considered to be a JIMG group cost. She thought that the same approach had been followed in relation to each of the Committee meetings;

(6) her dealings with Mr Richard Morris were in some ways very similar to her dealings with the NEDs on the Board. Mr Morris was effectively a consultant who acted as a sounding board for the EDs in relation to business development opportunities. So, although his relationship with the EDs was less formally structured than the relationship between the NEDs and the EDs, in that there weren't regularly-scheduled meetings in accordance with a fixed timetable and meetings were more ad hoc, he essentially played the same role of challenging the views of the EDs and bringing to bear personal insights based on his own experiences and skills;

(7) in answer to the question of how much of her work for the Jupiter Group could be said to relate to the JAMG group, as opposed to the JIMG group, she said that, when she attended meetings of the Committees, and when she presented the fruits of her labours to the Board at Board meetings and strategy day meetings, she thought that she was acting on behalf of the JIMG group in that, in relation to those activities, she was wearing her hat as a member of the executive team. In contrast, when it came to:

(a) matters at Board meetings and strategy day meetings that were not in her area, where she acted in the same way as the NEDs in challenging the views expressed in other people's papers; and

(b) the very final act of voting at Board meetings and strategy day meetings to approve all matters, including the matters which were in her area,

then she was wearing her hat as a member of the Board and was therefore acting at that point on behalf of the JAMG group. However, at most, the time spent in relation to the activities described in paragraphs 26(7)(a) and 26(7)(b) would have amounted to no more than 10% of the aggregate time that she spent at those meetings. In that regard, she thought that it was appropriate to conduct the apportionment between her two roles at those meetings by reference to time and not by reference to some objective measure of their respective values because adopting the latter approach would mean that a different apportionment methodology was being adopted in relation to the EDs from the one used in relation to the NEDs;

(8) putting it another way, when it came to the iterative processes involved in developing and implementing strategy in her area of activity, she said that she saw her role in those processes as acting almost exclusively on behalf of the JIMG group and not the JAMG group, despite the fact that the MSAs described the Management Services as including the development of, and supporting the implementation of, the strategies. In her view:

(a) as regards the development of the strategy, this was being done by both the JIMG group itself (when the executive team produced the initial proposals for the strategy) and the JAMG group (when the NEDs posed their challenges to the executive team); and

(b) as regards the implementation of the strategy, this was being carried out by the executive team on behalf of the JIMG group and then supported and monitored by the NEDs on behalf of the JAMG group;

(9) she explained that, in addition to the ExCom, the Jupiter Group had a risk and finance committee and a seeding committee. Like the ExCom, these were not committees of PLC or any other member of the Jupiter Group as such but were just groups of individuals within the operating companies who specialised in the particular areas that were the preserve of those committees. The preserve of the risk and finance committee was closely linked to the preserve of the ARC, to which the risk and finance committee reported;

(10) as regards the question of why the amounts paid under the MSAs did not cover all of the costs incurred by the JAMG group, she said that some of those costs related solely to matters pertaining to the JAMG group itself and could not be said to be related to the Management Services supplied to the JIMG group under those agreements. Those were the costs associated with the “outward facing” activities of the JAMG group. When asked why the JAMG group should be different from any other supplier of the services of the NEDs – which would inevitably seek to recover all of its overhead costs in the charges it made for those services – she said that this was distinguishable because those costs were different from overhead costs incurred in supplying the services of the NEDs. Instead, they were costs incurred by the JAMG group for its own account and pursuing its own activities as a holding company. The only value that the JAMG group was providing under the MSAs was the collective value of the NEDs and it was paying open market value for those already. Therefore, the JIMG group was paying a fair price for the value it received from the JAMG group;

(11) she conceded that the Management Services were critical to the effective management of the JIMG group and therefore very valuable. In addition, she thought that:

(a) part of the Management Services provided by the JAMG group included ensuring that the relationship between the CEO and CFO was effective; and

(b) ensuring that the NEDs had complementary skills and experience was important for the JIMG group

and that both of those were valuable to the JIMG group;

(12) however, she added that ensuring that the NEDs had complementary skills and experiences – which was the task performed by the NomCo - was of more direct benefit to the JAMG group than the JIMG group because having the right blend of NEDs on the Board was essential to PLC’s ability to be an effective holding company. The benefit to the JIMG group of the work carried out by the NomCo was more indirect

than direct. Thus, the time spent by the NEDs who were members of the NomCo in attending meetings of the NomCo had been allocated entirely to the JAMG group;

(13) she said that, although Mrs Filbee's breakdown of the NEDs' costs between the two VAT groups had been based solely on time spent at meetings of the Board and the Committees and had not expressly taken into account either the regular one-to-one meetings between the NEDs and the members of the executive team or the strategy day meetings, she thought that those would have followed a very similar pattern to the meetings of the Board and the Committees. Thus, the division of time at the meetings of the Board and the Committees was a reasonable proxy for the division of time at the one-to-one meetings and the strategy day meetings; and

(14) in relation to the allocation between the two VAT groups of the legal and professional costs, she admitted that she had not herself gone through each invoice to determine how it should be allocated but had instead discussed, in general terms, with Mrs Filbee the approach that Mrs Filbee had taken and she had agreed with it. It was a review and challenge of the methodology adopted by Mrs Filbee as opposed to a re-performance of the task itself.

#### Mr Bonham Carter

27. The key points arising out of Mr Bonham Carter's testimony were as follows:

(1) he explained the commercial purpose underlying the IPO, which he said was to raise capital in order to pay off the debts incurred in the course of the management buy-out (or "MBO") that took place in June 2007 and to obtain the benefits of being a listed company, such as greater visibility and better public relations. He added that one benefit of being listed was that it gave rise to higher expectations from the public in terms of governance standards and hence attracted better quality NEDs who could add more value to the Jupiter Group;

(2) he ceased to be CEO and became Vice Chairman in 2014. He could not recall exactly when in 2014 it was but he thought it was January. The key difference between his role as CEO and his role as Vice Chairman was that, as CEO, he was responsible for the day-to-day running of the Jupiter Group whereas, as Vice Chairman, his role was more "outward facing" (ie engaging with the Jupiter Group's stakeholders and maintaining the external profile of the Jupiter Group). However, his role as Vice Chairman also involved some "inward facing" activities as follows:

(a) providing strategic challenge and assistance to the executive team in their management of the operating companies;

(b) working closely with the Chairman and CEO in order to maximise the effectiveness of the Board; and

(c) networking with key contacts in the asset management sector to ensure that the group attracted the top talent and playing a significant role in the process of senior management recruitment;

(3) of those "inward facing" activities, he considered that the work he did in relation to recruitment might reasonably be described as being work carried out directly for the operating companies within the JIMG group, as opposed to being part of the Management Services supplied by the JAMG group under the MSAs. On the other hand, since the work that he did in that area contributed to the success of the Jupiter Group as a whole, and therefore to the success of PLC as the holding company of the Jupiter Group, it was a difficult distinction to draw;

(4) similarly, it was difficult to say with any precision how much of his work for the JAMG group could be said to relate solely to the JAMG group and how much could be said to relate to the provision of the Management Services to the JIMG group for the simple reason that activities carried out as part of the Management Services for the benefit of the JIMG group also gave rise to a benefit for the JAMG group;

(5) the bulk of the work in relation to the development of strategy was done by the EDs but the EDs did that work in consultation with the NEDs and the Board as a whole. The Board remained responsible for the strategy and ultimately approved the strategy but the bulk of the work on the development of the strategy was carried out by the EDs who consulted with the NEDs in so doing and were then subject to challenge by the NEDs before the strategy was approved by the Board;

(6) he said that each strategy which was approved by the Board following a strategy day would cover a period of three to five years but that the budget in relation to the relevant strategy would be prepared on an annual basis by the CFO and the finance management team and then be approved by the Board at a meeting. Thus, the budget was the living expression of the approved strategy;

(7) once the strategy was approved, the NEDs and the Board as a whole then provided support to the JIMG group in relation to the implementation of the strategy, provided oversight and monitoring of the operation and management of the JIMG group and maintained and supported relationships with the key stakeholders in the Jupiter Group; and

(8) he agreed that having the right blend of skills and experience amongst the NEDs would be of benefit to the JIMG group as well as PLC as the holding company of the Jupiter Group. It followed that the work done by the NomCo would be of great value to the JIMG group.

#### Mrs Filbee

28. The key points arising out of Mrs Filbee's testimony were as follows:

(1) shortly after joining the Jupiter Group, she had undertaken a review of all related party service charges within the group. As part of that review, she had considered the charges made by the JAMG group to the JIMG group in respect of the Management Services. That charge was £105,000 per annum (excluding VAT) in each of 2008 to 2012. The result of that review was an internal paper which concluded, inter alia, that:

(a) certain costs incurred by the JAMG group were not part of the supply to the JIMG group at all, and were therefore not to be taken into account in quantifying the charges made under the MSAs. For example, the audit costs incurred by the JAMG group related solely to the audit of the companies within that group. The JIMG group was separately invoiced directly by the auditors in relation to the audit of the companies within the JIMG group;

(b) other costs incurred by the JAMG group were benefitting both groups and therefore an appropriate proportion of the costs in question were to be taken into account in quantifying the charges made under the MSAs. Those costs were the costs of the NEDs and the legal and professional costs, some of both of which related to the activities of the JAMG group and the rest of both of which related to the activities of the JIMG group. Legal costs associated with advice in relation to the share remuneration plans for employees of the Jupiter Group were a good example of this;

- (c) over the course of the First MSA, which was to say in the years 2007 to 2012, the JAMG group had recovered broadly 50% of its aggregate costs as a result of the fees payable under the First MSA; and
- (d) now that the top company in the Jupiter Group was PLC and not the Appellant, the First MSA should be replaced by a new MSA (the Second MSA) between PLC and JAML to cover the provision of the Management Services by the JAMG group to the JIMG group going forward and that the fee payable under that agreement should initially be set at £340,000 per annum (excluding VAT), reflecting:
- (i) the increased costs incurred by the JAMG group since the IPO, largely as a result of the addition of more NEDs, increases in the fees paid to the NEDs over time and the costs of additional external compliance; and
  - (ii) a 50/50 allocation of those NED and legal and professional costs incurred by the JAMG group which were of mutual benefit to the two VAT groups;
- (2) she noted that the 50/50 split described above arose out of her discussions with the then CFO, the then head of finance and the departing head of tax as she was still feeling her way into the Jupiter Group and this was the first time that she had worked as head of tax for a listed group. Although she couldn't point to any documentary evidence of it, the proposal was not simply based on an equal division of costs incurred for the mutual benefit of the two VAT groups. Instead, certain other factors were discussed, such as the extent to which the costs incurred by the JAMG group in relation to the JIMG group were being reimbursed through the fees under the relevant MSA and what the JIMG group would be prepared to pay for the services being rendered to it by the JAMG group under the relevant MSA;
- (3) her attention was drawn to a letter which she had written to the Respondents on 25 September 2013 in which she had said that, since the costs incurred by the JAMG group had tripled since the IPO had occurred, the Jupiter Group had considered it appropriate to triple the fee payable for the supplies of the Management Services. She said that this was just a convenient way of explaining to the Respondents why the group thought it necessary to triple the fee. She accepted that she did not know whether the original fee had been set by reference to a 50/50 split of the relevant costs – as that explanation implied – but that she would have expected the person who had carried out the original process of setting the fee to have done the same as she had done;
- (4) in line with her recommendation at the end of 2012, the Second MSA was executed immediately after the review and took effect on 1 January 2013. Prior to the change to her role within the group in October 2013, the fee set under the Second MSA was charged on a quarterly basis;
- (5) between October 2013 and December 2015, she had worked as head of fund taxes within the group and therefore had no involvement in relation to the supplies of the Management Services or the fees payable for those services between the two VAT groups;
- (6) upon returning to her role as head of tax, in early 2016, she had conducted a further review of related party service charges within the Jupiter Group. In the course of that process, she had conducted a detailed review of the costs and appropriate re-charge mechanism for the Management Services in 2016 in order to ascertain whether the then-current charge of £580,000 per annum (excluding VAT) which had been set by

one of her predecessors (Mr John Needham) was valid. That review built on her earlier work in 2012 and involved discussions with the CFO and the head of finance at the time. Unfortunately, at that time, she did not have the benefit of speaking to Mr Needham and there had been nothing on the file to indicate the basis on which he had calculated the then-current charge;

(7) she concluded that the costs incurred by the JAMG group in relation to the statutory audit, public relations and listing services should not be factored into the fees payable by the JIMG group because the JIMG group either did not need the relevant services or sourced them from elsewhere. For example, the companies within the JIMG group paid directly for their own audits. In contrast, there were costs incurred by the JAMG group which needed to be reimbursed by the JIMG group. Those were the relevant portion of the amounts paid by the JAMG group to the NEDs and for legal and professional services;

(8) in conducting the apportionment between the two VAT groups of the amounts paid to the NEDs, she had made a number of assumptions as follows:

(a) the NEDs spent the same length of time preparing for a meeting of the Board or a Committee as was spent at the relevant meeting;

(b) each meeting of the Board or a Committee ran for the length of time that it was scheduled to run – the actual time taken was not measured;

(c) each agenda item discussed at each Board and Committee meeting took exactly the same length of time; and

(d) the time spent by the NEDs at strategy day meetings or in conducting one-to-one meetings with the executive team did not need to be taken into account specifically in making the apportionment. Instead, she had assumed that the apportionment of that time as between the two VAT groups should simply mirror the apportionment made by reference to the Board and Committee meetings. Thus, she considered that the fact that those meetings had not expressly been taken into account did not change the apportionment of the costs between the two VAT groups;

(9) based on the time spent by each NED at the Committee meetings over the period 2010 to 2015, and the agenda items for those meetings, and after discussions with the CFO and the company secretary for the Jupiter Group, she had determined that 50% of the time spent by each NED at each meeting of the ARC and the RemCo over that period was for the benefit of the JIMG group but that none of the time spent by each NED at each meeting of the NomCo over that period was for the benefit of the JIMG group;

(10) as regards the allocation in respect of the ARC, the items on the agenda for the ARC meetings which she had determined to be for the benefit of the JIMG group were those that related to enhancing the operations of the operating companies within the JIMG group – for example, discussions in relation to a new regulatory requirement or additional controls. Mrs Airey's assessment had been that the bulk of the ARC's work related to those items. However, Mrs Filbee said that just because the bulk of the ARC's work related to those items, that did mean that most of the time spent by the NEDs in relation to the ARC should be allocated to the JIMG group. This was because the question of whether the operating companies were meeting their regulatory obligations and applying appropriate controls was not just in the interests of the JIMG group. It was also of critical importance to the JAMG group. In other words, PLC, as



the ultimate holding company of the Jupiter Group, needed to satisfy the external stakeholders in the group that its operating subsidiaries were meeting their regulatory obligations and were applying proper controls. Mrs Filbee made the point that Mrs Airey had merely said that the bulk of the ARC's work related to the operating companies. Mrs Airey had not said that the bulk of the ARC's work was for the benefit of, and therefore allocable to, the operating companies as opposed to the JAMG group;

(11) as regards the RemCo, the same point applied. The terms of reference of that Committee showed that it was obliged to consider the external stakeholders in the group in discharging its duties. Thus, Mrs Airey's evidence to the effect that the bulk of the issues addressed by the RemCo related to the operating companies did not answer the question of which VAT group was the beneficiary of the work carried out by the RemCo. In the case of the RemCo, as with the case of the ARC, the work was being conducted both for the companies in the JIMG group and for PLC, a member of the JAMG group. It was being conducted for PLC because of the obligations which PLC had to ensure that the shareholders in PLC were satisfied with the remuneration arrangements and to ensure that PLC complied with its obligations as a listed company;

(12) the fact that the mutual benefit arising out of the work of these two Committees justified a 50/50 split of the costs of the NEDs in relation to work on those Committees was a decision which she had taken in discussions with the CFO, the head of finance and, in the case of the RemCo, the head of human resources and the head of reward;

(13) as regards the NomCo, she accepted that the role played by the NomCo did produce benefits for the JIMG group – in the form of an improvement in the blend of skills and experience offered to the JIMG group by the NEDs – but she pointed out that:

(a) it was of greater benefit to the JAMG group than the JIMG group that the NEDs had the appropriate blend of skills and experience because the JAMG group had obligations to its external stakeholders;

(b) the JIMG group was entitled to expect that the JAMG group was resourced appropriately in order to provide the Management Services and therefore that the NEDs who were providing the Management Services had the appropriate blend of skills and experience;

(c) taking those two points into account, she thought that the JIMG group would not have been prepared to pay very much for the work done by the NomCo and that, applying the test of materiality which she had adopted in the course of her 2016 review, an allocation of none of the costs associated with the NomCo to the JIMG group was reasonable; and

(d) in any event, taking into account the relatively low number of hours for which the NomCo sat, in comparison to the Board and the other Committees, even if 50% of the time spent by the NEDs at the NomCo were to be allocated to the JIMG group, that would barely move the dial in terms of the overall cost allocation between the two VAT groups. For example, a 50/50 split would mean that the percentage of aggregate costs incurred on the NEDs by the JAMG group which was taken into account in the fee for the Management Services would move from 43.99% to something like 47.8%, which was still well below the 50% mark which she had eventually adopted in her 2016 calculation;

(14) as regards the Board meetings, she had taken into account only the Board meetings held in 2015 (as she considered that to be a representative year) and had then

conducted a similar process in relation to the agenda items at each of those meetings as she had done in relation to the Committee meetings to derive an allocation to the JIMG group of the time spent by each NED in attending those meetings of approximately 45.4%;

(15) she had then aggregated the hours spent by the NEDs in 2015 in attending the meetings of the Board and the Committees and, applying the percentages described above, had determined that 43.99% of the time spent by the NEDs in those meetings was for the benefit of the JIMG group. She had then rounded that up to 44% and applied that percentage to the aggregate NED costs for the JAMG group for 2015;

(16) the same process had then been conducted in relation to each of the years 2010 to 2014;

(17) she considered that using the actual NED costs as the basis for calculating the fee for the Management Services, as opposed to those costs plus a mark-up, was appropriate because, if the JIMG group had been a stand-alone group, it would have needed to source the advice provided by the NEDs in relation to its activities independently and would thus have had to acquire directly the services of the relevant NEDs (or equivalent NEDs) itself. That the NEDs in this case were being paid a market rate could be seen in the fact that:

(a) in 2017, a former NED of the JAMG group had been engaged directly by the JIMG group at a cost which was proportionate and equivalent to the amount which had been paid to that NED by the JAMG group; and

(b) the rates for NEDs of listed financial services firms were publicly available and this enabled the NomCo to ensure that the amounts paid to the JAMG group's NEDs were market rates;

(18) as regards legal and professional costs, she had reviewed every single invoice paid by the JAMG group between 2010 and 2015 to consider if, predominantly, they had had a direct benefit to the JIMG group. In many cases, the invoices did not disclose on their faces the nature of the work carried out but she had ascertained what that was in discussions with Mr Alex Sargent, the head of finance, who had approved many of the invoices and therefore did know. (Even though the discussions between her and Mr Sargent were taking place in 2016 and pertained to invoices going back to 2010, Mr Sargent had an excellent recall of the nature of the services supplied). Having conducted that exercise, she had calculated, in relation to each year during that period, the portion of the invoices received in that year which had predominantly been for the direct benefit of the JIMG group. (In a case where, predominantly, services had a direct benefit for the JAMG group and an indirect benefit for the JIMG group, that invoice had not been allocated to the JIMG group). She had then, in relation to each year:

(a) calculated the percentage of the aggregate legal and professional costs invoiced in that year which were attributable to each VAT group on the above basis, for this purpose excluding the costs of that nature incurred in relation to the IPO; and

(b) that percentage had then been applied to the aggregate legal and professional costs which were accrued in respect of that year excluding the costs of that nature incurred in relation the IPO,

in order to ascertain how much had to be reimbursed to the JAMG group through the fees for the Management Services;

(19) she had then used the analysis described in paragraphs 28(8) to 28(18) above – which was for the purpose of validating the fees charged over the period 2010 to 2015 – as the basis for calculating the fee for 2016. More specifically, on the basis that 43.99% of the NED costs in 2015 and 51% of the legal and professional costs in 2015 were for the benefit of the JIMG group, she had concluded that a fee for 2016 which was calculated by reference to 50% of the NED costs and the legal and professional costs was appropriate. This meant that the fee of £580,000 per annum (excluding VAT), which had been charged for the Management Services in 2015, remained appropriate;

(20) upon returning to her role as head of tax, she had engaged KPMG’s transfer pricing team to review the fee paid for the Management Services and, in their report dated 6 December 2016, KPMG had confirmed that the approach she had adopted could reasonably be considered to have achieved an arm’s length price for the services over the period 2010 to 2016. However, she accepted that KPMG had not independently verified her figures in relation to the NED costs and the legal and professional costs. They had merely agreed that:

- (a) her approach of calculating the appropriate fee for the Management Services by splitting those costs between the two VAT groups by reference to those which were for the benefit of the JAMG group and those which were for the benefit of the JIMG group was reasonable; and
- (b) the method she had applied in relation to the split between VAT groups at each Board and Committee meeting by basing that split on the time spent was reasonable.

However, she added that, although it hadn’t been mentioned in the KPMG report, she had discussed with KPMG before the report was prepared her assumption that time spent by the NEDs on informal meetings with the executive team would follow the allocation at Board meetings and so KPMG were aware of that in producing their report;

(21) she and her team had conducted a further review of the fee in 2017 following changes at Board level and developments in the application of the Guidelines. The major change at Board level was that Mr Bonham Carter had moved from being the CEO to the position of Vice Chairman in 2014. This meant that, in her view, the fee for the Management Services needed to reflect a portion of the costs relating to Mr Bonham Carter’s services to the Jupiter Group. However, despite the change in his status, Mr Bonham Carter had continued to have his salary paid exclusively by the JIMG group from the time of his change in position in 2014 and that position did not change as a result of her review. (Mr Bonham Carter’s remuneration was switched from being paid by the JIMG group to being paid by the JAMG group only in 2018.) Thus, all that happened in 2017 was that, in addition to paying Mr Bonham Carter directly, the JIMG group began to pay the JAMG group an amount equal to a portion of the cost of Mr Bonham Carter as part of the fee for the Management Services. In effect, as regards that portion of the costs of Mr Bonham Carter, the JIMG group was paying twice. At that time, she had also decided that, in order to be consistent with the approach adopted by the Jupiter Group to other intra-group service charges, and in accordance with the Guidelines, it would be appropriate to apply a 5% mark-up to the costs which were attributable to the JIMG group when calculating the level of the fees for the supplies of the Management Services. Together, these changes meant that the fees payable under the Second MSA for the Management Services had increased to £725,000 per annum (excluding VAT) with effect from 1 January 2017;

(22) on 1 April 2018, PLC left the JAMG group and joined the JIMG group, with the result that, with effect from that date, the supplies of the Management Services ceased to be taxable supplies for VAT purposes;

(23) she confirmed that the JAMG group did not reimburse the JIMG group for any of the costs of the CEO or the CFO because, in her view, those two individuals were working exclusively for the JIMG group in managing the operations of the operating companies, in preparing the proposals and materials to be considered by the Board and the Committees from time to time and in attending meetings of the Committees as invitees (and not as members). Thus, even if one were to say that, in attending meetings of the Board as a director, the EDs were exclusively acting for the JAMG group, the time spent in that capacity would be only a fraction of their overall working time;

(24) she added that, even if, on the basis of the above, it was appropriate to conclude that, say, 6% of the time of the CEO and the CFO was attributable to work carried out for the JAMG group and a charge were to have been made by the JIMG group to the JAMG group for that work, half of that time would have been referable to matters on the Board meeting agenda pertaining to the JIMG group. They would therefore have had to be charged back to the JIMG group, so that, to that extent, the payment flow would be circular and what would be left to be ultimately borne by the JAMG group would be immaterial;

(25) expanding on the process whereby the strategies of the group were developed, she shared the view of Ms Jones and Mr Bonham Carter that the CEO and the CFO were acting in their capacity as officers of the companies within the JIMG group when they worked with their teams to create and formulate the strategies and policies which were discussed by the Board and the Committees at their meetings and that therefore the role played by the JAMG group in the development of the strategies did not encompass the work carried out in that regard by the EDs. She added that the JIMG group would hardly have agreed to pay for services which its own EDs were already performing for it in-house; and

(26) finally, she did not shed much light on the reasons why the Jupiter Group had chosen to keep PLC outside the JIMG group prior to 1 April 2018. She said that, when she joined the group in 2012, that was already the position and she thought that it was a hangover from the time of the MBO, when the Appellant was the top company in the group and was registered as a separate entity from the rest of the group. Subsequent to the IPO, no-one had focused on the question of whether the Appellant and then PLC should join the JIMG group. Instead, the status quo had simply been allowed to continue because it was easy to deal with as an operational matter and therefore didn't excite much attention. She suggested that one positive reason for retaining the status quo might have been the fact that having PLC outside the JIMG group would avoid the administrative complexity of having to add or remove companies to or from an existing VAT group when a corporate acquisition or disposal was made. However, she conceded that, regardless of its purpose, having PLC outside the JIMG group had increased the amount of VAT input tax which the Jupiter Group as a whole had been able to recover. The additional amount recovered fluctuated from year to year and was in some years immaterial.

#### THE EDS' EMPLOYMENT CONTRACTS

29. It was common ground that the relevant provisions of each of the employment contracts for the EDs were materially the same and that it was therefore appropriate to use the

employment contract for Mr Bonham Carter as an indication of the content of those employment contracts. The relevant provisions of Mr Bonham Carter's contract provided as follows:

- (1) the parties to the contract were stated to be PLC and Mr Bonham Carter;
- (2) clause 2 provided that Mr Bonham Carter was employed by PLC and agreed to act as CEO of PLC on the terms which followed;
- (3) clause 4.1 set out the duties of Mr Bonham Carter as CEO;
- (4) clause 4.6 provided that, if and for so long as PLC required it, and without receiving any further remuneration therefor (except as otherwise agreed), Mr Bonham Carter would carry out duties on behalf of, and act as a director or officer of, other members of the Jupiter Group;
- (5) clause 4.7 provided that PLC could at its sole discretion transfer Mr Bonham Carter's employment and assign the provisions of the contract to any other member of the Jupiter Group on the same terms and conditions as were set out in the contract;
- (6) clauses 6.1 to 6.5 provided that PLC would pay Mr Bonham Carter's remuneration comprising a salary and, at PLC's discretion, a bonus;
- (7) clause 6.6 provided that the remuneration was inclusive of any fees to which Mr Bonham Carter might be entitled as director of PLC or any other member of the Jupiter Group or of any other entity in which Mr Bonham Carter might hold office as nominee or representative of PLC. It further provided that, in the event that Mr Bonham Carter did receive fees for holding any office in any entity as nominee or representative of PLC, he would account to PLC for the fees or his remuneration under the contract would be reduced pro tanto;
- (8) clause 6.7 provided that payment of Mr Bonham Carter's remuneration would be made either by PLC or by another member of the Jupiter Group and, if by more than one company, in such proportions as the Board determined;
- (9) clause 19.4 provided that no term of the contract was enforceable by anyone other than a party to it; and
- (10) clause 19.5 provided that the contract contained the statement of initial employment particulars of Mr Bonham Carter as required under the Employment Rights Act 1996.

## THE EXPERT WITNESSES

### Introduction

30. The expert witness written evidence took the form of a witness statement by each expert followed by a joint memorandum setting out the areas of agreement and disagreement between them. At the hearing, the experts gave their evidence jointly so that we (and the parties' respective counsel) were able to engage both experts on the various questions in issue simultaneously, in a process known informally as "hot-tubbing". We found this process to be extremely helpful and informative and both experts engaged positively and constructively in the process.

31. Before summarising the evidence of the two experts, we should mention that, as things have transpired, in our deliberations following the hearing we have reached conclusions of law which mean that the expert evidence has virtually no relevance to our decision. This is not the fault of the experts or the parties. It was always possible that the legal arguments that

were presented to us might lead to a conclusion which rendered the expert evidence redundant or of limited evidential value.

32. However, because we are the primary fact-finding tribunal and the case may go further, we believe that it is appropriate for us to summarise the expert evidence and take it into account in our findings of fact.

#### The remit of each expert

33. Each expert's area of expertise was the Guidelines and, in particular, the application of the ALP within the Guidelines. JN based his evidence on the 2010 version of the Guidelines whereas SD based his evidence on the 2017 version of the Guidelines. However, both experts agreed that this difference did not give rise to any substantive difference between them in relation to the conclusions to be drawn on the facts of this case. The one potentially meaningful difference between the two versions in this context was that the 2017 version included a section on low value adding services and the 2010 version did not. However, the experts agreed that whether or not that section applied to the supplies of the Management Services in this case made no difference to their views on the appropriate price for those supplies under the ALP.

34. Both experts made it plain that:

- (1) they were not experts in matters relating to VAT and could therefore express no view on how OMV was to be determined for VAT purposes or the relationship between the ALP in the context of direct tax and OMV in the context of VAT; and
- (2) they knew that they were not witnesses of fact and were providing their evidence before any facts in the case had been found.

35. Together, these two points meant that the experts could provide us with no guidance on the extent to which the ALP should apply in determining OMV for VAT purposes or, more critically, the nature of the supplies of Management Services in this case. (Later on in this decision, we will outline how the precise nature of those supplies was a matter of considerable dispute between the parties and set out our views on that dispute. However, for present purposes, it suffices to note that the remit of the experts was simply to provide their expert advice on the application of the ALP to certain hypothetical facts which might or might not prove to be the actual facts in this case as subsequently determined by us.)

36. Notwithstanding the point made in paragraph 35 above, the experts noted that the ALP did contain references to transactions taking place in the "open market" and therefore open market value, as a general concept, and that open market value and the value determined under the ALP were aiming at the same thing and would often give rise to the same answer. In both cases, one would be looking at a willing buyer and a willing seller acting in the open market under conditions of fair competition.

#### The Guidelines in general

37. The experts explained that an important feature of the ALP in the context of intra-group services was the one set out in paragraph 7.6 of the Guidelines. This stated that the question as to whether, in performing any particular activity, one group member had provided a service to another group member depended on whether the activity in question provided the other group member with "economic or commercial value to enhance its commercial position". In other words, one needed to ascertain whether an independent enterprise in comparable circumstances would have been willing to pay for the activity in question if performed for it by an independent enterprise or would have performed the activity in-house

for itself. If the activity in question did not satisfy either of those tests, then the activity would not be regarded as an intra-group service under the ALP.

38. In applying paragraph 7.6 of the Guidelines:

(1) there was no need for a benefit to be “direct” before the recipient of the service should be treated under the ALP as being prepared to pay for it. Thus, to the extent that the addition to the benefit test of a limb requiring the benefit to be “direct” led to an under-allocation of value to the service, then the impact of that requirement should be disregarded; and

(2) in a cost-plus determination of value under the ALP, the recipient of a service would take into account a benefit received by its supplier in respect of the same activity in determining how much it was prepared to pay for that service. Thus, the recipient might well pay less for a service than the benefit it received from that service to the extent that it perceived that its supplier was also benefiting from the activity involved in the service. However, this principle did not apply to any benefit received incidentally by a holding company as a result of an increase in the value of its subsidiary as a result of the service. That was because the ALP required the position to be addressed on the assumption that the two entities were independent enterprises.

39. An example of activities which did not satisfy the benefit test was so-called “shareholder activities”. These were:

(1) activities carried out by a holding company in its capacity as a holding company and solely because of its ownership interest in its subsidiaries; or

(2) activities carried out by a holding company in relation to its own shareholders, such as investor relations and communications.

The ALP did not require a holding company which incurred costs in connection with its shareholder activities to reflect those costs in the supplies of management services which it made to its subsidiaries. In this regard, the costs of issuing shares, such as in an IPO, were generally shareholder activities. The position might arguably be different where the issue of shares had been made to benefit another member of the group, for example where the shares were being issued to fund the expansion of the business operations of that other group member, but that was not the case with the IPO carried out by the Jupiter Group.

40. The Guidelines were not prescriptive and there were many cases where several different approaches to the same set of facts might each reasonably be regarded as being consistent with the Guidelines. Resource implications for the parties were an important aspect in this respect. In order to allocate costs between the members of a group, the Guidelines provided for the use of different allocation keys such as turnover or headcount. In any situation, a number of different allocation keys might be regarded as being acceptable, with no single allocation key being more appropriate than any other. An important factor in determining the acceptability of any allocation key was the resource costs associated with the use of that key.

41. The application of the ALP would generally lead to a price that gave rise to a profit for the supplier of a service. However, this was not invariably the case. For example, a supplier might agree to provide a service at less than cost if it wanted to increase its market penetration or enter a new market.

#### The approach of the experts

42. The approach adopted by the experts was to address the application of the ALP to the supplies of the Management Services on the assumption that those supplies involved the

supplies of the services of the NEDs and the legal and professional services. That was the approach which had been adopted by Mrs Filbee and KPMG in reaching their conclusions on the application of the ALP to the supplies of the Management Services. As such, the experts had not considered prior to the hearing the application of the ALP to the supplies on the basis that the supplies might fall to be characterised in a different way.

43. Based on their original understanding of what the supplies of the Management Services entailed, the experts considered that the approach taken by the Jupiter Group in this case of using a cost-plus method to value the supplies of the NEDS' services and the legal and professional services (instead of some other method, such as the comparable uncontrolled price (or "CUP") method) was appropriate because there was a ready comparable in the market for the underlying supplies in each case – that is to say, the supplies of the NEDs' services and the supplies of the legal and professional services to the JAMG group. The fact that the supplies of the NEDs' services and the supplies of the legal and professional services to the JAMG group were made by parties dealing at arm's length with the JAMG group meant that it was reasonable to use the pricing of those supplies as the basis for pricing the onward supplies of the NEDs and the legal and professional services by the JAMG group to the JIMG group.

44. Moreover, since the pricing of those supplies to the JAMG group was already arm's length, it was reasonable to assume that a minimal or no mark-up on those costs would have been acceptable in establishing a price for the supplies by the JAMG group to the JIMG group in accordance with the ALP.

45. In that regard, if the JAMG group had incurred any identifiable friction costs in hiring the NEDs or incurring the legal or professional services, then there would have been two ways of dealing with those friction costs. Either an amount equal to those costs could have been on-charged to the JIMG group or the parties could have agreed a mark-up on the portion of the NED costs and legal and professional costs which was allocable to the JIMG group to enable the JAMG group to cover those friction costs. In this case, no meaningful external friction costs had been identified and therefore an absence of a mark-up on the portion of the NED costs and legal and professional costs which was allocable to the JIMG group was acceptable under the ALP. However, as mentioned in paragraph 49 below, the ALP would have required some allowance to be made for the activities of the NomCo, as those activities were analogous to external friction costs so far as the NED costs were concerned.

46. In this context, friction costs were to be distinguished from synergistic value. JN said that a synergistic value – which would arise if the sum of the NEDs was greater than the constituent parts - was something that would be reflected in the price determined in accordance with the ALP only if the JIMG group could identify that benefit and was prepared to pay for it. If, for instance, the JIMG group would have been able to build its own team of NEDs with the same synergistic value merely by incurring the cost of the NEDs and any friction costs (or the applicable costs of the NomCo), then it would not be prepared to pay for the synergistic value. However, if there was a synergistic value for which the recipient of the supply would be prepared to pay, then that would require the price determined in accordance with the ALP to be adjusted upward from that under the comparable transaction.

#### The basis of allocation

##### *Introduction*

47. The above meant that the only question which arose in relation to the NEDs' costs and the legal and professional costs was whether the Jupiter Group had applied the right basis in determining the portion of those costs which should be allocated to the JIMG group.



### *The NEDs' costs*

48. In that regard, it was reasonable for the Jupiter Group to have valued the supply of the services of the NEDs by the JAMG group to the JIMG group by reference to the time spent by the NEDs in benefiting the JIMG group as a fraction of the time spent by the NEDs overall. Mrs Filbee had made certain assumptions in making the allocation on that basis. These were things like the assumption that Board and Committee meetings ran on schedule, that each item at those meetings took the same length of time and that each of the preparation time for Board and Committee meetings, time spent on one-to-one meetings with the executive team and time spent on preparing for and participating in strategy day meetings was proportionate to time spent on the relevant items at the Board and Committee meetings. Taking into account the fact that Mrs Filbee had spent some time in seeking to understand how the business of the Jupiter Group operated and bearing in mind the resource implications of carrying out exhaustive granular verification, Mrs Filbee's approach was a reasonable one to have taken in the circumstances.

49. However, in considering the application of the ALP in the context of the time spent by the NEDs, it would have been better for some recognition to have been given to the fact that the JAMG group had spent time, through the activities of the NomCo, in ensuring that the NEDs as a group offered complementary skills which meant that the sum of the NEDs was greater than the aggregate of their parts. The experts differed on precisely how best to achieve this. JN considered that the best way of doing this would be to allocate a percentage of the time spent by the NEDS in participating in the NomCo meetings to the supplies of the Management Services. JN posited that this might be 25%. In contrast, SD considered that the best way of doing this would be to remove the time spent by the NEDs in participating in the NomCo meetings from both the numerator and the denominator of the fraction which was applied to the aggregate NEDs' time to determine the portion of the NEDs' time which was allocable to the supplies of the Management Services.

### *The legal and professional costs*

50. Similarly, the approach taken by the Jupiter Group in this case of seeking to value the legal and professional fees incurred by the JAMG group for the JIMG group by reference to whether the advice in question benefited the JIMG group was a reasonable one. Mrs Filbee had consulted with someone in the business before deciding which of the relevant costs benefited the JIMG group and should be allocated to the supplies of the Management Services.

### Different approaches to identifying the nature of the Management Services

51. The experts were asked at the hearing to consider how the ALP might apply to the supplies of the Management Services if those supplies were to be characterised in a different way from the way that the Jupiter Group had characterised them. For example, the experts said that, if instead of seeing the supplies as involving the supplies of the NEDS' services and the legal and professional services, the supplies had instead been characterised as involving the supplies of the NEDs' services on the basis that the JAMG group had used the relevant portion of the legal and professional services to improve the quality of the supplies of the NEDs' services, then, instead of allocating the relevant portion of the legal and professional costs to the JIMG group as part of the calculation of the fees for the supplies of the Management Services, it might have been more appropriate to treat those costs as part of the costs of the NEDs' services and therefore ignore the relevant portion of those costs in the calculation of the fees and instead charge a mark-up on the NEDs' services to reflect the relevant portion of those costs.

52. Similarly, both experts agreed that, if the supplies of the Management Services were to be regarded as involving an integrated mix of the services of both the NEDs and the EDs, then it would be difficult to find a comparable transaction to that one taking place between independent entities.

#### The EDs

53. In relation to the question of whether, on the facts of this case, they would have sought to apply the ALP on the basis that the supplies of the Management Services included the services of the EDs, both experts agreed that various factors would be taken into account, including the accounting treatment within each group, the terms of the EDs' employment contracts, the evidence given by the EDs themselves and documentary evidence such as the constitutional documents of the relevant companies, the terms of the MSAs and board minutes.

54. Beyond that, the views of the experts differed.

55. SD was inclined to give priority to the contractual position, under which each ED's employment contract was with PLC and it was PLC which was obliged to discharge, or procure the discharge of, the relevant ED's remuneration. As a result, he thought that the JAMG group were providing the services of the EDs to the JIMG group and ought, under the ALP, to be remunerated for doing so. In effect, he thought the discharge by the JIMG group of the EDs' remuneration should be characterised as consideration provided by the JIMG group to the JAMG group for the services of the EDs.

56. In contrast, JN was initially inclined to give priority to the accounts because the ALP was about modifying the profits which appeared in the accounts. As a result, he thought that no adjustment would fall to be made to the accounts of any entity within either VAT group under the ALP because the remuneration of the EDs had actually been borne by the JIMG group and not the JAMG group. He said that, had the services of the EDs been provided by the JAMG group to the JIMG group, one would have expected the accounts of PLC to show the cost of remunerating the EDs and then a separate re-charge of those costs by the JAMG group to the JIMG group. Moreover, the ALP did not allow for the re-writing of accounts in respect of third party costs, such as the remuneration of the EDs in this instance. The ALP was limited to re-writing accounts in respect only of transactions with an associated enterprise.

57. When pushed, JN accepted that the EDs did play some role in the provision of the Management Services although he felt that that role was confined to the narrow circumstances in which the EDs were participating in the Board and strategy day meetings of PLC and, in so doing, dealing with matters pertaining to the JIMG group. However, upon being taken through the terms of the EDs' employment contracts, he agreed that those were not entirely consistent with the above analysis and the accounting in both groups.

58. In relation to any EDs' costs which were so allocable, JN considered that no mark-up on those costs would be acceptable under the ALP. SD said that, in a case where the EDs were playing a meaningful role in the provision of the Management Services, the right answer would be to include a mark-up but that the absence of a mark-up would be a reasonable position to adopt.

#### The potential for a re-charge by the JIMG group

59. JN made a further point in relation to the activities of the EDs. This arose out the fact that, whereas the JIMG group had discharged the whole of the EDs' remuneration, a small part of the work done by the EDs related to their participation at Board and strategy day meetings and, in that capacity, they were wearing their JAMG group hats. This suggested

that the JAMG group should arguably have paid a fee to the JIMG group for the services of the EDs when they were wearing their JAMG group hats. However, he added that a number of points might be made in this context.

60. The first was that, in determining the amount of the payment to be made by the JAMG group to the JIMG group for that part of an ED's activities, it was not simply a question of ascertaining how much time, relative to his or her overall time, the relevant ED spent with his or her JAMG hat on. Some of the time spent by the ED at Board and strategy day meetings of PLC would have related to JIMG group matters, so that the JAMG group should not have had to pay the JIMG group for the ED to that extent or, if it did, the charge to that extent should have been netted off against an equivalent payment by the JIMG group to the JAMG group under the relevant MSA.

61. The second was that, if a charge were to have been appropriate, it would have been wrong for the charge to be calculated by reference to the ED's overall remuneration package because that remuneration package reflected the fact that, in performing his or her role for the JIMG group, the relevant ED was running the operations of a complex asset management group. In contrast, when the relevant ED was working for the JAMG group, he or she was fulfilling a function that was very much more like that of a NED. As such, the payment made by the JAMG group to the JIMG group should be based on the applicable rates for the NEDs.

62. This led on to the final point, which was that, given the small figures involved in any such re-charge, there was an argument that, because the JIMG group effectively received full value for the remuneration which it paid to the EDs for the services performed on its own account in any event, there would be no need for the JIMG group to seek to recover any part of that remuneration from the JAMG group and the JAMG group would have been able to resist payment by pointing out that the JIMG group was already receiving full value for its payments of remuneration to the EDs.

63. SD was a little more circumspect about reaching this conclusion, although he conceded that this was probably because he was approaching the issue with a different view of the facts and couldn't immediately see why the EDs were performing less valuable activities when they were acting for the JAMG group than they were in performing their activities for the JIMG group. After some discussion he agreed that, if JN's view of the facts was correct, then he would reach a similar conclusion.

## **PROCEDURAL ISSUE**

64. Before setting out our findings of fact and our views on the relevant law, it is necessary to deal with a point in relation to pleadings which was first raised by Mrs Brown, on behalf of the Appellant, in the course of her closing submissions and then elaborated upon in her reply to the closing submissions of Mr Jones, on behalf of the Respondents. The point is as follows.

65. A significant part of the rival submissions at the hearing related to the role played by the EDs in the performance of the Management Services. We describe in the relevant sections below where that question was relevant but, for present purposes, it suffices to note that the Appellant was of the view that very little of the EDs' activities related to the supplies of the Management Services - broadly speaking, only the time spent by the EDs in participating in, and preparing for, Board and strategy day meetings - whereas the Respondents considered that very much more of the EDs' activities was so related - broadly speaking, any part of the EDs' activities which fell within the scope of the definition of Management Services in the MSAs.

### The Appellant's position

66. In her closing submissions at the hearings, Mrs Brown said that the Respondents were precluded from arguing that the role of the EDs in relation to the supplies of the Management Services was any wider than the participation of the EDs in Board and strategy day meetings and the preparation therefor. She said that:

(1) none of the output tax assessments which were in issue in the current proceedings had taken into account in any way, or attributed any value to, the role played by the EDs in the provision of the Management Services. Moreover, although one of the output tax assessments in relation to a later period which was not part of the current proceedings (and had been stayed behind the current proceedings) had taken the EDs into account, even that output tax assessment had done so on the limited basis that:

(a) the EDs were involved in the provision of the Management Services only to the extent that they participated in, and prepared for, Board and strategy day meetings; and

(b) in doing so, the EDs were acting in the same capacity as the NEDs did in performing those services, so that the part of their remuneration to be reflected in the OMV of the supplies should be scaled down accordingly;

(2) the Respondents' position in this case was that, even if we concluded that an output tax assessment was incorrect, we would be precluded from discharging or reducing the relevant assessment because the Appellant had produced insufficient evidence to show whether the assessment should be vacated entirely or merely reduced or, in the latter case, the level to which the assessment should be reduced. This highlighted why the Appellant would be prejudiced if the Respondents were permitted to go outside the Respondents' pleaded case, as expanded by its skeleton argument;

(3) in their statement of case and skeleton argument, the Respondents had not given any indication that they wished to defend their output tax assessments by contending for a wider role for the EDs in the provision of the Management Services than had been taken into account in the later output tax assessment referred to in paragraph 66(1) above. If one were to search for the words "EDs" in the Respondents' materials in relation to the hearing, one would not find those words until the Respondents' submissions on the factual evidence produced by the Respondents on 11 February 2021, well after the stage of the hearing at which the witnesses of fact had provided their testimony and a mere two weeks before the start of the second stage in the hearing;

(4) if the Respondents had made it clear in those documents that it was contending that the EDs played the role in the provision of the Management Services which the Respondents were now embracing, the Appellant would have been able to bring evidence to meet that case, such as evidence as to the duties carried out by the EDs and the capacity in which those duties were undertaken and the way in which the EDs' remuneration was treated in the accounts of the companies within the Jupiter Group;

(5) the Respondents might have made an application to amend their pleadings, even at this late stage in the proceedings, but had not done so. This was not surprising given their position. Although we would have had a discretion to permit the amendment, that discretion would have been bound to be exercised against the Respondents on the grounds of unfairness to the Appellant;

(6) the principles to be adopted by the First-tier Tribunal in considering any such application to amend pleadings were set out by the High Court in *Quah International v Goldman Sachs* [2015] EWHC 759 at paragraphs [36] to [38] and those principles were

applied by the First-tier Tribunal in refusing permission to amend a skeleton argument in *Anthony Outram and Ross Outram v The Commissioners for Her Majesty's Revenue and Customs* [2021] UKFTT 0029 (“*Outram*”) - see *Outram* at paragraph [9]. The facts in this case were in fact far worse than those in *Outram* because, in *Outram*, the application was to amend the skeleton argument two weeks before the hearing began whereas, here, the Respondents had raised their new argument only after the factual evidence had closed; and

(7) In *Crane T/A Indigital Satellite Services v Sky-in-home Limited & Another* [2008] EWCA Civ 978 (“*Crane*”), Arden LJ had said that, before allowing a new argument to be adduced at the hearing, the court needed to be satisfied that the other party was not at risk of prejudice because it might have adduced other evidence or otherwise conducted its case differently if it had known of the argument – see *Crane* at paragraphs [18] to [25].

### The Respondents’ position

67. In response, Mr Jones said that:

(1) the appeal against the output tax assessments had always been about just one thing, and that was the OMV of the supplies of the Management Services. The Respondents had contended throughout that the Appellant had failed to account for output tax by reference to the OMV of those supplies;

(2) the Appellant had disputed that by having recourse to the ALP to show that it had in fact accounted for VAT by reference to the OMV of the supplies. It was for the Appellant to make good that contention;

(3) in order to do that, the Appellant had necessarily to put forward at the hearing all of the evidence which it considered supported its contention. It had to show that the nature and scope of the supplies were such that it had properly accounted for output tax by reference to the OMV of the supplies;

(4) it was common ground that the EDs were involved in some way in the provision of the Management Services;

(5) it followed that the Appellant should have come to the hearing equipped to produce evidence to demonstrate the extent of the role played by the EDs in the provision of the Management Services. To allege to the contrary was no more than saying that the Appellant now wished that it had run its evidential case more effectively;

(6) the evidence in this case had shown that the nature and scope of the supplies were wider than the Appellant had initially contended. That being the case, why should we be obliged to disregard that and why should the Respondents be precluded from advancing an argument based on that evidence in support of the very proposition which the Respondents had advanced in the first place?

(7) moreover, the Respondents’ position in relation to the role of the EDs could not have come as a surprise given that it had been flagged in their initial skeleton argument submitted before the hearing began. In paragraph [54] of that skeleton, the Respondents had said that what needed to be ascertained was the OMV of the supplies and that the supplies involved the use of the Board and the various Committees in order to do so;

(8) in addition, the Appellant had clearly understood at that stage that the role of the EDs was in issue in the proceedings because, in its reply skeleton before the hearing,

the Appellant had accepted that it was by virtue of the activities of the NEDs and the EDs that the Management Services were provided. In that reply skeleton, the Appellant had not denied that the EDs were involved in the provision of the services as a matter of fact but had instead sought to rely on the proposition of law that, as the costs of the EDs were already being borne by the JIMG group, it was only the NED costs and the legal and professional costs which needed to be taken into account in valuing the supplies under the ALP;

(9) at the opening of the first stage of the hearing, he had set out the Respondents' position to the effect that it was common ground that the Management Services involved high quality strategic and operational management services using the Board and Committees and that, in the Respondents' submission, this was much more valuable than the parts of those services which the Appellant was alleging should form the basis of the OMV calculation. The Appellant had not reacted at that point by submitting that the argument could not be run but had instead proceeded to call its witnesses, two of whom were EDs. Then, in the course of the evidence, the issue of the EDs' employment contracts had emerged and the Appellant had introduced the contracts into evidence. There had thus been an opportunity to explore the role of the EDs further at that stage;

(10) after the adjournment at the end of the first stage of the hearing, we had raised questions about the role of the EDs in connection with the evidence and, again, the Appellant had not raised a procedural objection to those questions but had instead filed its additional skeleton in which it had engaged with them under Issue 1 at paragraphs [6] to [19] and [24] to [29]. In addition, the Appellant had not raised any procedural objection in response to the Respondents' replies of the same date to our questions, which dealt with the issue in question;

(11) the first intimation that the Appellant might wish to make this point was when Mrs Brown laid down a marker to that effect in her closing submissions. Even then, Mrs Brown did not at that stage set out her argument in full or cite any authorities in support of her position until she made her reply to the Respondents' submissions at the very end of the hearing; and

(12) finally, it was clear from paragraph [38](i) in *Pegasus Birds Limited v The Commissioners of Her Majesty's Customs and Excise* [2004] EWCA Civ 1015 ("*Pegasus Birds*") that, in the case of any best judgment assessment, such as the output tax assessments in this case, the primary task of the First-tier Tribunal was to find the correct amount of tax so far as possible on the material made available to it and that, in all but the very exceptional case, that should be the primary focus of the hearing and the First-tier Tribunal should not allow itself to be diverted into an attack on the Respondents' judgment. Whilst that was dealing with a slightly different question of whether best judgment had been used, it was an approach that was equally pertinent to this issue.

## Conclusion

68. This issue is of great significance to the issues which we are required to decide. The central question in these proceedings so far as they relate to the output tax assessments is the calculation of the OMV of the supplies of the Management Services. In considering the issue, we have been cognisant of our obligation under Rule 2 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") to deal with cases fairly and justly. Having done so, we have concluded that the nature and scope of the EDs'

activities is something which we can address in reaching our findings of fact and conclusions in this decision.

69. We say that for the following reasons:

(1) there was enough in the terms of the Respondents' statement of case and skeleton argument before the hearing to suggest to the Appellant that all of the activities of the EDs were potentially "in play" as regards the determination of the OMV of the supplies of the Management Services;

(2) in addition, in response to Direction 2 of the First-tier Tribunal of 29 January 2019 – which directed the Appellant to propose, and the parties to attempt to agree, what the evidence to be relied on by the Appellant at the hearing was to address - the parties agreed a list of their proposals on evidence for the hearing. Paragraph 1 of those proposals stipulated that the Appellant would produce documentary evidence and call witness evidence from within the business to address, inter alia, "[what] activities/services are performed by the Appellant and supplied to the operating subsidiaries", "[how] such services are carried on" and which direct costs and overhead costs "are incurred by the Appellant in performing the services in question". Again, there was no indication within that list that any of the activities of the EDs were not potentially in point;

(3) the Appellant understood that all of the activities of the EDs were potentially "in play" and engaged with it both during the first stage of the hearing and in the period following that first stage before the second stage began;

(4) the Appellant did not at any point until it raised the issue in its closing submissions indicate that it objected to the inclusion of the evidence in relation to the EDs' activities and did not actually make submissions in relation to the issue until Mrs Brown's reply to Mr Jones's closing submissions; and

(5) therefore, it would be not be fair or just on the Respondents if we were to attempt to consider the validity or otherwise of the output tax assessments without taking all of the activities of the EDs into account.

70. By way of expanding on the above points, we start with the Respondents' statement of case. We agree with the Appellant that this was not as clear as it could have been that the activities of the EDs were "in play" as regards the determination of the OMV of the supplies of the Management Services. The contentions of the Respondents were set out in paragraphs [22] and [27]. The most relevant paragraphs in this respect were paragraphs [25] to [27]. However, whilst those paragraphs were primarily directed at the relationship between the costs to which the input tax claimed by the JAMG group was attributable and the OMV of the supplies of the Management Services, paragraphs [25] to [27] made it apparent that the Respondents' position was that the OMV of the supplies of the Management Services must be "at least equal to" or "not less than" the full cost of making the supplies. The language used by the Respondents in those paragraphs therefore flagged that the OMV of the supplies might well involve taking into account costs other than the costs in respect of which the JAMG group had claimed to recover input tax. This point perhaps emerges most clearly from paragraph [27], which expressly says that the OMV of the supplies must be not less than the costs in respect of which the JAMG group made its input tax claims "together with such other costs as JAMG incurs to make the supplies".

71. Just pausing there, we think that there was enough in the statement of case to make it clear to the Appellant that the matter at issue in the proceedings was the determination of the

OMV of the supplies and that that involved identifying all of the costs which the JAMG group had incurred in order to make those supplies.

72. Furthermore, as we have noted in paragraph 69(2) above, there was nothing in the terms of the agreed proposals on evidence to suggest that the evidence on which the Appellant needed to rely to vacate the output tax assessments did not include evidence in relation to all of the activities of the EDs.

73. In any event, any residual doubt on the point on the part of the Appellant should have been resolved by the terms of the skeletons which the parties exchanged prior to the hearing – see paragraphs 69(7) and 69(8) above. We agree with the submissions made on behalf of the Respondents in those paragraphs. The skeletons show that the Appellant understood before the start of the hearing that all of the activities of the EDs were potentially “in play” as regards the OMV determination. The Appellant then engaged fully with that part of the evidence at the hearing, calling two EDs to give evidence at the first stage of the hearing, entering the EDs’ employment contracts into evidence and making submissions both at each stage of the hearing and in the period between the two stages of the hearing as to why the cost of the EDs should not be taken into account in determining the OMV of the supplies in question.

74. Finally, although this is not determinative in and of itself, we note that the Appellant had plenty of opportunities to raise this procedural point well before it did. Even if it did not understand the Respondents’ position until after the first stage of the hearing was over, it could have raised this objection at some point between the two stages, for example when it received the Respondents’ submissions on the factual evidence two weeks prior to the second stage of the hearing. Had the Appellant raised the issue at that point, that would have enabled the Respondents to make their submissions in reply on the issue before the second stage began. One possible outcome of such an exchange at that juncture might have been an application by the Appellant to recall its witnesses or to provide additional documentary or witness evidence. There was time before the second stage of the hearing in which to do so. Instead, the Appellant chose not to raise the issue until it was too late. That may not be relevant to the validity of the issue itself but it is relevant to the question of what would be the fair and just approach for us to adopt in this case, which necessarily entails weighing up the relative unfairness to each party of our possible decisions on the point.

75. In short, we consider that:

- (1) the Appellant both understood, or should have understood, before the hearing began, that all of the activities of the EDs were potentially “in play” in these proceedings;
- (2) the way in which the Appellant conducted its case from the outset does not suggest that it failed to understand that but, in any event, even if the Appellant did fail to understand that, it should not have failed to do so;
- (3) the Appellant had ample opportunities to raise this procedural objection well before it did, particularly given the extensive delay between the hearing of the evidence at the first stage of the hearing and the closing submissions at the second stage. We think that a point of such substance should have been raised well before it was. In effect, it seemed to us to be something of an afterthought; and
- (4) it would therefore not be just or fair on the Respondents to prevent them from relying on the evidence in relation to the activities of the EDs in these proceedings.

76. We have therefore concluded that we should take the activities of the EDs into account in making our findings of fact and then considering the issues which are addressed below.



## **FINDINGS OF FACT**

### **INTRODUCTION**

77. This is a case where the fundamental question - the identification of the activities which were involved in the supplies of the Management Service – is not simply a question of pure fact but is instead a mixed question of pure fact and contractual analysis.

78. This means that, although the testimony of the witnesses of fact as to the way in which the Jupiter Group operated during the relevant period has been of great value to us in reaching our conclusions of fact, the views of those witnesses as to when or whether a particular individual, in carrying out any particular activity, was acting for the JAMG group or the JIMG group have not. It is ultimately a question of the contractual analysis as to whether, in carrying out any particular activity which benefited the JIMG group, the relevant individual was:

(1) simply carrying out his or her duties as an officer of a member of the JIMG group; or

(2) instead, carrying out his or her duties as an employee of PLC, a member of the JAMG group, in providing the Management Services to the JIMG group.

79. In each of those cases:

(1) the outcome would be precisely the same, in that the business of the JIMG group would be advanced by the relevant activity; and

(2) the actions of the relevant individual in carrying out the activity would be precisely the same.

Thus, only by having regard to the contractual position would it be possible to be able to conclude which of the descriptions set out in paragraphs 78(1) or 78(2) above was correct.

80. The relevant individual's understanding as to the entity or VAT group for whom he or she was carrying out the activity is neither here nor there if that understanding was founded on an erroneous understanding of the contractual position. This is because the mere belief on the part of the individual that he or she was carrying out the activity for a member of the JIMG group did not make it so. That would be the case only if, based on the proper construction of the various relevant contractual relationships, that belief was well-founded.

81. For the reasons which will become apparent in due course, we believe that the understanding of the witnesses of fact in relation to that question was fundamentally flawed. Consequently, although we do not doubt the good faith or credibility of the witnesses, we have discounted their views on that particular issue to the extent that those views seem to us to be contradicted by the contractual position.

### **FINDINGS OF FACT**

82. Before we get to our conclusions in relation to the nature of the supplies of the Management Services, we should set out our other findings of fact. These fall into two distinct categories – our findings of fact in relation to which entity in the Jupiter Group was the employer of each ED and responsible for discharging, or procuring the discharge of, the relevant ED's remuneration and our findings of fact in relation to the activities of the NEDs and the EDs.

#### **The employment position**

83. Our findings of fact in relation to which entity in the Jupiter Group was the employer of each ED and responsible for discharging, or procuring the discharge of, the relevant ED's remuneration are as follows:

(1) each ED was employed solely by PLC, a member of the JAMG group, and was not employed by any member of the JIMG group. It was PLC that was solely responsible for paying the relevant ED's remuneration although PLC was entitled to procure that all or part of that remuneration was discharged by another member of the Jupiter Group. No member of the Jupiter Group apart from PLC could enforce the terms of each ED's employment contract against the relevant ED and, correspondingly, no ED could enforce the terms of his or her employment contract against any member of the Jupiter Group apart from PLC – see paragraphs 29(1), 29(2) and 29(6) to 29(10) above;

(2) the contract between PLC and the relevant ED provided that PLC was entitled to require the relevant ED to work for another member of the Jupiter Group for no additional remuneration – see paragraph 29(4) above;

(3) the contract between PLC and each ED also permitted PLC to assign the employment of the ED and assign the provisions of the contract to any other member of the Jupiter Group on the same terms and conditions as were set out in the contract – see paragraph 29(5) above;

(4) each ED, in addition to being an employee of PLC, was also an officer of the operating companies within the JIMG group. In that capacity, each ED received all of his or her remuneration from an entity in the JIMG group (referred to hereafter in this decision as the “Payer”) – see paragraphs 25(15), 26(1), 26(7), 26(8) 28(23) to 28(25), 29(4), 29(7) and 29(8) above;

(5) there is no evidence to support the proposition that:

(a) there was any contract, either written or oral, between any member of the JIMG group and the relevant ED pursuant to which that member of the JIMG group became liable to make a payment of remuneration to the relevant ED. In any event, it would be surprising if there were to be any such contract because that would have entitled the relevant ED to be remunerated under two separate contracts – one with PLC and one with the relevant member of the JIMG group – and the relevant ED was already entitled, as against PLC, to the whole of his or her remuneration; or

(b) the employment contract between PLC and the relevant ED was assigned to any member of the JIMG group. Although the relevant contract did allow for such an assignment to occur (see paragraph 29(5)) :

(i) no evidence was produced by the Appellant to show that any such assignment did occur. If any such assignment had occurred, then we believe that there would have been evidence to that effect - it would have been documented and some or all of the witnesses would have mentioned it, particularly given the extent to which the subject of the EDs' employment featured in the evidence;

(ii) the assignee within the Jupiter Group, as the EDs' new employer pursuant to the assignment, would have become obliged to deliver to the EDs the written particulars of the new contract required by the Employment Rights Act 1996 and we have been provided with no evidence of that;

(iii) the way in which the employment contract between PLC and each ED was worded - in providing that PLC could both direct the relevant ED to work for another member of the Jupiter Group and procure that another member of the Jupiter Group discharged all or part of the relevant ED's remuneration - made any such assignment unnecessary and suggested that, at least at the time when the employment contract was executed, any such assignment was not expected to be required; and

(iv) no submission to that effect was made by the Appellant in the course of the proceedings.

Accordingly, we have concluded as a matter of fact that PLC remained the sole employer of each ED and remained solely responsible for discharging, or procuring the discharge of, the whole of each ED's remuneration at all times material to these appeals; and

(6) notwithstanding the conclusions set out in paragraphs 83(1) to 83(5) above:

(a) the entire remuneration of each ED was in fact paid by the Payer and not PLC;

(b) PLC did not reimburse the Payer for those payments;

(c) neither PLC nor any member of the JIMG group considered that PLC was obliged to reimburse the Payer for those payments; and

(d) neither PLC nor any member of the JIMG group considered that, in making those payments, the Payer was either doing so as consideration for any service supplied to it by PLC (whether or not under the MSAs) or intending to provide a gratuitous benefit to PLC

- see paragraphs 25(15), 26(1), 26(7), 26(8), 27(3), 28(21) and 28(23) to 28(25).

84. At the hearing, Mrs Brown took issue with our ability to draw from the evidence certain of the findings of facts which we have set out in paragraph 83 above. She said that:

(1) on a plain reading of each ED's employment contract, clauses 6.2, 6.3 and 6.7 provided that PLC could direct the relevant ED to work for another company in the Jupiter Group and that PLC's obligation to pay the relevant ED's remuneration could be assumed by another company in the Jupiter Group;

(2) in addition to being employees of PLC, the EDs were officers of entities within the JIMG group;

(3) in consequence of the contractual provisions referred to in paragraph 84(1) above, the correct analysis was that PLC had required the relevant ED to work for members of the JIMG group and that, consequently, the relevant ED had an enforceable right against the Payer to be paid his or her remuneration;

(4) that remuneration had then been discharged by the Payer;

(5) as a matter of employment law, it was reasonable to conclude that, although PLC was the entity with the written employment contract with the relevant ED, it was the Payer which was the de facto employing company and that that meant that the relevant ED had the basis for making a contractual claim for his or her remuneration against the Payer;

(6) consistent with the analysis set out in paragraphs 84(1) to 84(5) above, the solus accounts of the Payer had included the EDs' remuneration as emoluments for the EDs'

services as directors of the Payer and the solus accounts of PLC had neither shown that PLC was obliged to reimburse (or had reimbursed) the Payer for the EDs' remuneration nor shown that the remuneration had been discharged on its behalf; and

(7) from the tax perspective, it was the Payer and not PLC which was deemed to be each ED's employer – she referred in that respect to Sections 5 and 683 of the Income Tax (Earnings and Pensions) Act 2003 and paragraph 4 of The Income Tax (Pay As You Earn) Regulations 2003.

85. As will be apparent from our findings of fact in paragraph 83 above, we do not accept that any ED had an enforceable right to the payment of his or her remuneration against the Payer or, for that matter, any other entity in the JIMG group.

86. We start from the position that a company cannot become liable to pay remuneration to an employee unless it enters into a contract to that effect. Whilst that contract could be oral and not in writing, no evidence has been presented to us to demonstrate that there was an oral contract to that effect between the Payer or any other member of the JIMG group and any ED. Indeed, if there had been an oral employment contract between the Payer or any other member of the JIMG group and an ED, the Employment Rights Act 1996 would have required written particulars of that contract to have been executed and we have not been presented with any such particulars. Nor has any evidence been presented to us to show that the Payer or any other member of the JIMG group assumed the obligations of PLC to discharge the remuneration of the EDs or became entitled under the employment contracts to the services of the EDs. On the contrary, the evidence we have seen – in the form of the written contracts which existed between PLC and the EDs – suggests that no such assumption of liability was intended to occur. That is because those contracts expressly stated that the obligation to discharge, or procure the discharge of, the remuneration of the EDs was PLC's alone and that PLC was permitted to direct one of its subsidiaries to discharge all or part of the remuneration. They also expressly stated that PLC could direct the EDs to work for one or more of PLC's subsidiaries for no additional remuneration.

87. The EDs' employment contracts therefore signpost quite strongly that the intended structure here was that PLC would be the sole employing company, the sole entity with ultimate responsibility for discharging the EDs' remuneration and the sole entity with the entitlement to direct the EDs to carry out their services for members of the Jupiter Group. Any direction made by PLC to an entity in the JIMG group requiring that company to discharge PLC's obligation to pay the remuneration to an ED would not have given the relevant ED an enforceable right as against that entity to be paid his or her remuneration. The relevant ED would still have had to enforce his or her right to payment against PLC. Likewise, any direction made by PLC to an ED to perform his or her services for an entity in the JIMG group would not have given that entity an enforceable right against the ED to have the services performed for it. PLC would still have been the only entity in the Jupiter Group with the ability to enforce that right.

88. We are not aware of any provision of employment law which contradicts the basic contractual principles described above and no specific provision to that effect was brought to our notice.

89. In addition, we do not see any relevance to this question in the fact that, when the Payer discharged the remuneration of an ED, the tax legislation deemed the Payer to be the ED's employer for tax purposes. That was simply so that the income tax and national insurance deduction machinery could be engaged in relation to the payments of remuneration. It didn't change the fact that, as a matter of contract law, the sole employer of each ED was PLC.

90. Similarly, we do not think that the accounting treatment of the various companies within the Jupiter Group affects our analysis. This is for two reasons.

91. First, we are concerned in this decision with the legal analysis of the position and that is unaffected by what the auditors of the various companies in the Jupiter Group may have believed. It is quite possible that, like the relevant personnel within the Jupiter Group, the auditors believed that ultimate responsibility for the remuneration, in the form of the contractual obligation to the EDs to pay the remuneration, rested with the Payer as the entity in the Jupiter Group which actually discharged the remuneration. However, that didn't mean that that was the case.

92. Secondly, the auditors of the relevant companies were primarily concerned with whether or not the solus accounts of each company in the Jupiter Group showed a true and fair view of the financial position of the relevant company. Assuming for the moment that the remuneration paid to the EDs was equal to the value derived by the Payer from the activities of EDs, the solus accounts of the Payer would have reflected the same profit regardless of whether they recorded that the Payer bore the cost of that remuneration directly or they instead recorded that the Payer was reimbursed by PLC in respect of the remuneration which it had discharged on PLC's behalf and then paid a fee to PLC for the services performed for it by the EDs at PLC's behest. In the same way, the solus accounts of PLC would have reflected the same profit regardless of whether they recorded the discharge of the remuneration by PLC and also the fee paid to PLC by the JIMG group for the services performed for PLC by the EDs or did not take into account either of those items. In both cases, the cost of the EDs to the Jupiter Group would be shown as being borne by the Payer and PLC would simply be flat.

93. Finally, we have considered whether there is anything in clause 6.6 of the employment contract between PLC and each ED which could contradict the conclusions we have reached. That clause provided that the remuneration due from PLC was inclusive of any fees to which the relevant ED might be entitled as director of PLC or any other member of the Jupiter Group or of any other entity in which the relevant ED might hold office as nominee or representative of PLC. It further provided that, in the event that the relevant ED received fees for holding any office in any entity as nominee or representative of PLC, he or she was required to account to PLC for those fees or his or her remuneration under the relevant contract would be reduced pro tanto. We have considered whether this paragraph could indicate that there was intended to be a separate self-standing contract between a member of the JIMG group and the relevant ED such that payments of remuneration under that separate contract would be treated as reducing pro tanto the obligation of PLC to remunerate the relevant ED under the employment contract between PLC and the relevant ED.

94. We have concluded that this is not the case, for essentially three reasons as follows:

(1) first, as we have already said in paragraph 83(5) above, we have found no evidence that there was a separate self-standing contract between any ED and any member of the JIMG group;

(2) secondly, we consider that the language in clause 6.6 was distinguishing between "fees" – which is to say the fees which the ED might receive for being an office-holder in a company (including PLC) – and "remuneration" – which is to say the payment of salary and bonus which was due to be paid to the relevant ED under the employment contract. If that distinction were not to be respected, then the language in the clause would make little sense as it refers expressly to fees which might be received from PLC itself; and

(3) finally, the language at the end of the clause about the pro tanto reduction in the remuneration due from PLC was limited in its application to fees received by the relevant ED for holding any office in any entity as nominee or representative of PLC. Notably, and unlike the first part of the clause, no equivalent pro tanto reduction was to be made by reference to fees which might be received by the relevant ED from another member of the Jupiter Group.

95. We will return to this aspect of the case when we seek to identify the nature of the Management Services – see paragraphs 98 to 119 below – and to deal with the question of whether the EDs’ remuneration (to the extent that it related to the activities performed by the EDs in carrying out the supplies of the Management Services) formed part of the full cost to the JAMG group of making the supplies of the Management Services – see paragraphs 217 to 236 below. For present purposes, we will note only that it is not entirely clear to us whether the actions and beliefs described in paragraphs 83(6)(a) to 83(6)(d) above:

(1) were based on the apprehension within the Jupiter Group that it was the Payer and not PLC which had the contractual obligation to the EDs to discharge the EDs’ remuneration; or

(2) were based on the apprehension within the Jupiter Group that, although it was PLC and not the Payer which had the contractual obligation to the EDs to discharge, or procure the discharge of, the EDs’ remuneration, it was appropriate for the Payer, as a member of the JIMG group, to discharge that contractual obligation without being reimbursed therefor by PLC because the EDs were carrying out all but a de minimis part of their activities for the benefit of the JIMG group.

The submissions set out in paragraph 84 above suggest that the former of these was the case although we do not think that it matters to the conclusions reached in this decision which of those it was.

#### The activities of the NEDs and the EDs

96. Our findings of fact in relation to the activities of the NEDs and the EDs are as follows:

(1) the strategies and policies of the JIMG group were developed by way of an ongoing iterative process involving both the EDs and their executive team and the NEDs – see paragraphs 25(9) to 25(11), 25(16), 26(2) to 26(4), 26(7), 26(8), 27(2), 27(5) and 28(25) above;

(2) the EDs played their role in that development:

(a) by working with the rest of the executive team (both within and outside meetings of the ExCom) and employees of members of the JIMG group other than the executive team, and through one-to-one meetings with the NEDs to come up with proposed strategies and policies which would then be taken to Board, Committee or strategy day meetings for consideration, possible amendment and, in some cases, adoption – see paragraphs 25(5), 25(8) to 25(11), 25(16), 26(2) to 26(4), 26(7), 26(8), 27(2), 27(5), 27(6) and 28(23) to 28(25) above;

(b) by attending (and preparing for) meetings of the Committees (as non-members) to facilitate the discussions which took place in those Committees in relation to those strategies and policies and to communicate the decisions of those Committees to the executive team – see paragraphs 25(2), 25(3), 25(16), 26(4) and 28(23) to 28(25) above; and

(c) by participating in (and preparing for) Board and strategy day meetings at which the strategies and policies would be considered, possibly amended and, in

some case, adopted – see paragraphs 25(1), 25(9), 26(2), 26(3), 26(7), 26(8), 27(5), 27(6) and 28(23) to 28(25) above;

(3) the EDs, the rest of the executive team and employees of members of the JIMG group other than the executive team were responsible for the implementation of the strategies and policies of the JIMG group and the operation and management of the JIMG group. However, support for that implementation, and oversight and monitoring of the operation and management of the JIMG group, were provided by:

(a) the NEDs through their one-to-one meetings with the executive team and participation in (and preparation for) Board, Committee and strategy day meetings; and

(b) the EDs through their participation in (and preparation for) Board, Committee and strategy day meetings

– see paragraphs 25(2), 25(3), 25(9) to 25(11), 25(14), 25(16), 26(4), 26(7), 26(8), 27(2), 27(6), 27(7) and 28(23) to 28(25) above;

(4) the maintenance and support for relationships with key stakeholders of the Jupiter Group, including regulators, were provided by the NEDs and the EDs – see paragraphs 25(7), 25(8), 25(17), 26(3), 27(2), 27(7) and 28(10) to 28(13) above;

(5) the bulk of the work carried out by each Committee related to the activities of the JIMG group. In particular, the NomCo was responsible for ensuring that the NEDs collectively had the right blend of skills and experience to ensure that the JIMG group was managed most effectively – see paragraphs 25(2) to 25(4), 25(16), 26(7), 26(8), 26(11), 26(12), 27(3), 27(4), 27(8) and 28(10) to 28(13) above;

(6) however, that work also gave rise to benefits for PLC and, hence, for the JAMG group – see paragraphs 25(17), 26(12), 27(3), 27(4) and 28(10) to 28(13) above; and

(7) if it were to be correct that the supplies of the Management Services should be regarded as comprising solely the supplies of the services of the NEDs and the legal and professional services - which we do not consider to be the case for the reasons which follow in paragraphs 98 to 119 below - then, in seeking to establish whether the price which was actually paid for the supplies complied with the ALP:

(a) it was appropriate for a cost-plus basis to have been used in relation to those services – see paragraphs 42 and 43 above;

(b) it was reasonable for no mark-up to have been applied to those services – see paragraph 44 above;

(c) the portion of the NED costs which was allocated to the JIMG group was reasonable, subject to the fact that the fees should, in addition to that allocation, have taken into account:

(i) the work of the NomCo; and

(ii) the activities of Mr Bonham Carter for the period between his ceasing to be CEO (and becoming Vice Chairman) in 2014 until an adjustment began to be made to the fees for the supplies of the Management Services in respect of Mr Bonham Carter in 2017. (This is because, in 2014, Mr Bonham Carter ceased to be an ED and effectively became a NED but no adjustment to the fees for the supplies of the Management Services in respect of the activities of Mr Bonham Carter was made until 2017)

– see paragraphs 25(13), 26(5), 26(13), 27(2), 28(8) to 28(21) and 45 to 48 above;

(d) an adjustment in respect of the work of the NomCo which treated 25% of the hours spent by the NEDs in participating in the meetings of the NomCo as being allocable to the supplies of the Management Services would be reasonable. It would also be reasonable to make the adjustment in respect of the work of the NomCo by removing the hours spent by the NEDs in participating in meetings of the NomCo from both the numerator and the denominator of the fraction applied to determine the portion of the NEDs time which was allocable to the supplies of the Management Services – see paragraph 49 above;

(e) since the JIMG group would have been able to assemble the same team of NEDs itself simply by incurring the costs which were referable to the NomCo, it wouldn't have been prepared to pay for any synergistic value inherent in the NEDs team – see paragraphs 28(13), 46 and 49 above; and

(f) although there are grounds for some concern about the length of the period which passed between the time when the legal and professional costs were incurred and the time when Mrs Filbee sought to identify with Mr Sargent the nature of those costs, the portion of the invoices for legal and professional costs which was allocated to the JIMG group was reasonable – see paragraphs 28(18) to 28(20) and 50 above.

97. As regards the various paragraph references set out in paragraph 96 above, we should reiterate that we have accepted the evidence given by the witnesses of fact to the extent that that evidence related to the nature and conduct of the activities carried out within the Jupiter Group but taken no account of the views of those witnesses as to the entity or VAT group for whom those activities were being carried out to the extent that those views were inconsistent with the contractual analysis.

## THE MANAGEMENT SERVICES

### Introduction

98. It is common ground that the supplies which were made by the JAMG group to the JIMG group in this case were the supplies of the Management Services, as that term was defined in the relevant MSA. Neither party was of the view that the supplies in question encompassed activities other than as described in the definition or did not encompass activities which were described in the definition. In any event, as each MSA specified that it was not to be amended except by the written agreement of the parties and no written agreement to that effect was provided in evidence, we can see no grounds for questioning the parties' common position on this point.

99. The definition of the Management Services in both MSAs is more or less identical. Adopting the layout used in the Second MSA, the definition refers to:

“Various strategic and operational management services, including

- development of group strategies and policies;
- support for the implementation of group strategies and policies;
- oversight and monitoring of the operation and management of group companies; and
- maintenance and support for relationships with key stakeholders of the Jupiter Group, including regulators”.

100. As we say, there is no dispute between the parties as to whether or not the above definition accurately sets out the scope of the Management Services which were actually the



subject of the supplies. However, where the parties part company is in how they construe that definition in the light of the activities of the Jupiter Group as a whole.

101. This touches on a fundamental aspect of the appeals in this case because, as a matter of legal and economic reality, the Jupiter Group was a single group and operated as such over the VAT periods in question. Thus, in attempting to identify the precise nature of the Management Services, we have to unpick what was in reality the integrated operation of a single group and try to break it into two – those activities which can be said to have been carried out by the JIMG group and those activities which can be said to have been carried out by the JAMG group. More specifically even than that, we have to consider which of the relevant activities of the JAMG group fell within the ambit of the definition set out in paragraph 99 above.

#### The Appellant's position

102. Mrs Brown favoured a narrow construction of the language in the definition. She said that it was almost entirely limited to the role played by the NEDs in helping to develop the strategy of the JIMG group and then supporting the EDs in implementing that strategy, overseeing and monitoring the implementation of the strategy and supporting relationships with stakeholders. She was prepared to concede that the EDs played some role in providing the service as so described because, like the NEDs, the EDs participated in Board and strategy day meetings of PLC. However, that role was minimal and was confined to the time spent by the EDs in participating in, and preparing for, those meetings. In particular, she noted that the accounts for the Jupiter Group and the main company within the JIMG group showed that there was a clear divide within the Jupiter Group between the executive function and the director function. The EDs, like the rest of the executive team, were responsible for the day-to-day management of the operating companies whereas the NEDs performed a supervisory and more strategic function.

103. Mrs Brown added that the EDs were paid their entire remuneration by the Payer, a member of the JIMG group, and that various witnesses had said that they were acting for the JIMG group, and not providing the Management Services on behalf of the JAMG group, when they participated in meetings of the ExCom, attended meetings of the Committees as invitees (as opposed to being members) and carried on the day-to-day operations of the JIMG group.

#### The Respondents' position

104. Mr Jones put forward a much wider construction of the relevant language. He noted first that the definition was inclusive and not exhaustive in nature and that therefore the items specifically mentioned in the four bullet points were just some and not all of the activities envisaged by the definition. He also pointed to the fact that, in any event:

- (1) the preamble included a reference to operational management services as well as strategic management services;
- (2) there was no reference to the NEDs in the definition. Instead, the focus was on the nature of the activities as opposed to the personnel carrying out the activities;
- (3) the EDs were both employees of PLC and officers of members of the JIMG group. They had their employment contracts solely with the former and not with the latter. Under those contracts, it was PLC and not any entity within the JIMG group which had the sole obligation to pay the EDs for their work. The contracts provided that PLC might require the EDs to work for other companies in the Jupiter Group but that that would be for no additional remuneration;

(4) the role played by the EDs in the development of the strategies and policies of the JIMG group, in supporting the implementation of those strategies and policies, in overseeing and monitoring the operation and management of the JIMG group and in supporting relationships with stakeholders went way beyond the time spent by the EDs in participating in, and preparing for, Board and strategy day meetings. An example might be the preparation of a paper on a particular strategy which was to be presented to the Board at a Board meeting. In overseeing the preparation of that paper, the relevant ED was carrying out an activity which clearly fell within the language used in the definition of Management Services. As such, in so doing, the relevant ED was acting for the JAMG group in performing the services required by the relevant MSA; and

(5) similarly, although the EDs were not members of any Committee, they attended meetings of the Committees and played an active role in those meetings. Thus, to the extent that meetings of those Committees related to the development of, and support for the implementation of, the strategies and policies of the JIMG group or related to the oversight and monitoring of the operation and management of the JIMG group, the EDs, in participating in, and preparing for, those meetings, were acting as employees of PLC and providing the Management Services on behalf of the JAMG group. They were not doing so as officers of any entity within the JIMG group.

105. Mr Jones stressed that he was not saying that everything that the EDs did had been done in performing the Management Services on behalf of the JAMG group. He agreed that, when it came to matters which fell outside the ambit of the definition of the Management Services – such as carrying on the day-to-day operations of the JIMG group - the EDs were not providing the Management Services on behalf of the JAMG group. However, when an ED was carrying out an activity which involved one of the items specified in the definition of the Management Services, the EDs were acting for the JAMG group and carrying out the Management Services on behalf of the JAMG group. Thus, Mr Jones said, the scope of the Management Services encompassed much more of the EDs' activities than Mrs Brown was prepared to concede. Mr Jones said that, whereas the Management Services, viewed realistically, were like a cake comprising multiple ingredients, Mrs Brown's approach involved treating them as if they just comprised some specific ingredients of the cake.

### Conclusion

106. In paragraph 77, we describe the identification of the nature of the Management Services as being fundamental to the outcome of these appeals. Our reason for saying that is that our conclusions on this issue have implications both for the method by which the OMV falls to be determined and the application of that method to the facts of the case. The issue requires us to construe the definition of Management Services in the light of the activities carried on within the Jupiter Group. That task is made more difficult by two features of the facts in this case.

107. The first is that, as we have noted in paragraph 101 above, the Jupiter Group did not operate in a way that reflected the existence of two separate VAT groups within it. Instead, it operated as a single integrated group. This means that, when an ED was carrying out an activity which ultimately benefited the JIMG group, there was no way of knowing (absent an examination of the definition of the Management Services) whether that ED was carrying out the relevant activity as an officer of an entity within the JIMG group or carrying out the relevant activity as an employee of PLC in the course of providing the Management Services on behalf of the JAMG group. In either case, the JIMG group was the ultimate beneficiary of the relevant activity and the way in which the actions were effected would not tell us anything about which of those two things it was. Thus, the only way of answering the

question is to construe the definition of the Management Services in each MSA and consider whether the relevant activity fell within the ambit of that definition. In effect, each MSA was a legal construct which the Jupiter Group chose to adopt to characterise the relationship between the two VAT groups within the Jupiter Group and that legal construct has to be respected in deciding what did or did not fall within the scope of the supplies of the Management Services, even though the answer makes very little difference to the way in which the activities within the Jupiter Group were actually carried on.

108. The second difficult feature of the facts in this case is that, as a result of what we consider to have been a misunderstanding by the personnel within the Jupiter Group of the contractual position, it was generally thought that the EDs were employed by the Payer, a member of the JIMG group, and not by PLC, a member of the JAMG group. This meant that, so far as the witnesses of fact were concerned, the EDs must have been working for the JIMG group when they carried out activities which ultimately benefited the JIMG group.

109. Although the above features have made our task in relation to this question quite difficult, we come back to the fact that the Jupiter Group chose to divide itself into two VAT groups and to execute the MSAs to characterise the nature of the supplies between the two groups. As such, it is necessary for us to interpret the nature of those supplies by the language used in the MSAs, when viewed in the light of our conclusions in relation to the EDs' employment contracts set out in paragraphs 83 to 95 above. (This is a not dissimilar process to the one undertaken by Newey LJ in the Court of Appeal in dismissing the Respondents' appeal in *Adecco UK Limited v The Commissioners for Her Majesty's Revenue and Customs* [2018] EWCA Civ 1794 at paragraph [49].) In doing so, we cannot accept the Appellant's proposition that, when an ED was carrying out an activity which ultimately benefited the JIMG group, that activity necessarily fell outside the scope of the Management Services. As we have noted above, the relevant activity could have been being carried out solely for the JIMG group or could have been being carried out for the JAMG group in performing the Management Services for the benefit of the JIMG group.

110. We start our consideration of the language used in the definition by noting that the definition was inclusive and not exhaustive. Accordingly, it was perfectly possible for an activity comprising a strategic and operational management service to fall within the definition even though it was not specifically listed in the definition. Be that as it may, as other strategic and operational management services were not expressly set out in the definition, we think it best to proceed on the basis of the assumption that, notwithstanding the drafting, the definition of the Management Services should be regarded as being exhaustive and therefore as encompassing only the four bullet points specifically mentioned in the definition.

111. The next significant point is that nowhere in the four bullet points is there a reference to the NEDs, as distinct from the EDs. The bullet points are instead focused on the nature of the relevant activity and not on the identity of the personnel performing the relevant activity. Moreover, each of the four specified activities is one that was perfectly capable of being performed by an ED as well as a NED.

112. We have considered whether the language used in the second bullet point – “support for” the implementation of group strategies and policies – or the third bullet point – “oversight and monitoring of” the operation and management of group companies – could be construed as implying that the activity in question should be confined to the NEDs. The argument would be that, as the EDs were actively involved in the implementation of group strategies and policies and the operation and management of the JIMG group – and, in that respect, clearly wearing their JIMG group hats – they could not be involved in supporting, overseeing or monitoring any of those activities.

113. However, leaving aside the fact that the same argument does not arise in relation to the activities described in the first or fourth bullet points, we do not think that it is right that an ED could not both be actively involved in the implementation of group strategies and policies and the operation and management of the JIMG group in his or her capacity as an officer of members of the JIMG group and, at the same time, involved as an employee and director of PLC in supporting the implementation of group strategies and policies and overseeing and monitoring the operation and management of the JIMG group. For example, an ED might well have played the role of supporting, overseeing and monitoring in his or her capacity as a director of PLC when interacting with the other directors of PLC, whether in Board or strategy day meetings, Committee meetings or one-to-one meetings. We therefore think that an ED could easily have been performing activities falling within the second and third bullet points in his or her capacity as a director of PLC at certain times even though the ED was also implementing group strategies and policies and carrying out the operation and management of the JIMG group in his or her capacity as an officer of members of the JIMG group at other times.

114. Even if that is not correct, and there was no role for the EDs in the performance of the activities described in the second and third bullet points, there can be no doubt that the EDs could play a valuable role in the performance of the activities described in the first and fourth bullet points. The main point to note is that there is nothing in the definition to limit the supplies of the Management Services to the services of the NEDs and the legal and professional services. That seems to us to be an artificial construct which has been placed on the definition by the relevant personnel within the Jupiter Group and bears no relation to the language used in the definition.

115. For example, when the definition refers to the development of group strategies and policies, there is no reason to confine the meaning of the word development in that context to the work done by the NEDs. In reality, the development of a group strategy or policy was a seamless process – reflecting the reality that the Jupiter Group was a single economic group. The process involved extensive interaction between the EDs and the NEDS, given that the EDs were the people on the ground, with a greater depth of knowledge of the affairs of the Jupiter Group than the NEDs could ever have and very different skills and experience from those of the NEDs. The strategy or policy would thus entail considerable involvement on the part of the EDs outside the Board or strategy day meetings. When an ED was carrying out an act which was related to the development of a group strategy or policy, he or she was, in so doing, carrying out an act which fell fairly and squarely within the ambit of the language used in the definition and that was the case regardless of whether, at that time, he or she was participating in a Board or strategy day meeting or in a one-to-one meeting with a NED, participating in a meeting of the ExCom, attending a Committee meeting or even just working alone in his or her office.

116. In addition, we do not see any basis for concluding that the word “development”, when it was used in the definition, was not apt to include the activities of the EDs described above. At the hearing, Mrs Brown submitted that the dictionary definition of the word “development” showed that it was not necessarily limited in its scope to mean the whole process of developing something but could also mean the mere enhancement or elaboration of that thing. We see no reason to doubt that the word can be used in the latter way. However, it can also be used in the former way and there is nothing in the context of the language used in the definition or in the activities of the EDs to suggest that it should bear the more restricted meaning in this context.

117. The only reason for doubting this conclusion is that the remuneration of the EDs was actually paid by the Payer, a member of the JIMG group. However, that needs to be weighed

against the fact that the EDs were directors of entities in both VAT groups. In addition, although their remuneration was actually paid by the Payer, their employment contracts were with PLC and it was PLC alone which had the contractual obligation to discharge that remuneration. We will address later the issue of how the fact that the EDs' remuneration was actually paid by the Payer and not PLC impacts on the determination of the OMV of the supplies of the Management Services. For present purposes however, it suffices to note that we do not think that that fact displaces the natural interpretation of the language used in the definition of Management Services when one takes into account the fact that the EDs were directors of a member of the JAMG group as well as a member of the JIMG group and that their employment contracts were with the member of the JAMG group only.

118. For the above reasons, we agree with the Respondents' view on the nature of the Management Services. To be clear, we are not saying that everything which the EDs did fell within the scope of the Management Services. We agree with the Appellant that many of the activities of the EDs fell outside the scope of the definition, most notably when the EDs were implementing the strategies and policies to the development of which they had contributed in the course of providing the Management Services. (For completeness, we would add that, in respect of those other activities to the extent that they were for the benefit of the JIMG group, which is to say the activities falling outside the scope of the Management Services but nevertheless benefiting the JIMG group, the EDs were, in our view, still performing their services for PLC under their employment contracts with PLC. In respect of those activities, the EDs were carrying out their duties for the benefit of members of the JIMG group pursuant to directions from PLC under clause 4.6 of each ED's employment contract with PLC. As such, the remuneration received by the EDs for those services should have been borne by PLC with PLC's then being reimbursed by the JIMG group separately for the provision by PLC to the JIMG group of the EDs' services. However, it has been agreed by the parties that any such separate supplies of the EDs' services by the JAMG group to the JIMG group are outside the scope of these proceedings and so we will say no more about that in this decision.)

119. In summary:

- (1) our task of identifying the character of the Management Services necessarily entails unpicking the integrated activities of a single economic group and dividing it into its constituent parts;
- (2) we do not accept the proposition that the mere fact that the EDs were directors of members of the JIMG group and were paid by the Payer means that, when the EDs carried out activities which ultimately benefited the JIMG group, they were necessarily working for that entity;
- (3) the chosen structure compels us to identify which of the two VAT groups an ED was working for when carrying out any particular activity. The only way of deciding which of the two VAT groups it was when the activity in question benefited the JIMG group is to consider whether the activity in question falls within the scope of the language used in the definition of the Management Services;
- (4) in construing the definition of Management Services, the supplies of the Management Services were not confined to the services of the NEDs and legal and professional services but were instead much more wide-ranging than that and, in particular, included the activities of the EDs when those activities involved any of the matters listed in the four bullet points of the definition; and

- (5) that will have been the case even if, in carrying out those activities, the relevant ED was doing something other than participating in, or preparing for, a Board or strategy day meeting.

## DISCUSSION

### INTRODUCTION

120. Whilst it may seem counter-intuitive, given that the Respondents' preferred assessments in this case are their output tax assessments and the input tax assessments fall away in the event that the output tax assessments are upheld, we think that it would be helpful to set out our views in relation to the input tax position first. For reasons which will become clear later in this decision, we believe that it will greatly assist the analysis in relation to the output tax assessments.

### THE INPUT TAX ASSESSMENTS

#### Introduction

121. Each of the input tax assessments is based on the proposition that the input tax incurred by the JAMG group should have been recoverable only to the extent that the costs to which the input tax related were used by the JAMG group to make the supplies of the Management Services.

#### Common ground

122. In relation to the analysis underlying the input tax assessments, certain matters are common ground. These are as follows:

- (1) in making the supplies of the Management Services to the JIMG group, the JAMG group was carrying on an economic activity;
- (2) those supplies were taxable supplies for VAT purposes;
- (3) the JAMG group did not carry on the non-economic activity of holding shares in any subsidiary to which it did not supply the Management Services and the JAMG group did not carry on any other non-economic activity; and
- (4) the JAMG group did not make any exempt supplies for VAT purposes in the course of carrying on its economic activity of supplying the Management Services.

#### The Appellant's position

123. The Appellant relied on a number of cases which it said demonstrated that the facts set out in paragraph 122 above meant that it was entitled to recover all of its input tax regardless of the value of its output tax liabilities or the extent to which the input tax could be said to relate to costs which had been used in making the supplies which give rise to its output tax liabilities. It said that:

- (1) in *Cibo Participations SA v Directeur regional des impôts du Nord-Pas-de-Calais* (Case C-16/00) ("*Cibo*"), the Court of Justice of the European Communities (the "CJEU") held that, in working out the proportion of general overhead input tax that was recoverable by a holding company which both received dividends and received payments for its supplies of management services:
  - (a) the relevant input tax had a direct and immediate link with the business as a whole and that therefore, where the holding company carried out both transactions in respect of which input tax was recoverable and transactions in respect of which input tax was not recoverable, only the proportion of the relevant input tax which was attributable to the former was recoverable; and

(b) since the receipt of dividends was not consideration for any economic activity, dividends should be excluded from the denominator of the fraction which was used to calculate the proportion of the relevant input tax which was recoverable

- see *Cibo* at paragraphs [32] to [35], [44] and [45];

(2) in *Beteiligungsgesellschaft Larentia + Minerva mbH & Co KG v Finanzamt Nordenham and Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG* (Joined cases C-108/14 and C-109/14) (“*Larentia*”), the CJEU held that:

(a) where a holding company provided management services to all of its subsidiaries, it was exercising only an economic activity and was therefore entitled to recover all of its general overhead input tax; and

(b) where a holding company both held shares in companies to whom it was not providing management services and shares in companies to whom it was providing those services, the general overhead input tax of the holding company was recoverable only to the extent that that input tax was attributable to the latter activity because the former activity was a non-economic activity

see *Larentia* at paragraphs [24] to [33];

(3) in *Marle Participations SARL v Ministre de l'Économie et des Finances* (Case C-320/17) (“*Marle*”), the CJEU held that, where a holding company let a building to its subsidiary, that letting amounted to involvement in the management of the subsidiary and hence an economic activity and therefore that, as long as the letting was made on a continuing basis, was for a consideration and was not exempt for VAT purposes and the holding company had no subsidiaries to whom it did not let the building, then, applying both *Cibo* and *Larentia*, all of the general overhead input tax was recoverable – see *Marle* at paragraphs [35] to [39], [45] and [46]; and

(4) in *Sonaecom SGPS SA v Autoridade Tributária e Aduaneira* (Case C-42/19), (“*Sonaecom*”), the CJEU held that:

(a) costs incurred in relation to the acquisition of shares in another company to whom the acquirer intended to provide management services were recoverable even though the acquisition did not proceed. This was because the right to deduct arose immediately when the input tax was incurred; and

(b) however, where an initially-intended transaction (which would otherwise have given rise to a right to recover input tax) did not proceed and instead was replaced by a transaction which was exempt, it was the actual transaction and not the intended transaction which mattered in determining recoverability.

The Appellant said that the importance of the decision lay in the fact that the CJEU reiterated that general overhead costs of a holding company have a direct and immediate link with the company’s economic activity as a whole and therefore, in a case where the holding company is not carrying on a non-economic activity, must be recoverable in full unless the holding company is making exempt supplies – see *Sonaecom* at paragraphs [42] and [43].

### The Respondents’ position

124. In response, Mr Jones said that the Appellant’s proposition - to the effect that, in circumstances where a taxpayer carried on no non-economic activity and made no exempt supplies, all general overhead input tax was recoverable - had no basis in law. Instead, the relevant case law clearly demonstrated that a right of recovery arose only to the extent that

the taxpayer could show a direct and immediate link between the transaction giving rise to the input tax and a taxable supply. This necessity arose out of the fact that Article 168 of the Directive provided for a right of recovery only in relation to input tax on goods or services “used for the purposes of the taxed transactions of a taxable person”. That direct and immediate link could exist between the relevant costs and specific output tax transactions or between the relevant costs and the whole of the taxable person’s economic activity.

125. Mr Jones then pointed us to the summary of the relevant principles by Lord Hodge in *Frank A Smart & Son Limited v The Commissioners for Her Majesty’s Revenue and Customs* [2019] 1 WLR 4849 at paragraph [65]. He said that it was clear from paragraphs [65](ii) and [65](iii) of that judgment that the establishment of such a direct and immediate link was a pre-requisite to recovery. So far as general overhead costs were concerned, it was insufficient merely to show that the taxable person carried on only an economic activity. Instead, the taxable person had positively to show that there was a direct and immediate link between the relevant costs and that activity.

126. Mr Jones then took us through various passages in the cases cited above which he said made this necessity clear, such as:

- (1) *Cibo*, at paragraphs [32] and [33];
- (2) *Larentia*, at paragraphs [23] to [33]; and
- (3) *Sonaecom*, at paragraphs [41] to [43],

and added that the same could be seen in *Ryanair v The Revenue Commissioners* (Case C-249/17) at paragraphs [26] to [29] and *Direktor na Direktsia ‘obzhalvane I danachosiguritelna praktika’ – Sofia v Iberdrola Immobiliaria Real Estate Investments’ EOOD* (Case C-132/16) at paragraphs [31] and [32].

127. Mr Jones said that the application of this principle could also be seen in the domestic decision in *JDI International Leasing Limited v The Commissioners for Her Majesty’s Revenue and Customs* [2018] UKUT 214 (TCC) (“*JDI*”), where the Upper Tribunal upheld the conclusion of the First-tier Tribunal in that case to the effect that input tax incurred on tools which were then leased by the taxpayer to an affiliate for no consideration was not recoverable even though the taxpayer was also making taxable supplies of spare parts. The courts had held that the taxpayer had failed to identify a direct and immediate link between the acquisition of the tools and the supply of the spare parts and therefore the claim failed – see paragraphs [57] to [60]. Mr Jones said that *JDI* was a case where the taxable person did not carry on any non-economic activity and had not made any exempt supplies and yet was still unable to recover the input tax in question and that this was because of its failure to establish a direct and immediate link between the costs in question and its economic activity.

### Conclusion

128. We agree with the Respondents’ position to the effect that, in general, in order for a taxable person to be able to recover input tax in respect of costs which it has incurred, the taxable person needs to be able to establish that there is a direct and immediate link between those costs and the taxable transactions taking place within the course of the economic activity of the taxpayer. This is the reason why the taxpayer in *JDI* was unable to recover the input tax which it incurred in respect of the tools. However:

- (1) although it isn’t entirely clear because the Upper Tribunal did not say so in so many words, it seems to us that the failure to establish the necessary direct and immediate link between the costs and the economic activity in *JDI* may have been affected by the fact that the initial lease of the tools for no consideration was a non-



economic activity – see *JDI* at paragraphs [19], [20] and [57]. Thus, the facts in that case are distinguishable from the facts in this case, where the Appellant’s only activity was an economic activity; and

(2) in any event, in our view, the CJEU decisions cited in paragraph 123 above are authority for the proposition that, when it comes to a holding company whose only activity is a taxable economic activity, the necessary direct and immediate link between the costs and the economic activity can automatically be assumed to exist.

129. It is true that, in describing the link between general overhead costs incurred by a holding company and the existence of a direct and immediate link with the economic activity of the holding company, the CJEU does sometimes express itself ambiguously. For instance, in *Larentia*, the CJEU said the following:

“However, a taxable person also has a right to deduct even where there is no direct and immediate link between a particular input tax transaction and an output transaction or transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such costs do have a direct and immediate link with the taxable person’s economic activity as a whole” (see *Larentia* at paragraph [24]).

130. The above language is capable of being construed in two different ways. The first is that the CJEU might be saying that general overhead costs are to be regarded as having a direct and immediate link with the holding company’s economic activity only if those costs actually are a cost component of the goods or services which are supplied in the course of the holding company’s economic activity. However, the same language is equally capable of being construed as saying that, simply because general overhead costs are general costs, they are, by definition, a cost component of the goods or services which are supplied in the course of the holding company’s economic activity and therefore the necessary direct and immediate link is deemed to exist.

131. In the context of holding companies, we favour the latter construction of that language for the following three reasons:

(1) first, the CJEU does not always adopt exactly the same formulation as the one set out in paragraph 129 above in describing this head of recoverability. For example, in *Cibo*, at paragraph [33], the CJEU said the following:

“On the other hand, the costs of these services are part of the taxable person’s general services and are, as such, cost components of an undertaking’s products. Such services therefore do, in principle, have a direct and immediate link with the taxable person’s business as a whole.”

It can be seen that the CJEU was here clearly adopting the second meaning set out in paragraph 130 above;

(2) secondly, the way in which this principle was applied on the facts in *Larentia* was to say that, where a holding company had only a taxable economic activity (because it involved itself in the management of all of its subsidiaries), the general costs “must be regarded as attributed to that company’s economic activity” and therefore the input tax on those costs had to be recoverable – see paragraphs [25] and [29] in *Larentia*. The same was true in *Marle* – see *Marle* at paragraph [36]. The word “must” in that context indicates to us that the process is automatic and there is no need specifically to show that cost components in the holding company’s supplies of management services; and

(3) thirdly, when one looks at the actual facts in *Larentia* and *Marle*, there was no obvious direct and immediate link between the costs incurred by the holding companies in those cases, which is to say the costs incurred in relation to their acquisition of

subsidiaries, and the economic activity comprising the supplies of management services by the holding companies to those subsidiaries. In relation to that issue, Mr Jones sought to distinguish the costs associated with acquiring subsidiaries which the holding company is subsequently going to manage from the costs associated with an issue of shares, such as occurred in the course of the IPO in this case. He said that, in the former case, it was easier to discern a direct and immediate link with the supplies of management services made by the holding company than it was in the case of a share issue because, in the former case, the costs in question related to the acquisition of the subsidiaries which were going to be managed.

We agree that the link is closer. However, we do not discern a difference in principle between the two. This is because, in both situations, there is no direct and immediate link between the relevant cost and the supply of the management services. In other words, in both situations, the costs in question are not a direct cost component of the supplies of the management services and do not have a direct and immediate link with those supplies. If they did, then, in the cases referred to above, the costs associated with acquiring the subsidiaries would have fallen within the first category of costs the input tax in respect of which is recoverable and not the second category of costs - general overhead costs - as they were undoubtedly considered by the CJEU to be.

Once the costs associated with the acquisition of subsidiaries are seen as falling outside that first category and fall to be considered instead as general overhead costs, then there is no difference in principle between those costs and the costs associated with an issue of shares pursuant to an IPO. The fact that no distinction exists in this context can be seen in the CJEU decision in *Kretztechnik AG v Finanzamt Linz* (Case C-465/03) (“*Kretztechnik*”) – see *Kretztechnik* at paragraphs [36] to [38]. In *Kretztechnik*, the CJEU noted that an issue of shares by a holding company involved an increase in its capital for the benefit of its economic activity in general. This meant that the costs of the supplies received by the holding company in order to effect that issue formed part of its overheads and were therefore, “as such, component parts of the price of its products”. The CJEU went on to say that it therefore followed that, as long as all of the transactions carried out by the holding company were taxable transactions in the course of an economic activity, the holding company was entitled to deduct the input tax attributable to those costs. In our view, the CJEU were adopting the same principle in *Kretztechnik* as it did in the other cases mentioned above. That is to say, it accepted that, in a case where a holding company’s sole activity was the economic activity of making supplies of management services to its subsidiaries, then the input tax associated with its general overhead costs was recoverable automatically. The direct and immediate link to the holding company’s economic activity was deemed to exist.

132. We have therefore concluded that the submissions of the Appellant on this question are correct. Whilst the Respondents are quite right that, in order for input tax on general overhead costs to be recoverable, a direct and immediate link between the costs and the economic activity of the taxable person must be established, the CJEU cases cited above demonstrate that such a direct and immediate link is automatically deemed to exist in the case of the general overhead costs of a holding company which does not carry on any non-economic activity and does not make any exempt supplies. In other words, in order to recover the input tax in question, the holding company need merely show that it does not carry on any non-economic activity or make any exempt supplies.

133. The oddity here is that, were the holding company to hold shares in subsidiaries without making any supplies of management services to those subsidiaries, then the holding company would fall to be regarded as carrying on a non-economic activity, with a consequent adverse

impact on the recoverability of the input tax attributable to the holding company's general overhead costs. Logically, therefore, in a case where the holding company is both holding shares in its subsidiaries and making supplies of management services to those subsidiaries, the holding company ought to be treated as carrying on two activities – the non-economic activity of holding shares in its subsidiaries and the economic activity of making supplies of management services to those subsidiaries. Were the situation to be analysed in that way, then the holding company would not be able to recover all of the input tax attributable to its general overhead costs. That is because the existence of the non-economic activity would prevent the direct and immediate link with the economic activity from arising, at least for some of the general overhead costs. However, the CJEU has held that the mere fact that the holding company supplies management services to its subsidiaries allows the non-economic activity of holding shares in the subsidiaries to which the management services are being supplied to be disregarded. That seems like a slightly surprising conclusion but we believe that that is approach which the CJEU has adopted in the decisions mentioned above.

134. We will return to this point when we address the output tax assessments.

135. As we have already noted, we think that the situation in this case is distinguishable from the facts in *JDI* and, in any event, to the extent that it is not, we are bound to follow the CJEU in relation to this question.

136. It follows that, if we had been minded to uphold the Appellant's appeal in relation to the output tax assessments, we would also have upheld the Appellant's appeal in relation to the input tax assessments. We have chosen to deal with the input tax assessments first because, as we have trailed, the reasoning set out in paragraphs 128 to 135 above has, in our view, a meaningful impact on the analysis in relation to the output tax assessments which follows.

## THE OUTPUT TAX ASSESSMENTS

### Introduction

137. Each of the output tax assessments in issue in these proceedings is based on an OMV for the supplies of Management Services under the MSAs which is equal to all of the inputs (both taxable and exempt) in the VAT period immediately preceding the VAT period to which that assessment relates. In other words, the relevant output tax assessment has been based on an OMV for the supply of Management Services taking place in the VAT period to which the assessment relates that is equal to the cost of all goods and services received by the JAMG group from third parties in the VAT period immediately preceding the VAT period to which the assessment relates, regardless of whether those costs were input tax-bearing or not.

### The OMV of the supplies

138. The OMV Direction was given pursuant to paragraph 1 of Schedule 6 to the VATA. That paragraph provides for such a direction to be given where:

- (1) the value of a supply made by a taxable person for a consideration in money is less than its OMV;
- (2) the supplier and the recipient of the supply are connected; and,
- (3) if the supply is a taxable supply, the recipient of the supply is not entitled to recover all of its input tax.

139. There is no dispute between the parties as to the fact that the conditions in paragraphs 138(2) and 138(3) above are satisfied in this case in relation to the supplies of the Management Services. Thus, the dispute is focused only on the condition in paragraph 138(1) above.

140. This prompts three questions as follows:

- (1) what was the nature of the supplies made by the JAMG group to the JIMG group under the MSAs;
- (2) what was the consideration for those supplies? and
- (3) what was the OMV of those supplies?

#### The nature of the supplies

141. We have already set out in paragraphs 98 to 119 above our conclusions in relation to the nature of the supplies.

142. In short, we have concluded that:

- (1) the supplies of the Management Services were not confined to the services of the NEDs and legal and professional services but were instead much more wide-ranging than that and, in particular, included the activities of the EDs when those activities involved any of the matters set out in the definition of the Management Services in the relevant MSA; and
- (2) that will have been the case even if, in so doing, the relevant ED was doing something other than participating in, or preparing for, a Board or strategy day meeting.

#### The consideration for the supplies

##### *Introduction*

143. Each MSA made provision for the payment of quarterly fees by the JIMG group in return for the supplies of the Management Services. That was obviously a consideration in money.

##### *The Respondents' position*

144. Mr Jones submitted that additional consideration for the supplies was provided by the JIMG group in the form of the Payer's discharging the contractual obligation owed by PLC (and hence the JAMG group) to the EDs in return for the activities of the EDs in the course of the provision by PLC of the Management Services. He added that this too was a consideration in money because it merely amounted to payments of money by the JIMG group to discharge the JAMG group's contractual obligation and not the formal assumption of that contractual obligation by the JIMG group. He likened it to a case where a person who was obliged to pay a cash sum to another person agreed instead to discharge an amount owed by the other person to his butcher. In both cases, there was a consideration in money and, instead of paying the money to the other contracting party, the paying contracting party simply discharged an obligation owed by the other contracting party to a third party. The position was akin to a cash payment between the contracting parties and then the use by the recipient of the sum received to pay an amount owed by the recipient to the third party.

##### *The Appellant's position*

145. In response, Mrs Brown said that there was no evidence that the Payer or any other member of the JIMG group had ever agreed to discharge the contractual obligations owed by PLC to the EDs. The EDs were officers of members of the JIMG group (as well as being employees of PLC) and the Payer – a member of the JIMG group - stood in the position of an employer as regards the EDs. Thus, the payments of the remuneration did not amount to consideration passing from the JIMG group to the JAMG group. She added that, if that was not the correct analysis, and the Payer had assumed the contractual obligations owed to the EDs by PLC in consideration for the supplies of the Management Services, then that was

consideration in kind and not consideration in cash and therefore the OMV Direction could not apply to the supplies of the Management Services.

### *Conclusion*

146. We agree that there is no evidence that the Payer or any other member of the JIMG group ever formally assumed the contractual obligations owed by PLC to the EDs under the employment contracts between PLC and the EDs. However, Mr Jones did not allege that it or they did do that. He said merely that the Payer had in fact discharged those contractual obligations. For the reasons set out in paragraphs 83 to 95 above, we agree with Mr Jones that, on the basis of the evidence we have seen and heard, that is exactly what did happen.

147. We also concluded in those paragraphs that, when the Payer discharged PLC's contractual obligations

- (1) PLC did not reimburse the Payer for those payments;
- (2) neither PLC nor any member of the JIMG group considered that PLC was obliged to reimburse the Payer for those payments; and
- (3) neither PLC nor any member of the JIMG group considered that, in making those payments, the Payer was either doing so as consideration for any service supplied to it by PLC (whether or not under the MSAs) or intending to provide a gratuitous benefit to PLC.

It therefore appears to us that, for whichever of the two reasons we have set out in paragraph 95 above actually applied, no member of the Jupiter Group ever gave any consideration to the question of whether PLC should have reimbursed the Payer for the payments of remuneration which were made to the EDs. We will come back to this aspect of the case in due course when we address the question of how the OMV of the supplies of the Management Services falls to be determined but, for present purposes, we need to consider whether the fact that the Payer discharged the remuneration without seeking recompense from PLC for doing so should be regarded as additional consideration for the supplies of the Management Services.

148. We think that the mere fact that the contractual obligations to pay the remuneration were discharged by the Payer does not mean, in and of itself, that that discharge formed part of the consideration for the supplies of the Management Services. No evidence exists to give any basis for that conclusion. On the contrary, such evidence that we have suggests that both VAT groups were proceeding on the assumption that the ultimate responsibility for paying the remuneration lay with the JIMG group. That is why there was no reimbursement of the Payer by PLC in respect of the relevant remuneration and why no obligation to make any such reimbursement, or right to receive any such reimbursement, was reflected in the solus accounts of PLC or the Payer. That basis of proceeding appears to us to have been wrong but it nevertheless indicates that, in making the relevant payments, the Payer (and the JIMG group as a whole) did not see itself as paying any additional consideration for the supplies of the Management Services.

149. In other words, the fact that that was the understanding of the parties is an important reason why it would in our view be quite wrong to analyse the discharge of PLC's contractual obligations to the EDs as comprising additional consideration for the supplies of the Management Services. The subjective intentions of the parties were clearly that that was not the case. This conclusion is supported by the fact that neither MSA referred to the fact that the payment of the remuneration formed part of the consideration for the supplies of the Management Services and there is no other documentary evidence to suggest that it was.

150. For the above reason, we consider that the discharge by the Payer of PLC's contractual obligations to the EDs did not form part of the consideration for the supplies of the Management Services.

151. For completeness, we would add that, were to be wrong about this, we do not think that that would prevent the OMV Direction from having effect because we consider that the discharge by one party to a contract of contractual payment obligations owed by its contractual counterparty to a third party is still consideration in money and not consideration in kind. It might well be different if the relevant discharge was preceded by the formal assumption of the counterparty's contractual obligations to the third party to make the payment – because, in that case, the consideration might technically be said to be the assumption of the obligations and not the payment of money pursuant to those obligations. However, where no such prior formal assumption of the contractual obligations occurs, and there is simply a payment of money by one party to a contract to a third party to whom its counterparty owes those contractual obligations, then we think that the consideration in question is the payment of money.

### The OMV of the supplies

#### *Introduction*

152. The conclusions we have reached in paragraphs 143 to 151 above mean that the sole consideration for the supplies of the Management Services was in money and that that consideration was the amounts which were expressed in the MSAs to be payable by the JIMG group to the JAMG group for the supplies of the Management Services. That being the case, it is necessary to determine whether the OMV of those supplies was greater than the money so paid.

153. OMV is defined for the purposes of the Directive in Article 72 of the Directive, which we have set out in full in Appendix 2 below. That article contains two paragraphs, the first of which refers to the “full amount that, in order to obtain the goods or services in question at that time, a customer at the same marketing stage at which the supply of goods or services takes place, would have to pay, under conditions of fair competition, to a supplier at arm's length within the territory of the Member State in which the supply is subject to tax” and the second of which is expressed to be predicated on there being no comparable supply of goods or services which can be ascertained and, in such a case, defines OMV as “an amount that is not less than the full cost to the taxable person of providing the service”.

154. OMV is defined for the purposes of UK domestic law in Section 19(5) of the VATA, which we have also set out in full in Appendix 2 below. That section provides that the OMV of goods or services shall be taken to be “the amount that would fall to be taken as its value...if the supply were for such consideration in money as would be payable by a person standing in no such relationship with any person as would affect that consideration”.

155. The first point to address then is the extent to which Section 19(5) of the VATA properly incorporates the provisions of Article 72 of the Directive and, if it does not, whether the section, as a domestic law provision, needs to be construed in the light of the wording and purpose of the EU law which it seeks to implement (the doctrine of conforming construction) – see *British Gas Trading Limited v Lock and another* [2017] 4 All ER 291 at paragraphs [31] to [40].

#### *The parties' respective positions*

156. There is no dispute between the parties as to the scope of the doctrine of conforming construction in an appropriate case. They agree that the doctrine is wide-ranging but that it is subject to the limits that:

(1) the meaning needs to “go with the grain of the legislation” and be “compatible with the underlying thrust of the legislation being construed”; and

(2) “[the] exercise of the interpretive obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate”,

(see *Vodafone 2 v The Commissioners for Her Majesty’s Revenue and Customs (No 2)* [2009] EWCA Civ 446 at paragraph [37]).

157. However, whereas Mr Jones submitted that Section 19(5) of the VATA, in its present form, did not properly reflect the terms of Article 72 of the Directive and that, applying a conforming construction of that provision, the provisions of the second paragraph of the article should be treated as being incorporated in the section, Mrs Brown submitted that:

(1) it did (provided that the second paragraph of the article was construed in the manner that she proposed); but

(2) if we were to conclude that it did not (because we adopted a different construction of the second paragraph of the article from the one for which she contended), the doctrine of conforming construction was precluded from applying because that would go against the grain of the legislation.

158. Mr Jones started by pointing out that the Management Services, as they were defined in each MSA, comprised various strategic and operational management services from a holding company to its subsidiaries. Therefore, by definition, no comparable supply of those services between unconnected parties dealing at arm’s length could be ascertained. If one wanted to identify the consideration that would be payable by a recipient of the relevant services who was not standing in any such relationship to the supplier of the relevant services as would affect that consideration, one therefore had to apply the language in the second paragraph and not the first paragraph of Article 72 of the Directive. In other words, the consideration should be equal to the full cost to the supplier of providing the service. Construing the definition of OMV in Section 19(5) of the VATA in this way did not fall foul of either of the constraints on the doctrine of conforming construction set out in paragraph 156 above. On the contrary, the effect of doing so would be to ensure that the relevant UK domestic legislation conformed with the objectives of the Directive in the absence of clear statutory language that Parliament intended that such conformity should not exist – see *The Commissioners for Her Majesty’s Revenue and Customs v IDT Card Services Ireland Limited* [2006] STC 1252 at paragraph [90].

159. Mrs Brown made three points in reply:

(1) first, she said that Article 72 of the Directive should be construed as doing no more than reflecting the principles which were applicable in applying the ALP to determine the arm’s length price for transfer pricing purposes. In other words, whereas the first paragraph of the article was describing the CUP method - which was one method of calculating the arm’s length price for transfer pricing purposes - the second paragraph was describing the cost-plus method - which was another method of so doing. Thus, both paragraphs were doing no more than defining OMV in a VAT context by reference to the transfer pricing concept of the arm’s length price payable between unconnected persons as determined in accordance with the ALP. As such, both of them had properly been reflected in the terms of Section 19(5) of the VATA because all that that section was doing was requiring the effect of the connection between the parties to the supply to be disregarded and therefore requiring the determination of the arm’s length price;

(2) secondly, she said that, if Article 72 of the Directive were not to be construed in the manner described in paragraph 159(1) above and were instead to be construed as introducing, through its second paragraph, a self-standing “full cost” concept, which was different from, and independent of, the concept of the arm’s length price for transfer pricing purposes which was applicable in the first paragraph of the article, then that second paragraph went against the grain of Section 19(5) of the VATA and therefore could not be read into the section pursuant to the doctrine of conforming construction. In effect, reading the second paragraph of the article into the section in that situation would cross the boundary between interpretation and amendment because the section was aimed at determining the arm’s length price by disregarding the effect of the connection between the parties to the supply and that was quite different from calculating the value of the supply by reference to the full cost of making the supply; and

(3) thirdly, she said that, even if the second paragraph of Article 72 of the Directive were to be construed in the manner described in paragraph 159(2) above, and the doctrine of conforming construction were to apply to require the self-standing “full cost” concept to be read into Section 19(5) of the VATA, this was a case where there were comparable transactions because, as regards both the costs of the NEDS and the legal and professional costs, there were clear comparables in the form of the acquisition of the relevant services by the JAMG group itself. Thus, it was the first paragraph and not the second paragraph of Article 72 of the Directive which needed to be applied in this case in any event.

### *Conclusion*

160. We do not agree with any of the three submissions which were made on behalf of the Appellant on this point.

161. It may be seen that the first two points sit naturally together, turning as they do on the proper construction of the second paragraph of Article 72 of the Directive and the proper construction of Section 19(5) of the VATA. In short, we are invited by the Appellant either to adopt the construction of the second paragraph of the article proposed by the Appellant or to consider whether, on the basis of an alternative construction of that paragraph, it is permissible for the relevant paragraph to be read into Section 19(5) of the VATA pursuant to the doctrine of conforming construction. It follows that, as regards both points, it is helpful to start by setting out our interpretation of both the article and the section.

162. In our view:

(1) Section 19(5) of the VATA is saying that, in order to ascertain the OMV of a supply, one needs to find the consideration which would have passed between the parties to the supply had those parties been unconnected. In other words, the thrust (or grain) of the legislation is to identify the impact on the consideration to which the connection has given rise and then to eliminate that effect; and

(2) Article 72 of the Directive is doing precisely the same thing but is more granular in its approach. Through its two paragraphs, the article sets out exactly how one is to go about eliminating the impact on the consideration of the connection which exists between the two parties in question. In doing so, it postulates two distinct scenarios – one in which it is possible to identify a transaction between parties dealing at arm’s length that is comparable to the actual transaction (the first paragraph of the article) and then one in which it is not possible to identify such a comparable transaction (the second paragraph of the article). In effect, where there is no comparable transaction, the second paragraph of the article is requiring the impact on the consideration of the



connection to be eliminated by deeming the consideration to be equal to the full cost of making the supply.

163. It follows that we do not agree with the Appellant's submission that the two paragraphs of Article 72 of the Directive are doing no more than reflecting the principles which are applicable in determining the arm's length price for transfer pricing purposes and describing two alternative methods of applying the ALP – the CUP method (in the first paragraph) and the cost-plus method (in the second). On the contrary, and leaving aside at this stage the question of whether the ALP has any relevance to the operation of the article, our construction of the article is that it is drawing a distinction between the determination of OMV in a case where there is a comparable transaction and the determination of OMV in a case where there is not. However, both paragraphs of the article are directed at eliminating the impact on the actual consideration of the connection which exists between the parties to the supply. Consequently, it seems to us that all that the language used in the second paragraph of the article is doing is creating a basis for determining the OMV in circumstances where a comparable transaction does not exist and that is distinct from the basis applying in the first paragraph, where a comparable transaction does exist. Whilst that second method obviously has some similarities with the cost-plus method, there is no link between the two.

164. For instance, the paragraph simply refers to the full cost of providing the relevant service and not to that cost plus any appropriate margin. Similarly, the paragraph clearly provides that it operates in circumstances where there is no comparable transaction whereas, at least in some case, the cost-plus method under the ALP can be used to establish a price for a transaction in relation to which there is a comparable transaction. It is just that the cost-plus method is a method for establishing the price for the comparable transaction that is different from the CUP method for establishing that price. (See, for example, the statement by SD in paragraph [102] of his expert's report to the effect that, in the case of applying the cost-plus method, "it is important to ensure that the costs marked up in a controlled transaction are the same costs that would be marked up for an uncontrolled transaction at arm's length" and the reference by JN in paragraph [52] of his expert's report to the effect that, in the case of applying the cost-plus method, it is necessary to compare "the gross profit margin earned in the controlled transactions to gross profit margins earned in similar uncontrolled transactions"). Thus, the second paragraph of Article 72 of the Directive is setting out a wholly different way of ascertaining the OMV of the transaction from the way identified in the first paragraph, but, as with the first paragraph, it is doing so by attempting to eradicate the impact caused by the connection which exists between the parties to the actual transaction and therefore is as valid a means of applying Section 19(5) of the VATA as is the first paragraph of the article.

165. We therefore neither accept the construction of the article proffered by the Appellant (the Appellant's first point) nor, on the basis of our alternative construction of the article, see anything in the terms of the second paragraph of the article which is contrary to the grain of the section (the Appellant's second point). Instead, we see the full cost concept as being no more and no less than an alternative way of eliminating the impact which the connection between the parties to the actual supply has had on the consideration passing between them. Since Section 19(5) of the VATA is doing precisely the same thing, we do not perceive there to be any reason to disregard the second paragraph of Article 72 of the Directive in interpreting and applying Section 19(5) of the VATA. In fact, to do so would involve disregarding the terms of the article because it clearly states that, where no comparable supply can be found, the first paragraph of the article should not apply.

166. Consistent with the above conclusion, we do not see this as a case where the Respondents are seeking to rely against the Appellant on wording in the Directive which is

contrary to, and inconsistent with, the language used in the domestic legislation. That is because there is nothing in the domestic legislation which explains how the impact of the connection is to be disregarded in ascertaining the OMV of the supply. The position is simply left at large. As such, there is no reason why the whole of the (amplificatory) language in Article 72 of the Directive should not apply to inform the application of the domestic legislation.

167. For similar reasons, we do not think that anything turns on the fact that Section 19(5) of the VATA is based on equivalent language in Section 10 of the Finance Act 1972 and therefore preceded the enactment of the language which is now to be found in Article 72 of the Directive or that there was no equivalent to the second paragraph of Article 72 of the Directive in Article 11A1 of the Sixth Council Directive of 17 May 1977 (77/388/EEC), the predecessor to Article 72 of the Directive (“Article 11”). The language in the section is open. It is not saying that OMV is to be identified by reference to a comparable transaction between parties dealing at arm’s length – which is the area covered in the first paragraph of Article 72 of the Directive. Instead, it is merely saying that OMV is to be identified by reference to the price which would have passed between unconnected parties. Thus, even though, prior to the introduction of the Directive, the section would have been construed in accordance with Article 11 – with the result that the section would have applied as if only the first paragraph of Article 72 of the Directive existed - that does not mean that the second paragraph of Article 72 of the Directive should now be disregarded. Unless doing so would offend against one of the principles described in paragraph 156 above, which we consider that it does not, the doctrine of conforming construction requires that, following the enactment of the Directive, the section is to be read in the light of the whole of Article 72 of the Directive and not merely one paragraph of it.

168. In summary, in relation to the Appellant’s first two points, in our view:

- (1) the grain of Section 19(5) of the VATA is to identify the consideration which would have been given for the supply in the absence of a connection between the parties – in other words, to eliminate the impact on the consideration of the connection between the parties;
- (2) in a case where a comparable transaction exists, it is easy to do so by basing the OMV on the price paid in the comparable transaction (the first paragraph of Article 72 of the Directive). That has the effect, in the context of a supply where there is a comparable transaction, of eliminating the impact on the consideration of the connection between the parties. However, it does so only by relying on the terms of the comparable transaction; and
- (3) where no such comparable transaction exists, it is necessary to specify an alternative way in which the impact on the consideration of the connection between the parties is to be eliminated and the method for doing that is to identify the full cost to the supplier of making the supply (the second paragraph of Article 72 of the Directive).

169. Finally, for the reasons which we have set out in paragraphs 98 to 119 above, we believe that the Appellant’s third point is based on an unnecessarily restricted reading of the definition of the Management Services. If the supplies of the Management Services were correctly to be seen solely as the supplies of the services of the NEDs and the legal and professional services, then we agree with the Appellant that there were natural comparables to those supplies in the form of the acquisition of those same services by the JAMG group itself. But that would involve identifying the nature of the supplies of the Management Services solely by reference to two particular parts of the services and not the services as a whole. In effect, it would be identifying the nature of the cake by reference to just some of

the ingredients of the cake, to use the analogy favoured by Mr Jones. This was not a case where the supplies just involved those specific ingredients. Instead, the supplies were supplies of a whole cake.

170. In our view, once the supplies are seen in that light as the whole cake, there is, by definition, no comparable to that cake outside the confines of a group relationship, as the experts noted when asked to address how the ALP might apply to the supplies of the Management Services if they fell to be characterised in the manner which we have now done. Viewed as a whole, the supplies of Management Services had no comparables in the context of a relationship between unconnected parties because they were supplies which would be made only in the context of a group of companies. There is, in our view, no basis in the terms of Article 72 of the Directive (or, for that matter, Section 19(5) of the VATA) for seeking to break down what was, in essence, a single integrated supply into its constituent parts and then to identify comparables for those constituent parts individually. We therefore believe that the OMV of the supplies of the Management Services in this case fall to be determined by reference to the second paragraph of Article 72 of the Directive, which is to say by reference to the full cost to the JAMG group of making the supplies.

### The relevance of the ALP to the determination of the OMV

#### *Introduction*

171. As the list of issues set out in paragraph 20 above suggests, much of the hearing was devoted to the question of the extent to which the ALP was relevant to the calculation of the OMV for VAT purposes. For reasons which we address in detail in paragraphs 184 to 187 below, we believe that, even if the ALP were conceivably to be relevant to the calculation of the OMV under the first paragraph of Article 72 of the Directive, it could not have any application to the calculation of the OMV under the second paragraph of that article. Consequently, as we have already concluded that it is the second paragraph of that article which is pertinent to this case, there is, strictly speaking, no need for us to deal with the question. However, because we heard considerable argument from the parties in relation to it and also had the benefit of hearing evidence over two days from the parties' respective transfer pricing experts, we believe that we should say something about our conclusions on the subject.

#### *The parties' respective positions*

172. Mr Jones said that there were many reasons why the ALP was not an appropriate way to determine OMV for VAT purposes. He noted the following:

- (1) first, the ALP was an approach to direct tax that sought to remove distortions to the taxable profits of an enterprise which arose by reason of transactions with an associated enterprise. It did that by requiring profits to be calculated by reference to the ALP. In the context of intra-group services, the ALP gave rise to a two-stage process pursuant to which, first, the question of whether or not there would have been a service in an arm's length context (or what that service would have been in that context) was answered and then, only if the answer to the first-mentioned question was in the affirmative and the nature of the service which would have been supplied between arm's length parties was identified, the question of the appropriate price for that service was addressed. Thus, in the transfer pricing context, the first stage of the ALP could mean that a service that was actually supplied was treated for direct purposes as not having been supplied at all or as having taken a different form. In contrast, under the VAT regime, the starting point was the existence of an actual supply and it was only the nature of the actual supply which mattered. Except in the extreme case of abusive transactions falling within the scope of the principle laid down in *Halifax plc v The*

*Commissioners of Customs and Excise* (Case C-255/02) [2006] STC 919, the actual supply could not fall to be disregarded or re-characterised for VAT purposes. Thus, in a case where a supply falling within Article 80 of the Directive was made, it was simply a matter of determining the OMV of the relevant supply. There was no equivalent in the VAT context of the first stage of the two-stage process under the ALP referred to above;

(2) secondly, the OECD Model Convention (and the related Guidelines incorporating the ALP) related to direct tax, which was not harmonised at an EU level. It was not part of EU law and not all Member States were members of the OECD. In contrast, the concept of OMV in the Directive was directly applicable across the whole of the EU. It would be plainly inconsistent to seek to interpret a concept which applied autonomously across the whole of the EU by reference to a convention and guidelines which were not part of EU law and which were not common to each Member State;

(3) thirdly, neither Article 72 of the Directive nor Section 19(5) of the VATA made any reference to, or sought to import the terms of, Article 9 of the OECD Model Convention or the related Guidelines. Where the EU wished to import transfer pricing concepts into EU law, it had done so in clear terms. For example, article 4(1) of the EU Arbitration Convention repeated almost exactly the language used in Article 9 of the OECD Model Convention;

(4) fourthly, the aims of Article 9 of the OECD Model Convention and the related Guidelines were different from those of Article 80 of the Directive. The former was concerned with the proper allocation of profits between associated enterprises for direct tax purposes whereas the latter was concerned with ensuring that there was no loss of VAT through the use of associated entities to derive tax benefits. This difference could be seen in the fact that, whereas paragraph 1.2 of the notes on Article 9 of the OECD Model Convention stated expressly that a tax adjustment under the article might well be appropriate even in the absence of fraud or avoidance, Article 80 of the Directive was equally clear that its purpose was “to prevent tax evasion or avoidance”; and

(5) fifthly, the two regimes employed different approaches reflecting their respective concerns. The ALP was concerned with the ascertainment of a price which would be paid in a hypothetical scenario involving two independent parties as identified for transfer pricing purposes. It was thus based on a legal fiction, part of which might result in the conclusion that no service was provided at all or that the service which was actually supplied was different from the service which would have been supplied between arm’s length parties, as mentioned in paragraph 172(1) above. In contrast, the Directive was concerned with fact and economic reality.

173. Mr Jones said that many of the above points were made in a slightly different context in the decision of the CJEU in *Ministero dell’Economia e delle Finanze and another v FCE Bank plc* (Case C-210/04) (“*FCE*”). In that case, which concerned the VAT treatment of supplies made by FCE Bank plc to its Italian permanent establishment, the CJEU had held that the Italian permanent establishment did not constitute a taxable person for VAT purposes which was separate from the rest of the bank so that the services which were supplied to it did not constitute taxable supplies for VAT purposes. The main significance of the case in the present context was that both the Advocate General and the CJEU held that the provisions in Article 7 of the OECD Model Convention relating to permanent establishments were relevant solely for direct tax purposes and had no relevance in a VAT context – see *FCE* at paragraphs [61] to [65] of the Advocate General’s opinion and paragraphs [32] to [39] of the judgment of the court. Mr Jones said that, although the decision in *FCE* related to the provisions of Article 7 of the OECD Model Convention and not Article 9 of the OECD Model Convention, the

reasoning underlying the decision had more general application than just that one article and was highly pertinent to the present question. In particular, the Advocate General and the court had made it very plain in those paragraphs that the principles relevant to ascertaining profits for direct tax purposes were very different from the principles relevant to VAT.

174. Mrs Brown said that the decision of the CJEU in *FCE* was irrelevant in this context as it did not relate to Article 9 of the OECD Model Convention. It therefore had no bearing on the relationship between the ALP, which was relevant to Article 9 of the OECD Model Convention, and the OMV for VAT purposes.

175. She added that the question of whether OMV for VAT purposes was to be determined by reference to the ALP had already been decided as a matter of domestic law by Judge Richards in *Temple Finance Limited and Temple Retail Limited v The Commissioners for Her Majesty's Revenue and Customs* [2016] UKFTT 41 (TC) ("*Temple FTT*") and the Upper Tribunal on appeal in that case – in *The Commissioners for Her Majesty's Revenue and Customs v Temple Finance Limited and Temple Retail Limited* [2017] UKUT 315 (TCC) ("*Temple UT*"). She said that, in *Temple FTT*, Judge Richards had relied on transfer pricing reports produced by Grant Thornton to reach his view of the OMV of the relevant supplies and, in so doing, had rejected the argument of the Respondents to the effect that those reports had no relevance to the determination of the OMV – see *Temple FTT* at paragraphs [46] to [52], [107] to [110] and [111] to [198]. Then, in *Temple UT*, in dismissing the Respondents' third ground of appeal – to the effect that Judge Richards had erred in accepting one of the analogies adopted by Grant Thornton in its reports – and fourth ground of appeal – to the effect that Judge Richards had adopted an irrational approach in taking into account the margin made by the supplier – the Upper Tribunal had effectively accepted the validity of using the ALP to determine OMV by engaging with the reports – see *Temple UT* at paragraphs [52] to [56].

176. In response, Mr Jones said that, although Judge Richards in *Temple FTT*, in allowing the Grant Thornton reports to form part of the evidence in that case, had rejected the Respondents' objection based on the relevance of the ALP to the determination of OMV for VAT purposes, the reason for that was to be found in paragraph [50] of the decision. In that paragraph, the Judge noted that the first such report:

“[considered] different types of intra-group transaction separately from each other with a view to establishing the arm's length nature of the pricing of that transaction. There are separate sections dealing with, for example, the sale of goods from TRL to TFL, the provision of staff by TFL to TRL, the store concessions provided by TRL to TFL and repair services provided by TRL to TFL. In each of these sections, I consider that Grant Thornton seek to identify arm's length pricing for the particular transaction under consideration. I do not consider that this report, or any of the subsequent reports, is concerned with identifying overall profitability of a business as a whole: the focus is very much on the pricing of individual transactions.”

177. As such, the report was focused on the pricing of individual transactions and not the profitability of the business as a whole. Judge Richards had then gone to say in paragraphs [51] and [52] that, when goods or services were supplied on arm's length terms, it would be normal for them to be charged at OMV although there were cases where that might not be the case. Mr Jones said, that, in saying that, Judge Richards was not saying anything more than that the arm's length price would often be the same as the OMV, which was not surprising given that the first paragraph of Article 72 of the Directive made reference to a supplier's dealing at arm's length with the recipient of the supply. Finally, Mr Jones pointed out that:

- (1) Judge Richards had made it clear in paragraph [52] that his decision, to the effect that the arm's length price and the OMV were the same in that case, was based on the specific facts in the case; and

(2) Judge Richards had not made any general pronouncement as regards the application of the ALP in the determination of OMV but had instead simply said that the objection raised by the Respondents to the Grant Thornton reports was misplaced because those reports were seeking to identify the price which would be paid between parties dealing at arm's length.

178. As for the decision in *Temple UT*, Mr Jones said that the point simply wasn't before the Upper Tribunal.

179. In support of her view that the ALP was relevant to the determination of OMV in the VAT context, Mrs Brown referred us to the report by the European Commission (the "EC") VAT Expert Group on the possible VAT implications of transfer pricing dated 24 April 2017 (the "VAT Report"). Mrs Brown said that:

- (1) this was a report made on behalf of the EC and could therefore be assumed to set out the EC's view on the inter-relationship between the two concepts;
- (2) in section 3.1.1, the VAT Report dealt with the effect of Articles 72 and 80 of the Directive on the consideration which was deemed to be given for VAT purposes and referred to them as "reflecting the arm's length principle for VAT purposes";
- (3) in section 3.2.1, the VAT Report referred to "the arm's length valuation of a transaction (i.e. the open market value)"; and
- (4) in section 3.2.2, the VAT Report referred to Articles 72 and 80 of the Directive as "[introducing] the arm's length principle in the [Directive] where it seemed relevant".

180. In response, Mr Jones said that:

- (1) the VAT Report was merely a discussion document and did not set out the view of the EC. Even if it did, that would not be binding because the meaning of the law in relation to VAT was decided by the CJEU and not by the EC;
- (2) in any event, the focus of the VAT Report was not the relationship between the ALP and OMV for VAT purposes but rather the VAT implications of transfer pricing adjustments made pursuant to the ALP. This could be seen in the heading to the report, in the three paragraphs set out on the first page of the report and in sections 1 and 2.2 of the report; and
- (3) in section 3.2.2, the VAT Report discussed the extent to which the ALP could be imported into the VAT arena and did not reach any concluded view on that question.

### *Conclusion*

181. Our conclusion on this question is that the Respondents are correct in saying that the ALP is relevant only to direct tax and does not apply in the determination of OMV for VAT purposes. We say that because we agree with each of the points set out in paragraphs 172 and 173 above.

182. Of course, the fact that the ALP has no application in the determination of OMV for VAT purposes does not mean that the arm's length price can never be relevant in the determination of the open market value. There will be occasions when those two overlap for the simple reason that the arm's length price for a supply and the open market value of that supply will often, but not invariably, be similar. As Judge Richards observed in *Temple FTT* at paragraph [51], "where services or goods are supplied on "arm's length" terms, it would be normal for them to be charged for at OMV since, if less than OMV were charged, the counterparty would be receiving a gratuitous benefit". (But even that is not invariably the case. Judge Richards then went on to give an example of where no such correlation exists.)

183. The potential overlap referred to above between the arm's length price and the open market value is reflected in the language of the ALP and the language of the first paragraph of Article 72 of the Directive. For instance, the Guidelines, in dealing with the ALP, refer in some places to the "open market". In the same way, the first paragraph of Article 72 of the Directive refers to the identification of the OMV by reference to a supplier dealing at "arm's length".

184. Before addressing in more detail:

(1) the question of what the impact of the potential overlap between the concept of the arm's length price and the concept of open market value might have on the relationship between the application of the ALP and the OMV for VAT purposes; and

(2) the Appellant's contentions in relation to *Temple Finance FTT*, *Temple Finance UT* and the VAT Report,

we should explain that the area of potential overlap we have referred to in paragraphs 182 and 183 above is relevant only in a case where the OMV is being determined pursuant to the first paragraph of Article 72 of the Directive and not the second.

185. That is because it is that paragraph which refers to "the full amount that, in order to obtain the goods or services in question at that time, a customer at the same marketing stage at which the supply of goods or services takes place, would have to pay, under conditions of fair competition, to a supplier at arm's length within the territory of the Member State in which the supply is subject to tax". In other words, the method required by that paragraph for determining the OMV for the supply is to identify the price which the recipient of the supply would have had to pay to a supplier dealing at arm's length. In contrast, when the second paragraph of the article is engaged, there is no reference to the price which would have been paid between parties dealing at arm's length. Instead, the method required by that paragraph for determining the OMV for the supply is to identify the "full cost to the taxable person of providing the service". Whether or not a recipient of the supply would have been prepared to pay to a supplier dealing at arm's length an amount equal to that full cost is simply not relevant to the application of the paragraph.

186. Just to be clear, in saying this we are not contradicting our analysis in paragraphs 162 to 168 above and suggesting that the second paragraph of Article 72 of the Directive is not directed at identifying the price which would have passed between the parties had they been unconnected and instead dealing at arm's length. For the reasons set out in those paragraphs, we consider that it is. That is why that paragraph of the article is entirely consistent with, and does not go against the grain of, the language in Section 19(5) of the VATA. However, there is a difference between the purpose of the paragraph - which is to identify the price that would have been payable had the parties been unconnected and dealing at arm's length - and the method for doing that - which is to identify the full cost of making the supply.

187. Since the method required by the paragraph is to identify the full cost of making the supply, it follows that, where the paragraph applies to a supply, there is no need to address the question of what would have been the arm's length price for the supply. It is for this reason that, in reaching our conclusion in relation to the OMV of the supplies of the Management Services in the paragraphs below, we have seen no need to engage with the debate between the parties in relation to the relevance of the ALP to the OMV of a supply for VAT purposes.

188. Returning then to the question of the potential overlap between the concepts of the arm's length price and the open market value, we agree with Judge Richards that, where goods or services are supplied at arm's length, they will often, but not invariably, also be

supplied at open market value. As noted above, this is simply because of the close correlation between the term “open market” and the term “arm’s length”. But the mere fact that the OMV in cases falling within the first paragraph of Article 72 of the Directive is to be determined by reference to the price which would have been payable between parties dealing at arm’s length, and will therefore often correlate to the arm’s length price, is not the same as saying that the OMV will always be equal to the arm’s length price (which was the point noted by Judge Richards). More importantly even than that, it is a far cry from saying that the OMV is to be determined by reference to the ALP. That is because the ALP is just one way in which an arm’s length price might be calculated.

189. With respect, we think that the Appellant’s case leaps from the fact that the open market value of a supply will often be the same as the arm’s length price for that supply to the conclusion that the ALP must necessarily apply in determining the OMV. We do not see any basis for that. On the contrary, for the reasons given by Mr Jones in paragraphs 172 and 173 above, we consider that the ALP itself – as opposed to the identification of what would have been an arm’s length price - has no place in the context of determining OMV in the VAT regime.

190. There is nothing in the decisions in *Temple FTT* and *Temple UT* which suggests the contrary. In neither case was the question of whether or not the ALP applied in determining the OMV for VAT purposes directly in issue.

191. All that happened in *Temple FTT* was that the Respondents mounted a challenge to the relevance of specific pieces of evidence – namely, the Grant Thornton reports – and Judge Richards rejected that challenge on the specific facts of that case. Those included the fact that the focus of the Grant Thornton reports was on the pricing of the specific supplies which were in issue in the case and not on the profitability of the business as a whole – see *Temple FTT* at paragraph [50]. Given the close correlation to which Judge Richards adverted at paragraph [51] of his decision between the arm’s length price determined by Grant Thornton in those reports and the OMV, Judge Richards saw no reason to discount the reports as valuable evidential tools in the determination of the OMV. In our view, *Temple FTT* did no more than that. It did not say that the ALP should be applied in determining OMV for VAT purposes. It merely held that, on the facts of that case, the Grant Thornton reports were a valuable evidential tool in identifying the OMV for VAT purposes because they provided insights into the arm’s length price of the supplies.

192. The decision in *Temple UT* also didn’t touch on the question which is at issue here. The Upper Tribunal in that case merely considered whether the approach of Judge Richards in the way in which he engaged with the Grant Thornton reports could be criticised.

193. Similarly, there is nothing in the VAT Report which casts doubt on the conclusion reached above. On the contrary, the VAT Report is, if anything, supportive of the Respondents’ position on this point.

194. The focus of the VAT Report, as it says in several places, is on the VAT implications of any adjustments which might be required to be made for direct tax purposes pursuant to the ALP. For example, the first paragraph of section 3.2.1 draws attention to the tension which exists between the approach of the ALP under the transfer pricing rules and the VAT rules, which are based on the consideration actually given even if that consideration does not reflect the OMV of the supply. That section then goes on to explain how that tension between the two regimes makes it hard to see how transfer pricing adjustments made pursuant to the application of the ALP could have VAT consequences. The same view is reiterated in the conclusions in section 3.4 of the VAT Report. Footnote 54 in section 3.2.1 repeats that the focus of the report is on Article 73 of the Directive - which specifies that consideration for



VAT purposes is generally determined by reference to the subjective consideration for the relevant supply - and not on Articles 72 and 80 of the Directive – which deal with the unusual case where that might be overridden.

195. In other words, the VAT Report is focusing on how the VAT regime, which is generally based on the actual consideration for a supply, can deal with an adjustment which is not actual consideration but is instead made for direct tax purposes by reference to the ALP.

196. At section 3.2.2, the VAT Report describes the decision in *FCE* and observes that “some may question whether the findings of the CJEU and the Advocate General apply in scenarios other than that examined in *FCE Bank*”. However, in the context of the rest of the VAT Report, that expression of doubt isn’t suggesting that there might be a correlation between the ALP and OMV. It is merely ruminating on the ramifications of the decision in *FCE* on the interaction between the direct tax regime and the VAT regime in the context of transfer pricing adjustments made pursuant to the ALP. The VAT Report returns to this point in setting out its conclusions in section 3.4, where it notes that “[although] the CJEU has never expressly dealt with this issue, it has in the past limited the potential correlation between a direct tax rule and the rules laid down in the VAT Directive”. The issue referred to in that extract is the tension between the way in which the direct tax regime operates and the way in which the VAT regime operates. It is not the question of whether the ALP should be applied in calculating the OMV. In dealing with that tension, the section refers to the fact that the VAT regime usually operates by reference to actual consideration and that “a price at arm’s length” is required to be used only where certain conditions are satisfied. Conspicuously, the language used in the section is “price at arm’s length”. No reference is made to the ALP.

197. The Appellant sought to rely on the paragraph in section 3.2.2 of the VAT Report, in which it is said that “[the] legislator has already introduced the arm’s length principle in the VAT Directive where it seemed relevant, that is, in the scenarios envisaged under Articles 72 and 80 of the VAT Directive. The determination of the taxable amount of a transaction according to open market value deviates from the general rule laid down in Article 73 of the VAT Directive, which is based on the price actually paid (subjective value).” In our view, when read in the context of the VAT Report as a whole, that extract is not saying that Articles 72 and 80 of the Directive are the embodiment, in the context of the Directive, of the transfer pricing concept of the ALP. It is merely making the point, which we have seen also in *Temple Finance FTT*, that there is a strong correlation between the OMV for VAT purposes and the price reached between parties dealing at arm’s length. Articles 72 and 80 of the Directive represent the one situation where the consideration for a supply for VAT purposes is not subjectively determined but is to be determined by reference to the amount which would be paid between parties dealing at arm’s length. It is saying no more than that. The phrase “arm’s length principle” in that extract is not a synonym for the ALP. Instead the phrase is merely referring to the fact that, by being based on the price which would pass between parties dealing at arm’s length, the OMV is an embodiment of an arm’s length principle.

198. In short, we can see nothing in the VAT Report which suggests that the view of the EC is that the ALP should be used in determining OMV for VAT purposes. On the contrary, the terms of the VAT Report tend to emphasise the differences between the direct tax regime and the VAT regime and therefore to support the proposition that the ALP should not apply in a VAT context.

“Full cost”

199. For the reasons set out in paragraphs 152 to 170 above, in our view, the OMV of the supplies of the Management Services must be “an amount that is not less than the full cost to the [JAMG group] of providing the service”.

200. Neither party was able to provide us with any prior case law authority on the meaning of the phrase “full cost”. We will therefore seek to identify that “full cost” on the facts of this case in the paragraphs which follow.

#### Input tax-bearing costs with a direct and immediate link to the supplies of the Management Services

201. We think that it was common ground that the full cost to the JAMG group of providing the services must at least have included the input tax-bearing costs of the NEDs and the legal and professional advice to the extent that those costs were used in providing the services – in other words, to the extent that the activities of the NEDs and the advice in question were part of the supplies made by the JAMG group to the JIMG group. It follows that the input tax-bearing costs relating to that portion of the NED time and that portion of the legal and professional services were, on any analysis, part of the full cost of making the supplies of the Management Services. They had a direct and immediate link with the taxable supplies of the services and were a cost component in the value of those supplies.

202. There was considerable debate at the hearing as to whether the extent of the Appellant’s allocation of the NED time and/or the legal and professional services to the supplies of the Management Services was or was not correct. Given the conclusion which we reach in the section of this decision which follows, we do not think that anything turns on this debate so far as pertains to input tax-bearing costs relating to the NEDs and/or the legal and professional services. This is because, to the extent that the Appellant under-allocated the NED time and/or those legal and professional services to the supplies of the Management Services – so that more of the input tax-bearing costs associated with that time and/or those services had a direct and immediate link with the supplies than the Appellant considered to be the case – those additional costs would of course also fall to be taken into account as part of the full cost of making the supplies of the Management Services pursuant to the reasoning described in paragraph 201 above. Conversely, to the extent that the Appellant’s allocation of the NED time and/or those legal and professional services to the supplies of the Management Services was correct or indeed an over-allocation, the balance of the input tax-bearing costs associated with that time and/or those services would fall to be treated in the same way as the other input tax-bearing costs the input tax in respect of which was recovered by the JAMG group and therefore the reasoning set out in paragraphs 203 to 210 below applies.

#### Other input tax-bearing costs

##### *Introduction*

203. The parties did not agree on the extent to which the input tax-bearing costs incurred by the JAMG group that did not have a direct and immediate link with the supplies of the Management Services should nevertheless be regarded as forming part of the full cost of those supplies. As we have already outlined in discussing the input tax assessments, the input tax attributable to those costs was recovered by the JAMG group on the grounds that, although the costs in question did not have a direct and immediate link with any supplies made by the JAMG group, it had a direct and immediate link with the JAMG group’s economic activity as a whole.

##### *The Appellant’s position*

204. Mrs Brown said that the words “full cost” in the context of Article 72 of the Directive were not apt to include those costs. She said that those costs – as exemplified by the costs associated with the IPO - were not in any meaningful sense “used” to make the supplies of the Management Services. Instead, the input tax on those costs was recoverable only because the costs were general overhead costs and, as such, fell to be recovered automatically under the case law described in paragraph 123 above.

205. Mrs Brown was prepared to accept that, in the case of certain suppliers, general overhead costs would form part of the cost base of supplies which were made by those suppliers. For example, she accepted that the electricity or other overhead costs of a shopkeeper might well be cost components of the supplies made by the shopkeeper because, although there was no direct and immediate link between those costs and any particular supplies made by the shopkeeper, the shopkeeper could not supply its products without incurring those costs. Accordingly, in that instance, it would be appropriate to see the relevant overhead costs as having a direct and immediate link with the shopkeeper’s economic activity as a whole and therefore part of the full cost of making the supplies taking place in the course of that economic activity.

206. However, she said that the same was not true of the general overhead costs in this case because the costs in question related to supplies of goods and services to the JAMG group which had not in any sense been used to make the supplies of the Management Services. Those costs were completely unrelated to the supplies of the Management Services. They were merely general overhead costs. And, whereas a shopkeeper’s use of the costs forming part of its general overheads to make the supplies of its products could be evidenced by the fact that, unless the consideration which it received for those supplies was sufficient to discharge those costs, it would rapidly cease to trade, the same was not true of the JAMG group in this case. Instead, the general overhead costs of the JAMG group might just as easily be met out of the dividends received by the JAMG group from its subsidiaries as they could out of the fees received by the JAMG group for the supplies of the Management Services.

#### *The Respondents’ position*

207. Mr Jones said that, on the contrary, if the input tax in respect of the general overhead costs was recoverable by the JAMG group, then that could be only because there was a direct and immediate link between those costs and the economic activity of the JAMG group as a whole. The only economic activity of the JAMG group was the supplies of Management Services. Since the CJEU case law showed that input tax recovered on costs which had a direct and immediate link with the economic activity of a taxable person as a whole was being recovered on the basis that the costs in question were cost components of the taxable supplies taking place in the course of that economic activity, the costs in question in this case must therefore necessarily form part of the full cost to the JAMG group of providing those services.

#### *Conclusion*

208. This dichotomy lies at the heart of the appeals in this case. It stems from the way in which the CJEU has applied the input tax recovery rules to holding companies that, in addition to holding shares in their subsidiaries and receiving dividends from those subsidiaries, also make supplies of management services to those subsidiaries. As we have outlined in paragraphs 121 to 136 above, the CJEU treats input tax-bearing general overhead costs incurred by a holding company which falls to be treated as having only one activity, that being an economic activity of making supplies of taxable management services to its subsidiaries, as having a direct and immediate link with that economic activity and therefore

as being cost components in the provision of supplies within that economic activity by the holding company, without any regard to whether or not those costs have actually been used to make the supplies in question and therefore are, in reality, cost components of the supplies in question. The various decisions cited in the paragraphs mentioned above say this expressly. And yet that treatment overlooks the fact that, in reality, a holding company is not like a shopkeeper whose general overhead costs are actually used to make, and therefore cost components of, the supplies of the shopkeeper's products. Unlike the shopkeeper, there was no meaningful sense in which the JAMG group could be said to have "used" the input tax-bearing costs associated with the IPO in making its supplies of the Management Services. Those costs might well be deemed to be cost components of the economic activity with the result that the input tax attributable to those costs was recoverable. But that doesn't mean that the relevant costs were actually used in the course of that economic activity.

209. This leads inevitably to the question of whether the same fiction as that described in paragraph 208 above ought to be applied when it comes to determining the full cost of providing the Management Services which were supplied in this case by the JAMG group to the JIMG group. There are only two possible conclusions:

- (1) the first is that the Appellant is right to say that, as the input tax-bearing general overhead costs were not actually used to make the supplies of the Management Services, those costs did not form part of the full cost to the JAMG group of providing the Management Services; and
- (2) the second is that the Respondents are right to say that, if the input tax in respect of the input tax-bearing general overhead costs is recoverable, then that can be only because those costs were deemed to be cost components of the supplies of the Management Services and they must therefore necessarily form part of the full cost to the JAMG group of providing the Management Services.

210. The Appellant's approach has the benefit of accords with the commercial reality. The Respondents' approach has the benefit of treating the input tax and output tax sides of the JAMG group in a consistent way. We find this to be a difficult question to determine. The answer can hardly be said to be clear and, were it still to be within our remit, this might well have been a question to be referred to the CJEU. However, on balance, we have decided that the Respondents' view is to be preferred. We say that for the following reasons:

- (1) as its name suggests, VAT is a tax on added value. The essence of the tax is that each taxable person should suffer the burden of the tax on the value which it adds in the supply chain. That is not to say that, in any VAT period, a taxable person's input tax cannot exceed its output tax. There are all sorts of reasons why there might be such an excess, including the fact that the taxable person's supplies are subject to VAT at a lower rate than the supplies it receives, the fact that the taxable person has made a loss or the fact that the cash flows of the taxable person are such as to create a timing mismatch;
- (2) consistent with the fundamental basis of the tax, Article 168 of the Directive, which is the origin of the right to deduct input tax, refers to that right as arising only in relation to goods and services which are used for the purposes of the taxed transactions of the taxpayer. It is that language which creates the necessary nexus between the recoverability of input tax and the use of the costs to which the input tax relates in making taxable supplies;
- (3) the CJEU has outlined two distinct ways of recovering input tax. The first is where the taxable person is able to show a direct and immediate link between the goods or services to which the input tax relates and a taxable supply. In that case, the

expenditure attributable to those goods or services is said to be “a component of the cost” of the taxable supply. The second is where the taxable person is able to show that the goods or services have a direct and immediate link with the economic activity of the taxable person as a whole but, in that event, the relevant input tax is recoverable only to the extent that the economic activity involves the making of taxable supplies. In that case, and to that extent, the expenditure attributable to those goods or services is said to form part of the “cost components” of the taxable supplies made in the course of the economic activity;

(4) the language used to describe the second category set out above is of course easy to operate and perfectly apt when it comes to general overhead costs incurred by a shopkeeper. In that case, the relevant costs are clearly incurred in the course of the shopkeeper’s economic activity as a whole and are a necessary cost of the supplies made by the shopkeeper. However, it is less easy to operate in the case of a holding company which both makes supplies of management services to, and holds shares in and receives dividends from, its subsidiaries. This is because, in that case, the shareholdings and the receipt of the dividends in respect of those shareholdings, despite being a non-economic activity, are disregarded when the input tax recovery position is addressed and there is, in a sense, a fiction which operates to treat the sole activity of the holding company as its taxable economic activity of making supplies of management services. It is implicit in the reasoning underlying that fiction that the input tax-bearing general overhead costs are a cost component of the sole activity carried on by the holding company – namely, its economic activity of making supplies of management services;

(5) turning then to the present question, it is necessary to consider whether that same fiction should operate when construing the words “full cost” in Article 72 of the Directive or whether those words should instead be construed without regard to that fiction and simply by reference to economic reality;

(6) although it is tempting to conclude that the latter is the correct approach to adopt, we think that that approach would be inconsistent with a fundamental principle of the VAT system as a whole, which is that input tax on costs should be recoverable only to the extent that the costs in question are cost components of the taxable person’s taxable supplies. The language used by the CJEU in the input tax cases cited above makes it clear that the basis for allowing a holding company with just a single economic activity of making supplies of management services to recover the input tax on its general overhead costs is that those costs are “cost components” of those supplies. That is how the CJEU analysed the position in *Cibo*, *Larentia* and *Marle*, as described in paragraph 123 above. And, if they are “cost components” of those supplies for the purposes of the recoverability of the input tax attributable to them, then they must surely form part of the “full cost” of making those supplies;

(7) although it is not directly in point, support for this approach may be found indirectly in the judgment of Lewison LJ in *Birmingham Hippodrome Theatre Trust Limited v The Commissioners of Her Majesty’s Revenue and Customs* [2014] EWCA Civ 684 at paragraphs [35] to [37] and [54]. In those paragraphs, Lewison LJ makes the point that the VAT system should be seen as a coherent integrated whole and that it would be wrong to address the output tax position in any case without also taking into account the input tax position in that case. The same connection between input tax and output tax may be seen in the circumstances specified in Article 80 of the Directive. An OMV direction may be made under that article only in circumstances where the fact that the consideration passing between the parties to the supply differs from the OMV

has an impact on the input tax recovery position of either the supplier or the recipient of the supply; and

(8) in summary, we think that the same fiction which applies for the purposes of the input tax analysis – to the effect that the input tax-bearing general overhead costs of a holding company are cost components of the taxable supplies of management services by the holding company despite the fact that, in addition to its supplies of management services, the holding company holds shares in its subsidiaries and receiving dividends on those shares - should necessarily apply for the purposes of the output tax analysis in relation to that holding company.

#### Conclusion in relation to input tax-bearing costs

211. Based on the conclusions set out in paragraphs 201 to 210 above, we consider that the OMV of the supplies of Management Services should include all of the costs the input tax in respect of which was recovered by the JAMG group at the relevant time. This is because, to the extent that costs to which that input tax related did not have a direct and immediate link with the supplies of the Management Services, they had a direct and immediate link with the economic activity carried on by the JAMG group and therefore formed part of the cost components of the supplies made in the course of that economic activity.

212. The conclusions in paragraphs 201 to 210 above effectively mean that all of the costs the input tax in respect of which was recovered by the JAMG group while the Management Services were being supplied formed part of the full cost of providing those supplies.

#### Non-input tax-bearing costs

So far, in considering the costs which are to be taken into account in determining the full cost to the JAMG group of providing the Management Services, we have just considered those costs the input tax in respect of which was recovered by the JAMG group.

#### Exempt and zero-rated supplies

213. Of course, that exercise does not complete the picture because it is also necessary to consider whether the JAMG group incurred costs in making the supplies which did not themselves carry input tax.

214. We are of the view that, to the extent that those costs related to goods and services which were actually used by the JAMG group in making the supplies of the Management Services, they also formed part of the full cost of providing those services. Thus, to the extent that the JAMG group used exempt or zero-rated supplies of goods or services to make the supplies of the Management Services, the costs attributable to those exempt or zero-rated supplies formed part of the full cost of making the supplies of the Management Services.

215. Conversely, to the extent that the JAMG group received supplies of exempt or zero-rated goods or services which were not used to make the supplies of the Management Services, the costs attributable to those exempt or zero-rated supplies did not form part of the full cost of making the supplies of the Management Services.

#### The EDs

##### *Part of the full cost?*

##### Introduction

216. The full cost of providing the supplies of the Management Services also included any costs of the JAMG group in respect of the EDs to the extent that such costs related to work carried out by the EDs in providing the Management Services.

217. However, in order to be included, the costs in question need to have been costs of the JAMG group, as opposed to costs of some other person – for example, in this particular case, the JIMG group. This is because Article 72 of the Directive refers to the “full cost to the taxable person of providing the service”.

#### The Appellant’s position

218. Mrs Brown submitted that no such cost was so borne. She made the point that it was common ground that the EDs’ remuneration had been discharged exclusively by the Payer, a member of the JIMG group, and that there was no evidence that either PLC or any other member of the JAMG group had actually compensated the Payer in respect of that remuneration or that the parties considered that PLC or any other member of the JAMG group had an obligation to do so.

#### The Respondents’ position

219. In reply, Mr Jones said that there could be no doubt that the contractual obligation to pay the remuneration rested solely with PLC and not with the Payer or any other member of the JIMG group. No JIMG group company was party to the EDs’ employment contracts and there was no evidence that any entity in the JIMG group had assumed from PLC the contractual obligation to pay the EDs’ remuneration. As such, when the Payer paid the remuneration to the EDs, the PLC became obliged to reimburse the Payer in respect of that remuneration. That was a consequence which arose automatically as a matter of law and existed regardless of the fact that the reimbursement obligation had never been discharged or the fact that, in the solus accounts of PLC and the Payer, the reimbursement obligation was not reflected as a liability of PLC or as an asset of the Payer. On that basis, to the extent that the remuneration received by the EDs reflected the work done by the EDs in the performance of the Management Services, that was properly to be taken into account as part of the full cost incurred by the JAMG group in making the supplies of the Management Services.

220. In support of his submission, Mr Jones referred us to an extract from a leading contract law text book – Chitty on Contracts (33<sup>rd</sup> Edition) (“Chitty”). He pointed out that paragraphs 29-119 to 29-122 of that edition stated that:

- (1) where a payment was made to a third party by one person (A), at the request, whether express or implied, of another person (B); or
- (2) where B had the option to ratify a payment made by A to a third party and exercised its option to do so,

then A was entitled to be reimbursed by B. The basis of any such claim was not obviously contractual because the implied request was often fictional. However, the ground for recovery was “akin to the principle of the law of agency which imposes on the principal an obligation to indemnify his agent against any liability which he may incur in the exercise of his authority”. In addition, “[where] the payment has benefited [B], liability can be explained by reference to the unjust enrichment principle”.

#### Conclusion

221. We have found this question surprisingly complicated given the conclusions that we have previously reached to the effect that:

- (1) PLC, within the JAMG group, was the sole employer of the EDs and the only company in the Jupiter Group with the contractual obligation to discharge, or procure the discharge of, the EDs’ remuneration; and

(2) when the EDs were performing activities which fell within the scope of the definition of the Management Services in the relevant MSA, the EDs were acting in their capacity as the employees of PLC.

222. We should start by observing that it would be very surprising if, notwithstanding those two conclusions, we were to find that the cost of providing the EDs' remuneration, to the extent that that remuneration related to the activities which fell within the scope of the definition of the Management Services in the relevant MSA, were not to form part of the full cost to the JAMG group of providing those services. Any such finding would be counter-intuitive and entirely inconsistent with the above conclusions.

223. Nevertheless, it is still necessary to consider whether the contrary, logical and consistent, finding is justified as a matter of law. We have found it helpful to address this question in three separate parts, as follows:

(1) first, on each occasion when the Payer discharged the remuneration, did the Payer thereby acquire a right to reimbursement from PLC in respect of the relevant payment? In that regard, the mere fact that PLC was liable to the EDs to make the relevant payment and that the Payer made the relevant payment is not of itself sufficient to establish that the Payer had a claim for reimbursement from PLC. Instead, it must be established that there is some principle of law whereby that right to reimbursement arose and PLC had an obligation to bear the cost of the payment;

(2) secondly, assuming that the answer to the first question is in the affirmative, is the Payer's right to reimbursement in relation to each payment still enforceable or is it now time-barred? and

(3) thirdly, if the right to reimbursement in relation to a payment is no longer enforceable, can the reimbursement amount nevertheless still be regarded as part of the full cost to PLC, and hence the JAMG group, of making the supplies of the Management Services?

224. Turning to the first of these questions, depending on the precise facts, we consider that there are two alternative bases which lead to the conclusion that the Payer acquired a right to reimbursement from PLC in respect of each payment of remuneration. Both such bases are quasi-contractual and restitutional in nature. Which of the two bases applies ultimately depends on which of the two paragraphs in paragraph 95 above properly describes the facts in this case. In other words, the position depends on whether, at the time when the relevant payment of remuneration was made:

(1) PLC and the Payer believed that the liability to discharge the remuneration was a liability of the Payer and not PLC; or

(2) PLC and the Payer knew that the liability to discharge the remuneration was a liability of PLC but decided that, because PLC was entitled to procure that the liability could be discharged by another company in the Jupiter Group and had directed the EDs to provide their services to the Payer, the remuneration should be discharged by the Payer.

225. If the former was the case, then the Payer will have acquired a right to reimbursement against PLC on the basis that PLC was unjustly enriched as a result of the mutual mistake in relation to the contractual position. It is well-established that, where a person makes a payment as a result of a mistake, he is entitled to recover the relevant amount from the person enriched by the payment. Although the latter person is normally the recipient of the payment in question, the extract from Chitty referred to in paragraph 220 above shows that the principle is as applicable in a case where the enrichment arises because the payment in



question discharges the other person's liability as it is in a case where the enrichment arises because the payment is made to the other person.

226. Thus, if, in this case, at the time when the relevant payment of remuneration was made, both PLC and the Payer were under the mistaken apprehension that the liability to make that payment rested with the Payer and not PLC, then the Payer will have acquired a right of reimbursement against PLC at that time as a result of that mistake – see, for example, *Kelly v Solari* SC 11 LJ Ex 10; 6 Jur 107 (“*Solari*”) and *Graham Leslie v Farrar Construction* [2015] EWHC 58 (TCC). That right to reimbursement will have arisen immediately when the payment of remuneration was made. There will have been no need for the Payer to make a demand for reimbursement from PLC at the time – see *Baker v Courage & Co* [1910] 1 KB 56 and *Fuller v Happy Shopper Markets Limited* [2001] 2 Lloyd's Rep 49 – and the fact that the Payer may have had the means of knowing of its mistake was not a bar to a claim – see *Solari* and also *Scottish Equitable plc v Derby* [2001] 3 All ER 818.

227. It used to be considered that no right to restitution arose in respect of a payment made pursuant a mistake of law. That distinction no longer exists – see Chitty at paragraphs 29-044 and following and the decision of the House of Lords in *Kleinwort Benson Limited v Lincoln City Council* [1999] 2 AC 349. However, in any event, the mistake in this case will have been a mistake of fact – namely, a mistake as to which company in the Jupiter Group had the contractual obligation to ensure that the EDs were paid. In this respect, the situation is similar to that pertaining in the case of *Anglo-Scottish Beet Sugar Corporation, Limited v Spalding Urban District Council* [1937] 2 KB 607 (“*Spalding*”), where the claimant had made overpayments for water supplies which it had received from the defendant because both it and the defendant were unaware of a reduction in the rate payable effected by a later agreement between the parties. Atkinson J held that a mistake as to private contractual rights and obligations was a mistake of fact and not of law and therefore a restitution claim was not barred where a person made a mistake in thinking that he or she had an obligation to make a contractual payment which he or she did not have (see *Spalding* at pages 615 to 617). Consequently, in that case, the claimant was able to re-claim the overpayments from the defendant.

228. In contrast, if the facts in this case were that PLC and the Payer knew that the liability to discharge the remuneration was a liability of PLC but decided that, because PLC had directed the EDs to provide their services to the Payer, the EDs' remuneration should be discharged by the Payer, then the quasi-contractual right on which the Payer will have been entitled to rely in order to claim reimbursement against PLC was the one to which Mr Jones referred in the submissions summarised in paragraph 220 above. In other words, in this scenario, since both the Payer and PLC will have been aware that the contractual obligation to pay the remuneration was PLC's, the Payer can have discharged that obligation only because it was requested by PLC to do so, either expressly or impliedly.

229. In relation to this alternative basis of claim, the analysis proceeds as follows. Both the Payer and PLC were aware that PLC had the obligation to discharge, or procure the discharge of, the remuneration. The employment contracts expressly contemplated that, instead of discharging the remuneration itself, PLC could procure another member of the Jupiter Group to do so. As the parent company of the Jupiter Group, PLC was in the position of being able to do so. It could exercise its control of the Payer to ensure that the Payer discharged its obligations. It follows that, whether expressly or impliedly, PLC must have requested the Payer to make the payments. There is no other explanation for the fact that, in circumstances where both parties were aware that it was PLC which had the obligations to pay the EDs and the employment contracts made provision for PLC to procure that another company in the Jupiter Group discharged those obligations, the Payer in fact discharged the obligations. It is

not even necessary to have recourse to the principle mentioned by the Court of Appeal in *Falcke v Scottish Imperial Insurance Company* (1886) 34 Ch. D 234) that “the existence of a request to make [a] payment might be implied from slight circumstances”.

230. In summary, depending on the precise reason why the Payer discharged the obligations of PLC in respect of the EDs’ remuneration, this is a case where the EDs’ remuneration will have been discharged by the Payer either because of a mistaken understanding as to the contractual position or because the Payer must have been directed by PLC, either expressly or impliedly, to do so. Either way, the Payer will have acquired a right to reimbursement against PLC in respect of the remuneration on each occasion when that discharge occurred.

231. That conclusion leads on to the second question, which is whether the right to reimbursement which arose on each occasion when the remuneration was discharged currently remains enforceable. In *In Re Diplock* [1948] Ch 465, the Court of Appeal held that the limitation period applicable to “simple contracts” in what is now Section 5 of the Limitation Act 1980 applied also to “actions for money had and received”. Section 5 imposes a limitation period of six years. Although the claims in this case related to the discharge of obligations, as opposed to the receipt of payments, we consider that the same principle applies to the former as to the latter and Chitty, at paragraph 28-002, appears to adopt a similar approach in stating that restitutionary claims will in general be barred after six years. Under Section 32(1)(c) of the Limitation Act 1980, the limitation period for an action for relief from the consequences of a mistake does not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered his mistake. As a result of the above, we consider that, in this case:

- (1) if the Payer’s reimbursement rights against PLC arose as a result of a mistake, each such right will have ceased to be enforceable six years after the payment was made or, if later, six years after the date on which the Payer either discovered the mistake or could with reasonable diligence have discovered the mistake; and
- (2) if the Payer’s reimbursement rights against PLC arose as a result of the express or implied request of PLC, each such right will have ceased to be enforceable six years after the payment was made.

232. In our view, in the former case, the Payer would have known of the mistake at the time of making each payment had it exercised the appropriate due diligence. Consequently, regardless of how the rights to reimbursement arose, the six year limitation period in relation to each such right will have run from the date when the payment giving rise to the right was made. As the last such payment was made more than six years ago, none of the rights to reimbursement remains enforceable.

233. The analysis set out above means that:

- (1) PLC has not actually reimbursed the Payer in respect of the discharge of the remuneration;
- (2) PLC has never reflected in its solus accounts an obligation to reimburse the Payer in respect of that discharge; and
- (3) although the Payer was, at the time when each payment of remuneration was made, entitled to enforce a claim to reimbursement against PLC in respect of the payment, that claim is no longer enforceable by the Payer against PLC.

This naturally leads on to the third question which is can it still be said that each reimbursement amount was nevertheless part of the full cost to PLC of supplying the Management Services?

234. We can see how it might be said that the answer to the above question must be in the negative for the simple reason that the cost will now never be borne by PLC. However, we do not think that it is necessary for that to be the case before concluding that the reimbursement amounts were part of the full cost to the JAMG group of making the supplies of the Management Services. This is because, in our view, it is sufficient in this context that the reimbursement obligations arose, even if they have not been, and will now never be, discharged. To reach any other conclusion would be to drive a coach and horses through the underlying principle in the second paragraph of Article 72 of the Directive, which is to identify the open market value of the relevant supply by reference to the costs associated with making the supply. In that context, what is relevant in our view is that, in order to make the supply, the supplier has become obliged to incur a cost. It is not relevant that the supplier has actually incurred that cost. After all, the open market value of a supply, and the amount which would be paid for it by an unconnected party, will not change simply because an obligation incurred by the supplier in order to make the supply has not been discharged. (We would add that, although it makes no difference to the conclusion reached above, the effect of the Limitation Act 1980 is merely to bar enforcement of the reimbursement rights and not to extinguish them – see *Chitty* at paragraphs 28-127 and 28-128 and *Bize v Dickason and another, assignees of Bartenshlag* (1786) 1 Term Reports 285; 99 ER 1097. Thus, the reimbursement obligations of PLC remain in existence even now and are merely unenforceable by the Payer).

235. The conclusions set out above mean that the portion of the EDs' remuneration which was attributable to the EDs' activities in carrying out the supplies of the Management Services was part of the full cost to the JAMG group of making those supplies and therefore falls to be taken into account in determining the OMV of those supplies. As we have already intimated in paragraph 222 above, that determination is entirely consistent with the conclusions which are summarised in paragraph 221 above. Having concluded that it was PLC which was the EDs' employer and that, in carrying out the activities which fell within scope of the definition of the Management Services in the relevant MSA, the EDs were carrying out their duties as employees of PLC, logic would suggest that the full cost of the supplies of the Management Services should include the remuneration associated with that part of the EDs' overall activities. If that were not to be the case, then there would be a clear mismatch between the scope of the Management Services and the items taken into account in determining the full cost of providing those services.

236. That suffices to conclude our consideration of whether the full cost of the supplies of the Management Services should include the EDs' remuneration to the extent that the remuneration related to the activities performed by the EDs in connection with the supplies of the Management Services. However, for completeness, we would just note that the consequence of the analysis set out above is that, in our view, when the Payer made each payment of the EDs' remuneration, it became entitled to be reimbursed by PLC for all of the EDs' remuneration and not just for the part of the EDs' remuneration which related to the activities performed by the EDs in connection with the supplies of the Management Services. PLC should not of course have suffered the ultimate burden of that remuneration except to the extent that the remuneration related to the activities performed by the EDs for PLC other than in connection with the supplies of the Management Services – the so-called "shareholder activities". Thus, just as PLC ought logically to have imposed a charge under each MSA to recover the cost of the remuneration to the extent that the remuneration related to the activities performed by the EDs in connection with the supplies of the Management Services, so too should PLC have charged a fee to the JIMG group to recover the cost of the remuneration to the extent that the remuneration related to the activities performed by the EDs for the JIMG group at PLC's behest.

## *Rate of remuneration*

### Introduction

237. At the hearing, there was some discussion, albeit in the slightly different context of the application of the ALP, as to what rate of remuneration should be taken into account in determining what part of the overall cost of the EDs should be taken into account in valuing the supplies of the Management Services.

### The Appellant's position

238. Mrs Brown submitted that, when the EDs were participating in, or preparing for, Board and strategy day meetings as Board members of PLC, the relevant rate should reflect the rate of remuneration earned by the NEDs because, in so acting, the EDs were performing the same function as the NEDs. She said that, on that basis, it would be wrong simply to carry out an apportionment of the overall remuneration earned by the EDs by reference to the time spent by the EDs on the provision of the Management Services.

### The Respondents' position

239. Mr Jones said that Mrs Brown's view presupposed that the EDs were acting in the performance of the supplies of the Management Services in a much narrower range of circumstances than was actually the case. Moreover, it also presupposed that, in participating in, and preparing for, Board and strategy day meetings, an ED was performing a similar service to that of a NED simply because the ED was doing the same things as a NED whereas, in reality, the EDs were playing a very different role from the role played by the NEDs when they did those same things.

### Conclusion

240. In our view, for the purposes of calculating how much of the reimbursement obligation owed by PLC to the Payer in respect of the EDs' aggregate remuneration should be taken into account in determining the full cost of the supplies of the Management Services, it would be inappropriate to take account of the activities of the NEDs (and the rate of remuneration earned by the NEDs) at any stage. That would be to start from the wrong position. Instead, we believe that it would be correct to focus solely on the remuneration paid to the relevant ED overall and then seek to divide that aggregate remuneration into two parts – the part which was referable to the carrying out of the supplies of the Management Services and the part which was referable to the rest of the ED's activities – whether those were activities for the JAMG group other than in the performance of the Management Services or activities for the JIMG group, most notably, in the day-to-day operations of the JIMG group. It is not apparent to us that, in carrying out that allocation, any basis other than time apportionment would be appropriate. Each ED was carrying out the duties of an ED at all times when he or she was working. In so doing, he or she was bringing to bear on the relevant activity his or her own set of skills and experience and using those to progress the affairs of the Jupiter Group as a whole. To try to identify a different rate of remuneration for each of the various different activities involved in the overall package of activities seems to us to be artificial, unnecessarily time-consuming and ultimately futile. We therefore consider that the time spent on each relevant activity would be an appropriate basis for the apportionment.

241. We were not presented with any evidence as to the proportion of time which was spent by each ED in carrying out the supplies of the Management Services. This was because the Appellant's case was based on propositions as to the nature and scope of the Management Services, and the EDs' role in the provision of the Management Services, with which we have ultimately decided we do not agree. We therefore have no means of knowing what

proportion of the overall time which was spent by each ED was spent on activities relating to the carrying out of the supplies of the Management Services.

### The basis of calculating the output tax

#### *Introduction*

242. As noted in paragraph 137 above, the output tax assessment in respect of each VAT period which is relevant to this decision was made by the Respondents on the basis of the costs which had been incurred by the JAMG group in the VAT period immediately preceding the VAT period to which the assessment related. In response to a question which we posed following the hearing, Mrs Brown submitted that that approach bore no relationship to the correct position in law.

#### *The Appellant's position*

243. Mrs Brown said that:

- (1) as continuous supplies, the supplies of the Management Services were, for VAT purposes, deemed to be made on an ongoing basis on the earlier of the date when each payment was made or the related invoice for that payment was issued – see paragraph 90 of The Value Added Tax Regulations 1995 (SI 1995/2518). Each of those dates was a tax point in relation to the supplies;
- (2) the fact that the OMV Direction applied to the supplies did not change the tax points for the supplies. It merely changed the consideration which was deemed to have been given for the supplies;
- (3) in the present case, the JAMG group invoiced the JIMG group quarterly for 25% of each year's annual fee and payment of those invoices was in each case made after the date of the relevant invoice. Thus, the invoice date was, in each case, the tax point for the relevant supply;
- (4) the question which therefore arose was how the full cost of the supplies of the Management Services, however it was determined, should have been apportioned to each tax point which arose during the annual period when the Management Services were supplied;
- (5) whilst the Appellant of course did not accept that the OMV of the supplies should be calculated by reference to the full cost of the supplies, in the event that we disagreed with that, the full cost should be calculated on an annual basis – which is to say, over the same period as that to which each annual fee related – and then that amount should be apportioned equally across the tax points arising in that annual period in the same way as the annual fee. That would then enable a comparison to be made between the actual quarterly fee which had been invoiced in the relevant VAT period and the OMV of the supply to which that quarterly fee related; and
- (6) the JAMG group had occasionally, in addition to the four equal instalments of each annual fee, invoiced the JIMG group for some specific re-charges arising out of the fact that a particular service provider had billed an entity in the JAMG group for services provided to an entity in the JIMG group and in respect of which, rather than ask for the service provider to reissue the relevant invoice, the JAMG group had instead increased the recharge to the JIMG group. Mrs Brown referred in this context to the VAT period 08/11, where the JAMG group had accounted for VAT in the sum of £66,138 when the invoice for the Management Services in that period showed VAT of £5,060 – 20% of  $\frac{1}{4}$  of the annual charge (excluding VAT) of £105,000. Mrs Brown said that those re-charges would also need to be reflected as additional tax points for the

supplies of the Management Services in the allocation of the full cost over the year in which they arose.

#### *The Respondents' position*

244. In response, Mr Jones said the following:

- (1) he agreed that there were four tax points within each year when the invoices in relation to the supplies were issued;
- (2) however, he noted that, whereas the invoices were issued at the end of each calendar quarter – which is to say, the end of each of March, June, September and December - the VAT periods of the JAMG group did not coincide with those dates. In fact, the VAT periods of the JAMG group ran to the end of each of February, May, August and November;
- (3) as such, in relation to each quarterly period to which an invoice related, two months of that period fell within the preceding VAT period. For example, the invoice of 30 September 2010 related to the supplies of the Management Services over the period between 1 July 2010 and 30 September 2010 and two months of that period fell within the VAT period of the JAMG group ending on 31 August 2010;
- (4) that meant that, so far as the Respondents were concerned, the costs reflected in the return for the last complete VAT period were an appropriate basis by reference to which the full cost of each supply should be determined. Whilst that was not a complete match to the period over which the relevant supply had been made, such a complete match was impossible given the mismatch between the quarters under the MSAs and the VAT periods and it was a closer match than using the costs reflected in the return for the VAT period in which the relevant supply was treated as being made. The latter involved only a one-month overlap whereas the approach adopted by the Respondents involved a two-month overlap;
- (5) the Respondents' approach also avoided an issue inherent in the approach favoured by the Appellant and set out in Mrs Brown's submission, of looking at the position over the whole year and therefore potentially taking into account in determining the full cost of a supply costs which were not incurred until after the relevant supply was made; and
- (6) the Respondents had made their output tax assessments to the best of their judgment, based on the evidence which they possessed at the time. Given the reasoning set out above, the Respondents' approach was not arbitrary. The fact that the Appellant might not agree with how the judgment had been exercised did not invalidate the assessments – see *Dale Global Limited v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKFTT 363 (TC) at paragraph [112].

#### *Conclusion*

245. In considering this issue, we should start by noting that the only fees paid for the supplies of the Management Services were the ones set out in clauses 3 and 4 of the First MSA and clause 4 of the Second MSA. The fees payable under the First MSA were described as being “the costs incurred in the provision of the [Management Services] plus 10 per cent or as agreed between the parties from time to time”. The parties in fact agreed that the fees would be fixed at £105,000 per annum (excluding VAT) and would not fluctuate by reference to actual costs. Pursuant to clauses 3 and 4 of the First MSA, the fees were payable periodically “on a quarterly basis, or such other period as agreed between the parties”. The fees payable under the Second MSA were described as being “the actual cost from time to

time to [PLC] of providing the [Management] Services (which is £340,000 per annum as at the Effective Date)". Pursuant to clause 4 of the Second MSA, the fees were payable quarterly in arrear "in respect of the [Management] Services provided during the immediately preceding quarter".

246. Two points stem from the above language, as follows:

(1) first, it means that the re-charges described in paragraph 238(6) above can play no role in relation to this question. However those re-charges may be characterised, one thing which they were not was part of the consideration for the supplies of the Management Services. That consideration was solely the amounts which were paid between the parties as the fees under the relevant MSA. Whilst the JAMG group may well have accounted for additional VAT in respect of those re-charges, we do not see them as affecting the tax points of the supplies of the Management Services under the MSAs and therefore as affecting the analysis in relation to the full cost of those supplies; and

(2) secondly, we think that it would be wrong to describe the fees for the supplies of the Management Services as being annual fees. As regards the fees payable under the First MSA, there was no mention of an annual period at all. The only period mentioned in the First MSA was the quarterly period by reference to which the fees were payable. The fees were subsequently agreed at a certain amount per annum but this did not change the fact that they were expressed to be payable quarterly. As regards the fees payable under the Second MSA, the fees were expressed to be equal to actual costs and a statement was made that those actual costs were agreed to be a certain amount per annum as at the date when the Second MSA became effective. However, again, the language used in the Second MSA made it apparent that the fees were to be paid quarterly. Moreover, in the case of the Second MSA, the link between the period of payment and the period of supply was made even more explicit, in that each payment of fees was expressed to be due in respect of the immediately preceding quarter. In the case of both MSAs, therefore, there was no annual period by reference to which the fees were expressed to be payable. For example, no mention was made of fees' being payable for a year following the effective date and then a year following each anniversary thereof. The sole link to the period of a year in the case of each MSA was that the fees were agreed to be a certain amount "per annum". In our view, the mere fact that the fees were a certain amount per annum did not make the fees annual fees. That reference did not outweigh the express reference in the drafting to the fees' being payable quarterly (in the case of the First MSA) and to the fees' being payable quarterly in respect of the preceding quarter (in the case of the Second MSA).

247. Taking the above into account, we think that there is no justification in the terms of either MSA for adopting the approach proposed by the Appellant of calculating the costs over the period of a year and then dividing the relevant amount into four pieces. Since the Management Services were supplied quarterly, there is no reason to think that the calculation of full cost should be made by reference to costs incurred over the course a whole year. Moreover, as the Respondents pointed out, taking into account, in the full cost calculation, costs incurred over the course of a whole year would mean that a cost which was incurred in a period falling after the quarter in which the supply was made would potentially be taken into account in calculating the OMV of the supply taking place within that quarter, so that, not only would the amount of that cost be unknown as at the date when the supply was made but also the output tax arising by reference to that cost would have had to be accounted for before the input tax to which that cost related fell to be recovered. These features would be unusual to say the least.

248. The conclusion we have reached means that an approach which attempted so far as possible to equate the costs incurred over the quarter to which the supply related with the OMV of the relevant supply appears to us to be much more logical than the annual basis proposed on the part of the Appellant.

249. Having said that, because of the mismatch between the quarters over which the supplies were made and the VAT periods of the JAMG group, it was impossible to determine the costs with that level of precision. The approach adopted by the Respondents was the closest method possible to achieving the perfect symmetry. It both had the greatest degree of overlap between the period of the supply and the period over which the costs were calculated – two months instead of one month – and avoided the need to take into account in determining the OMV of any supply a cost incurred after the date of the supply.

250. In the circumstances, bearing in mind that the Respondents were making the output tax assessments to the best of their judgment, we do not think that the method they adopted can be said to have been unreasonable. On the contrary, we think that the method they adopted was both reasonable and the most practical one available in the circumstances.

#### Conclusion in relation to the output tax assessments

251. The analysis set out above leads to only one possible conclusion, which is that the output tax assessments must be upheld.

252. Whilst we have not investigated the minutiae of the output tax assessments and therefore cannot be certain whether the amount of each such assessment is accurate, we think that it is highly likely that each assessment was not correct, although it may have been an understatement or an overstatement. Our reasons for saying this are as follows.

253. Each output tax assessment was predicated on the assumption that the actual consideration for the supply of the Management Services in the quarter to which that assessment related was the actual consideration paid in that quarter under the relevant MSA. It then compared that actual consideration to the OMV of the relevant supply in that quarter, determined by reference to:

- (1) all input tax-bearing costs incurred by the JAMG group in the VAT period immediately preceding the VAT period to which the relevant output tax assessment related; and
- (2) all costs incurred by the JAMG group on exempt or zero-rated supplies of goods or services by external providers in that immediately preceding VAT period.

254. Notably, in determining the OMV of the relevant supply in that quarter which was being compared to the actual consideration for that supply, the relevant output tax assessment did not take into account any amount in respect of the cost of the EDs.

255. In contrast to the actual position adopted by the Respondents, the conclusions we have drawn in the preceding paragraphs of this section of our decision is that, in relation to each output tax assessment:

- (1) in carrying out the comparison between the actual consideration for the supply which took place in the quarter to which the assessment related and the OMV of that supply, the Respondents correctly identified that the actual consideration was the amount set out in the relevant MSA and did not include anything other than that – for example, the discharge by the Payer of PLC’s obligation to pay the EDs’ remuneration;
- (2) in determining the OMV of the relevant supply, it was reasonable and appropriate for the Respondents to have done so by reference to the costs incurred by the JAMG



group in the VAT period immediately preceding the VAT period to which the relevant assessment related;

(3) the costs taken into account in determining that OMV should therefore have included:

(a) all of the input tax-bearing costs incurred by the JAMG group in respect of the VAT period immediately preceding the VAT period to which the relevant assessment related;

(b) such part of the costs incurred by the JAMG group on exempt or zero-rated supplies of goods or services by external providers in that immediately preceding VAT period as related to goods or services that were actually used by the JAMG group in making the supplies of the Management Services; and

(c) such part of the remuneration of the EDs in that immediately preceding VAT period as related to the role played by the EDs in the supply of the Management Services (because of the obligation on the part of PLC to reimburse the Payer for that remuneration).

256. It can be seen from the above analysis that we have identified two distinct reasons why an output tax assessment in respect of a VAT period might not have been correct.

257. The first is that the output tax assessment in question might well have taken into account in determining the OMV of the relevant supply certain costs incurred by the JAMG group which it should not have done – that is to say, costs incurred on exempt or zero-rated supplies of goods or services made to the JAMG group by external providers in the immediately preceding VAT period which were not used by the JAMG group to make the supplies of the Management Services and which therefore did not form part of the full cost to the JAMG group of making that supply.

258. The second is that the output tax assessment in question might well have omitted to take into account in determining the OMV of the relevant supply certain costs incurred by the JAMG group which it should have done – that is to say, costs relating to the remuneration of the EDs in carrying out activities involved in the supply of the Management Services in the immediately preceding VAT period which did form part of the full cost to the JAMG group of making that supply.

259. It is impossible to know how those errors inter-related and therefore whether any particular output tax assessment was correct or was overstated or understated.

260. Be that as it may, it is not for the Respondents to justify the quantum of each output tax assessment. Since the Appellant has not challenged any output tax assessment on the ground that the Respondents did not use their best judgment in making the relevant assessment, the onus is on the Appellant:

(1) to prove, on the balance of probabilities, that the relevant assessment was an over-assessment; and then

(2) to provide us with sufficient evidence on which we are able, on the balance of probabilities, either to conclude that that assessment should be completely vacated or to identify an amount by which that assessment should be reduced.

261. In our view, the Appellant has failed to do this.

262. We simply do not have enough information about the impact on any output tax assessment of the amounts involved in relation to either of the above errors. This is particularly the case in relation to the second error. Even if we had enough information to be

able to identify, in principle, how much the amount of any output tax assessment should be reduced to exclude the impact of costs incurred on exempt or zero-rated supplies of goods or services made to the JAMG group by external providers in the immediately preceding VAT period which were not used by the JAMG group to make the supplies of the Management Services, we have certainly not been provided with enough information to reach any conclusion on the impact on any output tax assessment of the error in relation to the EDs' remuneration. That impact would have course have tended to increase the OMV of the relevant supply and therefore might very well have eradicated the impact of the first error in any particular case.

263. Consequently, we do not have sufficient evidence to be able to conclude that, on the balance of probabilities, any particular output tax assessment should be vacated or to identify an amount by which, on the balance of probabilities, any particular output tax assessment should be reduced.

264. Given the above, we consider that we are bound to dismiss the appeal against the output tax assessments.

## **CONCLUSION**

265. The analysis set out in the previous paragraphs of this decision means that we would answer the various agreed questions posed in paragraph 20 above as follows:

- (1) there is no service supplied between parties dealing at arm's length which is comparable to the supplies of the Management Services (see paragraphs 20(1)(a) and 20(1)(b) above);
- (2) consequently, the questions posed in paragraphs 20(1)(c) to 20(1)(f) above do not arise;
- (3) the "full cost" of providing the Management Services included all of the costs the input tax in respect of which was recovered by the JAMG group, together with those non-input tax-bearing costs which were incurred by the JAMG group and used to make the supplies of the Management Services (so that they were therefore cost components of those supplies), chief amongst which were the reimbursement amounts which PLC, a member of the JAMG group, became obliged to pay to the Payer in respect of the remuneration of the EDs to the extent that the EDs were performing activities in the course of the Management Services (see paragraphs 20(1)(g) and 20(1)(h) above);
- (4) all of the goods and services in respect of which the Appellant deducted input tax were used for the purposes of making the supplies of Management Services either because they had a direct and immediate link with those supplies or because they had a direct and immediate link with the economic activity carried on by the JAMG group (see paragraph 20(2) above); and
- (5) in a case where the OMV of a supply falls to be determined by reference to the "full cost" of making that supply, as required by the second paragraph of Article 72 of the Directive, there is a direct relationship between the right to deduct arising under Article 168 of the Directive and the determination of OMV under Article 72 of the Directive for the purposes of Article 80 of the Directive and paragraph 1 of Schedule 6 to the VATA and therefore it is not permissible, as a matter of EU law, for a holding company to claim to deduct input tax on the basis that it uses particular costs in order to make taxable supplies of management services, while at the same time accounting for

output tax in respect of those supplies on the basis that a proportion of the same costs should be disregarded in arriving at OMV (see paragraph 20(3) above).

266. The output tax assessments are upheld and the Appellant's appeal against those assessments is dismissed.

267. The input tax assessments therefore fall away but, if they had not fallen away, then we would have upheld the Appellant's appeal against them.

## **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

268. 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 Rules. 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.

**TONY BEARE  
TRIBUNAL JUDGE**

**RELEASE DATE: 09 APRIL 2021**

## **APPENDIX 1**

### **DETAILS OF ASSESSMENTS UNDER APPEAL**

1. An assessment (input tax) dated 22 August 2013 (reference 31209 9 00601)

Period	From	To	Due (£)
08/09	1 June 2009	31 August 2009	1,243.00
		Interest	111.86
Total			1,354.86

2. An assessment (input tax) dated 22 November 2013 (reference 31122 9 00564)

Period	From	To	Due (£)
11/09	1 September 2009	30 November 2009	3,791.00
02/10	1 December 2009	28 February 2010	36,701.00
05/10	1 March 2010	31 May 2010	167,761.00
08/10	1 June 2010	31 August 2010	237,082.00
11/10	1 September 2010	30 November 2010	57,268.00

02/11	1 December 2010	28 February 2011	88,106.00
05/11	1 March 2011	31 May 2011	35,387.00
08/11	1 June 2011	31 August 2011	69,267.00
11/11	1 September 2011	30 November 2011	169,401.00
02/12	1 December 2011	29 February 2012	13,390.00
05/12	1 March 2012	31 May 2012	43,757.00
08/12	1 June 2012	31 August 2012	40,600.00
11/12	1 September 2012	30 November 2012	9,411.00
02/13	1 December 2012	28 February 2013	19,514.00
05/13	1 March 2013	31 May 2013	11,587.00
08/13	1 June 2013	31 August 2013	14,437.00
		Interest	72,137.29
Total			1,089,597.29

3. An assessment (output tax) dated 22 November 2013 (Alternative)

Period	From	To	Due (£)
08/10	1 June 2010	31 August 2010	652,486.00
11/10	1 September 2010	30 November 2010	713,907.00
02/11	1 December 2010	28 February 2011	162,241.00
05/11	1 March 2011	31 May 2011	107,966.00
11/11	1 September 2011	30 November 2011	107,742.00
02/12	1 December 2011	29 February 2011	194,040.00
05/12	1 March 2012	31 May 2012	19,687.00
08/12	1 June 2012	31 August 2012	39,329.00
11/12	1 September 2012	30 November 2012	40,672.00
02/13	1 December 2012	28 February 2013	9,483.00
05/13	1 March 2013	31 May 2013	7,828.00
08/13	1 June 2013	31 August 2013	6,099.00
Total			2,061,840.00

4. Input tax adjusted on return that had not been fully processed (Preferred)

Period	From	To	Reduced by (£)	Date of reduction
11/13	1 September 2013	30 November 2013	28,042.00	12 February 2014

5. An assessment (output tax) dated 12 February 2014 (Alternative)

Period	From	To	Due
11/13	1 September 2013	30 November 2013	8,976.00

6. Input tax adjusted on return that had not been fully processed (Preferred)

Period	From	To	Reduced by (£)	Date of reduction
02/14	1 December 2013	28 February 2014	33 ,160.00	19 May 2014

7. An assessment (output tax) dated 19 May 2014 (Alternative)

Period	From	To	Due
02/14	1 December 2013	28 February 2014	31,987.00

## APPENDIX 2

### RELEVANT LEGISLATIVE PROVISIONS

1. In the case of the output tax assessments, the relevant legislation may be found in Articles 72 and 80 of the Directive, Section 19 of the VATA and paragraph 1(1) of Schedule 6 to the VATA.

2. The relevant parts of Article 80 of the Directive provide as follows:

“In order to prevent tax evasion or avoidance, Member States may in any of the following cases take measures to ensure that, in respect of the supply of goods or services involving family or other close personal ties, management, ownership, membership, financial or legal ties as defined by the Member State, the taxable amount is to be the open market value:

(a) where the consideration is lower than the open market value and the recipient of the supply does not have a full right of deduction under Articles 167 to 171 and Articles 173 to 177;...

For the purposes of the first subparagraph, legal ties may include the relationship between an employer and employee or the employee's family, or any other closely connected persons.

2. Where Member States exercise the option provided for in paragraph 1, they may restrict the categories of suppliers or recipients to whom the measures shall apply.

3. Member States shall inform the VAT Committee of national legislative measures adopted pursuant to paragraph 1 in so far as these are not measures authorised by the Council prior to 13 August 2006 in accordance with Article 27 (1) to (4) of Directive 77/388/EEC, and which are continued under paragraph 1 of this Article.”

3. Article 72 of the Directive provides as follows:

“For the purposes of this Directive, 'open market value' shall mean the full amount that, in order to obtain the goods or services in question at that time, a customer at the same marketing stage at which the supply of goods or services takes place, would have to pay, under conditions of fair competition, to a supplier at arm's length within the territory of the Member State in which the supply is subject to tax.

Where no comparable supply of goods or services can be ascertained, 'open market value' shall mean the following:

(1) in respect of goods, an amount that is not less than the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of supply;

(2) in respect of services, an amount that is not less than the full cost to the taxable person of providing the service.”

4. Paragraph 1(1) of Schedule 6 to the VATA provides as follows:

“1—

(1) Where—

(a) the value of a supply made by a taxable person for a consideration in money is (apart from this paragraph) less than its open market value, and

(b) the person making the supply and the person to whom it is made are connected, and

(c) if the supply is a taxable supply, the person to whom the supply is made is not entitled under sections 25 and 26 to credit for all the VAT on the supply,

the Commissioners may direct that the value of the supply shall be taken to be its open market value.”

5. Section 19 of the VATA provides as follows:

“19 Value of supply of goods or services

(1) For the purposes of this Act the value of any supply of goods or services shall, except as otherwise provided by or under this Act, be determined in accordance with this section and Schedule 6, and for those purposes subsections (2) to (4) below have effect subject to that Schedule.

(2) If the supply is for a consideration in money its value shall be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration.

(3) If the supply is for a consideration not consisting or not wholly consisting of money, its value shall be taken to be such amount in money as, with the addition of the VAT chargeable, is equivalent to the consideration.

(4) Where a supply of any goods or services is not the only matter to which a consideration in money relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it.

(5) For the purposes of this Act the open market value of a supply of goods or services shall be taken to be the amount that would fall to be taken as its value under subsection (2) above if the supply were for such consideration in money as would be payable by a person standing in no such relationship with any person as would affect that consideration.”

6. In the case of the input tax assessments, the relevant legislation may be found in Articles 168 and 173 of the Directive and Sections 24 to 26 of the VATA.

7. Article 168 of the Directive provides as follows:

“In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;...”

8. Article 173 of the Directive provides as follows:

“1. In the case of goods or services used by a taxable person both for transactions in respect of which VAT is deductible pursuant to Articles 168, 169 and 170, and for transactions in respect of which VAT is not deductible, only such proportion of the VAT as is attributable to the former transactions shall be deductible.

The deductible proportion shall be determined, in accordance with Articles 174 and 175, for all the transactions carried out by the taxable person.

2. Member States may take the following measures:

(a) authorise the taxable person to determine a proportion for each sector of his business, provided that separate accounts are kept for each sector;

(b) require the taxable person to determine a proportion for each sector of his business and to keep separate accounts for each sector;

(c) authorise or require the taxable person to make the deduction on the basis of the use made of all or part of the goods and services;

(d) authorise or require the taxable person to make the deduction in accordance with the rule laid down in the first subparagraph of paragraph 1, in respect of all goods and services used for all transactions referred to therein;

(e) provide that, where the VAT which is not deductible by the taxable person is insignificant, it is to be treated as nil.”

9. Sections 24 of the VATA currently provides as follows:

“24. Input tax and output tax.

(1) Subject to the following provisions of this section, “input tax”, in relation to a taxable person, means the following tax, that is to say—

(a) VAT on the supply to him of any goods or services;

(b) VAT on the acquisition by him from another member State of any goods; and

(c) VAT paid or payable by him on the importation of any goods from a place outside the member States,

being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.

(2) Subject to the following provisions of this section, “output tax”, in relation to a taxable person, means VAT on supplies which he makes or on the acquisition by him from another member State of goods (including VAT which is also to be counted as input tax by virtue of subsection (1)(b) above)....

(4) The Treasury may by order provide with respect to any description of goods or services that, where goods or services of that description are supplied to a person who is not a taxable person, they shall, in such circumstances as may be specified in the order, be treated for the purposes of subsections (1) and (2) above as supplied to such other person as may be determined in accordance with the order.

(5) Where goods or services supplied to a taxable person, goods acquired by a taxable person from another member State or goods imported by a taxable person from a place outside the member States are used or to be used partly for the purposes of a business carried on or to be carried on by him and partly for other purposes

(a) VAT on supplies, acquisitions and importations shall be apportioned so that so much as is referable to the taxable person's business purposes is counted as that person's input tax, and

(b) the remainder of that VAT (“the non-business VAT”) shall count as that person's input tax only to the extent (if any) provided for by regulations under subsection (6)(e).

(5A) For the purposes of subsections (1) and (5), a relevant asset held for the purposes of a business carried on or to be carried on by a taxable person is not, in any circumstances, to be regarded as used or to be used for the purposes of the business if, and to the extent that, it is used or to be used for that person's private use or the private use of that person's staff.

(5B) In subsection (5A) “relevant asset” means—

(a) any interest in land,



(b) any building or part of a building,

(c) any civil engineering work or part of such a work,

(d) any goods incorporated or to be incorporated in a building or civil engineering work (whether by being installed as fixtures or fittings or otherwise),

(e) any ship, boat or other vessel, or

(f) any aircraft.

(6) Regulations may provide—

(a) for VAT on the supply of goods or services to a taxable person, VAT on the acquisition of goods by a taxable person from other member States and VAT paid or payable by a taxable person on the importation of goods from places outside the member States to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents or other information as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases;

(b) for a taxable person to count as his input tax, in such circumstances, to such extent and subject to such conditions as may be prescribed, VAT on the supply to him of goods or services or on the acquisition of goods by him from another member State or paid by him on the importation of goods from places outside the member States notwithstanding that he was not a taxable person at the time of the supply, acquisition or payment;

(c) for a taxable person that is a body corporate to count as its input tax, in such circumstances, to such extent and subject to such conditions as may be prescribed, VAT on the supply, acquisition or importation of goods before the company's incorporation for appropriation to the company or its business or on the supply of services before that time for its benefit or in connection with its incorporation;

(d) in the case of a person who has been, but is no longer, a taxable person, for him to be paid by the Commissioners the amount of any VAT on a supply of services made to him for the purposes of the business carried on by him when he was a taxable person;

(e) in cases where an apportionment is made under subsection (5), for the non-business VAT to be counted as the taxable person's input tax for the purposes of any provision made by or under section 26 in such circumstances, to such extent and subject to such conditions as may be prescribed.

(6A) Regulations under subsection (6) may contain such supplementary, incidental, consequential and transitional provisions as appear to the Commissioners to be necessary or expedient...”

10. This was not the relevant form of the section throughout the period covered by the assessments to which the appeals relate. In particular, Sections 24(5)(a) and (b), 24(5A), 24(5B), 24(6)(e) and 24(6A) of the VATA were inserted by the Finance (No. 3) Act 2010. Before that Act, Section 24(5) of the VATA simply contained the language which now appears in Section 24(5)(a).

11. Section 25 of the VATA provides as follows:

“25. Payment by reference to accounting periods and credit for input tax against output tax.

(1) A taxable person shall—

(a) in respect of supplies made by him, and

(b) in respect of the acquisition by him from other member States of any goods, account for and pay VAT by reference to such periods (in this Act referred to as “prescribed accounting periods” ) at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

(3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a “VAT credit” .

(4) The whole or any part of the credit may, subject to and in accordance with regulations, be held over to be credited in and for a subsequent period; and the regulations may allow for it to be so held over either on the taxable person's own application or in accordance with general or special directions given by the Commissioners from time to time.

(5) Where at the end of any period a VAT credit is due to a taxable person who has failed to submit returns for any earlier period as required by this Act, the Commissioners may withhold payment of the credit until he has complied with that requirement.

(6) A deduction under subsection (2) above and payment of a VAT credit shall not be made or paid except on a claim made in such manner and at such time as may be determined by or under regulations; and, in the case of a person who has made no taxable supplies in the period concerned or any previous period, payment of a VAT credit shall be made subject to such conditions (if any) as the Commissioners think fit to impose, including conditions as to repayment in specified circumstances.

(7) The Treasury may by order provide, in relation to such supplies, acquisitions and importations as the order may specify, that VAT charged on them is to be excluded from any credit under this section; and—

(a) any such provision may be framed by reference to the description of goods or services supplied or goods acquired or imported, the person by whom they are supplied, acquired or imported or to whom they are supplied, the purposes for which they are supplied, acquired or imported, or any circumstances whatsoever; and

(b) such an order may contain provision for consequential relief from output tax.”

12. Finally, Section 26 of the VATA currently provides as follows:

“26. Input tax allowable under section 25.

(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—

(a) taxable supplies;

(b) supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom;

(c) such other supplies outside the United Kingdom and such exempt supplies as the Treasury may by order specify for the purposes of this subsection.

(3) The Commissioners shall make regulations for securing a fair and reasonable attribution of input tax to supplies within subsection (2) above, and any such regulations may provide for—

(a) determining a proportion by reference to which input tax for any prescribed accounting period is to be provisionally attributed to those supplies;

(b) adjusting, in accordance with a proportion determined in like manner for any longer period comprising two or more prescribed accounting periods or parts thereof, the provisional attribution for any of those periods;

(c) the making of payments in respect of input tax, by the Commissioners to a taxable person (or a person who has been a taxable person) or by a taxable person (or a person who has been a taxable person) to the Commissioners, in cases where events prove inaccurate an estimate on the basis of which an attribution was made; and

(d) preventing input tax on a supply which, under or by virtue of any provision of this Act, a person makes to himself from being allowable as attributable to that supply.

(4) Regulations under subsection (3) above may make different provision for different circumstances and, in particular (but without prejudice to the generality of that subsection) for different descriptions of goods or services; and may contain such incidental, supplementary, consequential and transitional provisions as appear to the Commissioners necessary or expedient.”

13. Again, this was not the relevant form of the section throughout the period covered by the assessments to which the appeals relate. In particular, the words “supplementary, consequential and transitional” in Section 26(4) of the VATA were inserted by the Finance (No. 3) Act 2010.