TAX APPEALS COMMISSION

Ref: 81TACD2022

Between/

[redacted]

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Matter under Appeal

1. This matter comes before the Tax Appeal Commission on foot of appeals against Notices of Assessment to Value Added Tax for the periods from 1 July 20[redacted] to 31 December 20[redacted] inclusive.

2. The sums assessed by the Respondent amounted in total to €45,037,282.00 made up as follows:-

(i) Assessment dated 26 August 20[redacted] for the period 1 July 20[redacted] to 31 August 20[redacted] in the sum of €49,005;

(ii) Assessment dated 28 October 20[redacted] for the period 1 September 20[redacted] to 31 October 20[redacted] in the sum of €229,362;

(iii) Assessment dated 16 December 20[redacted] in the total sum of €6,684,094 for the following periods and amounts:

(a) 1 Nov 20[redacted] - 31 Dec 20[redacted] €3,477,295;

(b) 1 Jan 20[redacted] – 29 Feb 20[redacted] € 86,007;

(c) 1 Mar 20[redacted] – 30 Apr 20[redacted] € 729,295;

(d) 1 May 20[redacted] – 30 Jun 20[redacted] €2,338,092; and,

(e) 1 Jul 20[redacted] – 31 Aug 20[redacted] € 53,405.

(iv) Assessment dated 26 October 20[redacted] of Tax Payable for the period 1 September 20[redacted] to 31 October 20[redacted] in the sum of €2,377,706;

(v) Assessment dated 14 December 20[redacted] for the period 1 November 20[redacted] to 31 December 20[redacted] in the sum of €6,971,718;

(vi) Assessment dated 22 February 20[redacted] for the period 1 Jan 20[redacted] to 28 February 20[redacted] in the sum of €495,344; and,

(vii) Assessment dated 16 March 20[redacted] in the total sum of €29,130,053 for the following periods and amounts:

(a) 1 Mar 20[redacted] - 30 Apr 20[redacted] €1,462,177;

(b) 1 May 20[redacted] – 30 Jun 20[redacted] €8,394,352;

(c) 1 Jul 20[redacted] – 31 Aug 20[redacted] €1,262,242;

(d) 1 Sep 20[redacted] – 31 Oct 20[redacted] €2,789,916;

(e) 1 Nov 20[redacted] – 31 Dec 20[redacted] €2,167,501;

(f) 1 Jan 20[redacted] – 28 Feb 20[redacted] € 105,785;

(g) 1 Mar 20[redacted] – 30 Apr 20[redacted] €2,890,303;

(h) 1 May 20[redacted] – 30 Jun 20[redacted]	€1,331,979;
(i) 1 Jul 20[redacted] – 31 Aug 20[redacted]	€1,015,613;
(j) 1 Sep 20[redacted] – 31 Oct 20[redacted]	€4,615,100; and,
(k) 1 Nov 20[redacted] – 31 Dec 20[redacted]	€3,094,585.

3. The Appellant appealed against the said Notices of Assessment within the time allowed by statute by Notices of Appeal dated between 26 August 20[redacted] and 16 March 20[redacted] inclusive.

B. Facts relevant to the Appeal

4. From [redacted] until [redacted] the Appellant herein was the Irish-incorporated and resident holding company of the [redacted] Group (hereinafter referred to as **"the Appellant Group"**). The Appellant's ordinary shares were listed on the New York Stock Exchange (hereinafter "**the NYSE**") and it was registered with the United States Securities and Exchange Commission (hereinafter "**the SEC**").

5. The Appellant Group was at all material times a global [redacted] products group and manufacturer of [redacted] and supplies. During the periods under appeal, it operated in three market segments, namely **(a)** [redacted], **(b)** [redacted] supplies and **(c)** [redacted].

6. The Appellant held 100% of the share capital of [redacted] (hereinafter "**Company A**") and 100% of the share capital of [redacted] (hereinafter **"Company B"**), a company registered in [redacted].

From [redacted] until the end of [redacted] the Appellant held 100% of the share capital of [redacted] (hereinafter "**Company C**"). From [redacted] until [redacted], the Appellant beneficially held 100% of the share capital of [redacted] (hereinafter "**Company D**"), an Irish-registered company. The Appellant had no other direct subsidiaries.

7. Company A is a company incorporated in [redacted] and resident in Ireland for tax purposes. It was the NYSE-listed parent of the Appellant Group which became Irish tax resident by moving its central management and control to Ireland in [redacted].

8. During the periods under appeal, the Appellant carried out the following two main activities:-

(a) As the parent of the Appellant Group, the Appellant directly and indirectly held shares in all of the subsidiaries in the Appellant Group. This comprised approximately [redacted] subsidiaries, the majority of which were owned directly or indirectly by Company A; and,

(b) The Appellant provided management services to four of its indirect subsidiaries, namely [redacted] (hereinafter "**Company E**"), [redacted] (hereinafter "**Company F**"), [redacted] (hereinafter "**Company G**") and [redacted] (hereinafter "**Company H**") (which four companies are hereinafter collectively referred to as the "**Service Recipients**") pursuant to an agreement effective from the [redacted] (hereinafter referred to as the "**Services Agreement**"). In order to provide the said management services, the Appellant

received services from a company within the Appellant Group, [redacted] (hereinafter "**Company I"**), pursuant to an agreement effective as of the [redacted] (hereinafter referred to as the "**Company I Agreement**").

9. In addition to the above-mentioned activities, the Appellant Group was restructured by way of a spin-off of the group's [redacted] business and [redacted] business globally into a separate part of the corporate group. The separate corporate group which was created by the restructuring was a newly formed plc named [redacted] (hereinafter "**Company J**"), which had been established for that purpose. The foregoing reconstruction and subsequent de-merger is hereinafter referred to as "**Project X**".

10. Subsequent to Project X, on the [redacted] and pursuant to a transaction agreement dated the [redacted], the Appellant herein was acquired by [redacted] (hereinafter "**Company K**"). The said acquisition was effected by means of a "cancellation scheme of arrangement" under Irish law, approved by the High Court and the Appellant's shareholders and is hereinafter referred to as the "**K Transaction"**. Issues arising for consideration in relation to the K Transaction arose during the period from the [redacted] until the [redacted].

11. During the relevant periods, the Appellant claimed full VAT recovery in respect of all costs which it incurred.

12. Following an audit carried out by the Respondent, the assessments to VAT the subject of this appeal were raised by the Respondent. The Respondent contends the assessments to VAT were raised applying an approach adopted

by the Appellant and which was set out by the Appellant whilst undertaking a detailed annual exercise in order to determine the costs which related to the provision of the management services to the Service Recipients. The result of the said audit by the Respondent was that it determined that partial VAT recovery was allowable in respect of ongoing costs and that none of the VAT inputs arising on Project X or the K Transaction were considered by the Respondent to be recoverable by the Appellant.

13. The appeal proceeded by way of an oral hearing which was heard over a period of 9 days beginning on the 11th March, 2019 and concluding on the 22nd March, 2019. I heard evidence on behalf of the Appellant during the course of the hearing, along with submissions on behalf of both the Appellant and the Respondent.

C. Grounds of Appeal

14. The Appellant appealed against the amended Notices of Assessment raised by the Respondent on the following stated grounds:

(a) The tax assessed is in excess of the amount actually due, if any;

(b) In reliance on confirmations and rulings from the Respondent prior to and shortly after the Appellant's establishment in the State, the Appellant ordered its VAT affairs in a manner which, in light of the Respondent's altered position and VAT assessments, is to the Appellant's significant detriment. In so doing, the Respondent acted contrary to the Appellant's legitimate expectation under EU law;

(c) The VAT incurred on supplies received with respect to which a deduction was refused by the Respondent was incurred by the Appellant in the course or furtherance of its economic activity and the Appellant is entitled to a full deduction with respect to that VAT as those costs (or a portion of those costs):

(i) have a direct and immediate link to the taxable supply of management services;

(ii) further and in the alternative, are in whole or in part 'overheads' with a direct and immediate link to the Appellant's business as a whole with respect to which there is full deductibility;

(iii) further and in the alternative, relate in whole or in part to the economic exploitation of shares in the Appellant's subsidiary and/or sub-subsidiaries, which holding of shares is an economic activity in respect of which there is a full deduction;

(d) The right to input tax deduction, the extent of that right and the identification of the costs in respect which that right arises is to be conducted in accordance with Part 8 of the Value Added Tax Consolidation Act 2010 (hereinafter "**VATCA 2010**"] and the jurisprudence of the Court of Justice, and not by reference to a transfer pricing methodology prepared for corporation tax cost allocation purposes and performed in accordance with the Organisation for Economic Co-operation and Development Model Tax Convention;

(e) Further and in the alternative, the strict outcome of the contractual approach adopted by the Respondent is that Company I provides no services of benefit to the non-US IP

Holders to the Appellant. If this were correct, the Appellant would not be engaged in any economic activity and would have no obligation to account for output tax nor any obligation to reverse charge input tax;

(f) Further and in the alternative, if the Appellant did not receive services from outside the State for the purposes of its economic activity, it is not subject to the reverse charge in respect of such costs as it is not a "taxable person acting as such" for the purposes of section 34 of VATCA 2010 in relation to the receipt of services from suppliers located outside of the State. Consequently, the place of supply of those services cannot be the State nor can the Appellant then be the accountable person as defined by Section 1 and 2 of VATCA 2010 with respect to those services;

(g) The Project X costs constitute overheads with a direct and immediate link to the Appellant's economic activity and in respect of which the Appellant is entitled to full deductibility;

(h) Further or in the alternative, the Project X costs fall outside the scope of VAT and constitute residual input costs with full recoverability by reference to the Appellant's economic activity;

(i) The Appellant is entitled to full deductibility in respect of the VAT charged on the K Transaction costs as VAT incurred by a taxable person in connection with a share issue under a scheme of arrangement. The VAT in question forms a residual input cost with recoverability determined by reference to the Appellant's economic activity; and,

(j) In the alternative, no Irish VAT arises in respect of the K Transaction costs as, at the date of issue of the relevant invoices,

the Appellant was not an accountable person and accordingly the place of supply of services was the location of the supplier, that is to say the United States of America.

15. Subsequent to the appeals being submitted by the Appellant, an Agreed List of Issues to be determined was submitted on behalf of the Parties. This Issue List defined the issues which require to be determined in these appeals as follows:

i. **Whether the Appellant was engaged in economic activity:**
The issue to be determined is whether the Appellant, for the periods in question, was engaged in economic activity as defined in domestic and European legislation. If the Appellant was engaged in economic activity, whether this represents the whole or part of its overall activities having regard to the full extent of activities in which it was engaged.

ii. **Whether the Appellant was obliged to self-account for VAT on supplies of services received from suppliers established outside the State:**
The issue to be determined is whether the Appellant, for the period in question, was obliged to self-account for VAT on supplies of services received from suppliers established outside the State in accordance with sections 33 and 34 of VATCA 2010. If so, by reference to the nature of the supplies received (taxable or exempt), to what extent was the Appellant obliged to so account?

iii. **Criteria for entitlement to VAT recovery:**

The issue to be determined is the test to be met by the Appellant in claiming an entitlement to deduct VAT on costs incurred. Additionally, it may be necessary for the Tax Appeals Commission to determine the correct approach in the apportionment of VAT incurred in circumstances where it is possible that the Appellant will be found to be carrying out taxable, exempt, economic or non-economic activity or a combination of one or more of the foregoing. The conclusions on this will hereinafter be referred to as "the Deduction Criteria".

iv. **VAT recovery - ongoing costs:**

With regard to "ongoing costs" as referred to in the Appellant's Statement of Case, the issue to be determined is whether and to what extent the Appellant is entitled to deduct input VAT having regard to the Deduction Criteria.

v. **VAT recovery - Project X:**

The issue to be determined is whether and to what extent the Appellant is entitled to deduct input VAT incurred on supplies made to the Appellant which related to Project X having regard to the Deduction Criteria.

vi. **VAT recovery – K Transaction:**

The issue to be determined is whether and to what extent the Appellant is entitled to deduct input VAT incurred on supplies made to the Appellant which relate to the K Transaction having regard to the Deduction Criteria.

16. The overhead issue arises for consideration in each VAT period, the Project X issue arises in periods between [redacted] and [redacted] and the K Transaction issue arises in periods between [redacted] and [redacted].

*D. **Relevant Legislation***

17. Section 2 of VATCA 2010 contains the following definitions relevant to this appeal:-

> *""business" means an economic activity, whatever the purpose or results of that activity, and includes any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, and the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis;*
>
> *...*
>
> *"taxable person" means a person who independently carries on a business in the Community or elsewhere;"*

18. Section 12 of VATCA 2010 provides that:-

> *"(1) Where—*
>
> > *(a) a taxable person who carries on a business in the State, or a person to whom a registration number has been assigned in accordance with section 65(2), receives a service from a supplier established outside the State, and*

(b) the place of supply of the service (as determined in accordance with section 34 (a)) is the State,

then the person is accountable for, and liable to pay, the tax chargeable in the State as if he or she had supplied that service for consideration in the course or furtherance of business."

19. Section 33 of VATCA 2010 provides that:-

"(1) For the purpose of applying section 34, every person registered for value-added tax is a taxable person.

(2) In section 34(c) a supply of services connected with immovable goods includes—

(a) a supply of services by experts or estate agents,

(b) a provision of accommodation in a hotel or guesthouse or in an establishment having a similar function, or in a holiday camp or a site developed for use as a camping site,

(ba) the supply of telecommunications services, radio or television broadcasting services or electronically supplied services, together with the provision of accommodation of the kind specified in paragraph (b), where the supply is by the provider of that accommodation acting in his or her own name, and

(c) a supply of services involving the preparation and co-ordination of construction work (including a supply of services of architects and of persons who provide on-site supervision).

(3) In section 34(e) "intra-Community transport of goods" means any transport of goods in respect of which the place of departure and the place of arrival are located within the territories of 2 different Member States.

(4) In section 34(k) "short-term" means the continuous possession or use of a means of transport throughout a period of not more than 30 days or, if the means of transport is a vessel, not more than 90 days.

(4A) In paragraphs (ka) and (kb) of section 34 "long term" means the continuous possession or use of a means of transport throughout a period of more than 30 days or, if the means of transport is a vessel, more than 90 days.

(5) The following services are specified for the purpose of section 34(m):

(a) services that consist of transferring or assigning copyrights, patents, licences, trade marks and similar rights;

(b) advertising services;

(c) the services of consultants, engineers, consultancy firms, lawyers, accountants and other similar services, as well as data processing and the provision of information;

(d) services that consist of obligations to refrain from pursuing or exercising, wholly or partly, a business activity or a right referred to in this subsection;

(e) services that consist of financial transactions (including banking transactions and financial fund management transactions but excluding the provision of safe deposit facilities) or insurance transactions (including reinsurance transactions);

(f) services that consist of supplying staff;

(g) services that consist of hiring out movable tangible property (other than a means of transport);

(h) services that consist of providing access to a natural gas distribution system situated within the territory of the Community or to any network connected to such a system, to the electricity system or to the heating and cooling networks, or the transmission or distribution through these systems or networks, and the provision of other services directly linked to those systems;

(i) telecommunications services;

(j) radio or television broadcasting services;

(k) electronically supplied services.

20. Section 34 of VATCA 2010 provides as follows:-

"The following rules apply to determine the place where, for the purposes of this Act, services are supplied:

(a) except as provided by paragraphs (c), (d), (g), (i), (j) and (k), the place of supply of services to a taxable person acting as such is—

(i) subject to subparagraph (ii), the place where the person's business is established,

(ii) if the services are supplied to a fixed establishment of the person located in a place other than the place where the business is established, the place where the fixed establishment is located,

(iii) if there is no such place of business or fixed establishment, the place where the permanent address or usual place of residence of the taxable person who receives the services is located;

(b) except as provided by paragraphs (c) to (n), the place of supply of services to a non-taxable person is—

(i) subject to subparagraph (ii), the place where the supplier's business is established,

(ii) if the services are supplied from a fixed establishment of the supplier located at a place other than the place where the supplier's business is established, the place where the fixed establishment is located,

(iii) if there is no such place of business or fixed establishment, the place where the permanent address or usual place of residence of the supplier is located;

(c) if the supply of services is connected with immovable goods, or is the grant of a right to use those goods, the place where those goods are located;

(d) if the supply of services is the provision of passenger transport, the place or the places where the transport takes place;

(e) if the supply of services is the provision of the transport of goods to a non-taxable person and is not an intra-Community transport of goods, the place or places where the transport takes place;

(f) if the supply of services is the provision of intra-Community transport of goods to a non-taxable person, the place of departure of those goods (being the place where the transport of the goods actually begins) irrespective of the distance covered by the means of transport in order to reach the place where the goods are located;

(g) if the supply of services, and of any ancillary services, is in respect of or related to admission to a cultural, artistic, sporting, scientific, educational, entertainment or similar event, such as a fair or exhibition (including the supply of tickets granting access to such an event), and the supply is to a taxable person, the place where that event actually takes place;

(ga) if the supply of services, and of any ancillary services, is in respect of or related to admission to a cultural, artistic, sporting, scientific, educational, entertainment or similar activity, such as a fair or exhibition (including the supply of services of the organiser of such an activity or the supply of tickets granting access to such an activity), and the supply is to a non-taxable person, the place where that activity actually takes place;

(h) if the supply of services is to a non-taxable person and consists of—

(i) ancillary transport activities, such as loading, unloading and handling goods,

(ii) carrying out valuations of, or work on, movable goods, or

(iii) contract work,

the place where those services are physically carried out;

(i) if the supply of services is the provision of restaurant or catering services (other than those referred to in paragraph (j)), the place where those services are physically carried out;

(j) if the supply of services is the provision of restaurant or catering services that are physically carried out on board a ship, aircraft or train

during a section of a passenger transport operation undertaken within the Community and the first scheduled point of departure within the Community of that transport operation is in the State, the State;

(k) if the supply of services consists of a short-term hiring out of a means of transport, the place where the means of transport is actually placed at the disposal of the customer;

(ka) subject to paragraph (kb), if the supply of services consists of a long-term hiring out of a means of transport to a non-taxable person, the place where that person is established or has a permanent address or usually resides;

(kb) if –

(i) the supply of services consists of a long-term hiring out of a pleasure boat to a non-taxable person, and

(ii) that service is actually provided by the supplier from his or her place of business or a fixed establishment situated in that place,

the place where the pleasure boat is actually put at the disposal of the customer;

(kc) if the supply of services consists of the provision of –

(i) telecommunications services,

(ii) radio or television broadcasting services, or

(iii) electronically supplied services,

(other than the provision of those services to which paragraph (c) relates) to a non-taxable person, the place where that person is established, has a permanent address or usually resides;

(m) if the supply of services consists of a supply of services specified in section 33(5) and the supply is to a non-taxable person—

(i) who is established outside the Community,

(ii) whose permanent address is outside the Community, or

(iii) who usually resides outside the Community,

the place where the person is established, has a permanent address or usually resides;

(n) if the supply of services is the provision of services to a non-taxable person by an intermediary acting in the name and on behalf of another person, the place where the transaction underlying the supply is made.

21. The relevant provisions of section 59 of VATCA 2010 provide that:-

"(2) Subject to subsection (3), in computing the amount of tax payable by an accountable person in respect of a taxable period, that person may, in so far as the goods and services are used by him or her for the purposes of his or her taxable supplies or of any of the qualifying activities, deduct—

(a) the tax charged to him or her during the period by other accountable persons by means of invoices, prepared in the manner prescribed by regulations, in respect of supplies of goods or services to him or her,

…

(5) Where, in relation to any taxable period, the total amount deductible under this Chapter exceeds the amount which, but for this Chapter, would be payable in respect of such period, the excess shall be refunded to the accountable person in accordance with section 99(1), but subject to section 100."

22. Section 61 of VATCA 2010 provides as follows:-

"(1) In this section—

"deductible supplies or activities" means the supply of taxable goods or taxable services, or the carrying out of qualifying activities within the meaning of section 59(1);

"dual-use inputs" means movable goods or services (other than goods or services on the purchase or acquisition of which, by virtue of section 60(2), a deduction of tax shall not be made, or services related to the development of immovable goods that are subject to Chapter 2) which are not used solely for the purposes of either deductible supplies or activities or non-deductible supplies or activities;

"non-deductible supplies or activities" means the supply of goods or services or the carrying out of activities other than deductible supplies or activities, and in the case of immovable goods acquired or developed by an accountable person on or after 1 January 2011, includes any activity consisting of the use of those goods, or part of those goods, for any purpose other than the accountable person's business;

"total supplies and activities" means deductible supplies or activities and non-deductible supplies or activities.

(2) Where an accountable person engages in both deductible supplies or activities and non-deductible supplies or activities, then, in relation to the person's acquisition of dual-use inputs for the purpose of that person's business for a period, the person shall be entitled to deduct in accordance with section 59(2) only such proportion of tax, borne or payable on that acquisition, which is calculated in accordance with this section and regulations, as being attributable to his or her deductible supplies or activities and such proportion of tax is, for the purposes of this section, referred to as the "proportion of tax deductible".

(3) For the purposes of this section, the reference in subsection (2) to "tax, borne or payable" shall, in the case of an acquisition of a qualifying vehicle (within the meaning of section 59(1)) be deemed to be a reference to "20 per cent of the tax, borne or payable".

(4) For the purposes of this section and regulations, the proportion of tax deductible by an accountable person for a period shall be calculated on any basis which results in a proportion of tax deductible which—

(a) correctly reflects the extent to which the dual-use inputs are used for the purposes of the person's deductible supplies or activities, and

(b) has due regard to the range of the person's total supplies and activities.

(5) The proportion of tax deductible may be calculated on the basis of the ratio which the amount of a person's tax-exclusive turnover from deductible supplies or activities for a period bears to the amount of the person's tax-exclusive turnover from total supplies and activities for that period but only where that basis results in a proportion of tax deductible which is in accordance with subsection (4).

(6) Where it is necessary to do so to ensure that the proportion of tax deductible by an accountable person is in accordance with subsection (4), the accountable person shall—

(a) calculate a separate proportion of tax deductible for any part of that person's business, or

(b) exclude, from the calculation of the proportion of tax deductible, amounts of turnover from incidental transactions by that person of the kind specified in paragraph 6 of Schedule 1 or amounts of turnover from incidental transactions by that person in immovable goods.

(7) The proportion of tax deductible as calculated by an accountable person for a taxable period shall be adjusted in accordance with regulations if, for the accounting year in which the taxable period ends, that proportion does not—

(a) correctly reflect the extent to which the dual-use inputs are used for the purposes of the person's deductible supplies or activities, or

(b) have due regard to the range of the person's total supplies and activities.

23. Article 9(1) of Council Directive 2006/112/EC of 28th November, 2006 on the common system of value added tax (hereinafter the "**PVD**") provides as follows:-

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

24. Articles 43 to 45 inclusive of the PVD (as inserted by Article 2 of Council Directive 2008/8/EC of 12th February 2008 (hereinafter the "**PSSD**")) provide as follows:-

> *"Article 43*
>
> *For the purpose of applying the rules concerning the place of supply of services:*
>
> *1. a taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services in accordance with Article 2(1) shall be regarded as a taxable person in respect of all services rendered to him;*
>
> *2. a non-taxable legal person who is identified for VAT purposes shall be regarded as a taxable person.*

Article 44

"The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.

Article 45

The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the supplier has his permanent address or usually resides."

25. Articles 167 to 169 inclusive of the PVD provide as follows:-

"Article 167

A right of deduction shall arise at the time the deductible tax becomes chargeable.

Article 168

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;

(b) the VAT due in respect of transactions treated as supplies of goods or services pursuant to Article 18(a) and Article 27;

(c) the VAT due in respect of intra-Community acquisitions of goods pursuant to Article 2(1)(b)(i);

(d) the VAT due or paid in respect of the importation of goods into that Member State.

Article 169

In addition to the deduction referred to in Article 168, the taxable person shall be entitled to deduct the VAT referred to therein in so far as the goods and services are used for the purposes of the following:

(a) transactions relating to the activities referred to in the second subparagraph of Article 9(1), carried out outside the Member State in which that tax is due or paid, in respect of which VAT would be deductible if they had been carried out within that Member State;

(b) transactions which are exempt pursuant to Articles 138, 142 or 144, Articles 146 to 149, Articles 151, 152, 153 or 156, Article 157(1)(b), Articles 158 to 161 or Article 164;

(c) transactions which are exempt pursuant to points (a) to (f) of Article 135(1), where the customer is established outside the Community or where those transactions relate directly to goods to be exported out of the Community."

26. Article 173 to 175 inclusive of the PVD provide as follows:-

"Article 173

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.

Article 174

1. The deductible proportion shall be made up of a fraction comprising the following amounts:

(a) as numerator, the total amount, exclusive of VAT, of turnover per year attributable to transactions in respect of which VAT is deductible pursuant to Articles 168 and 169;

(b) as denominator, the total amount, exclusive of VAT, of turnover per year attributable to transactions included in the numerator and to transactions in respect of which VAT is not deductible.

Member States may include in the denominator the amount of subsidies, other than those directly linked to the price of supplies of goods or services referred to in Article 73.

2. By way of derogation from paragraph 1, the following amounts shall be excluded from the calculation of the deductible proportion:

(a) the amount of turnover attributable to supplies of capital goods used by the taxable person for the purposes of his business;

(b) the amount of turnover attributable to incidental real estate and financial transactions;

(c) the amount of turnover attributable to the transactions specified in points (b) to (g) of Article 135(1) in so far as those transactions are incidental.

3. Where Member States exercise the option under Article 191 not to require adjustment in respect of capital goods, they may include disposals of capital goods in the calculation of the deductible proportion.

Article 175

1. The deductible proportion shall be determined on an annual basis, fixed as a percentage and rounded up to a figure not exceeding the next whole number.

2. The provisional proportion for a year shall be that calculated on the basis of the preceding year's transactions. In the absence of any such transactions to refer to, or where they were insignificant in amount, the deductible proportion shall be estimated provisionally, under the supervision of the tax authorities, by the taxable person on the basis of his own forecasts.

However, Member States may retain the rules in force at 1 January 1979 or, in the case of the Member States which acceded to the Community after that date, on the date of their accession.

3. Deductions made on the basis of such provisional proportions shall be adjusted when the final proportion is fixed during the following year."

27. Article 196 of the PVD provides as follows:-

"VAT shall be payable by any taxable person to whom the services referred to in Article 56 are supplied or by any person identified for VAT purposes in the Member State in which the tax is due to whom the services referred to in Articles 44, 47, 50, 53, 54 and 55 are supplied, if the services are supplied by a taxable person not established in that Member State."

28. The Recitals in the PSSD include the following provisions:-

"(4) For supplies of services to taxable persons, the general rule with respect to the place of supply of services should be based on the place where the recipient is established, rather than where the supplier is established. For the purposes of rules determining the place of supply of services and to minimise burdens on business, taxable persons who also have non-taxable activities should be treated as taxable for all services rendered to them. Similarly, non-taxable legal persons who are identified for VAT purposes should be regarded as taxable persons. These provisions, in accordance with normal rules, should not extend to supplies of services received by a taxable person for his own personal use or that of his staff.

...

(7) Where a taxable person receives services from a person not established in the same Member State, the reverse charge mechanism should be obligatory in certain cases, meaning that

the taxable person should self-assess the appropriate amount of VAT on the acquired service."

29. Finally, Regulations 19 to 21 inclusive of the Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for the PVD (hereinafter the "**VAT Implementing Regulation**") provide as follows:-

"(19) It should be clarified that when services supplied to a taxable person are intended for private use, including use by the customer's staff, that taxable person cannot be deemed to be acting in his capacity as a taxable person. Communication by the customer of his VAT identification number to the supplier is sufficient to establish that the customer is acting in his capacity as a taxable person, unless the supplier has information to the contrary. It should also be ensured that a single service acquired for the business but also used for private purposes is only taxed in one place.

(20) In order to determine the customer's place of establishment precisely, the supplier of the service is required to verify the information provided by the customer.

(*21) Without prejudice to the general rule on the place of supply of services to a taxable person, where services are supplied to a customer established in more than one place, there should be rules to help the supplier determine the customer's fixed establishment to which the service is provided, taking account of the circumstances. If the supplier of the services is not able to*

determine that place, there should be rules to clarify the supplier's obligations. Those rules should not interfere with or change the customer's obligations."

E. Evidence on behalf of the Appellant

30. At the hearing of the appeal, I heard evidence from four witnesses on behalf of the Appellant, namely:-

(a) Mr [redacted], President and Head of International Tax and Transfer Pricing, Company K (**"Witness 1"**);

(b) Ms [redacted], Corporate Tax Department, Company K (**"Witness 2"**);

(c) Mr [redacted], Tax Partner, [redacted] (**"Witness 3"**); and,

(d) Mr [redacted], Partner, [redacted] (**"Witness 4"**).

Witness 1: Mr [redacted]

31. I first heard from Witness 1, who was at all material times the Senior Director responsible for all of the Appellant Group's tax affairs across Europe, the Middle East, Africa, Asia and Greater China.

32. Witness 1 stated that the Appellant Group was, during the relevant periods, a large multinational [redacted] manufacturer with in or around [redacted] employees and with a turnover of in or around [redacted] billion.

Approximately 55% of its turnover was generated in the United States and the remaining 45% was generated outside the United States.

33. He stated that the Appellant Group was organised into three Business Units, namely [redacted], [redacted] and [redacted], with each Unit being responsible for the various products which fell under their particular category.

34. Witness 1 stated that the Board of the Appellant was an active Board and that it was directly responsible for all major decisions within the Appellant Group. The Appellant's Board was made up of its CEO along with Independent Directors who met a minimum of six times annually, most usually in Dublin. He stated that during these meetings there would be presentations from members of the Senior Executive Committee which would feed into the decisions made by the Board, which said decisions would then be communicated to the Senior Executive Committee.

35. Witness 1 stated that the decisions made by the Appellant's Board in relation to Appellant Group initiatives were communicated to the Senior Executive Committee for the purposes of research and, where appropriate, implementation. This engagement involved members of the Senior Executive Committee communicating to their team members relevant decisions in relation to new or existing initiatives made by the Appellant's Board. He said this occurred as part of a team process comprising representatives from various functions within the Appellant Group who would research and, if directed, implement the Appellant's Board decisions.

36. Witness 1 stated that the leads of the various functions within the Appellant Group who were involved in the team process were based in the US within Company I, with some individual workers based outside the US. He stated that those people, who were employed by Company I, were part of the Senior Executive Committee to which the Board of the Appellant delegated authority.

37. As an example of this, Witness 1 referenced an expansion initiative driven by the Appellant's Board which involved the training of [redacted] in order to assist with the expansion of the use of the Appellant's products in emerging markets. He stated that he was involved in the research and implementation of a change in the new product training strategy employed by the Appellant Group. He stated that this change in strategy had been driven by the Appellant's Board, who recognised that more locally-based training facilities were required for the Appellant Group's emerging markets, instead of relying on a single, centralised training and innovation facility in [redacted]. He stated that the Appellant's Board had recognised that there was a reluctance to travel to the [redacted] training facility by customers (in this case [redacted]) based in locations such as India, Korea and Turkey. This change, which came about as a result of the decision made by the Appellant's Board, cost somewhere in the region of €100,000,000 and involved significant and detailed changes within the structure of the Appellant Group.

38. In terms of the personnel involved in such Board-led projects, a team process would take place which involved the finance, legal, treasury, tax, human resources, trade compliance and public relations functions, the leads of which were all employees of Company I in the US. These were the personnel who would drive the initiatives and they were also members of the Senior Executive Committee to which the Board delegated authority.

39. Witness 1 made reference to the minutes of a Board meeting of the Appellant which took place on [redacted] 2013, where the Board made decisions in relation to a "Project Z". He testified that Project Z was the decision by the Appellant's Board to transfer the IP which related to the Appellant Group's Latin American market from the United States to Europe, and the minutes recorded:-

> *"Mr.* [redacted] *reported on a project to integrate the company's Latin America business into the Company H structure ("Project Z"). This integration will be accomplished by Company H acquiring certain intellectual property rights from Company A. Mr.* [redacted] *discussed the various steps involved in Project Z and noted the expected current cash tax impact, the financial statement impact and the estimated impact on the company's annual effective tax rate if Project Z is implemented. A discussion ensued and Mr.* [redacted] *responded to comments and questions from the Board. After further discussion, the Board determined that Project Z is in the best interests of the Company and its shareholders and, upon motion duly made and seconded, unanimously.*
>
> *RESOLVED, that Project Z, including the payment of US withholding taxes of approximately $70 million in connection therewith, be and hereby is authorized and approved."*

40. Mr [redacted] explained that Company H, which was a principal company in the Appellant Group, had the rights to almost all of the Appellant Group business outside of the Americas. The Appellant's Board resolution of [redacted] 2013 was in relation to the decision to move the rights to the Latin American Appellant Group business to Company H. This would enable Company H to sell products into the Latin American market. He explained that in order for this to occur,

the intellectual property needed to be transferred from the US to Company H. He stated that there would have been some tax impact on foot of this decision and subsequent actions taken, which the Appellant's Board would have considered as the decision would impact the tax rate for the Appellant Group. This would then impact on earnings per share, which in turn would potentially have an impact on how shareholders viewed the company.

41. The witness went on to explain that everything to do with the Appellant Group was driven by ownership of intellectual property and the recognition of risk. He testified that the Appellant Group established principal entities at the centre of the supply chain (one of those being Company H) and stated that those entities carried all of the risk in relation to the end-to-end supply chain. He stated that the principal entities would engage and direct manufacturers and covered the costs of those manufacturers, including the costs of any negative issues which might arise during the manufacturing process. The witness took me through a standard manufacturing agreement between an Appellant Group intellectual property holder and a manufacturing company to illustrate the typical agreements entered into. In addition to the costs of the manufacturers, a profit of in or around [redacted]% was also paid to the manufacturers. He stated that the two largest principal entities within the Appellant Group were Company H and Company I.

42. In addition, a similar model existed in relation to distribution/sales companies for the Appellant Group products, which entities were referred to as "limited receptors". He stated that the sales companies held distribution agreements with the principal entity which engaged them, whereby they had the rights to sell the Appellant Group products within a particular country. In turn, they were supported by the principal entity which carried all of the risk

in terms of marketing and training and also in relation to sales. In return, the sales companies would receive a margin of in or around [redacted]% on the sales which they made.

43. Similar agreements, he stated, were entered into between the principal entities and service companies which provided back office type activities, such as customer care and finance. He further stated that similar agreements were entered into in relation to research and development.

44. Witness 1 went on to say that the decisions on where to locate the principal entities were based on securing locations which were politically stable, had good patent laws, and had a well-educated workforce, and where authorities provided either incentives or had a reasonably low tax rate. He stated that the logic was that the intellectual property was held at the centre of the supply chain along with all of the obligations and the risk, and that therefore as much profit as possible was pulled within the principal entity. As a consequence of that, the financial model was optimised by paying the amount of tax which the principal entity was legally obliged to pay. In addition, all of the risk was assumed by the principal entities, in that they carried the risk of any losses or legal actions which may occur.

45. Witness 1 stated that as a consequence of all of these decisions to create and locate principal entities in favourable locations, and of the agreements which the principal entities made with manufacturers, distributors and service providers, all of the direction and knowledge that was created sat within the principal entity which was funding and providing the direction.

46. In addition to the tax benefits of this structure, Witness 1 stated that there were cash flow benefits which fed back into the Appellant's Board's ability to direct more research and development activity. He stated that what drove the Appellant Group was the need, and desire of the market, for innovation and technology and "the next best thing". In relation to [redacted] products in particular, he stated that [redacted] wanted to have the latest technology in order to be as successful as they could, and that they were great first adopters of technology. Similarly, he stated that [redacted] wanted the best outcomes for their [redacted] because they wanted to [redacted], and insurance companies wanted the best financial outcome. He stated that this resulted in a virtuous circle which drove innovation because everybody was always looking for the next best thing. In addition, the Appellant operated in a highly competitive industry and it was constantly reviewing what its competitors were doing. The cash flow benefits which were reaped by the model of principal entities used by the Appellant Group ensured that additional cash for research and development activity was available within the Group.

47. In this regard, Witness 1 gave an example of a principal entity making profits of $1 billion, which would attract a tax liability of approximately $350 million in the United States. If the Appellant was able to direct a movement in the business structure from the US principal entity to Company H in [redacted], where a tax rate of 10% applied, this would generate a significant multimillion dollar saving for the Appellant Group, which could then be used for other purposes, such as research and development.

48. In addition, Witness 1 stated that cash would be used to fund the purchase of other companies with new technologies through a process known as "buy in". These companies would be acquired by Company I, which would then sell the

outside-US rights to Company H, which would then have the rights to sell those technologies in all markets outside of the US. He stated that all of these decisions were driven by and made at the Appellant's Board level, and were then implemented through the Senior Executive Committee.

49. Witness 1 then went on to speak about a decision made by the Appellant's Board to look at the possibility of divesting the [redacted] business. He stated that the Appellant Group's [redacted] business had a high cost base and also required significant resources to be dedicated to it, which resulted in personnel being unable to focus on higher value, higher margin growth opportunities within the Appellant Group. He stated that the Appellant's Board made a decision to place the [redacted] business for sale and subsequently, when no suitable buyer for the business emerged, a decision was made to spin-off the [redacted] business into a company of its own. This would, in the opinion of the Appellant's Board, allow focus to be placed on what was viewed as the core business of the Appellant Group and away from the [redacted] business.

50. He stated that as a result of the Appellant's Board's decisions, significant work was undertaken in order to get the [redacted] business ready for sale and/or spin-off. He stated that the Group's tax function worked with the finance, HR and legal functions to develop a plan which would allow either a sale or spin-off to occur at very short notice. He stated that an enormous amount of work was undertaken to restructure the Appellant Group because all of the business was intertwined in terms of sales entities and manufacturing entities, whereby some of the manufacturing entities were manufacturing both [redacted] and other core products. This meant that an extremely complicated process of separating out the [redacted]

business from the Appellant Group core business needed to take place, irrespective of whether the ultimate decision was to sell the [redacted] business or to spin it off. This, he stated, needed to be done in as cost effective manner as possible, and one of the relevant considerations was tax, which was a large part of the cost of the exercise.

51. The functions which were involved in this process were tax, finance, legal, IT and HR, all of which were based in, or driven through, Company I, as were most of the department heads who comprised the membership of the Senior Executive Committee.

52. Witness 1 stated that the process of separating out the [redacted] business was extremely complex and he gave as an example meetings in London with lawyers where there were up to 100 people present representing all of the functions on both sides of the business. The process of separation of the [redacted] business involved not only the creation of new companies with their own finance, legal, HR and IT functions but also involved decisions on the physical location of where manufacturing lines were located and even decisions on where employees sat and parked their cars. In addition, separate distribution/sales agreements needed to be put in place. He stated that this was an enormous project which took place over a very long time, and that it was a process which would have had to take place regardless of whether the [redacted] business was sold or spun off.

53. Witness 1 further testified that transfer pricing was what supported and justified the costs that were incurred by a principal entity and also the relevant profits which were made by a principal entity. He stated that without transfer pricing, it would be possible to effectively artificially manipulate

results so that all of a company's costs were allocated to a high tax jurisdiction while profits were allocated to a low or zero tax jurisdiction. He stated that the purpose of transfer pricing was to level the field to ensure a common set of rules that everybody generally adhered to, and which allowed the authorities to then look at and confirm (or otherwise) the appropriateness of the return or profit that a local company was making.

54. Witness 1 then went on to speak about transfer pricing within the Appellant Group. He stated that transfer pricing drove all of the activities within the Appellant Group. In particular, he stated that transfer pricing drove the way in which remuneration was calculated within the operating model. He stated that care was taken to ensure that the transfer pricing used was based on internationally recognised rules and regulations so that, if there was a question from an overseas tax authority as to the return an entity was making, a report would exist which would be sufficient to defend the position.

55. Witness 1 referred me to two reports on transfer pricing which had been commissioned by the Appellant Group, one by [redacted] in 2012 (hereinafter **"Report A"**) and one by [redacted] in 2008 (hereinafter "**Report B"**). He stated that Company I had a lot of individuals who undertook activity which provided benefit to the overall Appellant Group. The costs of that activity needed to be appropriately split against the individuals or entities which were benefitting from the services provided. The services were provided by Company I on behalf of the Appellant as parent of the Appellant Group and as the entity which was directing everything going on within the Appellant Group. The witness referred me to the conclusions of Report A, and in particular to paragraph 6.3 thereof which stated:-

> *"Although* [Appellant] *management has established that* [Company I]*'s management services provide benefits, to allocate the costs related to these services it is important to review the allocation of the estimated benefits from the services. To determine where a benefit has been received, it is necessary to examine the functions and costs of the various management cost centres. For* [the Appellant], *costs related to services that only provide benefits to* [Company I] *are allocated to the US segment and, as a result, are not charged to any other* [Appellant] *affiliates. Costs that have been identified by* [Appellant] *management as costs incurred from services that provide benefits to* [Appellant] *or to non-US affiliates are allocated to the Parent Segment or to the Non-US segment, depending on the party that is receiving benefit. Both of these categories are allocated initially to* [Appellant]. *In* [Appellant]*'s case, costs allocable to the Parent Segment include costs attributable to shareholder or oversight activities, which are the responsibility of* [Appellant] *as the parent company of* [Appellant]. [Appellant] *allocates costs for services that provide general benefits, such as costs incurred from work providing general group benefit to the Corporate Segment."*

56. Witness 1 stated that he understood costs attributable to shareholder or oversight activities were those relating to the Appellant's obligations towards its shareholders. These he identified as investor relations, the strategic direction of the Group and communication of this to investors. He stated that investor relations was one of the most important things for the Appellant Group. Communication with investors, both current and future, was key, taking into account the fact that the main investors in the Appellant Group were very substantial organisations which had billions of dollars invested in large multinationals, and those investors needed to ensure that their

investments were good investments. In order to do so, the investors needed to understand the strategy that the business had adopted and understand how the business intended to develop. In addition, the investors needed to understand where the Appellant Group sat relative to their competitors. Essentially, he stated, investors needed to understand everything about the Appellant Group business. Witness 1 stated that if this was communicated correctly, and if the strategy communicated to the investors was executed, the investors would continue to buy the Appellant's shares, which in turn increased the share price, which in turn increased interest in the company and made it easier for the Appellant Group to raise capital for other expansion needs. In addition, Witness 1 stated that if the share price increased, there were follow-on benefits for employees who held shares or share options.

57. Witness 1 then went on to speak about the services provided by Company I to the Appellant Group outside of the US. He stated that the language in the Service Agreements entered into between the Appellant and the Service Recipients was "transfer pricing language"; in other words, the Service Agreements were about determining whether a cost was appropriate to allow a deduction of that cost for tax purposes. He went on to state that costs might arise which could not be allocated to a principal entity; an example was costs which arose as a result of a business project which the Appellant's Board decided to investigate and develop and on which it had spent capital, but where it had not yet determined which, if any, country or principal entity would implement the proposed business. Such a project, he stated, might have potential for the Appellant Group as a whole but not to any specific entity within the Appellant Group. These costs would therefore be allocated to the Appellant until such time as a firm decision to progress with the particular project in a particular location and entity had been made. Similar

considerations applied to financial analysis and planning services, which benefited the Group as a whole and therefore could not be allocated to a particular affiliate or company.

58. The witness testified that there was a "bucket of costs" relating to any service being provided by Company I, and these included costs which could not be directly attributed to a principal entity or to the Appellant as the parent of the Appellant Group. Those costs had to be attributed somewhere and it was necessary to come up with an appropriate methodology for doing so. He stated that Report A served to support the methodology applied by the Appellant Group in allocating such costs.

59. In cross-examination, Witness 1 accepted that one of the activities of the Appellant was the holding of shares, but he did not accept that it could fairly be described as just a holding company as it also undertook many other activities.

Witness 2 – Ms. [redacted]

60. Witness 2 gave evidence that she was employed by Company I from [redacted] onwards and had worked in its tax department during all relevant periods. Prior to the K Transaction acquisition, she was responsible for the corporate income tax issues in the Appellant's Irish entities and in addition she worked on Project X and dealt with some US issues.

61. Witness 2 stated that there were in total [redacted] legal entities within the Appellant Group of which [redacted] were active. She stated that the reason that there were so many legal entities was because the Appellant Group was a very

acquisitive business, acquiring businesses which had multiple legal entities. These legal entities would then be integrated into the Appellant's business model post-acquisition by way of sale of their IP to one of the IP holders within the Appellant Group, with their sales entities being integrated with the existing sales entities. This resulted in the remaining [redacted] dormant entities becoming either inactive or holding companies.

62. She stated that on the US side of the Appellant Group business, which was led by Company I, there were [redacted] legal entities engaged in functional activities. Company I was the primary US entity, owned most of the intellectual property and was the primary manufacturer and distributor.

63. She further went on to state that outside of the US, there were four "Foreign Principal Entities" (hereinafter "**FPEs**"), with most of the non-US intellectual property being owned by Company H. She stated that there were [redacted] active legal entities which were directly connected to the FPEs, which supported the [redacted] subsidiary entities either through services, such as research and development services and some finance services. The [redacted] legal entities were the distributors to the ultimate customers and also the manufacturers and marketers of the products.

64. Witness 2 further testified that the Appellant Group business was divided into a number of Global Business Units (hereinafter "**GBUs**"). These were not legal entities but were instead groupings within the Appellant Group under which a GBU assumed responsibility for all aspects of its regional business across all of the various products and markets that the GBU operated in.

65. She stated that Company I had two main functions, the first of which was to control the US Appellant Group operations as holder of the US intellectual property, and the second of which was to provide the Appellant Group corporate management function, which serviced the entire Appellant Group. She confirmed that none of the charges for the management services provided to the US entities were charged to the Appellant.

66. Witness 2 gave evidence in relation to a cost centre analysis which had been performed in relation to the costs which Company I applied to the Appellant, which was required because there was a need to determine from a corporate tax perspective where the expenses belonged in order to support a tax deduction. She stated that in order to support tax deductions, a transfer pricing exercise was required to establish how the expenses were allocated to legal entities for corporate tax purposes.

67. She stated that Report B and Report A were commissioned following a decision to obtain third-party expert reports to establish that the transfer pricing used in allocating the costs complied with US tax regulations along with those in Ireland, Switzerland and the Netherlands and also the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. She stated that Report A concluded that the transfer pricing methodology which was applied within the Appellant Group appeared to be in line with OECD guidelines. She testified that services were provided on an ongoing basis and the costs of those services were then allocated on a quarterly basis by the Tax Department's transfer pricing team.

68. In relation to transfer pricing, she stated that Report A dealt with the methodology adopted within the Appellant's organisation and in particular

that it identified that there were four "buckets" into which the costs being allocated were placed, those being **(a)** US segment, **(b)** Non-US segment, **(c)** Parent Segment and **(d)** Corporate Segment.

69. Witness 2 went on to give evidence in relation to certain costs allocated within the Appellant Group and in particular to costs relating to various functions within the organisation as follows:

i. **Corporate Executive** which she stated comprised the Chief Executive Officer, the Chief Financial Officer and the Vice President of Investor Relations. She stated that a lot of the costs allocated to the Corporate Executive related to activities which they carried out directly for the Appellant's Board and in particular in relation to investor relations. She stated that the costs also related to some business reviews which the Corporate Executive carried out on the GBUs.

ii. **Business Development** which she stated comprised costs relating to business development in terms of future acquisitions and future product development are also allocated to the Appellant.

iii. **HR** which she testified were costs relating to the activities of the Appellant Group's lead HR function, whose role related to policy setting for the organisation's [redacted] employees. She stated those policies related to compensation, benefits, stock options, diversity inclusion programmes, and harassment prevention.

iv. **Internal Audit** which was made up of a team whose function was to ensure that the financial reports which were submitted to the SEC were

correct. She stated that the Internal Audit team was also involved in engaging directly with Appellant entities and carrying out work on site in those entities, mostly within the US but also sometimes outside of the US. Witness 2 stated that the Internal Audit function was the only department where none of the costs were allocated to the FPEs and where all of the costs were allocated to the Appellant, primarily because the functions carried out by the Internal Audit team served the entire Appellant organisation from the point of view of ensuring a sound financial footing from a shareholder perspective. She stated that the OECD guidelines required any expenses relating to financial filings which the Appellant made to be allocated to the parent company, namely the Appellant. In relation to reporting required to comply with the Sarbanes-Oxley Act in the US, she stated that Company I was allocated part of the costs related to this with the balance being allocated to the Appellant.

v. **Finance** which she stated was a general category and which was the function which prepared the consolidated financials from all Appellant entities prior to filing and which were subject to Internal Audit review. In addition, the Finance function had responsibility for research and policy regarding accounting and compliance with GAAP. The Finance function also had responsibility for the implementation and maintenance of a single financial management system through which all of the Appellant organisation finances were recorded. In this regard, she stated that the Finance function was regarded as providing a resource to the entire Appellant organisation

vi. **Tax** which she stated had a responsibility for worldwide tax. She stated that a large part of the tax function was reporting into SEC filings for the "tax provision". In addition, the tax function had an international team which had responsibility for transfer pricing and international issues in relation to the US tax return. Furthermore, the tax function had a planning group which dealt with transactional plans which were occurring within the Appellant organisation, such as acquisitions, debt planning and Project X.

vii. **Legal** which she stated dealt with any worldwide issues which arose across the GBUs. In addition, the Legal function was responsible for intellectual property management at a corporate level along with litigation of all types. The Legal function also comprised the Company Secretarial function.

viii. **Treasury Services** which she stated dealt with capital planning connected to the Appellant Group's responsibility to its shareholders and also dealt with foreign exchange issues and hedging decisions within the Appellant Group. In addition, Treasury Services managed the Appellant Group pension plans and were involved in decision-making in relation to questions of insurance and whether the organisation would self-insure particular risks. Treasury Services were also concerned with cash management and how to deal with cash needs or excess cash within the various Appellant organisation entities.

ix. **Operations** which she stated, in the context of transfer pricing, related to the quality function within the organisation and ensuring the quality of products which were being marketed and sold.

x. **<u>Miscellaneous</u>** which she stated related to the IT Shared Services Centre which Company I operated and which was an office which dealt with all IT and computer issues which arose within the worldwide Appellant organisation.

70. Witness 2 stated that within the Appellant Group there were established processes of approvals for funding requests or business changes which were escalated through various levels and which could ultimately reach the Appellant's Board level. The Board would approve capital expenditure for large projects such as Project X. She stated such decisions made by the Appellant's Board would be communicated to the Senior Executive Committee, most of whom were employed by Company I, who then progressed the necessary steps through their teams, who would then liaise with all necessary personnel in the Appellant organisation, whether within Company I or within the wider Appellant organisation.

71. Witness 2 further testified that the ultimate allocation of costs to legal entities within the Appellant Group was based on the business model. The three ultimate receivers of costs were the US intellectual property owner, the four non-US intellectual property owners and the Appellant. Costs were broken out into the four "buckets". Costs in the first three buckets (namely Parent Segment, US Segment and Non-US Segment) were allocated in accordance with transfer pricing rules and costs in the fourth "bucket" was divided between the relevant entities on a basis pro rata with the first three buckets.

72. Witness 2 then went on to speak about shareholder costs and stewardship costs in the context of transfer pricing, which costs she noted were defined in

both US regulations and OECD guidelines. She stated that one of the main concepts with which transfer pricing is concerned is that relating to what a parent expense is, namely what expenses are incurred because of the parent's responsibility to its shareholders. She then referred to the Service Agreements entered into between the Appellant and Company I and also those between the Appellant and the Service Recipients. She stated that the agreements provided for Company I to provide a management service to the Service Recipients on behalf of the Appellant.

73. The witness went through Report A, which was the basis for the transfer pricing calculations, at some length. She explained that it was detailed in terms of cost centres. She went through the various categories of costs detailed in Report A and showed the methodology used to allocate those costs as between the beneficiaries of the services. She confirmed that the cost centres which related to financial planning and analysis and investor relations were not charged to the FPEs because of the rules relating to transfer pricing.

74. Witness 2 stated that the decisions in relation to the allocation of costs for transfer pricing were based on a reasonableness approach and, as part of establishing what was reasonable, one measured the time a team spent carrying out a function. This metric was used particularly for the allocation of Board Member costs. Another measure which was used was headcount, namely how many staff within Company I worked on US issues, how many worked on non-US issues and how many worked on Board issues.

75. In cross-examination, the witness confirmed that Report A and Report B were prepared for corporate income tax purposes and not for VAT purposes, and that no report had been obtained by the Appellant in relation to VAT.

Witness 3 – Mr [redacted]

76. Witness 3, who was a Tax Partner in [redacted] and a former officer with the Respondent's VAT office from [redacted] to [redacted], gave evidence at the hearing. It was agreed between the parties that Witness 3 was not an independent witness and any opinion evidence which he gave was heard as such.

77. Witness 3 stated that he had been involved with some of the Irish Appellant Group entities on an *ad hoc* basis prior to the Appellant becoming resident in Ireland sometime in [redacted] or [redacted]. He stated that he was involved with the Appellant from a VAT point of view, advising in relation to same and liaising with members of the [redacted] and Appellant tax teams to explain the operation of VAT in broad terms as it applied to holding companies, and to explain the difference between a passive holding company and an active holding company and the implications of this in terms of VAT.

78. He went on to state that in advising the Appellant his approach was that a passive holding company was a holding company which simply sat on top of its investment and was not engaged in an economic activity. Such a company, he advised the Appellant, was not entitled to register for or deduct VAT, and therefore a passive holding company would incur VAT on all its Irish and EU suppliers which it would not be able to recover.

79. In contrast, his view was that an active holding company was a holding company which was not a passive company because it was engaged in at least some economic activity.

80. He stated that in or around [redacted], the Respondent asked for clarity from the Appellant regarding its VAT profile. This, he stated, was usual in circumstances relating to a company as large as the Appellant. He stated that in or around July of [redacted], he met with Mr [redacted] from the Respondent and that he followed up on that meeting with a letter and submission to the Respondent wherein the position of the Appellant was set out. This correspondence, dated [redacted], set out the Appellant's view as to its VAT status and entitlement to register same and stated as follows:

> *"***[Appellant]** ***Group***
>
> *The* [Appellant] *Group supplies products in over 130 countries worldwide and has a presence in approximately 55 countries including Ireland where there are a number of operations including,* [redacted] *manufacturing facilities, a distribution operation and a customer shared services centre. As detailed in previous correspondence with your colleague* [redacted], [the Appellant], *a* [redacted] *incorporated parent of the* [Appellant] *Group, became Irish tax resident by moving its central management and control to Ireland in* [redacted].
>
> *Having become Irish tax resident* [Appellant] *entered into a scheme of arrangement under which a new Irish incorporated holding* [Appellant] *plc was placed in top of the group in* [redacted]. [Appellant] *is Irish incorporated and Irish tax resident.*
>
> [Appellant] *is now held directly by* [Appellant]. [Appellant] *itself holds a series of subsidiaries through which the entire group is held.*
>
> **[Appellant]**
>
> [Appellant] *is now, as mentioned, the ultimate holding company of the* [Appellant] *Group. The activities of* [Appellant] *include:-*
>
> - *Reviewing and approving major strategic decisions which relate to any part of the* [Appellant] *Group,*

- *Stewardship and investment management that is monitoring and evaluating the performance of the* [Appellant] *Group,*

- *Administration and management of the business,*

- *Taking general business decisions.*

[Appellant] *has a head office function based in Dublin (*[redacted] *employees). To enable it to discharge its responsibilities regarding the strategic management of the group it has therefore entered into a services agreement with* [Company I] *which is based in* [redacted]*. By way of background* [Company I] *provides services to the* [Appellant] *Group. The* [Appellant] *Group's senior management (including for example the CEO, the CFO, and Vice President Human Resources) sit within* [Company I] *as do a range of experts in areas such as communications, internal audit, treasury and information technology. Under its agreement with* [Appellant], [Company I] *provides* [Appellant] *with various services which fall broadly within the following categories:*

- *Financial – general financial and treasury services with respect to the preparation of financial statements and reports, cash management systems, and other aspects of the financial management of* [Appellant], *including, but not limited to supervising any independent audit of* [Appellant] *and its subsidiaries.*

- *Filings – activities with respect to the preparation and filing of reports required to be filed by* [Appellant] *with the Securities and*

Exchange Commission and all other stock exchanges and markets for which [Appellant] *is required to file reports.*

- *Professional activities – activities and advice with respect to obtaining insurance, accounting, legal and other professional activities.*

- *Compliance with laws – activities to ensure that* [Appellant] *is in compliance with all applicable laws, ordnances, rules and regulations.*

- *Management and leadership – executive level activities relating to leading and managing the global business of* [Appellant].

- *Miscellaneous – any other activities with respect to any other matters relating to the business of* [Appellant].

Based on prior years, the fee from [Company I] *to* [Appellant] *is anticipated to be in the region of US$70-$90m per annum. This represents the costs associated with the operation of the public company and costs relating to non-US Entrepreneurs (that will be recharged from* [Appellant] *– refer Stewardship fees below). Costs relating to US Entrepreneurs are outside of the amount charged to* [Appellant] *as these are retained in the US.*

The Board of [Appellant] *has also established a number of Board Committees including the Audit Committee, Compensation and a Remuneration Committee, Compliance Committee and Nominating and*

Governance Committee which support it in discharging its responsibilities.

Having regard to the above we believe [Appellant] *is properly regarded as actively managing the* [Appellant] *Group businesses.*

Stewardship fees

[Appellant] *will charge a stewardship fee for the strategic management / stewardship services it provides. It is presently intended that this charge will be made to* [Company H], *a company based in* [redacted]. *It is anticipated that this fee will be in the region of US$30-$40m for supplies made to date.*

It is possible that further charges will be made to other entities within the [Appellant] *organisation but at the time of writing no formal decision on such charges has been made.*

Deduction entitlement

In terms of the costs incurred by [Appellant], *other than the charge by* [Company I], *the company routinely incurs costs in relation to office rent and accommodation and local professional fees in respect of audit, tax and legal advice.*

We believe that [Appellant] *should be properly regarded as actively engaged in the management of the* [Appellant] *Group and is making supplies of taxable services. On that basis, and subject to the caveats mentioned below, we believe it is entitled to a full deduction of input VAT incurred.*

We appreciate that a deduction would not be available in respect of the following:

- *VAT incurred on costs in respect of which a deduction is specifically prohibited under Section 12 VAT Act 1972 (food, drink*

and accommodation for employees, car hire /leasing/purchase, entertainment and petrol).

- *Costs directly attributable to an exempt activity, other than where that activity is also a qualifying activity.*

- *Share related transactions – each individual transaction would need to be examined on a case by case basis with reference to the principles established in such cases as CIBO Participations SA and Directeur regional des Impots du Nord-Pas-de-Calais [2002] STC 260. Skatteverket v AB SKF (Case – C29/08) and Kretztechnick AG v Finanzamt Linz [2005] STC 1118 for example.*

Conclusion

[Appellant] *is the ultimate holding company of the* [Appellant] *group and it is actively engaged in the management of the* [Appellant] *Group businesses in respect for which it makes VATable supplies of strategic management services.*

We believe that given [Appellant] *is actively engaged in the provision of VATable supplies it has a general entitlement to a full input VAT deduction (subject to the normal restrictions mentioned above)…"*

81. The Respondent then replied by letter dated the [redacted] as follows:

"*I refer to your letter of the* [redacted] *last.*

1). Your letter stated the fee payable to [Company I] *will be in the regions of $70m-$90m. How will the company be funded to meet the* [Company I] *and Irish operations costs.*

2). I agree your VAT analysis that the company is entitled to a full deduction subject to restrictions as outlined in your letter – Section 12 VAT Act 1972, costs attributable to exempt activities and share related transactions.

3). VAT returns have been submitted from July/August [redacted] *to January/February* [redacted]*. Can you now review the claims and let me know if there are any non-deductible credits claimed.*

4). Can you request the [Appellant] *to submit all outstanding VAT returns."*

82. Witness 3 stated that the said letter from the Respondent satisfied him that the VAT profile which he had indicated to the Respondent had been accepted. He stated that the said letter provided clarity in relation to the Appellant's situation and that the Appellant was not being afforded any special treatment by the Respondent. He further confirmed that it was apparent from the correspondence that the Respondent was aware that the Appellant's charge out was going to be less than the charge in.

Witness 4 – Mr [redacted]

83. Witness 4, who is a Partner in the Corporate and Mergers & Acquisitions Department of [redacted], then gave evidence.

Project X

84. Witness 4 stated that he became involved with the Appellant towards the end of [redacted] as a senior associate in relation to Project X. He stated that from about November [redacted] he became the lead partner for Project X and worked day-to-day with a number of individuals in the Appellant and some of their other advisors. He stated that his main contact in the Appellant was Mr [redacted], Company Secretary and Vice President who was responsible for the legal implementation issues around Project X. He stated that he also worked with [redacted] who worked with Mr [redacted] and in addition he worked with [redacted] who were the lead US legal advisors for Project X.

85. He stated that he worked a lot with Mr [redacted] around preparation for the Appellant's Board meetings. He stated that the members of the Appellant's Board were nearly all independent directors/non-executive directors who would all be active or very senior former executives of US companies. He stated that the Appellant's Board was a very active Board and therefore the preparation for Board meetings was quite a focus of activity around Project X and was extremely detailed in anticipation of questions which the Board would have in order to allow it make decisions in relation to Project X.

86. Witness 4 stated that he was aware that in early [redacted] a sale of the [redacted] business had been considered but he stated that by mid- to late-[redacted] his focus was very much on the Project X spin-off, as a buyer willing to purchase the [redacted] business for a sufficient price had not materialised. He said that while it was always possible that the direction could switch back to a sale, almost the entire focus during his involvement was on a spin-off of the [redacted] business.

87. Witness 4 stated that a detailed press release relating to a spin-off of its [redacted] business was issued on [redacted] which stated as follows:-

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Transaction Details

[Appellant] *anticipates that the transaction will be in the form of a distribution that will be tax-free to U.S. shareholders of a new publicly traded stock in the new* [redacted] *company.* [Appellant] *currently expects that completion of the transaction could take up to 18 months.*

Completion of the transaction is expected to be subject to certain conditions, including, among others, receipt of regulatory approvals, assurance as to the tax-free status of the spin-off of the [redacted] *business to our U.S. shareholders, the effectiveness of a Form 10 registration statement to be filed with the U.S. Securities and Exchange Commission and final approval by the Company's Board of Directors.*

There can be no assurance regarding the ultimate timing of the proposed transaction or that the transaction will be completed. [Appellant] *does not intend to provide regular updates on its progress regarding this separation, but will announce final approval of the separation by the* [Appellant] *Board of Directors or completion of the transaction and will make such other disclosures as required by applicable law…"*

88. Witness 4 stated that the thinking behind the spin-off was that the Appellant had two very different businesses. The first was the [redacted] business which was growing and which had both revenue and profits that were increasing. He stated that the [redacted] business was less capital intensive than the [redacted] business, that it was less dependent on a pipeline and that it was throwing off cash. It was, he stated, ultimately part of a dividend paying business. The second business, the [redacted]

business, was a flat-lining business at that time and a lot of work was required to develop a pipeline of [redacted] which could be brought on stream. He stated that the [redacted] business was "more of an investment play."

89. Witness 4 testified that the Board believed these businesses were not complimentary. In order to maximise the shareholders' positions, and in the absence of a purchaser for the [redacted] business, they decided to make the press release in [redacted] so that market analysts, who would have been well aware of the two very different sides of the Appellant's business, would be in a position to very carefully analyse the Appellant's business in the context of an intended spin-off of the [redacted] business. The press release was also, he stated, the Appellant Board meeting its obligation to alert the market of the spin-off decision at an early stage; however, the Board could have changed its mind at any stage up to the execution of the spin-off.

90. Witness 4 stated that the process of separating the [redacted] business from the rest of the Appellant's business was a very extensive piece of work. He stated that prior to the decision to spin-off the [redacted] business, the whole business rationale in the Appellant Group was to keep everything as integrated as possible in order to achieve cost savings. For example, the Appellant Group had one administration tier with complimentary ways of making sales as well as all of the assets and liabilities of the various businesses sitting mixed together. He stated that, in order to effect a spin-off, the [redacted] business needed to be separated from the rest of the Appellant's business and this needed to be bundled together to form the spin-off [redacted] business which would then go on to be Company J.

Placing the Appellant in a position where Project X would produce a stand-alone entity with its own "financial position" was the entire concern and focus of the project.

91. Witness 4 gave evidence in relation to the Appellant's first Board meeting following the Press Release announcing the intended spin-off of the [redacted] business; this took place in [redacted]. In particular, Witness 4 highlighted the contents of the Board pack which was produced for the said meeting and a slide which dealt with the feedback received from the announcement of the spin-off. This included a note that the Appellant's share price had increased which indicated a positive reaction by the market to the spin-off announcement. The slide also contained a number of positive quotes in relation to the spin-off announcement from market analysts. Witness 4 stated that this feedback from the announcement was very important and that if the feedback had been extremely negative this could well have affected the Appellant's position in relation to the spin-off plans.

92. Witness 4 then gave evidence in relation to the Appellant's subsequent Board meetings which took place in [redacted], at which a further increase in the Appellant's share price was noted. This, he stated, meant that the implied value of the two companies when separated had increased from the date of the spin-off announcement, and this would have been seen as meaning that the two companies when separated had a greater value than if they remained together.

93. Witness 4 stated that he and his firm were very much involved with Mr [redacted] in producing the Board packs for these and subsequent Appellant Board meetings. He stated that he was involved from the standpoint of

making sure the Board was comfortable at each stage of Project X and that they knew exactly where they were from an Irish legal perspective. He also stated that it was part of his role to ensure that each Board member was aware that they had to be individually satisfied that Project X was in the best interests of the company, that the Board was delivering value back to shareholders and that there would, at the conclusion of Project X, be a viable long term business in the form of the company which would subsequently became Company J.

94. Witness 4 testified that a spin-off is a distribution to shareholders. In the case of Project X, the Appellant's assets had been placed into two companies, the existing Appellant and the newly formed Company J, and subsequently the Appellant declared a distribution whereby it reduced its distributable reserves by an amount matching the value of Company J's assets. He stated that the reason this was done was because the Appellant was reducing its assets by creating Company J and it was receiving nothing in return. Thereafter, he stated, the shareholders ended up holding the Company J assets directly in the form of Company J shares which were listed on the stock exchange at the same time as the distribution by the Appellant took place.

95. He stated that the precise mechanism which was employed was that a new listed entity was formed and the assets went into the newly listed entity at the exact time the shareholders were issued the shares in the newly listed entity. Witness 4 stated that at the end of the process, the shareholding in the Appellant was completely unaffected. The shareholders retained the same shareholding in the Appellant and in addition they also received Company J shares. In the spin-off, there was an issue of 1 Company J share for every [redacted] Appellant shares each shareholder held. This mechanism, he stated, was

known as a three-cornered demerger. Witness 4 stated that what occurred was not a sale or a share-for-share exchange but rather it was the Appellant distributing out assets in the form of the [redacted] business.

The K Transaction

96. Witness 4 then went on to discuss details of the K Transaction in which he acted as advisor to the Appellant on the Irish legal situation. He stated that the nature of this transaction meant that the work was extremely intensive and required a lot of involvement. He stated that he again worked with Mr [redacted] and also the Appellant's broader financial and tax teams, along with the legal firm [redacted] in the US.

97. He stated that what occurred was a merger of the Appellant and [redacted] Inc. which became Company K – an entirely new entity - for which the Appellant's shareholders received shares in Company K plus cash and the shareholders in [redacted] Inc. received only shares in Company K. No consideration was received by the Appellant. Witness 4 stated that as part of this merger, an application was ultimately made to the High Court by the Appellant for a cancellation of its shares pursuant to section 72 of the Companies Act 1963.

98. Witness 4 stated that there had been significant work in relation to this merger and that he had attended at some of the Appellant's Board meetings in relation to same. He stated that the information in relation to the merger was highly sensitive and that significant steps were taken to ensure the secrecy of meetings so that no information could be leaked to the market prior to the official announcement of the merger. Information and legal advice were provided to the Appellant's Board by its Irish and US lawyers along with

advice from its investment bank [redacted] in relation to the fairness and reasonableness of the proposed merger. All of this advice took considerable time and resources to put together. The Board received extensive advice in relation to the details of the merger, in relation to the mechanics of how the merger would proceed under Irish law, in relation to the regulatory requirements and in relation to the announcement of an Irish company listed on the New York Stock Exchange, the Appellant, being de-listed and a newly-formed Irish company (Company K) being listed for the first time on the New York Stock Exchange.

99. Witness 4 stated that the major benefit of the Appellant's merger with Company K was that the merger was expected to result in at least $[redacted] million of pre-tax cost savings by the end of the [redacted] fiscal year by way of the optimisation of back-office, manufacturing and distribution infrastructure as well as the elimination of redundant public company costs. He stated that this was hugely important from the Appellant's perspective in its decision making because this meant that its shareholders would continue to have an interest in the combined entities.

F. Submissions on behalf of the Appellant

100. Counsel for the Appellant indicated at the outset of the hearing that the Appellant was no longer pursuing the ground of appeal based on a legitimate expectation argument. Consequently, that issue is not considered further in this Determination.

101. In the submissions made on behalf of the Appellant, it was put to me that, as with all VAT related issues, the first matter to be decided is whether the Appellant is a taxable person within the meaning of VATCA 2010. It was submitted that this question must be answered in the positive if I find that the Appellant exploited its shareholding. It was further submitted that the Appellant did exploit its shareholding by providing management services for consideration to its subsidiaries.

102. It was submitted that from [redacted] until [redacted], the Appellant herein was the Irish incorporated and resident holding company of the Appellant Group. The Appellant's ordinary shares were listed on the New York Stock Exchange and it was registered with the SEC.

The Obligation to Self-Account

103. The Appellant submitted that the existence of an obligation to self-account for VAT is central to the within appeal. The assessments were, in each case, predicated upon the Appellant's obligation to self-account for VAT incurred on services received from abroad and the subsequent prohibition which the Respondent said exist against the deduction of that VAT. The Appellant submitted that if there was no obligation to self-account for VAT due on the receipt of the services, the question of whether there is a right to deduct VAT never arises.

104. The Appellant disputed any assertion that the fact that the Appellant was at all material times registered for VAT was sufficient to generate an obligation to self-account for VAT on services received from abroad. The Appellant maintained that, in addition to being a taxable person, it must also

be "acting as such" (within the meaning of Article 44 of the PVS and section 34 of VATCA 2010) in order for the obligation to self-account for VAT to arise. This, the Appellant submitted, is referred to as the distinction between "status" and "capacity".

105. The Appellant's business is established in Ireland and the Appellant submitted that sections 33 and 34 of VATCA 2010 are clear; Ireland is the place of supply of services only in respect of services received by a "taxable person acting as such". The Appellant submitted that when the definitions of "taxable person" and "business" in section 2 of VATCA 2010 are taken into account, it is clear that a person must be acquiring services for the purposes of an economic activity in order for the reverse charge to arise.

106. The Appellant submitted that it followed, as a matter of the plain and ordinary meaning of the words used in VATCA 2010, that the Appellant was not required to self-account for VAT on the services in question unless it received the services for the purposes of an economic activity.

107. The Appellant submitted that the CJEU had repeatedly held that a taxable person "acts as such" only where he carries out transactions in the course of his taxable activity. The importance of the concept of "acting as such", the Appellant submitted, was succinctly summarised by the CJEU in ***Klub OOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto'—Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite*** **C-153/11, [2012] STC 1129** where it held:-

> "*39. Thus it is the acquisition of the goods by a taxable person acting as such that determines the application of the VAT system*

and therefore of the deduction mechanism (see, to that effect, Lennartz (para 15), and Eon Aset Menidjmunt (para 57)).

40. A taxable person acts as such where he acts for the purposes of his economic activity within the meaning of the second subparagraph of art 9(1) of the VAT Directive (see, to that effect, Bakcsi v Finanzamt Fürstenfeldbruck (Case C-415/98) [2002] STC 802, [2001] ECR I-1831 (para 29)).

41. Whether a taxable person acts as such is a question of fact which must be assessed in the light of all the circumstances of the case, including the nature of the asset concerned and the period between the acquisition of the asset and its use for the purposes of the taxable person's economic activity (see, to that effect, Bakcsi (para 29), and Eon Aset Menidjmunt (para 58))." (emphasis added)

108. The Appellant further referred me to the UK First Tier Tribunal case of ***Wellcome Trust v HMRC*** **UKFTT 599**, which said decision was the subject of an appeal to the UK Upper Tier Tribunal which had in turn referred a question to the CJEU. The question referred was answered in March of 2021, subsequent to the hearing of the within Appeal.

109. The Appellant further made detailed submissions on the history and evolution of the relevant EU legislation and referred me to the travaux preparatoires relating thereto. I was further referred to the decisions in ***Sveda UAB*** **C-126/14** and ***Kollektivavtalsstiftelsen TRR Trygghetsrådet*** **C-291/07**.

110. The Appellant further submitted that it would be in breach of the principles of equal treatment and fiscal neutrality if the Appellant was required to self-account for VAT which was incurred for the purpose of a non-economic activity while another trader who carried on only the non-economic activity would not be subject to the reverse charge.

111. The Appellant further submitted that the only costs which were subject to the reverse charge are those which have a 'direct and immediate link' with an economic activity (in input tax terms). Any costs which have an indirect link (for input tax purposes) and are thus considered to be general overheads of the business as a whole are not subject to the reverse charge regime, as the recipient is not acting "as such" when it acquires those services.

112. The Appellant submitted that the Respondents had denied the Appellant the right to deduct input tax because they did not believe that the costs incurred related to any economic activity.

113. The Appellant submitted that the question of whether the services in question were received for the purposes of an economic activity had to be considered with respect to the Appellant's overheads, Project X and the K Transaction separately and then as regards each service received.

Overhead VAT Deduction

114. The Appellant submitted that the right to deduction of VAT is contained in section 59(2) of the VATCA, which states:-

"*Subject to subsection (3), in computing the amount of tax payable, by an accountable person in respect of a taxable period, that person may, in so far as the goods and services are used by him or her for the purposes of his or her taxable supplies … deduct:*

(a) the tax charged to him or her during the period by other accountable persons by means of invoices…

…

(g) the tax chargeable during the period, being tax for which he or she is liable by virtue of section 12 or 17(1) in respect of services received by him or her…"

115. The Appellant submitted that the right to deduction set out in section 59 of VATCA 2010 and article 169 of the PVD focus on the "use" to which the goods or services in question have been put, and that it is well-settled that in order for a right to deduction to arise the goods or services supplied must be "used for" the purposes of a taxpayer's economic activity.

116. In ***Dial-a-Phone Ltd v Customs & Excise Commissioners*** **[2004] STC 987**, the English Court of Appeal reviewed the relevant European Authorities and noted that:-

"…on the authority of BLP and Midland Bank, in applying the 'used for' test prescribed by art 17(2) of the Sixth Directive the relevant inquiry is whether there is a 'direct and immediate link' between the input cost in question and the supply or supplies in question; alternatively whether the input cost is a 'cost component' of that supply or those supplies. [Underline emphasis supplied] It is clear from the judgments of the ECJ in

BLP and Midland Bank, as I read them, that there is no material difference between these alternative ways of expressing the basic test."

117. In ***Mayflower Theatre Trust Ltd v Revenue & Customs Commissioners*** **[2007] STC 880**, the Court of Appeal concluded that "*the only reasonable view*" in that case was that there was a direct and immediate link between the cost of buying in a production from a production company (say, Phantom of the Opera) and the supply of programmes to patrons by the Theatre company. The Court held that:-

> "*It is true that the production companies were not directly responsible for the programmes, other than the provision of information. But the productions for which they were responsible, and which provided the subject-matter of the contracts, also provided the subject-matter of the programmes. To that extent, they were as much part of the raw material used in preparing the programmes, as the paper and ink from which they were physically made. That, in my view, is an objective link, sufficiently close to satisfy the test.*"

118. However, in addition to the foregoing, the Appellant submitted that it is also well-settled that a right to deduction exists – for those engaged in economic activity – where the costs in question do not have a direct and immediate link with a specific taxable supply. The CJEU had repeatedly held that:

> "*a taxable person also has a right to deduct even where there is no direct and immediate link between a particular input 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 he supplies. Such costs have a direct and immediate link with the taxable person's economic activity as a whole"

119. In ***Revenue and Customs Commissioners v Frank A Smart & Son Ltd*** **[2018] STC 806**, the Court of Sessions' Inner House quoted from the CJEU's 2017 judgment in ***Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika'—Sofia v 'Iberdrola Inmobiliaria Real Estate Investments' EOOD*** **C-132/16** and then provided its view as to the then current legal position:-

"The court [in Iberdrola] then provided a helpful statement of the existing law in this area (paras 26 et seq):

"26. The deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT…

28. In accordance with settled case-law, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to the right to deduct is necessary, in principle, before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement. The right to deduct VAT charged on the

acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct …

29. A taxable person also has a right to deduct even when there is no direct and immediate link between a particular input 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 …

30. On the other hand, where goods or services acquired by a taxable person are used for purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected or input tax deducted …

31. It is apparent from the case-law of the Court that, in the context of the direct-link test that is to be applied by the tax authorities and national courts, they should consider all the circumstances surrounding the transactions concerned and take account only of the transactions which are objectively linked to the taxable person's taxable activity. The existence of such a link must

thus be assessed in the light of the objective content of the transaction in question…"

120. Lord Drummond Young then continued as follows;

"*From the foregoing authorities, it is possible in our opinion to identify five basic principles that govern the recoverability of input tax.* ***First****, at a general level, the deduction of input tax is intended to relieve a trading entity entirely of the VAT that is payable in the course of all of its economic activities; this ensures overall neutrality of taxation in respect of all activities that are subject to VAT.* ***Secondly****, if VAT paid on an input transaction is to be deductible, there must be a direct and immediate link between that input transaction and the output transactions that give rise to a right of deduction. This is necessary because, if deduction of the input tax is to be permitted, the expenditure on the relevant inputs must be a component in the cost of the output transactions that are charged with the output VAT from which the input VAT is to be deducted.* ***Thirdly****, such a link will be broken if the goods or services obtained through the input transaction are used by the taxpayer for the purposes of an exempt transaction or a transaction that does not fall within the scope of VAT, including activities that are not economic activities in the sense in which that expression is used in dealing with VAT.* ***Fourthly****, the direct and immediate link will not be broken if the goods or services in question form part of the general overheads of the taxpayer's business, in*

such a way that they form component parts of the price of the taxpayer's product. This represents common sense. When goods or services are supplied to a customer, the costs incurred by the supplier in providing the relevant goods or services will include not only the cost of purchasing or manufacturing the goods or providing the services but also general overheads. To take a simple example, if the supplier manufactures goods, the cost of providing the goods will include not merely the cost of raw materials but also the cost of plant and equipment. This is a general proposition that has been recognised throughout the case law of the Court of Justice. ***Fifthly****, if the goods or services in question are used partly as general overheads of the taxpayer's business and partly for the purposes of exempt or zero-rated transactions, the input tax must be apportioned between those two uses. The reasons for this are obvious and straightforward."* [emphasis added]

121. The Appellant submitted that subsequent judgments of the CJEU had served to underscore the breadth of the right to overhead VAT deduction and that ***Volkswagen Financial Services v HMRC*** **C-153/17** in particular was worthy of close consideration.

122. In that case, the CJEU considered the right to VAT deduction in respect of hire purchase transactions. In essence, where a customer wished to purchase a car from a dealer using the hire purchase facility offered by VWFS, the latter company purchased the car from the dealership and sold it to the

customer with no mark-up. In setting the interest rate relating to the 'finance' aspect of the transaction, VWFS applied a margin for overheads, a profit margin and an allowance for bad debts to its own cost of financing the vehicle. Thus, the part of the repayments corresponding to interest was included in the VWFS's turnover, whereas the part corresponding to the repayment of the purchase price of the vehicle was not.

123. It was agreed that as a matter of UK VAT law, the transaction comprised two separate supplies by VWFS, one of a vehicle, and the other, of an exempt supply of credit. VWFS incurred general costs relating to everyday administration, such as those associated with staff training and recruitment, staff meals and drinks, maintenance and enhancement of IT infrastructure, and premises and stationery-related overheads.

124. It was not in dispute that these costs – even though they did not have a direct and immediate link with any supplies – were part of the Appellant's overhead and, in principle, deductible. However, HMRC argued that [redacted] the value of the hire purchase transaction was, from VWFS's perspective, largely attributable to the grant of finance, which is an exempt supply, and therefore only the portion of the overhead VAT relating to the value of the other taxable supplies made under such contracts, such as settlement charges and option to purchase fees, was recoverable. HMRC had succeeded on this argument in front of the UK First Tier Tribunal, the UK Upper Tribunal and the Court of Appeal. The Appellant submitted, however, that the CJEU held in essence that none of these courts or bodies had quite appreciated the sheer breadth of the right to VAT deduction.

125. The CJEU reformulated the questions posed by the UK Supreme Court as posing the question whether:-

> "*…even where the general costs relating to supplies of moveable goods by hire purchase, such as the supplies at issue in the main proceedings, are passed on not in the amount due by the customer in respect of the supply of the goods concerned, that is to say the taxable part of the transaction, but in the amount of the interest due in respect of the 'finance' part of the transaction, that is to say the exempt part thereof, those general costs must nonetheless be considered, for the purposes of VAT, to be a component of the price of that supply and, second, Member States may apply a method of apportionment which does not take account of the initial value of the goods concerned when they are supplied."*

126. The CJEU then answered the reformulated question as follows:-

> *"40. The deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures complete neutrality of taxation of all economic activities, whatever the purpose or results of those activities, provided that they are themselves subject to VAT …*
>
> *41. In accordance also with the Court's settled case-law, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to the right to deduct is necessary, in principle, before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement. The right to deduct VAT charged on the acquisition of input goods or*

services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct …

42 A taxable person also has a right to deduct even where there is no direct and immediate link between a particular input 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…

43. *In this case, it is apparent from the order for reference that the general costs at issue in the main proceedings have a direct and immediate link with the activities of VWFS as a whole, and not merely with some of them. In that regard, the fact that VWFS decided to include those costs not in the price of the taxable transactions, but solely in the price of the exempt transactions, can have no effect whatsoever on such a finding of fact.*

44 Thus, in so far as those general costs were in fact incurred, at least to a certain extent, for the purpose of the supply of vehicles, which are taxed transactions, those costs are, as such, components of the price of those transactions. Accordingly, a right to deduct VAT arises, in principle, in accordance with the considerations set out in paragraphs 38 to 42 of this judgment.

> *45 So far as concerns the fact that the general costs at issue in the main proceedings are not clearly reflected in the price of the taxed transactions of supplies of vehicles, it should be recalled that the result of those economic transactions is irrelevant for the right to deduct provided that the activity itself is subject to VAT…*
>
> *46 As the Court has already held, the right to deduct VAT must be guaranteed, without it being subjected to a criterion relating, inter alia, to the result of the economic activity of the taxable person, in accordance with Article 9(1) of the VAT Directive under which a taxable person 'shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity'…"* [emphasis added].

127. The Appellant submitted that although this appeal did not concern hire purchase transactions nor even the making of exempt supplies, the judgment in Volkswagen provides a vivid demonstration of the breadth of the right to input tax deduction and dispels any residue of doubt as to whether the 'cost component test' requires that the costs in question form part of the price of the supply to which they are linked. The Court of Justice had unambiguously confirmed that it does not.

128. The Appellant further submitted that all that is required in order for costs to form part of a taxable person's overheads is that "the cost of the services in question are part of his general costs". If they are part of the general costs then they are "as such, components of the price of the goods or services which he supplies".

129. The Appellant submitted that its case was not concerned with the deduction of share acquisition costs. Cases such as ***Cibo***, ***Floridienne***, ***Ryanair*** and others are concerned with the right of holding companies to deduct VAT which they incurred for the purpose of acquiring shares in a company which became (or was to become) a subsidiary of the holding company. The costs with respect to which deduction was sought had a direct and immediate link with a single transaction, namely, the acquisition of the shares. Each of those cases, therefore, was concerned with the circumstances in which costs of that specific transaction can be deducted. The CJEU had held, in essence, that one looks through the share acquisition itself and asks whether the purpose for acquiring the shares was so as to engage in economic activity by providing, for example, taxable supplies of management services. That issue, the Appellant submitted, did not arise in this appeal and those cases are, save to the extent that they lay down principles of general application, irrelevant. Instead, the Appellant submitted that it is an established provider of management services to the group companies.

The Overheads Issue

130. The Appellant submitted that the overheads issue arises in respect of the period from [redacted] to [redacted]. The following facts applied for that period:-

(a) The Appellant's offices were situated in Dublin.

(b) Prior to [redacted], when the Appellant was acquired by Company K, the Board of the Appellant consisted of one Executive Director and various independent non-Executive Directors.

(c) The Appellant had approximately [redacted] employees who supported the Board of Directors.

(d) The vast majority of the other services which the Appellant required to manage its shareholding in Company A and the Group beneath it were supplied by a related entity, Company I, for which a charge was levied.

(e) Company I was located in the US and since [redacted] had been responsible for the Appellant Group's US operations and had also functioned as a shared services centre for the Appellant Group.

(f) Company I was based in the US and it was therefore necessary, for US transfer pricing purposes, that the costs of the activities it undertook be allocated to the entities which, for transfer pricing purposes, ought to bear those costs. The application of a transfer pricing methodology did not entail *per se* the existence of any services being supplied for consideration for VAT purposes; transfer pricing was merely an exercise which seeks to ensure the appropriate allocation of costs and/or revenues, and therefore profits, amongst the various parts of the Appellant Group for corporation tax purposes.

(g) There were two written agreements in place for the provision of services. The first agreement was an agreement between Company I as supplier and the Appellant as recipient pursuant to which Company I agreed to provide certain services specified in that agreement to the Appellant. The second agreement was between the Appellant as supplier and four companies as recipients which between them owned all of the Intellectual Property rights for the non-US parts of the Appellant Group.

(h) The services to be supplied for consideration were set out in the agreement and the Appellant relied upon the terms of both agreements for their true meaning and effect.

131. It was submitted by the Appellant that all of the costs which the Appellant incurred from Company I either:

(a) had a direct and immediate link with the Appellant's taxable supplies of services pursuant to the management agreement; or

(b) were part of its general costs and thus overheads in accordance with the case law outlined above.

The Nature of the Services Acquired

132. The Appellant submitted that pursuant to the services agreement between Company I and the Appellant, Company I supplied the Appellant with a composite supply of services set out in article 3 thereof. The composite supply was comprised of various elements such as corporate executive, business development, human resources, internal audit, finance, tax, legal, treasury, operations and any other activities respecting any other matters relating to the Service Recipient's business.

133. The Appellant submitted that in order to properly consider the deductibility of the VAT on the services purchased by the Appellant, it was necessary that the nature of those services first be determined. The Appellant submitted that the supply was a composite supply in accordance with the guidance of the CJEU.

134. In this regard, the Appellant submitted that the key principles were correctly summarised by the UK Upper Tribunal in ***Honourable Society of the Middle Temple v Revenue and Customs Commissioners*** **[2013] STC 1998** at paragraph 60 as follows:-

> *"(1) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.*
>
> *(2) The essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.*
>
> *(3) There is no absolute rule and all the circumstances must be considered in every transaction.*
>
> *(4) Formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent.*
>
> *(5) There is a single supply where two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split.*
>
> *(6) In order for different elements to form a single economic supply which it would be artificial to split, they must, from the*

point of view of a typical consumer, be equally inseparable and indispensable.

(7) The fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant.

(8) There is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element.

(9) A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied.

(10) The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.

(11) Separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive.

(12) A single supply consisting of several elements is not automatically similar to the supply of those elements separately

and so different tax treatment does not necessarily offend the principle of fiscal neutrality."

135. The Appellant submitted that there was a single economic supply in the instant appeal, namely the supply of integrated and interrelated management services, and that it would be artificial to split up that transaction into its various elements. The elements, if there were several elements, were each so closely linked that they formed a single, indivisible economic supply which it would be artificial to split.

136. The Appellant submitted that in ***Deutsche Bank*** the CJEU considered whether the bank, which was providing a complex asset management function as well as an execution function (the buying and selling of shares), was making one supply or two. Having set out the law on composite and multiple supplies the Court continued:

"*23 Having regard, in accordance with the case-law referred to in paragraph 18 of this judgment, to all the circumstances in which that portfolio management service takes place, it is apparent that the service basically consists of a combination of a service of analysing and monitoring the assets of client investors, on the one hand, and of a service of actually purchasing and selling securities on the other.*

24 It is true that those two elements of the portfolio management service may be provided separately. A client investor may wish only for an advisory service and prefer to decide on and make the investments himself. Conversely, a client investor who prefers to take the decisions on investments in securities and, more

generally, to structure and monitor his assets himself, without making purchases or sales, may call on an intermediary for the latter type of transaction.

25 However, the average client investor, in the context of a portfolio management service such as that performed by Deutsche Bank in the main proceedings, seeks precisely a combination of those two elements.

26 As the Advocate General stated at point 30 of her Opinion, to decide on the best approach to the purchase, sale or retention of securities would be pointless for investors within the context of a portfolio management service if no effect were given to that approach. Likewise, to make — or not, as the case may be — sales and purchases without expertise and without a prior analysis of the market would also be pointless.

27 In the context of the portfolio management service at issue in the main proceedings, those two elements are therefore not only inseparable, but must also be placed on the same footing. They are both indispensable in carrying out the service as a whole, with the result that it is not possible to take the view that one must be regarded as the principal service and the other as the ancillary service.

28 Consequently, those elements must be considered to be so closely linked that they form, objectively, a single economic supply, which it would be artificial to split."

137. The Appellant submitted that the evidence showed that the Appellant, and the Service Recipients, like the customers in ***Deutsche Bank***, wished to acquire the combination of services for which the service agreements provided. Accordingly, the Appellant both received and supplied a composite service.

138. It was submitted that the Appellant incurred VAT on the receipt of a single composite supply of services and that the question of its entitlement to VAT deduction must be determined by asking whether that service had a direct and immediate link with the Appellant's taxable supplies or with its business as a whole (both of which were entirely taxable).

The supplies made by the Appellant

139. The Appellant was a company registered for VAT and it engaged in taxable economic activity, namely the supply of services to the Service Recipients. The Appellant provided those entities with a single composite service, namely the services for which Article 3 of the Service Agreement provided. The service was comprised of various elements such as corporate executive, business development, human resources, internal audit, finance, tax, legal, treasury, operations and any other activities respecting any other matters relating to the Service Recipient's business.

140. The Appellant submitted that the said service was a taxable supply of services and was subject to VAT.

Right to Deduction

141. It was submitted by the Appellant that the costs which the Appellant incurred on the single composite service received from Company I had a direct and immediate link with its taxable supply of a single composite service to the Service Recipients or, in the alternative, were a cost of its business, and thus deductible as overheads.

142. It was common ground between the parties that the consideration which the Appellant received from the Service Recipients was less than the consideration which the Appellant paid for the supply it received from Company I. In fact, the assessments which the Respondent had raised related exclusively to this difference.

143. The Appellant submitted, however, that it was simply not relevant that it paid more for the service it received than it obtained from the Service Recipients, and that its consistent position in this regard had been unreservedly endorsed by the CJEU in its judgment in ***Volkswagen***.

144. The Appellant submitted that the only conceivable consequence of the Respondent's reliance upon the fact that the Appellant was making a loss on its supplies of management services was that the supplies of management services were not economic activities at all. The Appellant disputed this but submitted that if it was the case that the loss incurred on the Appellant's activities meant that the supplies to the service recipients were not an economic activity, then there would be no obligation to self-account for VAT on the services received from Company I as the Appellant would not have been a taxable person acting as such.

The Obligation to Self-Account

145. The Appellant submitted that it was only liable to self-account for VAT on the services it received from abroad if it received those services as a "taxable person acting as such". This in turn, the Appellant submitted, meant that it was a taxable person purchasing those services for the purposes of its economic activity.

Project X

146. The Appellant submitted that over an extended period of time, lasting more than one year, the Appellant Group was restructured in a complex and lengthy series of steps in a large number of jurisdictions.

147. The object and effect of this reorganisation was to separate out the Appellant Group's [redacted] business and [redacted] business globally into a separate part of the corporate group. Ultimately, the separate corporate group which was created by virtue of this restructuring was "spun-out" to a newly formed plc named Company J, which had been established for that purpose.

148. The Appellant submitted that there were two issues which fall for consideration, namely:-

(a) whether, and if so to what extent, the Appellant was required to account for VAT on the reverse charge basis on the services it received in connection with Project X; and,

(b) whether the Appellant is entitled to deduct any such VAT due.

149. The Appellant submitted that in addressing the first issue, I should apply the principles outlined earlier in order to:

(a) identify the services which the Appellant received for the purpose of Project X; and

(b) ascertain whether, in each instance, the Appellant received that service in its capacity as a taxable person acting as such.

150. The Appellant submitted that [redacted] were the principal law firm for the separation process. That firm charged the Appellant approximately €9.5 million for professional services including disbursements. As many of the fees and costs associated with Project X were incurred at a local level, the [redacted] costs were mostly related to overall coordination as opposed to granular local issues.

151. In addition to the foregoing, the Appellant also received services from Company I. The services related, *inter alia*, to preparation and implementation of the Step Plan, preparation for IRS rulings, the provision of accounting, tax and legal advice, corporate portfolio restructuring, human resources and business strategy. These services were provided pursuant to the Services Agreement and formed part of a composite supply of services.

152. The Appellant submitted that the answer to the question posed by part **(a)** above involved a consideration of each supply which the Appellant received for the purposes of this project and could involve consideration in any given case of whether that supply was a composite supply or a multiple supply.

153. In that regard, the Appellant pointed out that the Respondent's letter of 6 May 2016 stated that:

> "*The Project* [X] *costs did not have a direct and immediate link with* [Appellant's] *economic activity, that is, the provision of management services to subsidiaries; nor were they part of the general costs linked to* [Appellant's] *economic activity*".

154. The Appellant submitted that if this was correct then it followed that the Appellant could have had no obligation to self-account for output VAT on the services it received as it did not receive the services in its capacity as a taxable person acting as such.

155. The Appellant submitted that the Appellant Group undertook a worldwide and lengthy restructuring, which involved many of its entities and businesses across the world in order to separate out the two businesses into separate legal entities and reporting lines in each of the jurisdictions in which they operated. This, it submitted, culminated in the [redacted] business being collected in and below two companies the shares of which were held by the Appellant immediately prior to the spin off ([redacted] and [redacted], the "**Spin Cos**").

156. The final step of this separation which involved the Appellant directly was a transfer of the shares in the Spin Cos to a newly incorporated public limited company, Company J, to give effect to a distribution *in specie* in accordance with the terms of a Separation and Distribution Agreement. The spin-off itself was driven by the commercial objective of improving the allocation of resources within both businesses and maximising shareholder value.

157. The Appellant submitted that the following steps were undertaken to effect the spin off:-

(d) The company formerly known as [redacted] Limited, and now known as Company A, paid a dividend to its immediate parent, the Appellant. That dividend *in specie* was comprised of the shares held by the Appellant in the Spin Cos and some cash;

(e) The Appellant then declared a dividend in favour of its own shareholders and effected a distribution *in specie* of the shares in the Spin Cos only.

(f) The distribution *in specie* was effected "sideways", meaning that, in satisfaction of the distribution it had undertaken to make, the Appellant transferred the shares in the Spin Cos to Company J, which was held outside the Appellant Group (rather than by the shareholders directly). No cash was involved in this transaction and the Appellant did not receive any consideration from Company J or its own shareholders for the transfer of the Spin Cos.

(g) Company J then issued shares to the Appellant's shareholders pro-rata to their existing holdings in the Appellant; this is known as a three cornered demerger. The spin-off ratio was [redacted]:1, i.e. the Appellant's shareholders would, for every [redacted] Appellant shares held by them, receive one share in Company J.

158. The crux of the spin-off was the three-cornered demerger whereby the Appellant declared a dividend in favour of its own shareholders (having satisfied itself that it had sufficient distributable reserves to do so) and then effected the distribution of that dividend by transferring the Spin Cos to

Company J. That company then issued shares in itself to the Appellant's shareholders. This structure had been specifically approved by the Respondent in Tax Briefing 48.

159. The Appellant submitted that the net effect of this arrangement was that the Appellant transferred, to each of its shareholders, by means of a distribution, a proportionate share in the Spin Cos (albeit now held through the vehicle of a separate entity, namely Company J).

160. The Appellant submitted that none of these transactions involved the Appellant either in economic activity or the supply of services for consideration. It is well-settled that supplies must be made for consideration in order for an economic activity to exist. Thus, in ***Gotz* C-408/06**, at paragraph 18, the Court summarised the nature of "economic activity" and clarified that supplies made free of charge are not 'economic activities', saying:-

> "'*Economic activity' is defined in Article 4(2) of the Sixth Directive as including all activities of producers, traders and persons supplying services, inter alia the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis (Régie dauphinoise, paragraph 15, and T-Mobile Austria and Others, paragraph 33). The latter criteria, relating to the permanent nature of the activity and the income which is obtained from it, have been treated by the caselaw as applying not only to the exploitation of property, but to all of the activities referred to in Article 4(2) of the Sixth Directive. An activity is thus, generally, categorised as economic where it is permanent and is carried out in return for*

remuneration which is received by the person carrying out the activity (see to that effect, Commission v Netherlands, paragraphs 9 and 15).”

161. Similarly, in ***Elida Gibbs*** **C-317/94**, the Court had confirmed that:-

“*26 By virtue of Article 11(A)(1)(a) of the Sixth Directive, the taxable amount for supplies of goods and services within the territory of a state comprises all sums which make up the consideration which has been or is to be obtained by the supplier from the purchaser.*

27 According to the Court's settled case-law, that consideration is the "subjective" value, that is to say, the value actually received in each specific case, and not a value estimated according to objective criteria (see Hong Kong Trade, cited above, paragraph 13, Case 230/87 Naturally Yours Cosmetics [1988] ECR 6365, paragraph 16, and Case C-126/88 Boots Company v Commissioners of Customs and Excise [1990] ECR I-1235, paragraph 19).”

162. The Appellant reiterated that it had received no consideration in respect of any aspect of Project X.

163. The Appellant further submitted that the CJEU had held repeatedly that the payment of a dividend is “merely the result of ownership of the property” (for example, in the judgments in ***Sofitam SA (formerly Satam SA) v Ministre chargé du Budget*** **[1997] STC 226**, and ***Harnas & Helm CV v Staatssecretaris van Financiën*** **[1997] STC 364**) In other words, the

Appellant submitted, the shareholder does not supply services to the company in return for which the dividend is paid, he merely receives the dividend because he holds the shares. Nor does the company supply services to the individual by paying a dividend. The transfer of the shares to Company J was the dividend to which the Appellant shareholders were entitled. The Appellant submitted that that transfer is not an economic activity, it is merely the payment of a dividend.

164. The Appellant submitted that even if the transfer of the Spin Cos to Company J was not, because of its nature, non-economic, the transfer was not made for consideration and hence was not an economic activity.

165. The Appellant further submitted that the foregoing analysis assumed that all of the costs which the Appellant incurred in respect of Project X had a direct and immediate link with the spin transaction. It submitted that while certain costs may have been incurred directly and immediately for the purpose of that transaction, the overwhelming majority of the costs were incurred in order to effect the restructuring of the corporate group so that the [redacted] businesses could be moved into a separate part of the corporate group. In doing so, the Appellant did not make any taxable or non-taxable supplies other than the supply of taxable management services to the Service Recipients.

166. The Appellant accepted that it, in the course of Project X, transferred shares to Company J but, for the reasons outlined above, submitted that the transfer was not within the scope of VAT.

167. In the event that the Appellant was required to self-account for VAT on the supplies it received for the purposes of Project X (which necessarily entailed that it acquired the services for the purposes of an economic activity), it submitted that cases such as ***Midland Bank***, ***Abbey National, Cibo, Kretztechnik*** and ***Securenta*** confirmed that the costs associated with that transaction are deductible as overhead.

168. The Appellant further submitted that the CJEU had repeatedly found that VAT incurred for the purpose of share related transactions which fall outside the scope of VAT is part of the overhead costs of that business and deductible on that basis. In ***AB SKF*** **C-29/08**, the CJEU went further and held that costs which had a direct and immediate link with an exempt share transaction were nonetheless part of the company's general overheads because the sale of the shares had taken place for the purpose of benefitting the taxpayer's overall business.

169. It was submitted that if the Appellant was required to self-account for VAT on the services it received from abroad, then the VAT so incurred was deductible as general overhead in respect of which the Appellant has a 100% VAT deduction entitlement.

The K Transaction

170. On [redacted], pursuant to a transaction agreement dated [redacted], the Appellant herein was acquired by Company K under a new holding company incorporated and tax resident in Ireland (Company K). That acquisition was effected by means of a cancellation scheme of arrangement under Irish law approved by the High Court and the Appellant's shareholders.

The Appellant's position was that the K Transaction did not involve an exempt supply of shares or indeed any supply by the Appellant, but rather involved the cancellation of the existing Appellant shares and the issue of new shares which were transactions outside the scope of VAT and were all part of the management of the Group to maximise shareholder value.

171. The Appellant submitted that accordingly, the principal question in the K Transaction Issue was whether the Appellant was required to reverse charge VAT on some or all of the services received and, if so, whether or not such VAT was to be regarded as 'residual input tax' or 'overhead' for VAT purposes. That question fell to be answered by reference, the Appellant submitted, to the same principles as previously outlined.

172. The K Transaction arises in respect of the period from [redacted] to [redacted]. The facts as set out below applied for that period.

173. Immediately prior to the acquisition of the Appellant by Company K, the Appellant was a public limited company but in the course of the restructuring it became the Appellant. On [redacted], the company previously known as [redacted] Limited became Company A.

174. The acquisition of the Appellant was effected by means of a cancellation scheme of arrangement. Under the terms of that scheme of arrangement, Company K and [redacted] (a wholly owned subsidiary of Company K) between them paid $[redacted] in cash and Company K allotted and issued 0[redacted] of a Company K ordinary share to the shareholders of the Appellant for each Appellant share held by those shareholders, and the Appellant cancelled its existing shares and issued new shares (out of the

reserve arising from such cancellation) to Company K and [redacted], as fully paid up shares.

175. The scheme of arrangement involved an application by the Appellant to the High Court to sanction the scheme. On the scheme becoming effective, existing Appellant shares were cancelled pursuant to sections 72 and 74 of the Companies Act 1963. The reserve arising from the cancellation of the existing Appellant shares was capitalised and used to issue fully paid new Appellant shares to Company K and [redacted] in place of the pre-existing Appellant shares cancelled pursuant to the scheme. As a result of the scheme, the Appellant became a wholly-owned direct subsidiary of Company K.

176. The Appellant submitted that accordingly, costs incurred by the Appellant in relation to its acquisition by Company K were not attributable to an exempt supply of shares for VAT purposes but rather to a cancellation of its shares and an issue of new shares to Company K pursuant to the scheme of arrangement.

177. The Appellant submitted that in ***Kretztechnik*** **C-465/03** the CJEU considered whether an Austrian company involved in the development and distribution of medical equipment was entitled to deduct VAT incurred in raising capital with a view for admission to the Frankfurt Stock exchange. Since the issuing of shares is regarded as VAT exempt in Austria, the Austrian tax authorities had held that Kretztechnik could not avail of any right to deduct input VAT.

178. In considering the question, the CJEU considered whether the services which were received in connection with the admission to the stock exchange could be regarded as "component costs" of the Company's output transactions. The Court held that the raising of capital formed part of a company's overheads and, as such, a component part of the price of its products, stating:-

> "*36 In this case, in view of the fact that, first, a share issue is an operation not falling within the scope of the Sixth Directive and, second, that operation was carried out by Kretztechnik in order to increase its capital for the benefit of its economic activity in general, it must be considered that the costs of the supplies acquired by that company in connection with the operation concerned form part of its overheads and are therefore, as such, component parts of the price of its products. Those supplies have a direct and immediate link with the whole economic activity of the taxable person (see BLP Group, paragraph 25; Midland Bank, paragraph 31; Abbey National, paragraphs 35 and 36, and Cibo Participations, paragraph 33).*
>
> *37 It follows that, under Article 17(1) and (2) of the Sixth Directive, Kretztechnik is entitled to deduct all the VAT charged on the expenses incurred by that company for the various supplies which it acquired in the context of the share issue carried out by it, provided, however, that all the transactions carried out by that company in the context of its economic activity constitute taxed transactions. A taxable person who effects both transactions in respect of which VAT is deductible and transactions in respect of which it is not may, under the first subparagraph of Article 17(5) of the Sixth Directive, deduct only that proportion of the VAT which is attributable to the former*

transactions (Abbey National, paragraph 37, and Cibo Participations, paragraph 34).”

179. The Appellant submitted that the principle established in ***Kretztechnik*** had been put on a legislative footing in Ireland. This was, strictly speaking, unnecessary since the right to deduction in ***Kretztechnik*** did not turn on any special or particular rule in the relevant VAT Directive but arose simply as a consequence of the application of the general rules of VAT deduction. The inclusion of a provision in the Irish legislation confirming the existence of the right to deduct was unobjectionable but did not serve to limit or circumscribe the entire extent of that right under the PVD.

180. Section 59(2) of VATCA 2010 provides for the right to deduct VAT incurred in respect of taxable supplies or qualifying activities. “Qualifying activities” is defined in section 59(1) as including:-

“*(e) services consisting of the issue of new stocks, new shares, new debentures or other new securities by the accountable person in so far as such issue is made to raise capital for the purposes of the accountable person’s taxable supplies, and…”*

181. The Appellant submitted that, in the event that I find that the Appellant was required to self-account for VAT on the services received from abroad, as a matter of EU and domestic law (and as a matter of logic) the costs incurred in respect of this transaction were residual input costs, with recoverability to be determined by reference to the Appellant’s overhead deduction entitlement.

G. ***The Respondent's Submissions***

182. The Respondent submitted that during the periods for which an audit of the Appellant was carried out, the Respondent was informed by the Appellant that there were approximately [redacted] subsidiaries in the Appellant Group, the majority of which were owned, directly or indirectly, by Company A, which was itself a 100% subsidiary of the Appellant.

183. The Respondent further submitted that the Appellant was also engaged in the provision of taxable management services and that this was done pursuant to a written agreement entered into with four subsidiary companies. In order to provide the said management services, the Appellant received supplies of services from Company I.

184. The Respondent submitted that the assessments raised on the Appellant reflected the fact that the Respondent had allowed a partial deduction of VAT in respect of costs incurred and that VAT deductibility had been allowed where it had been shown that the conditions required to be fulfilled for VAT on inputs to be deductible had been met. The VAT assessments were premised on the Respondent's view that, on a proper interpretation of the relevant legislation, the Appellant was obliged to self-account for VAT on services received from Company I. The Respondent submitted that the services from Company I were not the only services received by the Appellant and that it also incurred VAT on domestic purchases of goods and services and on other non-Company I services received from abroad.

185. The Respondent submitted that during the relevant periods the Appellant claimed full VAT recovery in respect of all costs which it incurred, regardless of whether those costs were incurred as ongoing costs, in connection with Project X or in connection with the K Transaction.

186. The Respondent highlighted the fact that each year the Appellant Group undertook a detailed exercise in order to determine the costs which related to the provision of management services to the Service Recipients. The Respondent submitted that by applying the approach adopted by the Appellant Group, and not altering this in any way, the Respondent calculated the Appellant's VAT recovery entitlement based on the Appellant Group's own detailed analysis and calculations. The result was that partial VAT recovery was allowable in respect of ongoing costs, while none of the VAT inputs arising on either the Project X costs or in relation to the K Transaction were considered to be recoverable.

187. The Respondent emphasised in its submissions that the Appellant's VAT recovery entitlement was established solely on the basis of the figures and materials supplied by the Appellant to the Respondent and that deduction of VAT was allowed by the Respondent where the materials supplied showed that input VAT was incurred for the purposes of the Appellant's taxable supplies by reference to the verified materials and figures furnished by the Appellant.

188. The Respondent submitted that where VAT deduction was not allowed, the materials supplied did not allow for the conclusion that the input VAT sought to be recovered was used for the purposes of its taxable supplies.

189. The Respondent submitted that the Appellant had at all material times [redacted] employees in Ireland and that the Appellant's board of directors comprised one executive director and ten non-executive directors.

190. In relation to the Services Agreement, the Respondent highlighted that the services to be provided by the Appellant under the Services Agreement were dealt with in Article 3 of the Services Agreement and were stipulated to include: *"… only those activities that provide a benefit to the Service Recipients, i.e. provide an increment of economic or commercial value that enhances the Service Recipients' commercial positions or is reasonably anticipated to do so*."

191. In addition, the compensation to be paid under the Services Agreement is provided for at Article 4, which stipulated as follows:

> "*4.1 Compensation*
>
> *(a) The Service Recipients shall collectively pay to* [Appellant] *a service fee (the "Fee")* ***equal in amount to* [Appellant]*'s total services costs incurred in connection with providing the Services to the Service Recipients ("total services costs")****, plus a markup percentage, as set forth in Exhibit A, of such costs. For the purposes of calculating the Fee, costs incurred by* [Appellant] *shall be allocated to the Services using a reasonable and consistent method of allocation as provided in Section4.1(c) below.*
>
> *(c)* ***Total services costs shall be equal to the sum of direct costs and indirect costs****, as described in Sections 4.2 and 4.3 … Costs incurred by* [Appellant] *in connection with activities that provide no benefit to Service Recipients shall not be considered in the calculation of total services costs for purposes of computing the Fee under this Agreement.*

4.2 Direct costs are those identified directly with particular activities. These include, but are not limited to, costs for (i) compensation, bonuses, and travel expenses attributable to employees directly engaged in performing such activities, (ii) materials and supplies directly consumed in performing such activities, and (iii) other costs incurred in connection with such activities.

4.3 Indirect costs are costs other than direct costs referred to in Section 4.2 above which are reasonably allocable to a particular activity. Indirect costs include costs with respect to utilities, occupancy, supervisory and clerical compensation and ***other overhead burdens*** *of the departments and other applicable general and administrative expenses to the extent reasonably allocable to a particular activity. These include rent, property taxes, other costs of occupancy,* ***and other overhead costs****, and allocations of costs from other departments, such as personnel, accounting, payroll, and maintenance departments, and other applicable general and administrative expenses, including compensation of* [Appellant]*'s senior management*" (emphasis added).

192. Article 5 of the Services Agreement stipulated that:-

"[Appellant] *shall keep and maintain accurate and adequate records of all activities performed on behalf of the Service Recipients hereunder and all expenses incurred by* [Appellant] *in connection with such activities, including a summary description of such costs and of the activity categories to which they relate, and the methods by which the costs pursuant to Article 4 were computed, including the allocation of the Fee among the Service Recipients*."

193. The Respondent submitted that the manner in which services and costs were identified and distinguished under the Services Agreement is relevant to the within appeal.

194. The Respondent submitted that in order to fulfil its obligations as parent of the Appellant Group and its obligations under the Services Agreement, the Appellant entered into the Company I Agreement, which was signed in [redacted] but was stated to be effective from [redacted].

195. The Respondent noted that in accordance with Article 4.1(e) of the Services Agreement, the Appellant was "*authorized to subcontract with other companies or firms (including affiliates of* [Appellant]*) (all such entities referred to as "Third Parties") to perform services for the benefit of the Service Recipients, in fulfilment of* [Appellant]*'s obligations under this Agreement*". The Respondent contended that under the Company I Agreement, the Appellant effectively outsourced its management services function to Company I.

196. Articles 3 and 4 of the Company I Agreement broadly mirrored Articles 3 and 4 of the Services Agreement. The Respondent submitted that the services received from Company I by the Appellant were in respect of both the outsourcing of the provision of taxable management services to the four Services Recipients and the non-economic activity of holding the shares in the Appellant's other approximately [redacted] subsidiaries.

197. The Respondent submitted therefore that in addition to its arrangement with the Appellant, Company I also provided services to other US subsidiaries and to the wider Appellant Group as a whole. In so doing, it

incurred a "bucket" of costs and found it necessary, for transfer pricing reasons, to identify and allocate the costs incurred to the proper beneficiaries of those costs including, *inter alia*, to the Appellant and to the Service Recipients.

198. The Respondent submitted that the transfer price was the consideration for services, both from Company I to the Appellant and from the Appellant to the Management Service Recipients, for VAT purposes.

199. The Respondent highlighted that it had been provided with reports by the Appellant which were prepared for the purpose of allocating costs incurred by Company I. An analysis of the reports provided assistance in identifying the nature of costs incurred and the use to which those costs were put in practical terms. The Respondent submitted that it was apparent that the costs incurred were not singularly or solely related to services provided to the Service Recipients under the Services Agreement but that they also covered costs which related to the fact that the Appellant was a holding company.

Project X

200. The Respondent submitted that what occurred on [redacted] on foot of the distribution which occurred was that the Appellant transferred the shares it held in two 'Company J' companies to Company J, which said shares were held outside of the Appellant Group. In exchange, Company J issued shares to shareholders in the Appellant; no cash was exchanged in the transaction. This had been understood by the Respondent as essentially a share-for-share exchange at ultimate shareholder level, whereby the

shareholders in the Appellant held shares in only the Appellant prior to Project X and shares in both the Appellant and Company J immediately post-Project X.

201. By an email of [redacted], the Appellant had confirmed that "*all amounts charged to and borne by* [Appellant] *... were appropriate as such charges were for the benefit of the parent company.*" [emphasis added]

202. The Respondent also highlighted that the Appellant had confirmed that it "*did not raise any capital or receive immediate monetary benefit or other such benefit as a result of the* [redacted] *business spinoff transaction.*"

The K Transaction

203. The Respondent submitted that the K Transaction involved a takeover of the Appellant by Company K, which was done by way of a cancellation scheme of arrangement, involving the cancellation of existing Appellant shares, the capitalisation of the reserve arising from the cancellation and the issue of fully paid up Appellant shares to Company K.

204. The Respondent submitted that according to the relevant Transaction Agreement, the Appellant received no payment for the issuing of new shares by it and that the transaction appeared to have been carried out to enhance shareholder value.

205. Further, the Respondent submitted that the K Transaction completed on [redacted] and that the Appellant deregistered for VAT with effect

from [redacted], on the basis that it ceased to carry out economic activity from that date.

The Overhead Issue

206. The Respondent submitted that the net question which arose under this heading was whether the words "acting as such" in Article 44 of the PVD, as amended by the PSSD, are intended to mean that a taxable person only has to self-account for VAT on supplies received from abroad where those supplies have a link to the taxable person's economic activity.

207. The Respondent submitted that a full analysis of the question involves a consideration of Articles 43, 44, 45 and 196 of the PVD and that, because Articles 43 to 44 and 196 were inserted by Article 2 of the PSSD with effect from 1 January 2010, the recitals to the latter Directive are therefore relevant.

208. The Respondent further submitted that it is also necessary to consider Articles 19, 20 and 21 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax ("the VAT Implementing Regulation"), which provisions, under Article 65 of the Regulation, have applied since 1 July 2011, as well as sections 33 and 34 of VATCA 2010, the interpretation of which must be compatible with that of the PVD, as amended, and the VAT Implementing Regulation.

EU & Irish Legislation

209. Recital 4 of the PSSD states as follows:-

"*For supplies of services to taxable persons, the general rule with respect to the supply of services should be based on the place where the recipient is established, rather than where the supplier is established. For the purposes of the rules determining the place of supply of services and to minimise burden on business,* ***taxable persons who also have non-taxable activities should be treated as taxable for all services rendered to them****. Similarly non-taxable legal persons who are identified for VAT purposes should be regarded as taxable persons. These provisions, in accordance with normal rules, should not extend to supplies of services received by a taxable person for his own personal use or that of his staff*" [emphasis added].

210. Recital 7 thereof states:-

"*Where a taxable person receives services from a person not established in the same Member State, the reverse charge mechanism should be obligatory in certain cases, meaning that the taxable person should self-assess the appropriate amount of VAT on the required service*."

211. Article 43 of the PVD, as inserted by Article 2(1) of the PSSD, is the sole provision in the 'Definitions' section (Section 1) of Chapter 3 on 'Place of supply of services' and states:-

"*For the purposes of applying the rules concerning the place of supply of services:*

(1) A taxable person who also carries out activities or transactions which are considered to be taxable supplies of goods or services in accordance with Article 2(1) shall be

regarded as a taxable ***person in respect of all services rendered to him****;*

(2) A non-taxable legal person who is identified for VAT purposes shall be regarded as a taxable person" [emphasis added].

212. Section 2, as inserted by Article 2(1) of the PSSD, contains the "*General rules for Chapter 3*". It comprises Article 44 to 55 of the PVD. Article 44 first provides:-

"***The place of supply of services to a taxable person acting as such shall be the place where that taxable person has established his business****. However, if those services are provided to a fixed establishment of a taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment, or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.*" [emphasis added]

213. Article 45 then provides:-

"*The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services*

shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment the place of supply of services shall be the place where the supplier has his permanent address or usually resides."

214. The Respondent submitted that the next article of relevance is Article 196 of the PVD, as inserted by Article 2(7) of the PSSD, which provides that:-

"*VAT shall be payable by any taxable person, or non-taxable legal person identified for VAT purposes, to whom the services referred to in Article 44 are supplied, if the services are supplied by a taxable person not established within the territory of the Member State*."

215. Article 19 of the VAT Implementation Regulation then further provides as follows:

"*For the purpose of applying the rules concerning the place of supply of services laid down in Articles 44 and 45 of Directive 2006/112/EC, a taxable person, or a non-taxable legal person deemed to be a taxable person, who receives services exclusively for private use, including use by his staff, shall be regarded as a non-taxable person.*

Unless he has information to the contrary, such as information on the nature of the services provided, the supplier may consider that the services are for the customer's business use if, for that transaction, the customer has communicated his individual VAT identification number.

Where one and the same service is intended for both private use, including use by the customer's staff, and business use, the supply of that service shall be covered exclusively by Article 44 of Directive 2006/112/EC, provided there is no abusive practice."

216. Article 20 of the said Regulation provides:

"*Where a supply of services carried out for a taxable person, or a non-taxable legal person deemed to be a taxable person, falls within the scope of Article 44 of Directive 2006/112/EC, and where that taxable person is established in a single country, or, in the absence of a place of establishment of a business or a fixed establishment, has his permanent address and usually resides in a single country, that supply of services shall be taxable in that country.*

The supplier shall establish that place based on information from the customer, and verify that information by normal commercial security measures such as those relating to identity or payment checks.

The information may include the VAT identification number attributed by the Member State where the customer is established."

217. Article 21 of the Regulation then provides:-

"*Where a supply of services to a taxable person, or a non-taxable legal person deemed to be a taxable person, falls within the scope of Article 44 of Directive 2006/112/EC, and the taxable person is established in more than one country, that supply shall be taxable*

in the country where that taxable person has established his business.

However, where the service is provided to a fixed establishment of the taxable person located in a place other than that where the customer has established his business, that supply shall be taxable at the place of the fixed establishment receiving that service and using it for its own needs.

Where the taxable person does not have a place of establishment of a business or a fixed establishment, the supply shall be taxable at his permanent address or usual residence."

218. The Respondent submitted that the plain effect of Article 43 of the PVD is that, regardless of the use to which services are put, where they are rendered to a taxable person, the place of supply rules set out in Article 44 of the PVD apply thereto and in respect of the entirety thereof.

219. The Respondent further submitted that the above EU provisions are reflected in and transposed by sections 2(1), 12(1), 33(1), and 34(a) of VATCA 2010.

220. In the Respondent's submission, Article 44 of the PVD must be read in light of Article 43. In *European Tax Law*, Terra and Wattel (6th ed.), at page 340, the authors state as follows:-

"*Different rules for taxable and non-taxable persons could create problems when a person is acting both in the capacity of a taxable person and a non-taxable person, e.g., charities or government departments.*

A new Article 43 therefore provides that, for the purpose of applying the rules concerning the place of supply of services, ***a taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services must be deemed to be a taxable person in respect of all services rendered to him and also that a non-taxable legal person who is identified for that purpose must be deemed to be a taxable person***" [emphasis added].

221. The effect of Article 43, according to the authors, is to provide that, *regardless of the use to which services are put* (that is to say, whether they are used to make taxable or non-taxable supplies), where they are received by a taxable person, the place of supply rules set out in Article 44 apply.

222. The authors referred to the judgment in ***Kollektivavtalsstiftelsen TRR Trygghetsrådet*** and noted that in that case the CJEU found, in the absence of any express provision in Article 9(2)(e) of the Sixth Directive (the predecessor to Article 44, which did not use the phrase "*taxable person acting as such*"), that the services supplied must be used for the purposes of the customer's economic activity, and that "*it must be concluded that the fact that a customer uses those services for activities which fall outside the scope of the Sixth Directive does not preclude the application of that provision*".

223. The Respondent submitted that the facts and circumstances in ***TRR*** were worthy of detailed consideration, as the Respondent submitted that the reasoning therein is of continuing relevance with regard to the proper interpretation of Articles 43 and 44 of the PVD.

224. ***TRR*** concerned a Swedish foundation which carried out both economic and other activities and which intended to purchase consultancy services from Denmark. The referring court asked the CJEU whether, for the purposes of applying relevant VAT provisions, the foundation was a taxable person even though the purchase was to be made in respect only of the part of its activities which fell outside the scope of the VAT Directive. The Respondent submitted, therefore, that the facts in that case were broadly analogous to those in this appeal.

225. The question asked of the Swedish Tax Authority by the ***TRR*** foundation was whether it was a trader for the purposes of relevant VAT provisions in that jurisdiction, such that it was obliged to apply the reverse charge VAT mechanism in respect of supplies of services received from Denmark. TRR had argued that registration for VAT did not of itself mean that the registered party was to be regarded as a trader for the purposes of the reverse charge mechanism. It argued that when making purchases for activities that fell outside the scope of VAT, it was not to be regarded as a trader.

226. The Respondent quoted from the opinion of Advocate General Mazak whose opinion was followed by the CJEU:-

> *"33. Thus the Court has held that a person who carries out an economic activity for the purposes of Article 4 of the Sixth Directive is a taxable person, even if that economic activity is an ancillary one. A person may be considered a taxable person under Article 4 of the Sixth Directive even where, as in the case of TRR, a predominant part of his activity does not fall within the scope of that Directive.*

34. The Court noted in Gillan Beach that "Article 9 of the Sixth Directive contains rules for determining the place where services are deemed to be supplied for tax purposes. Whereas Article 9(1) lays down a general rule on the matter, Article 9(2) sets out a number of specific instances of places where certain services are deemed to be supplied. The object of those provisions is to avoid, first, conflicts of jurisdiction which may result in double taxation, and, secondly, non-taxation.

35. The Court went on to state, in the same judgment, that 'it is appropriate also to note that, in respect of the relationship between Article 9(1) and (2) of the Sixth Directive, the Court has held that Article 9(1) in no way takes precedence over Article 9(2). In every situation, the question which arises is whether that situation is covered by one of the instances mentioned in Article 9(2) of that Directive. If not, it falls within the scope of Article 9(1)'.

36. It follows that Article 9(2) of the Sixth Directive, not being an exception to the rule in Article 9(1), is not to be interpreted narrowly.

37. Additionally in Gillan Beach, the Court held that 'in interpreting a provision of Community Law, it is necessary to consider not only the wording of that provision but also the context in which it occurs and the objects of the rules of which it is part'. Thus, according to the Court, it must be borne in mind that Article

9(2) of the Sixth Directive is a rule of conflict which determines the place of services and, consequently, delimits the powers of Member States. I note here that it follows that "services of consultants" is a Community concept which must be interpreted uniformly in order to avoid instances of double taxation or non-taxation.

38. It should be noted that Article 9(2)(e) of the Sixth Directive does not specify whether or not a taxable person purchasing services must make that purchase in respect of his economic activity; for that matter, there is nothing in that provision to suggest that such a fact should assume any importance for the purposes of its application.

39. However, as the referring court rightly points out, Article 2(1) of the Sixth Directive explicitly states that VAT is payable on the supply of goods or services effected for consideration within the territory of the country by a taxable person 'acting as such'. Furthermore, Article 17(2) of the Sixth Directive clearly provides that the taxable person's right of deduction of input tax is recognised in so far as the goods and services are used for the purposes of his taxable transactions.

40. Nevertheless, while Articles 2(1) and 17(2) of the Sixth Directive specifically refer to the taxable person 'acting as such' or to services being used for the purposes of taxable transactions, Article 9(2)(e) of that directive makes no such specific reference. In my view this is by no means a (legislative) oversight on the part of the Community legislature. Rather, the absence in Article 9(2)

of any reference to economic activity, to a taxable person acting as such or to taxable transactions means that, for the purposes of determining the place of supply of services, the fact that the customer additionally undertakes activities which fall outside the scope of the Sixth Directive is not a bar to the application of that provision.

41. Furthermore, the above interpretation of the relevant provisions is in line with the interests of simplicity of administration (of the rules on the place of supply of services) and ease of collection, as well as the prevention of tax avoidance. Indeed, as the Skatteverket correctly points out, if the customer of services supplied were required to be a taxable person acting as such or if the services had to be used for the purposes of his taxable transactions, the determination of the place of supply of services would in many cases be much more difficult, both for companies and for the fiscal authorities of the Member States.

42. Moreover, with regard to the practicality (19) of such a construction of the relevant provisions, in the case of a person purchasing consultancy services the tax is charged at the stage of that person's VAT return which he submits to the tax administration in the Member State where he is established. Being a taxable person, he is bound to be registered in that Member State already for the purposes of VAT returns. Moreover, if those services are used in respect of his economic activity, the purchaser may avail himself of his right of deduction of input tax. The supplier of

the services, on the other hand, need only demonstrate that the person purchasing them is a taxable person.

43. Finally, in my view such a reading of the relevant provisions is dictated also by the principal of legal certainty, as the rules on the place of supply of services must be predictable to traders. This principal applies with particular rigour to rules which have fiscal consequences, so that individuals can identify their obligations under such rules.

44. Moreover, that interpretation should be conducive to reducing the burden on traders operating across the internal market. And that, in turn, will help to facilitate the free movement of goods and services, which, as I recall, is one of the general aims of the common system of VAT."

227. The CJEU in ***TRR*** followed the opinion of the Advocate General at paragraphs 24 to 34 of its judgment, observing additionally that the interpretation opined for by the Advocate General was "*in line with the objectives and operating rules of the Community VAT system since it ensures, in a situation such as that at issue in the main proceedings, that the ultimate consumer of the supply of services bears the final cost of the VAT payable*".

228. The Respondent submitted that a number of points emerge from the ***TRR*** case, namely:-

(i) First, that the application of the reverse charge mechanism is not an exception to a general rule. It is an autonomous, or freestanding rule in and of itself.

(ii) Secondly, regard must be had to the purpose of the so-called 'VAT package rules' as expressed through Article 44, which is a rule which determines the place of supply of services and delimits the powers of Member States in that regard.

(iii) Thirdly, that the interpretation contended for by the Advocate General and accepted by the Court was one which was in line with the interests of simplicity of administration of the rules of the place of supply of services and ease of collection, as well as the prevention of tax avoidance.

229. The Respondent submitted that it was worth emphasising also that ***TRR*** was decided in the context of the application of the Sixth VAT Directive and the PVD, prior to its amendment by the PSSD. In paragraph 22 of its judgment, the CJEU summarised the question referred as "*asking whether Article 9(2)(e) of the Sixth Directive and Article 56(1)(c) of Directive 2006/112 are to be interpreted as meaning that where the customer for consultancy services supplied by a taxable person established in another Member State carries out both an economic activity and an activity which falls outside the scope of those directives, that customer is to be regarded as a taxable person even where the supply is used solely for the purposes of the latter activity*".

230. The CJEU continued, in paragraph 23, to hold that, as "*the wording of Article 9(2)(e) of the Sixth Directive is, essentially, identical to that of Article 56(1)(c) of Directive 2006/112 … those two provisions must be interpreted in the same way*". This then is how the CJEU proceeded (paragraphs 24-33), finally noting (in paragraph 34):-

> "*that point (1)(b) of Article 21 of the Sixth Directive (essentially reproduced in Article 196 of Directive 2006/112) provides that VAT is*

payable by persons to whom services covered by Article 9(2)(e) of the Sixth Directive (essentially reproduced in Article 56(1)(c) of Directive 2006/112) are supplied", and that, "*[a]ccordingly, if the conditions for the application of Article 9(2)(e) of the Sixth Directive are met, the purchaser is liable for VAT on the supply of services which he receives, whether or not they have been supplied for the purposes of activities which fall outside the scope of those directives ultimately concluding in paragraph*".

231. The CJEU then answered the question referred as follows (paragraph 35):-

> "*... that Article 9(2)(e) of the Sixth Directive and Article 56(1)(c) of Directive 2006/112 must be interpreted as meaning that where the customer for consultancy services supplied by a taxable person established in another Member State carries out both an economic activity and an activity which falls outside the scope of those directives, that customer is to be regarded as a taxable person even where the supply is used solely for the purposes of the latter activity.*"

232. The Respondent submitted that the clarity of this answer and of the interpretation of the PVD that it provides had not been called into question by the amendments inserted into the PVD by the PSSD with effect from 1 January 2010. Once again, the Advocate General's opinion was of assistance in this regard. In particular, Advocate General Mazak laid emphasis (at paragraph 40 of his opinion) on the fact that Article 2(1) of the Sixth Directive made reference to a taxable person "*acting as such*". A similar phrase appeared in Article 17(2) of the Sixth Directive, providing for the taxable person's right of

deduction. Advocate General Mazak drew a distinction with Article 9(2)(e) of the Sixth Directive which made no such reference. He concluded that the absence of this phrase could not be considered to be a legislative oversight and that the absence of any reference to "a taxable person acting as such" must mean that, for the purposes of determining the place of supply of services, the fact that the customer additionally undertook activities which fell outside the scope of the Sixth Directive was not a bar to the application of that provision.

233. The Respondent submitted that if one looked only at Article 44 of the PVD in the light of Advocate General Mazak's observations, then the introduction of the reference to a taxable person "acting as such" might be problematic. However, this approach ignored the fact that Article 43 of the PVD, as inserted by the PSSD, was clearly designed to address this issue.

234. As the Advocate General noted (in footnote 22 to paragraph 44 of his opinion), the then recently adopted PSSD provided, with effect from 1 January 2010 in Article 43, that, for the purposes of place of supply rules, a person is a taxable person "*in respect of all services rendered to him*". The Respondent submitted that clearly Advocate General Mazak, who noted that the PSSD was not applicable to the facts before him, did not at all consider that it detracted from his reasoning; but, rather, by the insertion of Article 43 into the PVD, in fact supported it.

235. The Respondent noted that the Appellant placed significant reliance on the decision in the UK of the First-Tier Tribunal in ***Wellcome Trust*** **[2018] UKFTT 599**. Wellcome Trust Ltd (the "Trust") was a trust for a charitable organisation. It was engaged to a small degree in the provision of taxable services and was registered for VAT in the UK in respect of the provision of

those services. It was mainly engaged in investment activity, the receipts from which funded the activities of the charity. The Respondent submitted that the CJEU had previously ruled that the investment activity of the Trust constituted a non-economic activity (see ***Wellcome Trust* C-155/94**), the carrying on of which did not give an entitlement to deductibility. The Trust received various services from other Member States and from third countries relating to its investment activities. The matter at issue before the Tribunal was whether the Trust was required to self-account for VAT payable on services received from outside the UK in relation to its investment activity. In answering this issue in favour of the Trust, the Tribunal appeared to have considered that, if the words "acting as such" in Article 44 of the PVD exclude services received for private use therefrom, then that wording must also exclude services relating to non-economic business purposes from that Article. Based on this view, the Tribunal concluded that the supply of services to the Trust for non-economic business purposes did not fall within the provisions of Article 44 of the PVD.

236. The Respondent disagreed with the conclusions of the Tribunal and invited me not to follow it for the following principal reasons:-

(i) Article 43(1) of the PVD regards a taxable person as being a taxable person "in respect of all services rendered to him". The Respondent submitted that this must mean that if he is a taxable person in respect of the acquisition of services, he must be acting as a taxable person when acquiring those services.

(ii) To interpret the words "acting as such" in Article 44 of the PVD as meaning that services received for the purposes of a non-economic business activity were excluded from the

provisions of that Article, would mean, at the very least, that some services received by a taxable person would fall outside EU law place of supply rules altogether. They would not be provided for in either Article 44 or Article 45 of the PVD. This, in the Respondent's submission, appeared a highly unlikely and problematic interpretation, most particularly in the light of the above-discussed judgment of the CJEU in ***TRR***. It would mean that three categories of supply would exist – business, private, and business/non-economic. For the third category, no explicit EU-law rule as to place of supply would exist, thereby undermining the otherwise high degree of harmonisation pursued by EU VAT law. Nor, as Advocat General Mazak observed in his opinion in ***TRR***, would the relevant provisions of the PVD give any guidance in respect of how one would have to proceed with the requisite apportionment, thereby further undermining the harmonisation pursued by the Directive.

(iii) Article 43 of the PVD does not distinguish between services acquired for non-economic business purposes and services acquired for personal use, so that it was deemed necessary to exclude services acquired for personal use from the provisions of Article 44 by way of Article 19 of the VAT Implementing Regulation. If services received for personal use did not fall within Article 44 in the first place, it would not be necessary to exclude such services from Article 44 by way of the VAT Implementing Regulation. If services in relation to non-economic business activities were not meant to be covered by Article 44 of the PVD, the question would

arise as to why they were not excluded by the VAT Implementing Regulation in like manner to services acquired for personal use. Again, in the Respondent's submission, to conclude that this was the outcome contemplated by the Union legislature in enacting the PVD seemed highly unlikely; and,

(iv) Article 43 of the PVD provides that a non-taxable legal person who is registered for VAT is a taxable person for the purposes of place of supply rules. A non-taxable legal person, by definition, does not have any taxable supplies and therefore could not be in a position to receive services in respect of such supplies. Article 21 of the VAT Implementing Regulation, however, refers to the situation where a supply of services to a non-taxable person "deemed to be a taxable person, falls within the scope of Article 44" of the PVD. This situation would not be possible if the UK Tribunal decision in ***Wellcome Trust*** was correct, and it would mean that part of Article 21 of the said Regulation would be deprived of meaningful sense. The Respondent submitted that such an interpretation had to be incorrect and in any event, as it was not binding on the TAC, should be eschewed by me in reaching my determination.

237. The Respondent further submitted that it did not appear that the UK Tribunal in ***Wellcome Trust*** had regard to the CJEU's decision in ***TRR***, and submitted that this was a serious omission. Furthermore, while the Tribunal indicated that it had regard to principles of interpretation of EU law (citing ***E LATS* C-154/17** in support of the proposition that the words of EU Directives

should be interpreted by reference to their context, the objectives of the legislation and the history of the provisions in question), it was not at all apparent to the Respondent from the reasoning and result arrived at by the Tribunal that this approach was actually undertaken by it.

238. In conclusion, although the Appellant submitted that, taking the provisions of the PVD, VATCA and the VAT Implementing Regulation as a whole, the words "acting as such" in Article 44 of the PVD could reasonably be read as intending to exclude supplies relating to non-economic activities of a taxable person, the Respondent submitted in response, first, that such an interpretation ignored the approach adopted by the CJEU in ***TRR*** to the harmonious interpretation of the Sixth VAT Directive and the PVD, and particularly the express view of Advocate General Mazak that the amendments adopted in the PSSD in 2008 with regard to the PVD, but not yet in force when he delivered his opinion (June 2008), did not suggest a different interpretation.

239. Furthermore, the Respondent submitted that it would compromise the general rules relating to the supply of services by adding in a significant layer of complexity (and, potentially, subjectivity) to the analysis required to determine whether a reverse charge obligation arose or not. In addition, it would render the provisions of Article 43, PVD, part of Article 21 and the first paragraph of Article 19 of the VAT Implementing Regulation effectively meaningless, when there was nothing to suggest that the EU legislature intended them so to be.

Principles applicable to VAT deduction and their application

240. The Respondent referred me to Article 9 of the PVD and section 2(1) of VATCA 2010 and noted that "*economic activity*" is not defined in VATCA 2010 but rather "*Business*" is defined as "*an economic activity, whatever the purpose or results of that activity, and includes any activity of producers, traders or persons.*"

241. The Respondent noted that the PVD provides, as regards the right to deduct, as follows:-

> "*Article 167*
>
> *A right of deduction shall arise at the time the deductible tax becomes chargeable.*
>
> *Article 168*
>
> ***Insofar 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;*
> >
> > *(b) The VAT due in respect of transactions treated as supplies of goods or services pursuant to Article 18(a) and Article 27;*

(c) The VAT due in respect of intra-community acquisitions of goods pursuant to Article 2(1)(b)(i);

(d) The VAT due or paid in respect of the importation of goods into that Member State.

Article 169

In addition to the deduction referred to in Article 168, the taxable person shall be entitled to deduct the VAT referred to therein insofar as the goods and services are used for the purposes of the following:

(a) Transactions relating to the activities referred to in the second sub-paragraph of Article 9(1), carried out outside the Member State in which that tax is due or paid, in respect of which VAT would be deductible if they had been carried out within that Member State;

(b) Transactions which are exempt pursuant to Articles 138, 142 or 144, Articles 146 to 149, Articles 151, 152, 153 or 156, Article 157(1)(b), Articles 158 to 161 or Article 164;

(c) Transactions which are exempt pursuant to points (a) to (f) of Article 135(1), where the customer is established outside the Community or where those transactions relate directly to goods to be exported out of the Community" [emphasis added].

242. In the domestic legislation, section 59 of VATCA 2010 provides *inter alia*:-

> *"59.—*
>
> *.....*
>
> *(2) Subject to subsection (3), in computing the amount of tax payable by an accountable person in respect of a taxable period, that person may, in so far as the goods and services are used by him or her for the purposes of his or her taxable supplies or of any of the qualifying activities, deduct—*
>
> > *(a) the tax charged to him or her during the period by other accountable persons by means of invoices, prepared in the manner prescribed by regulations, in respect of supplies of goods or services to him or her,*
>
> *....*
>
> *.....*
>
> *(5) Where, in relation to any taxable period, the total amount deductible under this Chapter exceeds the amount which, but for this Chapter, would be payable in respect of such period, the excess shall be refunded to the accountable person in accordance with section 99 (1), but subject to section 100."* [emphasis added]

243. The Respondent further submitted that Articles 173, 174 and 175 of the PVD provide for the apportionment between VAT incurred in connection with taxable and exempt transactions and that section 61 of VATCA 2010 sets out the domestic rules which give effect to those Articles of the PVD.

244. The Respondent submitted that as the above rules relate to apportionment between taxable and exempt transactions, rather than, as is at issue in this appeal, between economic and non-economic transactions, they are not directly relevant. The methodology for the apportionment of the latter is not prescribed in the PVD or in VATCA 2010. The Respondent submitted that there was a consistent line of jurisprudence from the CJEU in this regard, and referred me to the decision of the CJEU in ***Larentia + Minerva v Finanzamt Nordenham and Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG*** **Joined Cases C-108/14 and C-109/14**, where the Court stated as follows:-

> "*27. The rules in Article 17(5) of the Sixth Directive concern the input tax chargeable on expenses relating exclusively to economic transactions. The determination of the methods and criteria for apportioning input VAT between economic and noneconomic activities within the meaning of the Sixth Directive is in the discretion of the Member States which, when exercising that discretion, must have regard to the aims and broad logic of the directive and, on that basis, provide for a method of calculation which objectively reflects the part of the input expenditure actually to be attributed, respectively, to those two types of activity (judgments in Securenta, C-437/06, EU:C:2008:166, paragraphs 33 and 39, and Portugal Telecom, C-496/11, EU:C:2012:557, paragraph 42).*
>
> ...

32. In those circumstances, and for the same reasons as those set out by the Advocate General in points 20 and 21 of his Opinion, it is not for the Court to substitute itself either for the EU legislature or for the national authorities in order to determine a general method for calculating the proportion of economic activities to non-economic activities."

Criteria for deduction of VAT

245. The Respondent submitted that it was clear from the relevant legislation that certain core criteria must be satisfied before a right to deduct can arise. First, there must be an economic activity. This is because only a taxable person, that is to say one who carries on an economic activity, may deduct VAT. Secondly, there must be attribution, *i.e.* cost inputs must be "used for the purposes of the taxed transactions of a taxable person". The Respondent referred me in regard to the second point to the Opinion of Advocate General Sharpston in ***Związek Gmin Zaglębia Miedziowego w Polkowicach*** **C-566/17**.

246. The Respondent addressed these two criteria as follows:

(1) Economic activity

247. The Respondent submitted that the CJEU has consistently stressed that for a holding company to be engaged in economic activity, it must make taxable supplies. The Court set out this principle in ***MVM***, acknowledging that it had most recently been re-stated in ***Larentia + Minerva***, stating that:-

"*The mere acquisition and holding of shares in a company are not to be regarded as economic activities, within the meaning of Directive*

2006/112, conferring on the holder the status of a taxable person. The mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis because any dividend yielded by that holding is merely the result of ownership of the property (judgment of 16 July 2015, Larentia + Minerva and Marenave Schiffahrt, C-108/14 and C-109/14, EU:C:2015:496, paragraph 19 and the case-law cited).

The position will be otherwise where the holding is accompanied by direct or indirect involvement in the management of the companies in which the holding has been acquired, without prejudice to the rights held by the holding company in its capacity as shareholder (judgment of 16 July 2015, Larentia + Minerva and Marenave Schiffahrt, C-108/14 and C-109/14, EU:C:2015:496, paragraph 20 and the case-law cited).

In that respect, it follows from settled case-law of the Court that the involvement of a holding company in the management of companies in which it has acquired a shareholding constitutes an economic activity within the meaning of Article 9(1) of Directive 2006/112 where it entails carrying out transactions which are subject to VAT by virtue of Article 2 of that directive, such as the supply by a holding company to its subsidiaries of administrative, financial, commercial and technical services (judgment of 16 July 2015, Larentia + Minerva and Marenave Schiffahrt, C-108/14 and C-109/14, EU:C:2015:496, paragraph 21 and the case-law cited).

Thus, the mere involvement of a holding company in the management of its subsidiaries, without carrying out transactions subject to VAT under

Article 2 of Directive 2006/112, cannot be regarded as an 'economic activity' within the meaning of Article 9(1) of that directive (see, to that effect, order of 12 July 2001, Welthgrove, C-102/00, EU:C:2001:416, paragraphs 16 and 17). Accordingly, such management does not come within the scope of Directive 2006/112".

248. The Respondent submitted that I should also have regard to the opinion of Advocate General Fennelly in ***Floridienne and Berginvest*** **C-142/99**, whose opinion was followed by the CJEU in that case, where he stated in paragraphs 25 and 26:-

"*In addition to the aforesaid activities which a holding company carries on as a shareholder in other companies, there are activities which, like any other company, it carries on through its organs and which, in so far as they are conducted within the company (in its relations with the shareholders and the company's organs) also cannot be regarded as "economic activities", within the meaning of the Sixth Directive. These activities include the administration of the holding company, the making up of the annual accounts, the organisation of the general meeting, the decision to spend the holding company's profits and to declare (and possibly pay out) dividends…*

As Advocate General Van Gerven noted in respect of such a holding company, "there are activities which, like any other company, it carries on through its organs and which, in so far as they are conducted within the company (in its relations with the shareholders and the company's organs), also cannot be regarded as "economic activities". The Advocate General did not, however, deal with the suggestion implicit in the national court's question in the present case that the provision of management

and other services to a subsidiary, even pursuant to taxable transactions (and I presume contractual relationships), leads to a different result. I do not believe it does."

249. The Respondent agreed that the Appellant provided taxable management services to the Service Recipients. Therefore, it was not in dispute between the parties that the Appellant was engaged in an economic activity in this respect.

250. However, the Respondent submitted that it was informed by the Appellant that the Appellant had approximately [redacted] subsidiaries. Therefore, the Appellant held either directly or indirectly shares in subsidiaries, to the vast majority of which it did not provide any taxable management services. The Respondent submitted that the CJEU had made it abundantly clear since ***Polysar* C-60/90** that management by a holding company of its investments in its portfolio of subsidiaries is not an economic activity for VAT purposes.

(2) Attribution based on use

251. Turning to the criterion of "*used for the purposes of the taxed transactions of a taxable person*", the Respondent submitted that the meaning of this phrase is to be found in the settled case law of the Court and can be summarised succinctly as either (i) the costs must have a direct and immediate link to taxed output transactions, or (ii) the costs must form part of the general overheads of the taxed output transactions.

252. The Respondent submitted that the CJEU's judgment in ***Skatteverket v AB SKF*** is particularly helpful in highlighting this, referring me to paragraph 60 which states:-

"*It follows that whether there is a right to deduct is determined by the nature of the output transactions to which the input transactions are assigned. Accordingly, there is a right to deduct when the input transaction subject to VAT has a direct and immediate link with one or more output transactions giving rise to the right to deduct. If that is not the case, it is necessary to examine whether the costs incurred to acquire the input goods or services are part of the general costs linked to the taxable person's overall economic activity. In either case, whether there is a direct and immediate link will depend on whether the cost of the input services is incorporated either in the cost of particular output transactions or in the cost of goods or services supplied by the taxable person as part of his economic activities*" [emphasis added].

253. The Respondent submitted that the CJEU had made clear that the key test is always to be found in the words of Article 168 of the PVD. The Respondent submitted that since deduction is only available to the extent that input VAT is "*used for the taxed transactions*" of a taxable person, deduction is not available where input VAT is used for transactions amounting to non-economic transactions - the transactions or activities of an investment company – or exempt transactions or activities.

254. The Respondent submitted that the Appellant was a holding company which had represented itself as engaged in investment activity, as well as a company which provided some taxable management supplies. The Respondent submitted that the Appellant was only entitled to deduct input VAT on services used for the latter and not the former, and relied upon the decisions in ***Portugal Telecom*** and ***MVM*** in this regard.

255. ***Magyar Vilamoz Muvek v Nemzeti Adó - és Vámhivatal Fellebviteli Igazgatósága*** **C-28/16** concerned a state-owned power company which carried out the taxable activity of leasing power plants and fibre optic cables. MVM also held subsidiaries to whom it provided management services, along with services provided to the corporate group, to which it belonged, as a whole. It did not charge for these services. MVM sought to reclaim all input VAT incurred by it on the cost of making management services to its subsidiaries. The CJEU held, *inter alia*, in its decision in that case that:

> "*35. In the present case, it is apparent from the order for reference that, during the period at issue in the main proceedings, MVM normally received no remuneration from its subsidiaries in exchange for its centralised management of the activities of the group. Thus, in the light of the foregoing considerations, it must be held that the involvement of MVM in the management of its subsidiaries cannot be regarded as an 'economic activity', within the meaning of Article 9(1) of Directive 2006/112, such as to come within the scope of that directive.*
>
> *36. The Court has previously held that, to the extent to which input VAT relating to expenditure incurred by a taxpayer is connected with activities which, in view of their non-economic nature, do not come within the scope of Directive 2006/112, it cannot give rise to a right to deduct (judgments of 13 March 2008, Securenta, C-437/06, EU:C:2008:166, paragraph 30, and of 29 October 2009, SKF, C-29/08, EU:C:2009:665, paragraph 59).*
>
> *37. It follows that MVM does not have the right to deduct the VAT paid for the services at issue to the extent to which those services relate to transactions falling outside the scope of Directive 2006/112.*

38. That finding is not called into question by the fact that MVM engaged in other activities, such as the leasing of power plants and fibre optic networks, since the services at issue do not appear to have a direct and immediate link with any taxable economic activity, within the meaning of the case-law cited in paragraph 29 above, although this is a matter for the referring court to determine.

39. In this regard, it must be noted that, as the Court held in paragraph 24 of the judgment of 16 July 2015, Larentia + Minerva and Marenave Schiffahrt (C-108/14 and C-109/14, EU:C:2015:496), a taxable person has a right to deduct even where there is no direct and immediate link between a particular input 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 overheads 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.

40. In the present case, it is common ground that, during the period at issue in the main proceedings, MVM engaged in a taxable economic activity, namely the leasing of power plants and fibre optic networks. However, it appears difficult to imagine that the services at issue, namely services procured in the interest of other members of the group and business-management services relating mainly to the acquisition of shareholdings, may have a direct and immediate link with that leasing activity, considered overall, although this is a matter for the referring court to determine.

…

43. Before the Court, MVM has also claimed that the services at issue served the interests of the group and that, since its subsidiaries engaged in activities conferring a right to deduct, those services have a link to the economic activities of the entire group.

44. However, in the present case, it should be pointed out that the VAT relating to the services at issue cannot be deducted as a result of the choice made by MVM not to charge the members of the group for its management services.

45. In that regard, suffice it to note that, on the one hand, traders are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their activities (see, to that effect, judgment of 12 September 2013, Le Crédit Lyonnais, C-388/11, EU:C:2013:541, paragraph 46) and, on the other hand, the principal of fiscal neutrality does not mean that a taxable person with a choice between two transactions may choose one of them and avail himself of the effects of the other (judgment of 9 October 2001, Cantor Fitzgerald International, C-108/99, EU:C:2001:526, paragraph 33).”

256. In ***Portugal Telecom SGPS SA v Fazenda Publica*** **C-496/11,** the taxpayer company provided technical administrative and management services to subsidiaries. It acquired services from consultants and invoiced subsidiaries for those services at the same price at which it acquired them. In

2000, the company deducted the entire of the VAT paid by it; however, the tax authority set the deductible percentage of VAT at 25%, which was the subject of appeal. The CJEU acknowledged first the threshold to be met for a holding company to be regarded as engaged in an economic activity. Then, the CJEU acknowledged that the right to deduct VAT was an integral part of the VAT scheme and in principle could not be limited. It further acknowledged that a right to deduct exists where supplies on which input VAT is charged have a direct and immediate link to taxable output supplies or are general overheads and, as such, constitute cost components of the prices of those supplied services.

257. Having acknowledged these principles, the CJEU concluded as follows:-

"....a holding company...which, in addition to its main activity of managing shares in companies in which it holds all or part of the share capital, ***acquires goods and services which it subsequently invoices to those companies*** *is authorised to deduct the amount of input VAT provided that the input services acquired have a direct and immediate link with the output economic transactions giving rise to a right to deduct. Where those goods and services are used by the holding company in order to perform both economic transactions giving rise to a right to deduct and economic transactions which do not, the deduction is allowed only in respect of the part of the VAT which is proportional to the amount relating to the former transactions and the national tax authorities are authorised to provide for one of the methods for determining the right to deduct in Article 17(5). Where those goods and services are used both for economic and noneconomic activities, Article 17(5) of the Sixth Directive is not applicable and the methods of deduction and apportionment are to be defined by the Member States which, in exercising that power must*

take account of the purpose and general scheme of the Sixth Directive and, on that basis, lay down a method of calculation which objectively reflects the input expenditure actually attributed to each of these two activities."

258. The Respondent submitted that further significant guidance was to be found in ***Larentia + Minerva/Marenave***. In those linked cases, the CJEU considered *inter alia* the criteria for deduction of VAT in circumstances where holding companies had paid for the procurement of capital for the acquisition of a shareholding in subsidiaries to whom the holding companies subsequently made taxable supplies. Larentia and Minerva made taxable supplies to subsidiaries and, the CJEU noted "*in respect of those services subject to VAT, Larentia and Minerva deducted in full the input VAT paid in procuring capital from a third party which was used to fund the acquisition of its shareholdings in the subsidiaries and its services, in particular administrative and consultancy services."* Marenave increased its capital by issuing shares and the costs connected with that increase in capital resulted in the payment of a significant sum in VAT. In the same year Marenave, as holding company, acquired shares in four limited shipping partnerships in the business management of which it was involved for remuneration. From the VAT payable in respect of the revenues from those management activities, it deducted the entire sum of approximately €373,000 as input VAT. The referring court asked inter alia the following question of the CJEU:-

"*Which calculation method is to be used to calculate a holding company's (pro-rata) input tax deduction in respect of input supplies connected with the procurement of capital for the purchase of shares in subsidiaries, if that holding company subsequently (as intended from the outset) provides various taxable services to those subsidiaries?"*

259. The CJEU answered that question in the following terms:-

> "*… The answer to the first question is that Article 17(2) and (5) of the Sixth Directive must be interpreted as meaning that the expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in their management and which, on that basis, carries out an economic activity must be regarded as belonging to its general expenditure and the VAT paid on that expenditure must, in principle, be deducted in full, unless certain output economic transactions are exempt from VAT under the Sixth Directive, in which case the right to deduct should have effect only in accordance with the procedures laid down in Article 17(5) of that Directive;*
>
> ***The expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in the management only of some of those subsidiaries and which, with regard to the others, does not, by contrast, carry out an economic activity must be regarded as only partially belonging to its general expenditure, so that the VAT paid on that expenditure may be deducted only in proportion to that which is inherent to the economic activity****. According to the criteria for apportioning defined by the Member States, which when exercising that power, must have regard to the aims and broad logic of the Sixth Directive, and on that basis, provide for a method of calculation which objectively reflects the part of the input expenditure actually to be attributed,*

respectively, to economic and to non-economic activity, which it is for the national courts to establish" [emphasis added].

260. The Respondent noted that the Appellant had relied in its submissions on the ***Kretztechnik, Volkswagen*** and ***AB SKF*** cases to argue that general overheads are "as such" cost components of the price of taxable goods or services, and are therefore recoverable even where – as in the **Volkswagen** case – the overhead costs were not reflected in their entirety in the consideration receivable for the taxable output transactions.

261. The Respondent submitted that this approach posed a fundamental difficulty and that the result sought to be achieved by the Appellant was to have all of what the Appellant termed 'overhead' costs deemed to be attributable to taxable output supplies, even where they were not. In other words, the Respondent submitted that even where, as on the facts of this appeal, overhead costs had been incurred which, as a matter of fact, did not have a direct or immediate link to taxable output supplies, the Appellant was contending that they should somehow be regarded "as such" as a cost component of those supplies.

262. In ***Volkswagen***, it was established as fact that input VAT incurred related to two linked transactions supplied by the taxpayer, namely the supply of vehicles and the supply of hire purchase finance. The extent to which the transactions were conflated by the CJEU is apparent, the Respondent submitted, from the description of the supply in the reformulated question as "supplies of moveable goods by hire purchase." Thus, at issue in ***Volkswagen*** was apportionment between taxable and exempt transactions for which rules are laid down in Articles 173 to 175 of the PVD. The

Respondent submitted that this was a very different situation from that at issue in the within appeal, where input VAT was clearly divisible between taxable economic supplies, on the one hand (management services), and activities which are not taxable, non-economic supplies, on the other (shareholder activity).

263. The Respondent submitted that, even more importantly, it was also not in dispute in ***Volkswagen*** that the cost inputs at issue were used for the purposes of both the taxable and the exempt activity. This was not the case in this appeal as regards the use of the cost inputs arising in respect of the non-economic activities of the Appellant; the point as to whether any of those inputs were actually used for such activities (and as such could give rise to a right to deduct) was very much in dispute between the parties. On this basis, apart from the fact that the ***Volkswagen*** case reiterated the "use" criteria, the Respondent submitted that it is of little other relevance.

264. The Respondent further submitted that in ***Kretztechnik***, the taxpayer company had established as fact that it was a company engaged only in an economic activity, the distribution of medical equipment. The Appellant, in contrast, was a mixed holding company. In ***Kretztechnik***, the issue of shares on which costs had been incurred was carried out to raise capital for the benefit of that economic activity. There was a factual nexus between the input VAT and the economic activity of the taxpayer. This was not a generalised or notional link; it was a link established on the specific facts of the case.

265. The Respondent disagreed with the Appellant's submission in relation to the finding of the CJEU in ***AB SKF***. The Appellant had submitted that:-

"*The CJEU has repeatedly found that VAT incurred for the purposes of share related transactions which fall outside the scope of VAT is part of the overhead costs of that business and deductible on that basis. In* ***AB SKF*** *the CJEU went further and held that costs which had a direct and immediate link with an exempt share transaction were nonetheless part of the company's general overheads because the sale of the shares had taken place for the purposes of benefitting the taxpayer's overall business*"

266. The Respondent submitted that the relevant portions of the ***AB SKF*** actually held as follows:-

"*A disposal of shares such as that at issue in the main proceedings must be exempted from value added tax pursuant to both Article 13B(d)(5) of Sixth Directive 77/388, as amended by Directive 95/7, and Article 135(1)(f) of Directive 2006/112.*

There is a right to deduct input value added tax paid on services supplied for the purposes of a disposal of shares*, under Article 17(1) and (2) of Sixth Directive 77/338, as amended by Directive 95/7, and Article 168 of Directive 2006/112,* ***if there is a direct and immediate link between the costs associated with the input services and the overall economic activities of the taxable person****. It is for the referring court to take account of all the circumstances surrounding the transactions at issue in the main proceedings and to determine whether the costs incurred are likely to be incorporated in the price of the shares sold or whether they are among only the cost components of transactions within the scope of the taxable person's economic activities*" [emphasis added].

267. The Respondent submitted that what was required in this appeal is a careful, detailed and objective exercise in attribution. It submitted that what I must consider is whether the Appellant has proved that the entire of the input VAT incurred by it is directly and immediately linked to taxable output transactions or to its economic activity as a whole.

268. The Respondent further submitted that the criterion of 'general overheads' is particularly in dispute between the Parties. The Respondent submitted that the Appellant had sought to assert that the CJEU has ruled that all general overheads as a matter of fact constitute cost components of an economic activity. It submitted that this "extreme" position distorted the relevant interpretative principles enunciated by the CJEU and was not accepted by the Respondent. The Respondent again referred me to the ***MVM*** case, where there was an economic activity but the cost inputs at issue, contended as in this appeal to be general overheads, were not linked to that activity, but were instead linked to a non-economic activity of merely holding shares; they were accordingly held not to be deductible.

269. The Respondent further submitted that the onus was on the Appellant to establish the link to its economic activity, and submitted that the Appellant had failed to discharge this burden. The Respondent submitted that the Appellant sought to assert that any costs that do not have a direct link to its limited management services activity are, by default, general overheads and fully deductible as such, without considering whether, in fact, those costs have a direct and immediate link to its considerable non-economic activity. The Respondent submitted that this was done without the Appellant offering any explanation as to how the services rendered to it could relate to its economic

activity, consisting as it did solely of the provision of taxable management services to the Service Recipients, namely four of its approximately [redacted] subsidiaries.

270. The Respondent considered, based on the description of the cost inputs as provided by the Appellant and its analysis and categorisation of these costs, that those costs did not relate in any way to the economic activity. The Respondent gave as an example investor relations. Company I invoiced the Appellant for investor relations services. 100% of the costs were proper to the Appellant according to the Appellant Group's own detailed analysis and, accordingly, the costs were borne by the Appellant. The Respondent did not dispute this and was of the view that a holding company, such as the Appellant, would necessarily incur these costs, regardless of whether or not it carried on a separate business of providing management services to a few of its subsidiaries, as it was first and foremost the parent of the Appellant Group, and interacting with its investors was a key role for any holding company of a public group of companies.

271. In this regard, the Respondent noted that during the relevant periods, the Appellant considered itself to be an investment company for the purposes of corporation tax, in accordance with section 83 of the Taxes Consolidation Act 1997. An investment company for the purposes of that section is one "*whose business consists wholly or mainly of the making of investments, and the principal part of whose income is derived from the making of investments*".

272. The Respondent submitted that the CJEU's case-law repeatedly makes reference to "cost components" and again referred me to the judgment in ***AB SKF*** where the CJEU held that:-

> *"Accordingly, there is a right to deduct when the input transaction subject to VAT has a direct and immediate link with one or more output transactions giving rise to the right to deduct. If that is not the case, it is necessary to examine whether the costs incurred to acquire the input goods or services are part of the general costs linked to the taxable person's overall economic activity.* ***In either case, whether there is a direct and immediate link will depend on whether the cost of the input services is incorporated either in the cost of particular output transactions or in the cost of goods or services supplied by the taxable person as part of his economic activities.****"* [emphasis added]

273. The Respondent accepted that a taxable person did not have to make a profit. However, in the instant appeal, the Respondent submitted that the terms and conditions of the Services Agreement could not be ignored and that all costs (including general overheads) incurred by the Appellant which relate to the provision of the relevant services must, based on the Appellant's own terms, comprise the consideration for the services. The Respondent submitted that the costs which had been disallowed did not, according to the Appellant's own analysis and calculations, form part of the cost components of the services provided by it.

Ongoing Costs

274. In relation to ongoing costs, the Respondent submitted that during the relevant periods the Appellant was a mixed holding company. It held shares in subsidiaries to whom it did not supply management services. In accordance with settled case-law, this was not an economic activity for VAT

purposes. The Appellant provided management services to four of its subsidiaries for consideration; this was an economic activity for VAT purposes. The Appellant incurred costs for supplies made by Company I and other domestic and foreign service providers. A detailed exercise was undertaken by the Appellant Group itself in each year to determine the portion of costs incurred which were used for management services provided to the Service Recipients and the Appellant only charged the said four Service Recipients for those costs. The Respondent had allowed full VAT recovery in respect of those identified cost inputs on the basis that the costs involved were used for the purposes of the Appellant's economic activity of providing management services. The Respondent submitted that the remainder of the costs, according to the Appellant Group's own analysis and calculations, were not used for the provision of management services and on this basis, did not give rise to an entitlement to deductibility for VAT purposes.

275. The Respondent submitted that the costs incurred either meet the statutory test or they do not and argued that it was beyond dispute that costs which do not have a direct or immediate link to taxable supplies or which are not a cost component of those supplies do not give rise to an entitlement to deduct VAT.

276. The Respondent submitted that it was possible to identify those input costs which were used for the provision of taxable management services to the Service Recipients for consideration and those which were not. Those which were not properly fell to be regarded in substance as being attributable to non-economic shareholder activity, were discrete and were not capable of being viewed as supporting the supply of the taxable services.

277. Accordingly, the Respondent submitted that the partial deductibility which it had allowed, reflecting those costs which met the statutory test for deductibility, was correct and should be upheld by the Commission.

Project X

278. The Respondent submitted that what occurred in Project X was a share-for-share exchange at the ultimate shareholder level, and that it was appropriate to look at the matter in that way.

279. The Project X costs which were incurred by the Appellant were not used by it for the purposes of providing management services to the Service Recipients. The Appellant had confirmed that it did not receive any monetary or other benefit from the transaction.

280. The Respondent submitted that the Appellant's Board minutes illustrated that the Appellant was in clear pursuit of a divestiture of its [redacted] business from as early as [redacted]. While it was clear from the Board minutes that the Appellant had not decided the means of divestiture (that is, by spin-off or open market sale), it had identified the specific business line to be disposed of and was taking the necessary actions to give effect to this divestiture.

281. The Respondent referred me to the decision in ***AB SKF***, where the Court held that:-

> "*the tax treatment of a disposal of shares must be based on the objective characteristics of the transaction at issue and cannot vary according to whether the transaction is carried out in one or several stages. The*

answer to the fourth question is therefore that the answers to the preceding questions are not affected by the fact that the disposal of shares is carried out by way of several successive transactions."

282. Therefore, the Respondent submitted that its decision that none of the Project X costs were deductible inputs was correct and any attempt by the Appellant to divorce the restructuring of the [redacted] and [redacted] businesses from the actual spin transaction in order to claim a VAT input credit on the portion of the Project X costs would be unfounded.

The K Transaction

283. The Respondent submitted that, as with the Project X transaction, the K Transaction costs were not used by the Appellant for the purposes of providing management services to the Service Recipients. The Respondent submitted that the transaction could not be properly regarded as an economic activity.

284. The Respondent submitted that the contention that the input VAT incurred in respect of the K Transaction was recoverable as overheads and deemed to be "as such" cost components of taxable transactions flew in the face of the proper application of VAT deductibility rules, because it would enable the Appellant to wrongly avail of a deeming provision.

285. The Respondent did not accept the Appellant's submission that the ***Kretztechnik*** case supported the latter's position that the costs incurred in the K Transaction were a general overhead and therefore attracted VAT

recovery. The Respondent submitted that ***Kretztechnik*** and the instant appeal were not at all comparable because ***Kretztechnik*** was not a holding company and had increased its capital for the benefit of its economic activity; the Respondent submitted that there was no similar purpose associated with the K Transaction. Therefore, the Respondent submitted that the principles enunciated in ***Kretztechnik*** by the CJEU provide no support for the alleged VAT recoverability of the costs of the K Transaction.

286. Finally, the Respondent submitted that the Appellant's assertion that the K Transaction was "*all part of the management of the Group to maximise shareholder value*" implied that the beneficiaries of the transaction were in fact the shareholders of the Appellant and not the Service Recipients. This meant, in the Respondent's view, that the Appellant could not plausibly seek to contend that such cost inputs were used for the purposes of the Appellant's economic activity of providing management services to the Service Recipients.

H. Analysis and findings

287. Having had regard to the grounds of appeal, the evidence given on behalf of the Appellant and the submissions made on behalf of the Parties herein I believe that the following are the issues which require determination in order to decide this appeal:-

(i) Was the Appellant engaged in economic activity?

(ii) What was the supply received by the Appellant from Company I?

(iii) Did the Appellant use the supply received from Company I for its economic activity?

(iv) Is the Appellant entitled to a deduction in respect of the Project X costs? And,

(v) Is the Appellant entitled to a deduction in respect of the K Transaction costs?

288. Each of these issues is considered and decided below.

(i) Was the Appellant engaged in economic activity?

289. The starting point for the consideration of this issue is Article 9(1) of the PVD which provides as follows:-

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

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

290. Having regard to the foregoing definition, which is mirrored in the definition of "*business*" contained in section 2 of VATCA 2010, the Appellant must be considered to have been carrying on an economic activity if it was exploiting its tangible property, namely its shareholding in direct and indirect

subsidiaries, for the purposes of obtaining income therefrom on a continuing basis.

291. The jurisprudence of the CJEU makes it abundantly clear that a holding company whose sole purpose is to acquire holdings in other undertakings and which does not involve itself directly or indirectly in the management of those undertakings, without prejudice to its rights as a shareholder, does not have the status of a taxable person and has no right to deduct tax. It is equally clear from the jurisprudence that the mere acquisition and holding of shares in a company is not to be regarded as an economic activity conferring on the holder the status of a taxable person. The mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis because any dividend yielded by that holding is merely the result of ownership of the property. I refer in this regard to the decisions in ***Polysar***, ***Floridienne*** and ***Sofitam*** to which I was referred by the parties and which are cited above.

292. However, it is equally clear that the situation is different where the holding is accompanied by direct or indirect involvement in the management of the companies in which the holding has been acquired. I note that in ***Cibo***, the CJEU held as follows in paragraphs 21 and 22:-

> *"It is clear from paragraph 19 of the judgement in* [***Floridienne***] *that direct or indirect involvement in the management of subsidiaries must be regarded as an economic activity within the meaning of Article 4(2) of the Sixth Directive where it entails carrying out transactions which are subject to VAT by virtue of Article 2 of that directive, such as the supply*

by a holding company such as Cibo of administrative, financial, commercial and technical services to its subsidiaries.

The answer to the first question referred for a preliminary ruling must therefore be that the involvement of a holding company in the management of companies in which it has acquired a shareholding constitutes an economic activity within the meaning of Article 4(2) of the Sixth Directive where it entails carrying out transactions which are subject to VAT by virtue of Article 2 of the directive, such as the supply by holding company to its subsidiaries of administrative, financial, commercial and technical services."

293. While the Court in ***Cibo*** was obviously considering the Sixth Directive, the wording of the relevant portion of Article 4(2) is effectively repeated in Article 9 of the PVD and so I believe the judgement of the Court is relevant and applicable in the instant appeal.

294. The taxpayer in ***Cibo*** had incurred costs in respect of the supply of various services for which it was invoiced by third parties in connection with the acquisition of shares in its three subsidiaries. The services in question included the auditing of companies, assistance with the negotiation of the purchase price of the shares, organising the take-over of the companies and legal and tax services. Following the acquisition, Cibo provided services to the subsidiaries including making available qualified staff to work in general, administrative, financial, commercial and technical management, and the subsidiaries were invoiced for those services on a flat-rate basis of 0.5% of their turnover. The Court held that Cibo was carrying on an economic activity

and that it was entitled to a deduction in respect of the costs related to the acquisition of shares.

295. The Respondent called in aid in relation to this issue the decision in ***MVM***, which it argued supported its submission that the Appellant was not carrying on economic activity save insofar as it was supplying management services to the four FPEs. However, I agree with the submission by the Appellant that that case is distinguishable from the facts of the instant appeal because the taxpayer therein did not charge its subsidiaries for those management services, nor did it impose a general charge for strategic management; paragraphs 33 to 35 of the judgement are relevant in this regard.

296. Turning to the facts of the instant appeal, I accept as correct the evidence of Witness 1 and Witness 2 in relation to the manner in which the business of the Appellant Group was conducted. The Group's activities were divided into a number of Global Business Units; each of these Units covered a particular aspect of the business such as, for example, [redacted] or [redacted]. It was not the case that a particular subsidiary would have responsibility for a particular aspect of the business.

297. I accept Witness 1's evidence that the business was structured in this manner because the Group was driven by ownership of intellectual property and the recognition of risk. The Group had established principal entities, such as Company I and Company H, at the centre of the supply chain and those entities carried all of the risk in relation to the end-to-end supply chain. The principal entities engaged and directed manufacturers and covered the costs of those manufacturers, including the costs of any negative issues which might

arise during the manufacturing process, and paid the manufacturers a profit of approximately [redacted]%.

298. A similar model existed in relation to distribution and sales companies for the Appellant Group products, known as "limited receptors" because of their limited exposure to risks. The sales companies held distribution agreements with the principal entity which engaged them, which gave them the rights to sell the Appellant Group products within a particular territory. In turn, they were supported by the principal entity which carried all of the risk in terms of marketing and training and also in relation to sales. As consideration for this, the sales companies would receive a margin of in or around [redacted]% on the sales which they made. Similar agreements were entered into between the principal entities and service companies which provided back office type activities, such as customer care, finance and research and development services.

299. A useful summary of the operating structure of the Appellant Group was contained at paragraph 3.4 of Report A. The summary was confirmed by the evidence given by Witness 1 and Witness 2 and I accept it as correct. The report stated as follows:-

> *"The FPEs are participants in the eight different CSAs* [cost sharing arrangements] *that reflect* [Appellant]*'s prevailing IP ownership structure. To review* [Appellant]*'s intercompany services transactions, it is important to understand* [Appellant]*'s overall operating structure and the role and responsibility (e.g., functional and risk profile) of* [Company I] *and the FPEs.*

[Appellant]*'s operating structure is based upon its foundation as a company from cumulative acquisitions of large independent companies in the latter-half of the* [redacted]*s and early* [redacted]*s. These companies … each brought their own operating structures to* [Appellant]*. [Appellant] operates today with several entrepreneurs who have rights to develop and/or use the IP. The rights to develop and use IP are conveyed through 8 different CSAs… A US legal entity is a participant with a non-US entity in each one of the CSA's.*

The entrepreneurs, including [Company I] *and the FPEs (*[Company I] *and the FPEs are referred to collectively as "Principal Companies"), bear the business and financial risk for the development of IP, manufacturing a product, and distribution of product to customers. The Principal Companies typically perform or engage related affiliates to assist and carry out aspects of their responsibilities. Therefore, the majority of* [Appellant]*'s operating legal entities, other than the Principal Companies, have a single functional role, such as a distributor with responsibilities only to sell products to customers in its local marketplace or a contract manufacturer with responsibilities only to produce product. These single function entities allow the Principal Companies to utilize, for example, the same local country distribution affiliate to sell product in the marketplace.* [Appellant]*'s intercompany transfer pricing policies target each of these single function entities to earn a routine return for its functions and allocates all non-routine returns to the relevant* [Appellant] *Principal Company. Consistent with this business model, any costs incurred by* [Appellant] *affiliates that (i) benefit the Principal Company's operations and financial results and (ii) are not a part of the*

tangible goods transactions with the Principal Companies are to be charged to the Principal Companies."

300. It is clear from the documentary and oral evidence in the appeal that decisions were made by the Board of the Appellant in relation to all aspects of the Appellant Group's business. These decisions were then communicated to the executive officers who would in turn communicate the decisions onwards to the appropriate personnel in the relevant subsidiaries for research and, where appropriate, implementation by the Global Business Units. I believe it is relevant in this regard to note that the executive officers, who were in the main employees of Company I, were what is known under US SEC Regulations as "Section 16 Officers"; this meant that, as persons who were in charge of a principal business unit or who performed policy-making functions, they were deemed to be officers of the Appellant.

301. The documentation submitted to me by the Appellant included a significant number of Board Packs which were used for Board Meetings of the Appellant. These Board Packs demonstrate the detailed and ongoing involvement of the Appellant's Board in the management of the Appellant Group as a whole and in relation to specific projects and initiatives within the Appellant Group.

302. Witness 1 gave evidence of his understanding of the role of the Appellant's Board in deciding on and overseeing new and existing initiatives within the Appellant Group, and gave as an example the changes implemented in the training facilities offered to customers of [redacted] devices. In addition, Witness 1 gave evidence in relation to the Appellant's Board's involvement in the strategic direction of the Appellant Group as a whole, such as its initiation

and oversight of "Project Z", which involved the transfer of the Appellant Group's Latin American intellectual property from the US to Company H.

303. Having carefully considered all of the evidence and the submissions of the parties, I am satisfied that the Appellant was at all material times actively engaged in the management of all aspects of the business of the Appellant Group. It was, to use Witness 3's phrase, an "*active holding company*" and was actively managing all aspects of the businesses of the Appellant Group. I find as a material fact that through its agreement with Company I and the Service Agreement, it was providing management services not only to the four FPEs but also to the [redacted] subsidiaries who were connected to the four FPEs.

304. It was submitted on behalf of the Respondent that the Appellant was a holding company which was engaged in both economic activity and non-economic activity at the same time. The Respondent had argued in this regard that the Appellant was a "*mixed holding company*" and that only those costs incurred to provide management services to its subsidiaries attracted the right to a VAT deduction; the remainder of the costs it incurred were what the Respondent described as "*shareholder costs*", which related to what the Respondent characterised as the Appellant's non-economic activity of holding shares. I was referred to the decisions in, *inter alia,* ***Larentia + Mine*****rva** and ***MVM*** in this regard. The non-economic activity contended for by the Respondent was the Appellant's holding of shares in subsidiaries where the Appellant did not play a management role. While I accept as correct and binding upon me the statements of principle contained in those judgments, and that a holding company may be engaged in both economic and non-economic activities, I do not believe that the evidence in this appeal supports a finding that the Appellant was engaged in non-economic activity.

305. I therefore find as a material fact that the Appellant was not just a passive holding company but was instead at all material times actively engaged and directly and indirectly involved in the management of its subsidiaries and sub- subsidiaries. I further find as a material fact that its said engagement and involvement in managing those companies was for the purposes of the exploitation of its holdings in those companies for the purpose of obtaining income therefrom on a continuing basis.

306. I therefore find that the Appellant was wholly engaged in economic activity at all times material to this appeal.

(ii) What was the supply received by the Appellant from Company I?

307. The starting point for my consideration of this issue must be the Company I Agreement under which management services were received by the Appellant from Company I. Article 3 of that Agreement provided that:-

> *"*[Company I] *shall provide to (or at its discretion, procure for) the Service Recipient* [the Appellant]*, various services as described in this Article 3 (the "Services"). Services shall include only those activities that provide a benefit to the Service Recipient, i.e., provide an increment of economic or commercial value that enhances the Service Recipient's commercial position, or is reasonably anticipated to do so, and may include but shall not be limited to the following…"*

308. Article 3 then went on to list the 10 categories of services that might be provided, namely Corporate Executive, Business Development, Human

Resources, Internal Audit, Finance, Tax, Legal, Treasury and Risk Management, Operations and Miscellaneous.

309. Article 4(1) governed the compensation payable by the Appellant for the services provided by Company I and subparagraph (a) thereof provided:-

> *"The Service Recipient shall pay to* [Company I] *a service fee (the "Fee") equal in amount to* [Company I]*'s total services costs incurred in connection with providing the Services to the Service Recipient ("total service costs"), plus a markup percentage, as set forth in Exhibit A, of such costs. For purposes of calculating the Fee, costs incurred by* [Company I]*, shall be allocated to the Services using a reasonable and consistent method of allocation as provided in Section 4.1(c) below, and the Service Recipient agrees to pay the Fee to* [Company I]*. The method of allocation of costs shall be applied consistently each year, unless a change in facts occurs which necessitates a change in the allocation method. The Fee shall be stated exclusive of any value added taxes, goods and services taxes (GST), sales tax, or similar turnover dependent taxes and duties (collectively, "Turnover Taxes") that may arise thereon."*

310. Witness 2 gave evidence, which I accept as correct, that the reference in Article 3 to the provision of economic or commercial value and in Article 4 to the allocation of costs was reflective of transfer pricing concepts and was included for corporation tax purposes.

311. The quarterly invoices received by the Appellant from Company I each charged the Appellant a single amount for what were described therein as "*Interim Stewardship fees*" and there was no breakdown therein of that amount as between the various types of services that had been provided.

312. Having carefully considered the relevant documentation and the evidence and submissions of the parties, and applying the principles enunciated by the UK Upper Tax Tribunal in ***Middle Temple***, I am satisfied and I find as a material fact that the Appellant received a single, composite supply of services from Company I. It is appropriate to record in this regard that the Respondent did not contend that the Appellant had received multiple supplies from Company I.

(iii) Did the Appellant use the supply from Company I for its economic activity?

313. Having so found, the next question which falls to be determined is whether the Appellant used the single composite supply received from Company I for the purpose of its output supplies. The Appellant's entitlement to deduct the VAT it suffered on the purchase of management services from Company I is contingent upon those services being used for its taxable supplies to its subsidiaries or for other qualifying activities.

314. Section 59(2) of VATCA 2010 provides in this regard:-

"Subject to subsection (3), in computing the amount of tax payable by an accountable person in respect of a taxable period, that person may, insofar as the goods and services are used by him or her for the purposes of his or her taxable supplies or of any of the qualifying activities, deduct –

(a) the tax charged to him or her during the period by other accountable persons by means of invoices, prepared in the manner prescribed by regulations, in respect of supplies of goods or services to him or her…"

315. It was argued on behalf of the Appellant that, simply put, because the Appellant had received a single supply of management services, and because it had made a supply of management services, it was self-evident that the services received had been used for the purposes of the Appellant's output supplies.

316. I agree with the parties that the decision in ***Cibo*** is relevant and of assistance in determining this issue. The CJEU stated in paragraphs 27 and 28 of its judgment that:-

> *"It should be observed at the outset that the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT* [citing ***Midland Bank*** and ***Abbey National***].
>
> *Article 17(5) of the Sixth Directive, in the light of which Article 17(2) must be interpreted, lays down the rules applicable to the right to deduct VAT where the VAT relates to input transactions used by the taxable person 'both for the transactions covered by paragraphs 2 and 3, in respect of which value added tax is deductible, and for transactions in respect of which value added tax is not deductible', limiting the right of deduction to that portion of the VAT which is attributable to the former transactions. The use of the words 'for transactions' in Article 17(5) shows that, in order to give rise to the right to deduct under paragraph 2, the goods or services acquired must have a direct and immediate link*

with the output transactions in respect of which VAT is deductible, and that the ultimate aim pursued by the taxable person is irrelevant in this respect [citing ***BLP Group***, ***Midland Bank*** and ***Abbey National***]."

317. The Court then went on in paragraphs 31 to 33 to state as follows:-

"It follows from that principle, as well as from the rule that, in order to give rise to the right to deduct, the goods or services purchased must have a direct and immediate link with the output transactions in respect of which VAT is deductible, that there was a right to deduct the VAT borne by those goods or services because the expenditure incurred in acquiring them was a component of the cost of those output transactions. The expenditure must therefore form part of the costs of the output transactions in respect of which VAT is deductible which use the goods and services acquired [citing ***Midland Bank*** and ***Abbey National***].

Clearly, there is no direct and immediate link between the various services purchased by a holding company in connection with its acquisition of the shareholding in a subsidiary and any output transaction or transactions in respect of which VAT is deductible. The amount of VAT paid by the holding company on the expenditure incurred for those services does not directly burden the various cost components of its output transactions in respect of which VAT is deductible. That expenditure does not form part of the costs of the output transactions which use the services.

On the other hand, the costs of those services are part of the taxable person's general costs 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 [citing ***BLP Group***, ***Midland Bank*** and ***Abbey National***]."

318. I was also referred to the decision in ***Larentia + Minerva*** by both parties in relation to this issue. Having held, as discussed above, that the involvement of a holding company in the management of companies in which it has acquired a shareholding constitutes an economic activity where it entails carrying out transactions which are subject to VAT, such as the supply to subsidiaries of administrative, financial, commercial and technical services, the CJEU went on to state as follows:-

> *"...* [I]*t should also be noted that the right to deduct provided for in Article 17 et seq. of the Sixth Directive is an integral part of the VAT scheme and in principle may not be limited. The right to deduct is exercisable immediately in respect of all the taxes charged on transactions relating to inputs. Any limitation of the right to deduct VAT affects the level of the tax burden and must be applied in a similar manner in all the Member States. Consequently, derogations are permitted only in the cases expressly provided for in the Sixth Directive* [citing ***Portugal Telecom***].
>
> *For VAT to be deductible, the input transactions must have a direct and immediate link with the output transactions giving rise to a right of deduction. Thus, the right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that give rise to the right to deduct* [citing ***Cibo*** and ***Portugal Telecom***].
>
> *However, a taxable person also has a right to deduct even where there is no direct and immediate link between a particular input 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 [citing ***Cibo*** and ***Portugal Telecom***].

In the circumstances, as the Advocate General stated in point 39 of his Opinion, the expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in their management and which, on that basis, carries out an economic activity, as was noted in paragraph 21 of the present judgement, must be regarded as attributed to that company's economic activity and the VAT paid on that expenditure gives rise to the right to full deduction, pursuant to article 17(2) of the Sixth Directive."

319. I respectfully agree with the decision of the English Court of Appeal in ***Dial-a-Phone Ltd*** that:-

"… on the authority of BLP and Midland Bank, and applying the 'used for' test prescribed by Article 17(2) of the Sixth Directive, the relevant enquiry is whether there is a 'direct and immediate link' between the input cost in question and the supply or supplies in question; alternatively whether the input cost is a 'cost component' of that supply or those supplies. It is clear from the judgements of the ECJ in BLP and Midland Bank, as I read them, that there is no material difference between these alternative ways of expressing the basic test."

320. Having carefully considered all of the evidence given and submissions made in the course of the appeal, I am satisfied and find as a material fact that there was a direct and immediate link between the input costs suffered by the Appellant on the single composite supply of management services it received from Company I and the supply of management services by the Appellant to the 4 FPEs and their [redacted] subsidiaries. The fact that the [redacted] subsidiaries were not party to the Service Agreement and the fact that the cost of the management services supplied by the Appellant were borne by the four FPEs do not, in my view, require me to reach a different conclusion. In relation to the latter point, I accept the Appellant's submission that its operating structure and intercompany transfer pricing policy meant that there was a logic and benefit to the four FPEs in paying for the management services received by their [redacted] subsidiaries.

321. The allocation of costs discussed and analysed in Report A does not, in my view, affect my finding in this regard. I accept the submission and evidence of the Appellant that that report was prepared for transfer pricing and corporate income tax purposes, and it is not of direct relevance to the issues of VAT which arise in this appeal.

322. I therefore find that the services received by the Appellant from Company I were used in their entirety for the purposes of the Appellant's economic activity.

323. Having so found, it is not necessary for me to consider the Appellant's alternative argument that the costs it incurred on the supply of services by Company I formed part of the Appellant's general overheads. The finding

equally makes it unnecessary for me to consider the issues of apportionment of costs and the "*as such*" issue.

(iv) Is the Appellant entitled to a deduction in respect of the Project X costs?

324. The Respondent's submissions in relation to this issue were premised at least in part on their assertion that what occurred in Project X was "*a share-for-share exchange at the ultimate shareholder level.*" I believe this assertion to be factually incorrect. Witness 4 gave evidence, which I accept as accurate and correct, that the transaction was a three-cornered demerger. The Appellant did not receive any shares or any cash as part of the transaction. The Appellant's shareholders did not exchange shares; they retained their existing shareholding in the Appellant and received additional shares in Company J proportional to their shareholding in the Appellant.

325. I further accept as accurate and correct Witness 4's evidence that the spin off was effected by way of the distribution of a dividend *in specie*.

326. Having carefully considered the evidence and the submissions of the parties, I am satisfied and find as a material fact that the initial decision to divest the Appellant's [redacted] business by way of sale or spin off, the subsequent decision to proceed by way of spin off and the subsequent implementation of that decision were all an integral part of the active management by the Appellant's Board of the Appellant Group's business as a whole. I therefore find that the planning and execution of Project X constituted economic activity on the part of the Appellant.

327. I further accept as correct the evidence given that the structuring of the Appellant Group into Global Business Units meant that the divestiture of the [redacted] business affected not only the four FPEs but also their subsidiaries throughout the Group.

328. I therefore find that services supplied to the Appellant in relation to Project X related to the Appellant's economic activity and had a direct and immediate link to the Appellant's taxable output supplies to its direct and indirect subsidiaries. I believe this finding is supported by the decisions of the CJEU in ***Midland Bank***, ***Abbey National***, ***Cibo***, ***Kretztechnik*** and ***Securenta*** discussed *supra*.

329. It follows therefrom that the Appellant is entitled to a deduction in respect of the VAT it incurred on the cost of the services it received in relation to Project X.

(v) Is the Appellant entitled to a deduction in respect of the K Transaction costs?

330. As outlined above, the K Transaction was effected by way of a cancellation scheme of arrangement approved by the High Court in this jurisdiction. On the scheme becoming effective, the existing shares in the Appellant were cancelled, the resulting reserve was capitalised and used to issue fully paid new shares in the Appellant to two Company K companies.

331. As with Project X, I am satisfied that the Board's initiation, oversight and execution of the disposal to Company K was an integral part the active

management by the Appellant's Board of the Appellant Group's business as a whole.

332. As noted above, the CJEU held in ***Kretztechnik*** that:-

"*In this case, in view of the fact that, first, a share issue is an operation not falling within the scope of the Sixth Directive and, second, that operation was carried out by Kretztechnik in order to increase its capital for the benefit of its economic activity in general, it must be considered that the costs of the supplies acquired by that company in connection with the operation concerned form part of its overheads and are therefore, as such, component parts of the price of its products. Those supplies have a direct and immediate link with the whole economic activity of the taxable person* (citing ***BLP***, ***Midland Bank***, ***Abbey National*** and ***Cibo***).

It follows that, under Article 17(1) and (2) of the Sixth Directive, Kretztechnik is entitled to deduct all the VAT charged on the expenses incurred by that company for the various supplies which it acquired in the context of the share issue carried out by it, provided, however, that all the transactions carried out by that company in the context of its economic activity constitute taxed transactions. A taxable person who effects both transactions in respect of which VAT is deductible and transactions in respect of which it is not may, under the first subparagraph of Article 17(5) of the Sixth Directive, deduct only that proportion of the VAT which is attributable to the former transactions (citing ***Abbey National*** and ***Cibo***).

The answer to the third question must therefore be that Article 17(1) and (2) of the Sixth Directive confer the right to deduct in its entirety the VAT charged on the expenses incurred by a taxable person for the various supplies acquired by him in connection with a share issue, provided that all the transactions undertaken by the taxable person in the context of his economic activity constitute taxed transactions."

333. As I have already found as a material fact that Appellant was fully engaged in economic activity at all times material to this appeal, it follows that the Appellant is entitled to a full deduction in respect of the VAT it incurred on the cost of the services it received in relation to the K Transaction.

I. Conclusion

334. Having made the findings detailed above, I am satisfied that the Appellant is entitled to succeed in all aspects of this appeal.

335. I find that the Appellant has been overcharged to Value Added Tax by reason of the Assessments to VAT detailed in paragraph 2 *supra* and therefore determine pursuant to section 949AK(1)(a) of the Taxes Consolidation Act 1997 as amended that those amended assessments be reduced accordingly.

MARK O'MAHONY
Appeal Commissioner
29 April 2022

The Tax Appeals Commission has been requested to state a case for the opinion of the High Court in relation to this Determination.