AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

Between 110TACD2023

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This is an appeal, under section 119 of the Value Added Tax Consolidation Act 2010 ("VATCA 2010"), by [redacted] ("the Appellant") against the decision of the Revenue Commissioners ("the Respondent") to refuse the Appellant's claim for repayment of Value Added Tax ("VAT") in the total amount of €2,166,230 for periods between [redacted] to [redacted].

2. This appeal considers whether the services provided by the Appellant constituted exempt transactions under Schedule 1, Part 2 of the VATCA 2010. The Appellant contends that they were not exempt, whereas the Respondent contends that they were.

3. The appeal proceeded by way of a hearing on 25, 27 and 28 April 2023.

Background

4. On 30 April 2018, the Appellant claimed repayment of VAT in the amount of €1,437,618 for the period from [redacted] to [redacted] ("Claim 1"). The Respondent refused Claim 1 on 28 February 2019, and the Appellant appealed the refusal to the Tax Appeals Commission ("the Commission") on 7 April 2020.

5. On 27 May 2020, the Appellant claimed repayment of VAT in the amount of €728,612 for the period from [redacted] to [redacted] ("Claim 2"). The Respondent refused Claim 2 on 8 April 2022, and the Appellant appealed the refusal to the Commission on 13 April 2022.

6. On 6 September 2021, the Respondent objected to the Commission hearing the appeal in respect of Claim 1. Its objections were on two grounds: (1) that the appeal was late, and (2) that the appeal was brought in the name of [redacted] which had ceased to exist on [redacted]

7. A hearing was held on 19 and 20 July 2022 to consider the Respondent's objections. On 25 August 2022, the Commissioner issued his decision rejecting the Respondent's objections. He directed that the appeal continue under the version of the Appellant's name set out at the heading of the Determination herein. A copy of the decision on the Respondent's preliminary objections is attached as an appendix to this Determination.

8. Thereafter, it was agreed to consolidate the two appeals, as they were both concerned with the same facts and law. On 20 January 2023, the hearing was scheduled for four days: 24, 25, 27 and 28 April 2023.

9. On 17 April 2023, the Respondent provided a copy of an expert report ("the report") prepared by [redacted] ("the Respondent's/its expert"). In its covering email, the Respondent stated that it was providing the report "*as a courtesy*", but it was reserving its position as to whether or not it would call its expert to give evidence at the hearing.

10. On 20 April 2023, the Appellant wrote to the Commission regarding the Respondent's expert's report. It stated that it had received the report on 17 April 2023 "*without any prior warning or notice*." It submitted that it would be unfair to admit the report into evidence, and also that the report was inadmissible as irrelevant and inappropriate. It requested a decision refusing to admit the report into evidence.

11. On 20 April 2023, the Respondent replied to the Appellant's request. It denied that admitting the report would be unfair or that it was inadmissible as irrelevant and inappropriate. It suggested that the Appellant's complaint could be addressed by a deferral of the hearing. In reply, the Appellant submitted a brief email which did not address the suggestion of a deferral.

12. On 21 April 2023, the Commission wrote to the parties to state *inter alia* that

> "*[The Commissioner] considers the submission of [the Respondent's expert's] report so close to the scheduled hearing date of the appeal, and without any prior notification to the Commission or the Appellant, to be very regrettable. Nevertheless, the Commissioner considers that it would be disproportionate to exclude his evidence prior to the hearing, and therefore the Appellant's application is refused. It will of course be open to the parties to make submissions regarding the weight to be given to any such evidence at the hearing herein.*
>
> *The Commissioner considers that any potential unfairness to the Appellant arising from the late submission of [the] report can be addressed by an adjournment of the hearing, in order to afford the Appellant an opportunity to identify an expert to consider and respond to the issues in [the] report.*
>
> *Consequently, the Commissioner will vacate the hearing scheduled to commence on Monday 24 April. The Commissioner intends to reschedule the hearing at the earliest opportunity, and therefore the Appellant is directed to update the Commission within 21 days regarding progress made by it to identify and instruct an expert*."

13. Shortly after the issuance of this email, the Appellant's agent replied to state that the Appellant was objecting to an adjournment of the hearing. To allow it to consider the report, it asked that the hearing commence on 25 April (rather than 24 April as originally

scheduled). It also stated "*For the avoidance of doubt the Appellant maintains that the report should not be admitted and reserves its position in this regard*."

14. In response, the Commissioner agreed to reinstate the hearing, to commence on 25 April. The email to the parties also stated that

> "*The Commissioner is surprised at the Appellant's objection to an adjournment of the hearing, particularly as no objection was raised by the Respondent's suggestion of a possible deferral of the hearing in its letter.*
>
> *The Commissioner notes the Appellant's comment that "For the avoidance of doubt the Appellant maintains that the report should not be admitted and reserves its position in this regard." The Commissioner considers it important to record that the adjournment was proposed to enable the Appellant to procure its own expert witness in response to the report provided by the Respondent, but that the Appellant has objected to that adjournment*."

15. Accordingly, the hearing commenced on 25 April 2023.

16. While the Appellant's name is as stated in the heading of this Determination, during the time periods with which this appeal is concerned it was known as [redacted]. Therefore, references in this Determination to [redacted] should be understood to refer to the Appellant.

Legislation

17. Directive 77/388/EEC ("the Sixth VAT Directive") stated *inter alia* that

> "*Article 13*
>
> *Exemptions within the territory of the country*
>
> *[…]*
>
> *B. Other exemptions*
>
> *Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse…*
>
> *(d) the following transactions:..*

5. transactions, including negotiation, excluding management and safekeeping, in shares, interests in companies or associations, debentures and other securities, excluding:

- documents establishing title to goods,

- the rights or securities referred to in Article 5 (3);

6. management of special investment funds as defined by Member States;"

18. Directive 2006/112/EC ("the Principal VAT Directive") states *inter alia* that

"*Article 135*

Member States shall exempt the following transactions…

(f) transactions, including negotiation but not management or safekeeping, in shares, interests in companies or associations, debentures and other securities, but excluding documents establishing title to goods, and the rights or securities referred to in Article 15(2);

(g) the management of special investment funds as defined by Member States;"

19. Section 46 of the VATCA 2010 states *inter alia* that

"(1) Tax shall be charged, in relation to the supply of taxable goods or services, the intra-Community acquisition of goods and the importation of goods, at whichever of the following rates is appropriate in any particular case:..

(3) Goods or services which are specifically excluded from any paragraph of a Schedule shall, unless the contrary intention is expressed, be regarded as excluded from every other paragraph of that Schedule, and shall not be regarded as specified in that Schedule."

20. Section 59 of the VATCA 2010 states *inter alia* that

"(1) In this subsection and subsection (2)—

"qualifying activities" means—

[…]

(d) services specified in paragraph 6(1), 7(1), 7 or 8 of Schedule 1 supplied—

(i) outside the Community, or

[…]

(f) supplies of goods or services outside the State which would be taxable supplies if made in the State;

[…]

(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,

[…]

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…"

21. Schedule 1, Part 2 to the VATCA 2010 provided (at the relevant time) *inter alia* that the following activities are exempt:

"*Financial Services*

(6) (1) Financial services that consist of any of the following:

(a) issuing, transferring or otherwise dealing in stocks, shares, debentures and other securities (other than new stocks, new shares, new debentures or new securities for raising capital and documents establishing title to goods);

(b) arranging for, or underwriting, an issue of stocks, shares, debentures and other securities (other than documents establishing title to goods);

[…]

(2) Financial services that consist of managing an undertaking of a kind specified in this subparagraph:

(a) a collective investment undertaking as defined in section 172A of the Taxes Consolidation Act 1997;

(aa) an investment limited partnership within the meaning of section 739J of the Taxes Consolidation Act 1997;

(b) an investment limited partnership within the meaning of section 739J of the Taxes Consolidation Act 1997;

(c) an undertaking that is administered by the holder of an authorisation granted under the European Communities (Life Assurance) Regulations 1984 (S.I. No. 57 of 1984), or by a person who is deemed, by Article 6 of those Regulations, to be such a holder, the criteria in relation to which are the criteria specified in relation to an arrangement to which section 9(2) of the Unit Trusts Act 1990 applies;

(d) a unit trust scheme established solely for the purpose of superannuation fund schemes or charities;

(e) an undertaking that is a qualifying company for the purposes of section 110 of the Taxes Consolidation Act 1997;

(ea) an undertaking that enters into specified financial transactions within the meaning of Part 8A of the Taxes Consolidation Act 1997 where that undertaking corresponds to an undertaking specified elsewhere in this subparagraph;

(eb) a defined contribution scheme (within the meaning of the Pensions Act 1990), other than a one-member arrangement (within the meaning of that Act);

(f) any other undertaking that is determined by the Minister to be a collective investment undertaking for the purposes of this subparagraph.

(3) A determination referred to in subparagraph (2)(f) takes effect on the date when it is notified to the undertaking concerned or on such later date as is specified in the determination.

(4) In relation to an undertaking specified in subparagraph (2), management of the undertaking can consist of any one or more of the 3 functions listed in Annex II of Directive No. 85/611/EEC of the European Parliament and Council (being the functions included in the activity of collective portfolio management) where the relevant function is carried out by the person who has responsibility for supplied that function in respect of the undertaking.

Agency Services

(7) (1) The supply of agency services relating to the financial services specified in subparagraph (1) of paragraph 6, excluding management and safekeeping services in regard to the services specified in clause (a) of that subparagraph.

(2) The supply of agency services relating to the financial services specified in paragraph 6(2)."

Case Law

22. In *Elisabeth Blasi v Finanzamt München I* Case C-346/95 ("*Blasi*"), the Court of Justice of the European Union ("CJEU") stated that

> "*18 It must first be noted that the Court has consistently held that the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive are to be interpreted strictly, since they constitute exceptions to the general principle that turnover tax is to be levied on all services supplied for consideration by a taxable person (Case 348/87 Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën [1989] ECR 1737, paragraph 13, and Case C-453/93 Bulthuis-Griffioen v Inspecteur der Omzetbelasting [1995] ECR I-2341, paragraph 19).*"

23. In *Sparekassernes Datacenter (SDC) v Skatteministeriet* Case C-2/95 ("*SDC*"), the CJEU stated that

> "*32 The transactions exempted under points 3 and 5 of Article 13B(d) are defined according to the nature of the services provided and not according to the person supplying or receiving the services. Those provisions make no reference to that person.*
>
> *[…]*
>
> *37 It must be stated in regard to this point that the specific manner in which the service is performed, electronically, automatically or manually, does not affect the application of the exemption. The provisions in question make no distinction in this regard. Accordingly, the mere fact that a service is performed entirely by electronic means does not in itself prevent the exemption from applying to that service. If, on the other hand, the service entails only technical and electronic assistance to the person performing the essential, specific functions for the transactions covered by points 3 and 5 of Article 13B(d), it does not fulfil the conditions for exemption. That conclusion follows, however, from the nature of the service and not from the way in which it is performed.*
>
> *38 The answer to the second part of the first question, the second question, part A of the third question and the sixth question must therefore be that points 3 and 5 of Article 13B(d) of the Sixth Directive are to be interpreted as meaning that the exemption is not subject to the condition that the transactions be effected by a certain type of*

institution, by a certain type of legal person or wholly or partly by certain electronic means or manually.

[…]

46 In the present case, most of the services provided by SDC involve no legal relationship between it and the end recipient, namely the customer of a member bank of SDC. In such a situation the legal relations which are formed are between the bank and its customer and between the bank and SDC.

47 The services in point in the main proceedings are the services which SDC has performed for its own customers, namely the banks, and in return for which the banks have paid remuneration. Having regard to that relationship, the services which SDC provides to the customers of the banks are therefore significant only as descriptors and as parts of the services provided by that body to the banks.

[…]

53 On this point, it must be noted first of all that a transfer is a transaction consisting of the execution of an order for the transfer of a sum of money from one bank account to another. It is characterized in particular by the fact that it involves a change in the legal and financial situation existing between the person giving the order and the recipient and between those parties and their respective banks and, in some cases, between the banks. Moreover, the transaction which produces this change is solely the transfer of funds between accounts, irrespective of its cause. Thus, a transfer being only a means of transmitting funds, the functional aspects are decisive for the purpose of determining whether a transaction constitutes a transfer for the purposes of the Sixth Directive.

54 In cases where the customer effects a transfer or causes a transfer to be effected without any action by the bank, the specific acts which constitute the transfer are carried out either by the data-handling centre and the customer or by the data-handling centre and a third party, the latter acting at the customer's request, or by the data-handling centre acting alone pursuant to a standing order from the customer.

55 The contractual links between the bank and its customer do not diminish the role of the data-handling centre. It is from those links that the customer derives the right to have transactions effected, even if they are invoiced as services provided to the bank and also alter the bank's financial situation.

56 Moreover, if point 3 of Article 13B(d) of the Sixth Directive covered only the service which a financial institution provides to the end customer, only certain acts concerning transfer transactions could be exempt. Such an interpretation would restrict the exemption in a way which is not supported by the wording of the provision in question. That wording does not restrict the exemption to that relation and it is sufficiently broad to include services provided by operators other than banks to persons other than their end customers.

57 It follows from the foregoing that an interpretation restricting application of the exemption provided for by point 3 of Article 13B(d) to services provided directly to an end customer is unfounded.

58 As far as SDC's other functions are concerned, its role in relations with the banks and end customers is comparable to its role in a transfer. Furthermore, the other exemptions provided for by points 3 and 5 of Article 13B(d) are, like the exemption for transfers, also defined according to the nature of the services provided and not according to the identity of the persons to whom they are provided.

59 The answer to part B of the third question and to the fifth question must therefore be that the exemption provided for by points 3 and 5 of Article 13B(d) is not subject to the condition that the service be provided by an institution which has a legal relationship with the end customer. The fact that a transaction covered by those provisions is effected by a third party but appears to the end customer to be a service provided by the bank does not preclude exemption for the transaction.

[…]

65 However, since point 3 of Article 13B(d) of the Sixth Directive must be interpreted strictly, the mere fact that a constituent element is essential for completing an exempt transaction does not warrant the conclusion that the service which that element represents is exempt. The interpretation put forward by SDC cannot therefore be accepted.

66 In order to be characterized as exempt transactions for the purposes of points 3 and 5 of Article 13B, the services provided by a data-handling centre must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service described in those two points. For `a transaction concerning transfers', the services provided must therefore have the effect of transferring funds and entail changes in the legal and financial situation. A service exempt under the Directive must be distinguished from a mere physical or technical supply, such as making a data-

handling system available to a bank. In this regard, the national court must examine in particular the extent of the data-handling centre's responsibility vis-à-vis the banks, in particular the question whether its responsibility is restricted to technical aspects or whether it extends to the specific, essential aspects of the transactions.

67 It is for the national court, which is acquainted with all the facts of the case, to determine whether the operations carried out by SDC have such a distinct character and whether they are specific and essential.

68 In view of all foregoing considerations the reply to be given to the first and fourth questions concerning point 3 of Article 13B(d) of the Sixth Directive must be that this provision is to be interpreted as meaning that transactions concerning transfers and payments include operations carried out by a data-handling centre if those operations are distinct in character and are specific to, and essential for, the exempt transactions.

[…]

73 Furthermore, trade in securities involves acts which alter the legal and financial situation as between the parties and are comparable to those involved in the case of a transfer or a payment.

74 However, the description provided in this regard by the national court is not sufficient to enable the Court to determine the precise nature of SDC's services concerning advice on, and trade in, securities.

75 The answer to be given to the first and fourth questions concerning operations entitled `Advice on, and trade in, securities' must therefore be that services consisting in making financial information available to banks and other users are not covered by points 3 and 5 of Article 13B(d) of the Sixth Directive. As regards, more specifically, trade in securities, point 5 of that provision is to be interpreted as meaning that transactions in shares, interests in companies or associations, debentures and other securities include operations carried out by a data-handling centre if they are separate in character and are specific to, and essential for, the exempt transactions."

24. In *Card Protection Plan Ltd (CPP) v Commissioners of Customs & Excise* Case C-349/96 ("*CPP*"), the CJEU stated that

"*18 It is not essential that the service the insurer has undertaken to provide in the event of loss consists in the payment of a sum of money, as that service may also take the form of the provision of assistance in cash or in kind of the types listed in the annex to Directive 73/239 as amended by Directive 84/641. There is no reason for the*

interpretation of the term `insurance' to differ according to whether it appears in the directive on insurance or in the Sixth Directive.

[…]

29 In this respect, taking into account, first, that it follows from Article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.

30 There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (Joined Cases C-308/96 and C-94/97 Commissioners of Customs and Excise v Madgett and Baldwin [1998] ECR I-6229, paragraph 24)."

25. *In Commissioners of Customs & Excise v CSC Financial Services Ltd*. Case C-235/00 ("*CSC*"), the CJEU stated that

"*6 CSC provides to financial institutions what is termed a call centre service. According to the national court, that service essentially consists in the call centre handling on behalf of the financial institution concerned all its contacts with the general public in relation to the sale of certain financial products, from initial enquiry up to but excluding execution.*

7 Sun Alliance, which groups together a number of companies that manage investment funds and personal equity plans, entrusted to CSC all communications and contacts with the public concerning an investment product known as the Daisy Personal Equity Plan, under which investment is made by means of units in a unit trust.

8 CSC operators provide potential investors with all the information they require regarding the Daisy Personal Equity Plan, together with the relevant investment application forms. Under applicable national legislation, they are not authorised to provide advice, merely information. CSC also processes application forms submitted by prospective investors. It checks that the form has been properly filled in, that the

applicant satisfies the conditions of eligibility and that the correct payment is enclosed. It also deals with cancellation requests.

9 The formalities for issuing and transferring the securities, that is to say, the units in the unit trust, are, however, carried out by a separate company unconnected with CSC.

10 Sun Alliance pays CSC a fee for its services which is made up of a fixed sum and an amount reflecting the number of calls and sales.

[…]

23 It is important to note that the wording of Article 13B(d)(5) of the Sixth Directive does not in principle preclude a transaction in securities from being broken down into a number of separate services which may together amount to a transaction in securities within the meaning of that provision and which may benefit from the exemption laid down therein (see, to that effect, with regard to transactions concerning transfers, within the meaning of Article 13B(d)(3) of the Sixth Directive, paragraph 64 of the judgment in SDC).

24 It is therefore necessary to determine what the conditions are for that exemption and whether those conditions are satisfied in the case of services such as those provided by CSC in the main proceedings.

25 In paragraph 66 of its judgment in SDC, the Court held that, in order to be characterised as exempt transactions for the purposes of Article 13B(d)(3) and (5), the services provided by a data-handling centre must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service described in those two provisions.

26 As regards, more specifically, transactions concerning transfers within the meaning of Article 13B(d)(3) of the Sixth Directive, it is clear from the judgment in SDC that the services provided must have the effect of transferring funds and entail changes of a legal and financial character. The Court held at paragraph 66 of its judgment in SDC that a service exempt under the Sixth Directive must be distinguished from a mere physical or technical supply, such as making a data-handling system available to a bank and that, in this regard, the national court must examine in particular the extent of the data-handling centre's responsibility vis-à-vis the banks, in particular the question whether its responsibility is restricted to technical aspects or whether it extends to the specific, essential aspects of the transactions.

27 In principle, the same analysis applies, mutatis mutandis, with regard to transactions in securities within the meaning of Article 13B(d)(5) of the Sixth Directive.

28 As the Court emphasised at paragraph 73 of its judgment in SDC, trade in securities involves acts which alter the legal and financial situation as between the parties and are comparable to those involved in the case of a transfer or a payment. The supply of a mere physical, technical or administrative service, which does not alter the legal or financial situation would not, therefore, appear to be covered by the exemption laid down in Article 13B(d)(5) of the Sixth Directive.

29 That view is supported, first of all, by the fact that the management and safekeeping of shares - transactions which, significantly, do not involve alteration of the legal or financial positions of the parties - are expressly excluded by Article 13B(d)(5).

30 By introducing an exception to the exemption laid down by Article 13B(d)(5) for transactions in securities, the phrase excluding management and safekeeping which appears in that provision places the management and safekeeping of shares under the general scheme of the directive, whereby VAT is to be charged on all taxable transactions, except in the case of derogations expressly provided for. It therefore follows that services of an administrative nature which do not alter the legal or financial position of the parties are not covered by the exemption laid down in Article 13B(d)(5).

31 Next, as the Court held at paragraph 70 of its judgment in SDC, it is apparent from the actual wording of Article 13B(d)(3), (4) and (5) of the Sixth Directive that none of the transactions described by those provisions concerns operations involving the supply of financial information, which cannot, therefore, be covered by the exemption provided for therein.

32 Lastly, the mere fact that a constituent element is essential for completing an exempt transaction does not warrant the conclusion that the service which that element represents is exempt (paragraph 65 of the judgment in SDC).

33 It follows from the foregoing that the words transactions in securities refer to transactions liable to create, alter or extinguish parties' rights and obligations in respect of securities.

[…]

37 Article 13(B)(d)(5) of the Sixth Directive does not define the meaning of negotiation in securities for the purposes of that provision.

38 Clearly, the words including negotiation are not intended to define the principal object of the exemption laid down in the provision, but to extend the scope of the exemption to negotiation.

39 It is not necessary to consider the precise meaning of the word negotiation, which also appears in other provisions of the Sixth Directive, in particular, Article 13B(d)(1) to (4), in order to hold that, in the context of Article 13B(d)(5), it refers to the activity of an intermediary who does not occupy the position of any party to a contract relating to a financial product, and whose activity amounts to something other than the provision of contractual services typically undertaken by the parties to such contracts. Negotiation is a service rendered to, and remunerated by a contractual party as a distinct act of mediation. It may consist, amongst other things, in pointing out suitable opportunities for the conclusion of such a contract, making contact with another party or negotiating, in the name of and on behalf of a client, the detail of the payments to be made by either side. The purpose of negotiation is therefore to do all that is necessary in order for two parties to enter into a contract, without the negotiator having any interest of his own in the terms of the contract.

40 On the other hand, it is not negotiation where one of the parties entrusts to a sub-contractor some of the clerical formalities related to the contract, such as providing information to the other party and receiving and processing applications for subscription to the securities which form the subject-matter of the contract. In such a case, the subcontractor occupies the same position as the party selling the financial product and is not therefore an intermediary who does not occupy the position of one of the parties to the contract, within the meaning of the provision in question."

26. In *Kretztechnik AG v Finanzamt Linz* Case C-465/03 ("*Kretztechnik*"), the CJEU stated that

"*21 As regards the question whether the issue of shares by a company may be regarded as an economic activity within the scope of Article 2(1) of the Sixth Directive, it is important to note, first, that the nature of such a transaction does not differ according to whether it is carried out by a company in connection with its admission to a stock exchange or by a company not quoted on a stock exchange.*

22 Second, it must be borne in mind that, under Article 5(1) of the Sixth Directive, a supply of goods involves the transfer of the right to dispose of tangible property as owner. The issue of new shares – which are securities representing intangible property – cannot therefore be regarded as a supply of goods for consideration within the meaning of Article 2(1) of that directive.

23 The taxability of a share issue therefore depends on whether that transaction constitutes a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive.

[…]

27 It follows that a share issue does not constitute a supply of goods or of services for consideration within the meaning of Article 2(1) of the Sixth Directive. Therefore, such a transaction, whether or not carried out in connection with admission of the company concerned to a stock exchange, does not fall within the scope of that directive."

27. In *Volker Ludwig v Finanzamt Luckenwalde* Case C-453/05 ("*Ludwig*"), the CJEU stated that

"*6 The applicant in the main proceedings is by profession a self-employed financial adviser and acts on behalf of Deutsche Vermögensberatung AG ('DVAG') on the basis of a commercial agency agreement.*

7 Through the intermediary of its subagent acting in the capacity of financial adviser, DVAG makes available to private persons a range of financial products, such as credit facilities, in respect of which the general conditions have been defined in advance with the lending financial institutions ('the lenders').

8 To that end, the financial adviser canvasses potential clients in the name of DVAG, in order to invite them to an interview, the purpose of which is to review their financial situation and to determine their possible investment needs.

[…]

11 If a contract is concluded, DVAG is rewarded by the lender with a commission. DVAG then pays to the financial adviser – in his capacity as subagent, and in return for his role in the conclusion of the contract – a commission, the amount of which depends on the terms of the commercial agency agreement. The client, for his part, does not pay any commission, either to DVAG or to the adviser.

[…]

19 In the main proceedings, the fact, first, that the services rendered by DVAG and its subagent are remunerated by the lenders only on condition that the clients approached and advised by the financial adviser enter into a credit agreement suggests that the negotiation should be regarded as the principal service and the giving of advice as merely ancillary. Second, the negotiation of credit appears to be the decisive service

both for the borrowers and for the lenders, in so far as the activity of giving financial advice occurs only in a preliminary phase and is limited to helping the client choose, from among the various financial products, which are best adapted to his situation and to his needs.

20 The answer to the first question should therefore be that the fact that a taxable person analyses the financial situation of clients canvassed by him with a view to obtaining credit for them does not preclude recognition of the service supplied as being a negotiation of credit which is exempt under Article 13B(d)(1) of the Sixth Directive if, in the light of the foregoing interpretative criteria, the negotiation of credit offered by that taxable person falls to be considered as the principal service to which the provision of financial advice is ancillary, in such a way that the latter shares the same tax treatment as the former. It is for the national court to determine whether that is the case in the proceedings before it.

[…]

23 The term 'negotiation' used in points (1) to (5) of Article 13B(d) of the Sixth Directive is not defined by that directive. The Court has nevertheless held in the context of point (5) of that provision that the concept of 'negotiation' applies to the activity of an intermediary who does not occupy the position of a party to a contract relating to a financial product and whose activity amounts to something other than the provision of contractual services typically undertaken by the parties to such contracts. Negotiation is, in effect, a service rendered to and remunerated by a contractual party as a distinct act of mediation. In that regard, the purpose of such an activity is to do all that is necessary in order for two parties to enter into a contract, without the negotiator having any interest of his own in the content of the contract (see, to that effect, Case C-235/00 CSC Financial Services [2001] ECR I-10237, paragraph 39). On the other hand, it is not negotiation where one of the parties entrusts to a sub-contractor some of the clerical formalities related to the contract (see, to that effect, CSC Financial Services, paragraph 40).

[…]

27 The Court's case-law makes clear that, in order to be regarded as exempt transactions for the purposes of Article 13B(d) of the Sixth Directive, the services provided must, viewed broadly, form a distinct whole, fulfilling in effect the specific and essential functions of the service of negotiation (see, to that effect, with regard to Article 13B(d)(5) of the Sixth Directive, SDC, paragraph 66, and CSC Financial Services,

paragraph 25, and with regard to Article 13B(d)(6) of that directive, Abbey National, paragraph 70).

28 In that regard, the Court has held that negotiation is an act of mediation, which may consist, amongst other things, in pointing out to one of the parties to the contract suitable opportunities for the conclusion of such a contract, in making contact with another party or negotiating, in the name and on behalf of a client, the detail of the payments to be made by either side, the purpose of such an activity being to do all that is necessary in order for two parties to enter into a contract, without the negotiator having any interest of his own in the terms of that contract (see, to that effect, with regard to Article 13B(d)(5) of the Sixth Directive, CSC Financial Services, paragraph 39).

29 It follows from the above that the recognition of an activity of negotiation which is exempt for the purposes of Article 13B(d)(1) cannot necessarily depend on the existence of a contractual link between the provider of the negotiation service and one of the parties to the credit agreement.

[…]

34 It should be emphasised that the wording of Article 13B(d)(1) of the Sixth Directive does not, in principle, preclude the activity of negotiation from being broken down into separate services which may then fall under the concept of 'negotiation of credit' for the purposes of that provision and benefit from the exemption for which it provides (see, to that effect: with regard to Article 13B(d)(3) of the Sixth Directive, SDC, paragraph 64; with regard to Article 13B(d)(5) of that directive, CSC Financial Services, paragraph 23; and with regard to Article 13B(d)(6) of that directive, Abbey National, paragraph 67).

35 In those circumstances, it follows from the principle of fiscal neutrality that operators must be able to choose the form of organisation which, from the strictly commercial point of view, best suits them, without running the risk of having their operations excluded from the exemption provided for in Article 13B(d)(1) of the Sixth Directive (see, to that effect, with regard to Article 13B(d)(6) of the Sixth Directive, Abbey National, paragraph 68).

36 Nevertheless, as pointed out in paragraph 27 of the present judgment, in order to be classed as exempt transactions for the purposes of Article 13B(d)(1) of the Sixth Directive, the service provided must, viewed broadly, form a distinct whole, fulfilling in effect the specific and essential functions of the service of negotiation.

37 It is not, therefore, inconsistent with Article 13B(d)(1) of the Sixth Directive for the service of negotiation of credit to be divided, as in the case before the referring court, into two services, the first provided by the main agent DVAG, in the context of the negotiation with the lenders, and the second by its subagent, Mr Ludwig, in his capacity as financial adviser, in the context of the negotiation with the borrowers.

38 As stated in paragraph 39 of CSC Financial Services, negotiation is an act of mediation which may consist, amongst other things, in pointing out to one party to the contract suitable opportunities for the conclusion of such a contract, the purpose of such an activity being to do all that is necessary in order for two parties to enter into a contract, without the negotiator having any interest of his own in the terms of that contract. The concept of negotiation does not, therefore, necessarily presuppose that the negotiator, as subagent of the main agent, enters into direct contact with both parties to the contract, in order to negotiate its terms, provided, however, that his activity is not limited to dealing with some of the clerical formalities related to the contract.

39 In addition, the very fact that the terms of the credit agreement have been fixed in advance by one of the parties to the contract cannot, as such, preclude the supply of a negotiation service for the purposes of Article 13B(d)(1) of the Sixth Directive, given that, as stated in the previous paragraph, the activity of negotiation may be limited to pointing out to one party to the contract suitable opportunities for the conclusion of such a contract.

40 The answer to the second question must therefore be that the fact that the taxable person has no contractual link with any of the parties to a credit agreement to the conclusion of which he has contributed and that he does not establish direct contact with one of those parties does not preclude that taxable person from providing a service of negotiation of credit which is exempt under Article 13B(d)(1) of the Sixth Directive."

28. In *DTZ Zadelhoff vof v Staatssecretaris van Financiën* Case C-259/11 ("*DTZ*"), the CJEU stated that

"*20 It is also established case-law that the terms used to specify those exemptions are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (Case C-8/01 Taksatorringen [2003] ECR I-13711, paragraph 36; Case C-472/03 Arthur Andersen [2005] ECR I-1719, paragraph 24; and Case C-453/05 Ludwig [2007] ECR I-5083, paragraph 21).*

21 Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by the exemptions provided for in Article 13 of the Sixth Directive and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 13 should be construed in such a way as to deprive the exemptions of their intended effect (see, to that effect, Case C-445/05 Haderer [2007] ECR I-4841, paragraph 18, and Case C-461/08 Don Bosco Onroerend Goed [2009] ECR I-11079, paragraph 25."

29. In *Blackrock Investment Management (UK) Limited v Commissioners for Her Majesty's Revenue and Customs* Case C-231/19 ("*Blackrock*"), the CJEU stated that

"*29 On the one hand, there is a single supply where one or more elements are to be regarded as constituting the principal supply, while other elements are to be regarded, by contrast, as one or more ancillary supplies which share the tax treatment of the principal supply. In particular, a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (judgments of 25 February 1999, CPP, C-349/96, EU:C:1999:93, paragraph 30, and of 18 January 2018, Stadion Amsterdam, C-463/16, EU:C:2018:22, paragraph 23 and the case-law cited).*

[…]

34 The Court has also already held that the management of an investment portfolio is a single supply, composed of the service of analysis and of monitoring the assets of the client investor and the service of purchasing and selling securities, and that both the first and the second are equally indispensable in carrying out the service as a whole (see, to that effect, the judgment of 19 July 2012, Deutsche Bank, C-44/11, EU:C:2012:484, paragraph 26 and 27)."

30. In *MacCarthaigh v Cablelink Ltd* [2003] 4 IR 510, Fennelly J stated that

"*I am not convinced that it is possible to extract any principles of general application. The legislation provides no guidance. Community law has no relevance to decisions concerning the application of purely national headings of charge. However, I find the approach of the Court of Justice persuasive. It said in Faaborg-Gelting Linien A/S v. Rhanzamt Flensburg (Case C-231/94) [1996] E.C.R. I-2395 that "regard must first be had to all the circumstances in which that transaction takes place." It attaches particular weight to the economic character of the supply of services. A single economic service should not be artificially divided and ancillary elements should share the tax treatment*

of the principal service. A single price may not be decisive but may be indicative of a single service. Equally, in my opinion, separate prices may suggest separable supplies. I do not consider that the statement in Card Protection Plan Ltd. v. Commissioners of Customs & Excise (Case C-349/96) [1999] E.C.R. I-973 at para. 30 that … "service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied" should be regarded as laying down a principle of general application."

31. In *Dunnes Stores v Revenue Commissioners* [2019] IESC 50, McKechnie J stated that

"*69. Aside from the provisions of s. 5 of the 2005 Act, but in a closely related context, there is the case, cited by both parties of Inspector of Taxes v. Kiernan [1981] I.R. 117. It is a case of general importance, where the Court was called upon to determine whether the word "cattle" in s. 78 of the Income Tax Act 1967, could be read as including "pigs".*

Henchy J. in his judgment made three points of note. The first of these he stated as follows:

> *"A word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole, and to an extent that will truly effectuate the particular legislation or a particular definition therein."*

The learned judge went on to discuss when and in what circumstances a word should be given a special meaning, in particular a word or phrase which was directed to a particular trade, industry or business. At pp. 121 and 122 he quoted the words of Lord Esher M.R. in Unwin v Hanson [1891] Q.B. 115 at 119, who said :-

> *"If the Act is one passed with reference to a particular trade, business or transaction, and words are used which everybody conversant with that trade, business or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."*

The other interpretative rule which Henchy J. also referred to is the presumption against double penalisation or put in a positive way, there is an obligation to strictly construe words in a penal or taxation statute. In this context he said:-

> *"Secondly, if a word or expression is used in a statute, creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word*

should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language…as used in the statutory provision in question here, the word "cattle" calls for such a strict interpretation."

32. In *Bookfinders Ltd v Revenue Commissioners* [2020] IESC 60 ("*Bookfinders*"), O'Donnell CJ stated that

"*47. However, that should not be understood to mean that the interpretation of tax statutes cannot have regard to the purpose of the provision in particular, or that the manner in which the court must approach a taxation statute is to look solely at the words, with or without the aid of a dictionary, and on the basis of that conclude that, if another meaning is capable of being wrenched from the words taken alone, the provision must be treated as ambiguous, and the taxpayer given the benefit of the more beneficial reading. Such an approach can only greatly enhance the prospects of an interpretation which defeats the statutory objective, which is, generally speaking, the antithesis of statutory interpretation.*

[…]

71. This is not a case in which the specific reference to tea and coffee in the Second Schedule can trump the general words of para. (iv) of the Sixth Schedule, and the consequent exclusion from the Second Schedule of items contained therein, by the introductory words of para. (xii) of that Schedule. The general principle expressed in the Latin maxim generalia specialibus non derogant may be helpful in some cases in establishing that a specific provision is not to be treated as overridden by some general words which, perhaps taken in isolation, might be considered capable of applying to the subject matter. But that principle can have no application here, since it is clear that the Act intends that items which would otherwise be within the Second Schedule will be excluded from it if included in the Sixth Schedule. Furthermore, the terms of Sixth Schedule are clearly intended to apply to items which are referred to specifically in the Second Schedule, if the qualifying conditions (heating, maintenance above ambient temperature, et cetera) are satisfied.

[…]

85. I do agree with Bookfinders that the pre-existing statutory provision may sometimes provide helpful guidance as to the interpretation of a subsequent amending provision, since it can often indicate the state of the law which it is intended to alter and suggest a rationale for the amendment, which may in turn assist in its interpretation. I agree

also that the decision in Cronin, which considered that subsequent amendments could not be used as a guide to the construction of the prior statutory provision, is not applicable in this case, and is somewhat different. In that case, Griffin J. rejected the argument that the amendment was indicative of a view on the part of the Oireachtas that the original provision bore the interpretation which the taxpayer was asserting. As Griffin J. pointed out, such amendments may be made for a variety of reasons and, in any event, the question was not what view the Oireachtas or, more plausibly, those promoting the amendment, understood the previous provision to mean, but what the Court considered it to mean."

Evidence

Documentary evidence

33. The following agreements were submitted as evidence and have been considered by the Commissioner for the purposes of this Determination:

    A. Sub-Distribution Agreement between [redacted] and [redacted] including Amendment Agreement.

    B. Distribution Agreement between [redacted][1] and [redacted].

    C. Distribution Agreement between [redacted] and [redacted].

    D. Distribution Agreement between [redacted] and [redacted].

    E. Distribution Agreement between [redacted] and [redacted].

    F. Distribution Agreement between [redacted] and [redacted], with [redacted] as local representative.

    G. Direct distribution between [redacted] and [redacted].

    Provisions of these agreements considered relevant by the Commissioner are set out in the Analysis section below.

34. Certain correspondence between [redacted] which previously represented the Appellant and was instructed by it, and the Respondent ("[redacted] correspondence") was also provided to the Commissioner. The [redacted] correspondence concerned the Appellant's request for

[1] According to the evidence of [redacted], [redacted] agreements were subsequently novated to [redacted] and therefore all references to [redacted] are to be read as [redacted] for the purposes of this Determination.

confirmation from the Respondent that the services received by it from sub-sub-distributors were VAT-exempt agency services relating to the sale of shares.

35. A letter dated 30 July 2014 from [redacted] to the Respondent stated *inter alia* that:

> "*Going forward, [redacted] will become the "global sub-distributor" of the Funds. In essence, this means that [redacted] will contract with various management companies within the [redacted] group of companies to distribute the Funds. For example, [redacted] will contract with the management company of the [redacted] domiciled funds (called [redacted] to distribute units/shares in the [redacted] managed [redacted] funds.*
>
> *[redacted] will be paid an assets based fee by [redacted] (and the other relevant management companies) for these distribution services.*
>
> *In order to enable [redacted] to fulfil its distribution functions across various jurisdictions, it will enter into further sub-distribution agreements with local third parties, such as banks, with a view to those third party distributors distributing the Funds via their own distribution networks. By entering into the relationships with the third party local distributors, [redacted] is able to leverage the local distributor's client base and network.*
>
> *Furthermore, in certain markets where it has been deemed necessary to have a local presence in order to effectively target the market and source third party distributors of the Funds, and where [redacted] has not established a branch to fulfil this role due to regulatory impediments or for other reasons, [redacted] will contract with local [redacted] entities, which also undertake a role in the distribution process, by liaising with the third party local distributors with a view to sourcing (and increasing the amount of) business that they can generate for [redacted].*
>
> *[redacted] services are VAT exempt, on the basis that they constitute agency services in relation to the issue and sale of shares, as per paragraph 7, Part 2, Schedule 1, VAT Consolidation Act, 2010.*
>
> *On the basis that it is making a VAT exempt supply, [redacted] will have limited VAT recovery and therefore, it is reviewing a number of the services that it will receive with a view to considering whether such services are in fact VAT exempt, including the "sub-distribution" services provided by local [redacted] entities (as referred to above).*
>
> *[…]*

Based on the above, the "sub-distribution" services, should in our view, be considered as an integral part of the distribution chain, which is reflected by the fact that the service providers are remunerated on a success basis. This is based on the fact that "sub-distribution" services do go beyond the mere clerical services as referred to above.

On the basis of the above, such services should, in our view, be treated as VAT exempt in Ireland and therefore, the receipt of such services by [redacted] *from non-Irish recipients would not give rise to a reverse charge VAT liability for* [redacted] ."

36. In an email from [redacted] to the Respondent dated 2 April 2015, it was stated *inter alia* that:

"*By way of background, investors invest money into investment funds, in return for units/shares. The fund then uses this money to make investments. The aim is to provide investors with a return on their investment in the form of a dividend and/or capital appreciation.*

Therefore, a key component of the investment management industry is getting investors to invest (and keep) their money in funds. This is reflected by the fact that the UCITS Directive includes "marketing" as one of the 3 pillars of "management" (together with investment management and administration).

This function (of getting investors to invest their money into funds) is defined in this context as "distribution" and includes the offering, selling and marketing shares or units in a fund. This would include the sourcing of a distribution channel, i.e., entering into relationships with local third party distributors, such as banks or IFAs in order to encourage those third party distributors or IFAs to get their clients to invest in funds.

For [redacted] *as "Global Sub-Distributor" is responsible for the above. However, to enable it to perform this function, it has mandated a large portion of this activity in local markets to local functionaries (such as* [redacted] *).*

In this regard, [redacted] *and* [redacted] *(both of whom are regulated entities which have been authorised to perform distribution activities) target and secure local Third Party Distributors (TPDs) or IFAs to access their client portfolios and to encourage those TPDs and/or IFAs to get their clients to invest in* [redacted] *funds. Their role includes having a local footprint in the respective jurisdictions to raise awareness about* [redacted] *products. This involves the* [redacted] *offices educating the local TPDs/IFAs about the* [redacted] *products and also responding to queries that the TPDs/IFAs may have.*

Increasingly, TPDs/IFAs approach the [redacted] and [redacted] offices requesting [redacted] to consider developing a product (such as a new share/unit class in a fund) or registering existing funds/classes for sale in their jurisdictions to meet specific client needs or developments in the market from the perspective of the TPDs/IFAs. In this regard, the nature of fund distribution is changing from a more traditional model whereby a general product (such as a fund) is developed and launched and distributors then go out to look for investors.

Now, fund managers, such as [redacted] increasingly need to take the needs of its clients into consideration and develop products based on their requirements. [redacted] and [redacted] play a pivotal role in relation to this new type of distribution by working with the TPDs/IFAs in terms of their client needs and then exploring the possibilities to develop new products to sell to such investors, or tailor/alter or register existing products in the relevant jurisdiction to meet client needs.

As part of this role, [redacted] and [redacted] look after all branding, all events, promotion and "end client promotion", but, to be clear, their role is not confined to such services. Rather, such activities are undertaken with a view to ultimately "partnering" with local TPDs/IFAs to develop products to be sold to prospective investors. The commercial terms are agreed by [redacted] and [redacted] (within parameters and up to specified limits), whereby the role of [redacted] is to formalise the commercial terms in distribution contracts, administer the distributor intake process and retain general responsibility/oversight.

[redacted] and [redacted] also have an ongoing role in respect of business that they source, in terms of contributing to the ongoing due diligence effort on appointed TPDs and/or IFAs and maintaining good ongoing business relationships with such entities. They are essentially the primary contact point for such TPDs and/or IFAs.

[redacted] and [redacted] are paid success based fees, based (ultimately) on the management and (where applicable) distribution fees earned by [redacted] which are, in turn, a function of the investments made by the funds out of the money invested by the very clients targeted (and secured) by [redacted] and [redacted]

Please note that no fees have yet been issued by [redacted] as this is a new entity and the business has only recently transferred from the [redacted] branches of [redacted] in [redacted] The total amount of invoices from [redacted] during [redacted]

The breadth of the services is reflected in the proportion of overall fee that [redacted] *and* [redacted] *retain, reflecting their pivotal role in the end to end distribution process.*

Additionally, in the case of [redacted] *can't operate using a branch structure, due to local regulatory requirements and therefore, a local company, authorised as a distributor, is required*."

37. Further details were provided in a letter from [redacted] to the Respondent dated 15 September 2016, in which it was stated that:

"*The Management Company and primary distributor of the* [redacted] *domiciled* [redacted] *Funds,* [redacted] *has delegated the role of sourcing investors to purchase units/shares in these funds across a number of jurisdictions to* [redacted] *in turns* [sic] *performs this function through a combination of direct marketing and distribution using its own employees / branches and representative offices in a number of jurisdictions and, in other jurisdictions for legal or regulatory reasons and operational reasons in the case of* [redacted]*, it has appointed the* [redacted] *Local Entities to source banks and other financial intermediaries that will sell* [redacted] *funds to its client base (on both an advisory and discretionary basis). These* [redacted] *Local Entities cover the* [redacted] *and other* [redacted] *markets, in addition to the* [redacted] *market.*

The [redacted] *Local Entities have authority to negotiate and agree commercial terms (within agreed parameters) with banks, IFAs and third party distributions platforms (referred to hereafter as Third Party Distributors - "TPD's) in respect of distribution agreements. The Local Entities have exactly the same authority to negotiate the terms of placement agreements with direct professional investors.*

[…]

Firstly, the activities of the [redacted] *Local Entities go far beyond the mere marketing of products, or clerical activities in relation to the distribution agreements. The* [redacted] *Local Entities have authority (within prescribed parameters) to negotiate, as an agent of* [redacted] *the commercial terms of the distribution agreements with TPD's. In that manner, all commercial aspects in relation to the distribution agreements are negotiated locally between the* [redacted] *Local Entities and the relevant party (as* [redacted] *does not have any resources in the local market to undertake this function). Once negotiated locally, the commercial agreement is then passed back to* [redacted] *in* [redacted] *for finalisation.*

The next aspect that must be examined is what, precisely, is the purpose of the activities undertaken by the [redacted] Local Entities vis-a-vis the promotion of the [redacted] Funds in the local markets, identification of suitable TPD's, and negotiating commercial terms with these (on behalf of [redacted] in respect of the distribution of [redacted] Funds.

To answer the above question, we must first begin with the simple and indisputable fact that were it not for the services performed by the [redacted] Local Entities, [redacted] would not be in a position to facilitate the issuance of units/shares by the [redacted] Funds to customers in their respective local markets.

[…]

In summary therefore, the above factors combined lead one to the conclusion that the primary purpose of the commercial agreements between [redacted] and the [redacted] Local Entities must be to facilitate the sourcing of investors and issuing of units/shares to these investors (whether directly, or indirectly via agreements with local TPD's)."

38. On 14 March 2017, the Respondent notified [redacted] on behalf of the Appellant that the services received by it from the "[redacted] Local Entities" were exempt from VAT in accordance with paragraph 7(1) Schedule 1 of the VATCA 2010.

39. Subsequently, the Appellant informed the Respondent that it believed it had been under-claiming VAT on its operating costs in Ireland. On 30 April 2018, the Appellant argued that "*The provision of the funds distribution services is VAT exempt. However, in accordance with Revenue practice, [redacted] turnover from distribution services provided in respect of these funds (and billed to the fund manager) should be treated as giving a recovery entitlement to the extent the fund assets are invested in non-EU assets*."

40. Later, the Appellant came to the view that the entirety of the distribution services provided by it to [redacted] should be subject to VAT. Its claims for refunds of VAT were refused by the Respondent on the basis that the services provided were exempt under paragraph 7(1), Schedule 1, Part 2 of the VATCA 2010.

Witness - [redacted]

41. [redacted] was [redacted] for the Appellant. He stated that he had worked in the asset management industry for 27 years, [redacted]. [redacted] was acquired by the [redacted] in [redacted] He stated that he was very familiar with the nature of the services supplied by [redacted] to [redacted]

42. He stated that the following chart was an accurate representation of the relevant part of the [redacted]:

43. At the top of the chart was [redacted] as it was authorised to manage both Undertakings for Collective Investments in Transferrable Securities ("UCITS") and Alternative Investment Funds ("AIFs"). [redacted] operated a delegation model, so that it delegated the majority of its tasks while at all times retaining responsibility for those delegated activities.

44. [redacted] was appointed as global sub-distributor for [redacted] in turn used its MiFID passport to passport its services into a number of EU member states, as well as creating branches which were regulated under local law in countries (e.g. [redacted]) "*where we felt that there were significant distribution opportunities for the* [redacted] *funds*."

45. The witness referred, as an example, to [redacted] branch in [redacted] and stated that

> "*The* [redacted] *office probably had six to seven staff, all of whom were distribution staff, so sales people or sales support people. Their job was to source, procure investment into the funds, or procure distribution services for* [redacted] *And it did this through two main mechanisms, firstly, through sourcing local third party distributors. These would typically be retail banks, private banks, fund of funds, family offices, insurance*

companies, pension funds, really every type of financial intermediary, and they would present [redacted] *funds under management. They would present various types of marketing material, fun fact sheets, pitch book, and basically promote the funds to those distributors. And assuming the promotion was successful, a distribution agreement or sub DA would be negotiated between* [redacted] *and the end distributor, subject to commercial terms that were defined by* [redacted] *through a financial approval matrix. And the legal team in* [redacted] *would have had responsibility for negotiating and executing that agreement.* [redacted] *had full discretion from* [redacted] *to execute those distribution agreements, within the terms of the financial approval matrix…*

Then a secondary source of business for [redacted] *I guess, was where the sales staff in* [redacted] *would approach an institutional investor, which again could be a fund of funds, a pension fund, a family office, so what we would call an end investor, and promote the funds directly to them.*

If the investor was interested then typically we would promote to them a dedicated share class, so an institutional share class which had preferential pricing, so basically a bulk discount.

If the end investor expressed interest in investing, they would be directed to the transfer agent of the fund to make their investment. So they are, I think, the two typical modes of distribution."

46. The witness then went on to describe the "*trail rate*":

"*So typically an end distributor was entitled to retain, collect and retain what's called the front-end load. So if you are an end investor in a fund there is an entry fee, a fixed entry fee, which is a percentage of your initial investment. And typically the end investor, if that fee was levied, and it was at the discretion of the end investor, they would keep that entire entry fee. But then in addition in order for maintaining the relationship with the end investor, so providing them with ongoing information on how the product is performing, and essentially maintaining a relationship on behalf of* [redacted] *with the end investor, they were paid what is called a trail fee. So trailing the initial investment into the fund. They earned a fee for maintaining the relationship typically that trail fee payment would end when the investor disinvested*."

47. [redacted] had nothing to do with determining the price of a unit of a fund, which was the role of the management company and its service providers. The price of a unit was a purely mechanical calculation, i.e. the total assets under management ("AUM") divided by the number of units in issue.

48. The witness was then brought through the Sub-Distribution Agreement between [redacted] and [redacted] He stated that the appendix to the Agreement set out the relevant funds, which were '*fonds commun de placement*' ("FCP"), a [redacted] contractual entity with no legal personality. He stated that recital (c) of the Agreement, "*describes the scheme that* [redacted] *is proposing to engage in, which is to procure investments in the funds to continuing offerings. And it is confirming that those offerings will be at the prices and on the terms of the prospectus and the management regulations of the fund. And those two documents are part of what creates the contract between the end investor and the management company. It is describing the general scheme that* [redacted] *is proposing to engage in*."

49. Regarding recital (d), he stated that it "*simply recites* [redacted] *agreement and commitment to assist the Distributor to procure investment into the funds…Maybe it is the ultimate effect of the service, but the job of* [redacted] *was clearly to go out, prospect for distributor, who in turn would engage with end distributors and encourage them to make investments into the funds.*"

50. He stated that clause 2.2, "Services", was representative of what [redacted] actually did, "*So 2.2(a), I think, just simply reflects the provisions of 2.1, the appointment clause. And then 2.2(b) and (c) refer to additional services. So* [redacted] *had quite a large marketing team whose job was to prepare and disseminate marketing material to all of the branch offices, and also to individual distributors and translate that material. The legal team would have been responsible for validating it, it was quite a big part of what we did, so thousands of pieces of material would be approved for dissemination every year. And under (c), this I think also reflects a core part of our job, which is the onboarding. So once a distributor is proposed to be appointed for the distribution of* [redacted] *funds, the sales team had the job of collecting all of the KYD, know your distributor, KYC documentation in relation to the end distributor, providing that to the client servicing team in* [redacted] *for them to validate, and then after the validation the distribution agreement would be released to the sub-distributor and then the negotiation process would begin*."

51. Clause 3.1 was titled "Obligations of the Sub-Distributor". The witness stated that 3.1.1 "*doesn't really reflect the reality, because the management company had responsibility for producing, translating and disseminating the prospectus*." 3.1.2 was not reflective of the services provided, "*because the prospectus and the KIID and subscription form and other relevant documentation was all made available through various websites and intranet sites, so practically speaking we didn't make copies of the prospectus available,*

it was made available by the ManCo[2]." 3.1.3 did reflect the marketing activity carried out by [redacted]

52. Regarding the reference in clause 3.3 to [redacted] selling units or causing them to be sold, the witness stated that "[redacted] *role is not to sell anything*." Regarding the payment of fees, the witness stated that "*So we had different models in place, but in the traditional or classic model that I referred to where* [redacted] *appointed a distributor, and then that distributor procured investment into the fund. The end distributor was paid directly by* [redacted] *the trail rate that was agreed by* [redacted] *with the end distributor. There were slightly different models in place where the sub distributor was part of the* [redacted] *of which* [redacted] *was a subsidiary, so the* [redacted] *banking group*." There was a change to the fee methodology in the Amendment Agreement of [redacted] but [redacted] stated that this was not significant.

53. A document titled "Fund life cycle" was handed in and the witness spoke to elements of it:

> "[redacted] *as the management company takes a decision to create an FCP in this case, as I said it's a contractual fund, not a company. So it will work with its lawyers to create prospectus and management regulations for that fund. Those documents are submitted to the* [redacted] *the* [redacted] *National Competent Authority,* [redacted] *Financial Regulator. There would be an extensive review process carried out by the* [redacted] *and typically lots of back and forth on the content of the prospectus, not so much the management regulations, which are typically uncontroversial.*
>
> *Once the fund receives what's called a VISA from the* [redacted] *the fund legally exists. And then typically the management company will have already decided on its distribution strategy and will begin to passport the fund under the UCITS passport that will be available to it…*
>
> *Then for an FCP, the ManCo appoints the custodian bank, depository bank, it is a bit different for SICAV, which is a company. That's a separate contract. Then also the ManCo appoints the registrar transfer agent and administrator. Sometimes those activities, the latter activities are co-mingled, and it could be provided by one service provider. Sometimes they are separate…*
>
> *…So another appointment at that time would have been the appointment of the Distributor. As I mentioned* [redacted] *typically appointed three group entities as sub*

[2] i.e. [redacted]

distributors, [redacted], [redacted] and [redacted] So again contracts for that purpose would be executed by the management company before the launch of the fund.

So that is really day one in the life of the fund. And then the Distributor will go forth and attempt to procure sub-sub-distributors for the purposes of promoting the funds in the jurisdictions where the funds are registered. We could also appoint distributors in countries where the funds were not registered for sale, but in those cases obviously there were restrictions on the activities that the distributors and [redacted] staff could carry out. So we had very strict rules, what we called sales guidelines in place that defined the parameters around the activities of our staff, and the end distributors.

So [redacted] in this case - sometimes in some countries in the group appointed local group entities to interface with end distributors. So there were a number of examples, [redacted] is one, [redacted], [redacted], they all had very substantial local presences, so we would have had hundreds of people in each of those locations, and they were deemed to be sufficiently big that it made sense to appoint them as intermediaries facing off to the end distributor, who in turn would face off to the end client.

So we had a direct distribution model where were we were directly interfacing with a distributor who was interfacing with an end client. And then we had another model where [redacted] was appointing a group entities, who in turn would appoint a non-group distributor, who in turn would face off to the end client.

So I think this document describes the group model… So quite often [redacted] would procure the services of an IFA[3] network. And under our model, [redacted] entered into those contracts with the [redacted] entities. That wasn't always the case where we used the local group distributor, but it was in the case of the [redacted].

So the contract would be executed following the process that I described earlier. And then [redacted] would have had the job of providing sales support to the IFA network, using material that's produced centrally in [redacted] and then localised. So translated, but always localised in other ways, and supporting the activities of the broker in that way.

Then the [redacted] distributor or IFA would contact end clients…and would provide them with detailed marketing material on a [redacted] registered fund. Provide them with

[3] Independent financial adviser

formation on the share class that was most appropriate for them. And if the investor took the decision to invest, or sometimes the intermediary would have had discretion to take that decision for the investor, the decision to invest under a discretionary portfolio management agreement.

Once they do that then a subscription form has to be completed by the end client, or it could be completed by the bank on behalf of the client, depending on the level of discretion they have. And that would start the process of the actual subscription into the fund. But that activity is not something we were privy to or part of, it wasn't part of the value chain that we had an involvement in…

So the [redacted] - the end intermediary, the IFA in this case would have had responsibility for collecting all of the KYC documentation required from the client, getting that translated to the extent necessary, and providing that to - I think at that time providing it to the registrar and transfer agent. And once the completed application form, subscription form was sent to the registrar in TA… Those orders would be bulked up and reviewed and, if accepted, processed by the registrar and transfer agent."

54. The decision to issue fund units/shares was taken by the registrar/transfer agent, and [redacted] was not involved: "*The only way [redacted] would become aware that a subscription actually happened is when it receives its fees for [redacted] several months later*." A subscription resulted in the creation of new units which didn't exist before. When an investor wished to redeem/encash their units, they completed a redemption request which was submitted to the transfer agent. A redemption resulted in the cancellation of existing units. There was no secondary market in units/shares.

55. The witness was then brought to the agreements between [redacted] and its sub-sub-distributors. He stated that:

"*[redacted] would have appointed [redacted], [redacted], [redacted] [redacted] as a sub sub distributor, with the mandate to find end distributors, who in turn would procure investments from end investors. That is one model.*

Another model is where [redacted] directly, through the activities of its sales staff, appoints distributors, end distributors, who in turn prospect for investments into [redacted] funds.

The third model is really quite unusual, and it doesn't exist anywhere outside the [redacted] [redacted], and it is a particular - sorry, not [redacted], it's a particular requirement of [redacted] law, [redacted] obviously, they have their own regime where we were required to use a local representative to act as a facilities agent for the fund, and that entity in this

case [redacted], had to be a party to the agreement, turning it into a tripartite agreement. Again pretty bespoke arrangement just for [redacted]

And then we had a limited amount of direct distribution by [redacted] so there is an example there where you would be asset management [redacted] So a [redacted] asset management company is agreeing with [redacted] to purchase units directly into [redacted] funds. That is what we would have called purchase terms and conditions. It's essentially setting out the terms under which [redacted] is being given favourable terms based on a bulk buying commitment by them."

56. Regarding the agreement with [redacted], he was asked about the reference in recital 2 to [redacted] accepting offers to purchase units: "[redacted] *wasn't in a position to accept offers to purchase units or shares, it was in a position to execute distribution agreements with sub distributors or sub sub distributors, as the case may be, depending on the model… the job of accepting offers was the job of the registrar and transfer agent or the management company*."

57. Regarding the agreement with [redacted], he was asked about the reference to the subject of the agreement being "*the mediation of transactions for the acquisition and sale as well as the exchange of units*": "*To me it just reflects that [redacted] is being contracted to carry on sub distribution services on behalf of [redacted] The word "mediation" is "vermittlung" in German, which to me is distribution, it is another way of - so I think the translation is accurate and accurately reflects what we were asking [redacted] to do. It is the same as the activities that [redacted] was asked to perform*."

58. Regarding the reference in the agreement with [redacted] ([redacted] – a non-[redacted] sub-sub-distributor) to the "*offer, sale, redemption and exchange of Units and any other acts or transactions related to the distribution of Units…*", [redacted] stated that, "*it reflects the fact that end investors if they wanted to subscribe for units in the fund, those subscriptions could only occur in compliance with the provisions of the prospectus*."

59. The agreement with [redacted] was stated to be essentially the same as [redacted] The [redacted] agreement was a tri-partite one, due to specific requirements of [redacted] law. Regarding the agreement with [redacted] "*the actual purchase of the units is something that needs to be conducted by [redacted] with the registrar and transfer agent and management agent of the funds and that is not regulated by this agreement*." The witness stated that [redacted] did not sell or issue units to [redacted]

60. The witness was then asked a number of questions about the report provided by the Respondent's expert. He agreed with some matters in the report and disagreed with

others. He agreed that the activity of distribution included the sales and marketing process. He did not agree that it also included the facilitation of issuance/sales/redemption of units in the fund. Regarding advisory services on the promotion of growth and asset raising capabilities, he stated that:

> "*I think this probably refers to a distributor having to pitch to a management company to say you should register the fund in a particular jurisdiction because we believe we can raise X billion of assets by the following distribution channels over a certain period of time. Then the management company would have to take a decision as to whether it was worthwhile to spend the investor's money, because it was the investor's money, on that registration activity with the overall goal of growing the fund and increasing economies of scale and ultimately improving the overall return for the investor*."

He agreed that this was a [redacted] function.

61. Regarding sub-sub-distribution arrangements entered into by [redacted] he stated that "*Definitely the management company needs to be at all times aware of and up to date on its distribution network but, as we already described,* [redacted] *had sole discretion to enter into some distribution agreements but reported on that on a quarterly basis ex post to the ManCo*."

62. He stated that "*I think the primary purpose of* [redacted] *is to procure distribution agreements or additional distributors for the* [redacted] *funds and to onboard and to support those distributors… The end goal of all of the services providers is to procure investment capital from the market*."

63. He did not agree that without the activities of [redacted] no issuance of units could occur, "*I disagree in the sense that* [redacted] *was of course at liberty to enter into its own distribution agreements and own distribution arrangements. It did with* [redacted] *and* [redacted] *and in fact it had other direct distribution relationships as well.*"

64. Regarding "transferring" of a unit, the witness stated that "*Transfer is when an investor decides to transfer the legal ownership of their existing units to another investor. So the typical situation would be where an investor has a debt and wants to satisfy that debt by transferring their units to another investor.*" He stated that [redacted] had no knowledge of this activity. He stated that there was no purpose in the idea of recycling existing units: "*What actually happens is the units are deleted in the register of the fund when a redemption request is processed and they are created in the register of the fund when a subscription is processed.*"

65. Regarding the Respondent's expert's opinion that [redacted] was "arranging for" the issuance of shares, the witness stated:

> "*To me the term arranging does have a specific meaning, none in the context of our industry. So I think in another part of the global financial services industry the term arranger and arranging is well understood and that is the capital markets industry. So where a company is seeking to issue debt or issue shares it will arrange the services of an arranger, typically an investment bank whose job is to arrange everything to do with that issuances including determining market appetite, determining the right price and actually arranging for the shares to be issued or the debt or the bond to be issued. But I have to say it is not a term that to me is used in the funds industry which, as you will appreciate from everything I have said so far is quite a specific industry with specific terminology attached to it*."

66. He stated that he believed the activity of "arranging for" related to activities in the capital markets industry. He handed in a document he stated that he had found on the Lexis website, which stated that an arranger has:

> "*A pivotal role in the issuance of debt into the market and would be expected to take the lead in every aspect of the transaction. The issuer will need initially to be advised as to the viability of an issue. There may be little appetite in the market for such debt or the likely pricing of such an issuance may be too high. Those will be matters on which the arranger can advise. The decision whether or not to proceed with the issuance will be coloured by the arranger's view if the duties and distribution of the issue are to be shared and co-managers may be involved*."

He stated that this was reflective of his understanding.

67. On cross examination, [redacted] agreed with counsel's note of his evidence that "[redacted] *would pitch to the management company to register funds in a particular jurisdiction. I think you were saying because* [redacted] *would do that on the basis that it could raise X billions of assets over a period of time that would grow the fund, improve economies of scale and then ultimately be for the benefit of investors in the fund*." He stated that he did not see this as a separate service provided by [redacted] but as part of its job as a distributor.

68. When asked who in [redacted] identified a potential sub-sub-distributor, the witness replied, "*The sales staff in* [redacted] *We had a system called* [redacted] *which had a number of fields that needed to be completed by the sales staff covering everything to do with the identity of the distributor, who they were authorised by, if they were a regulated entity. And then it had a facility for uploading constitutional documentation and other documentation related*

to the distributor. Then a key part was the sales person would need to propose to [redacted] *the commercial terms for the distribution agreement, the proposed commercial terms, and confirm that those commercial terms were within the scope of the financial approval matrix…*"

69. He confirmed that draft distribution agreements were prepared by [redacted] staff. He stated that [redacted] received instructions from the global [redacted] group on what were the "focus funds" and "*the* [redacted] *marketing team would produce the marketing collateral based on those instructions*." This marketing material was aimed at "*persuading or giving end distributors the material to persuade investors that deciding for an investment in a particular* [redacted] *fund was better than deciding for an investment in a [competitor fund]*."

70. The witness stated that [redacted] assisted the sub-sub-distributors regarding which funds and share classes were most relevant to their jurisdictions: "*So through the discussions with the distributors our sales staff will have identified for their markets which share classes are most appropriate. We probably had at one point 10 or 12 share classes numbered, sorry, lettered A to I can't remember I or even further down the alphabet. Those share classes had different features, different pricing points and were aimed at different investors. In some cases they were exclusively available only for particular markets. So class E was reserved for the* [redacted] *market for a particular regulatory reason. Our sales staff would assist the distributors in identifying the correct share classes for them to distribute, the ones that were going to be most attractive to end investors. And those are the classes on which the commercial terms were agreed and reflected in the DA. So not all DAs would include all share classes, it depends on the market*."

71. Regarding the relationship between [redacted] and [redacted]

    "*Q. Of course* [redacted] *as we have noted, is the Distributor or the global distributor?*

    A. Correct.

    Q. And the sub distributor, so [redacted] *has agreed with* [redacted] *to use all reasonable endeavours to procure persons to subscribe for the units; that is correct?*

    A. Correct.

    Q. That just simply reflects that this is a delegation down from [redacted] *to* [redacted] *so obviously* [redacted] *is doing what* [redacted] *could otherwise do itself, that's correct?*

    A. Correct."

72. The witness agreed with the proposition that the purpose of the global distributor (i.e. [redacted] the sub-distributor (i.e. [redacted] and the sub-sub-distributor was to bring the possibility of investment to the attention of the potential investor. Regarding [redacted] marketing function, he stated that "*the marketing team are responsible for promoting all of the funds really at all times. It is just that some were more saleable than others at particular times [i.e. the "focus funds"]*."

73. The witness stated that marketing material is "*talking about the fund. It's talking about the fund's performance. It's talking about the performance of the asset class. It's giving views from our chief investment officer on where the asset class is likely to go in the next 12 months. And then it's indicating performance against peers, sharp ratios, various other technical risk data related to the fund*."

74. Regarding the statement in the Sub-Distribution Agreement between [redacted] and [redacted] that "*The sub distributor shall not sell or cause to be sold the units in any jurisdiction where it would be unlawful for it to do so*", the witness stated that "*I would read this clause to say: The Distributor shall not distribute or cause to be distributed the units in any jurisdiction where it would be unlawful to do so, because I maintain that the Distributor was not selling*." He confirmed that there were around [redacted] people in [redacted] legal team.

75. Regarding the payment of fees to sub-sub-distributors, he stated that "*if it was an external sub-sub-distributor,* [redacted] *was responsible for paying the trail to those sub-sub-distributors. It was an internal sub-sub-distributor appointed by* [redacted] [redacted] *would pay that sub-sub-distributor out of the trail paid to it by* [redacted] He stated that the fund paid fees to [redacted] and that [redacted] and the other sub-sub-distributors were paid out of the fees received by [redacted]

76. In respect of how the [redacted] branch network operated, he stated that "*at one point anyway we had* [redacted] *branches around the world. Those branches were inhabited almost exclusively by sales people, distribution people whose job was to prospect for distribution agreements*." He stated that [redacted] was involved in the distribution of AIFs as well as UCITS:

    "*Q. So* [redacted] *in addition to I will use UCITS as a shorthand?*

    A. Was also selling hedge funds.

    Q. That was during the relevant period?

    A. Yes."

77. Regarding the agreement with [redacted] in [redacted] he agreed that the document was executed in the English language. He agreed that the document stated that [redacted] agreed to mediate or provide for the mediation of such transactions between interested investors and the funds, but that "*it is not what actually* [redacted] *was asked to do*." He agreed that without [redacted] or someone like it, the investor would not be able to invest in the fund.

78. Regarding the agreement with [redacted] and the associated "distribution chain":

"*Q. Exactly. So, this is all part of a, I suppose if I can use the word "distribution chain" where the investor has a contact maybe with an IFA - an independent financial advisor - is that correct?*

A. Correct.

Q. Who is distributing on behalf of [redacted] *that's correct?*

A. They may be a tied agent of [redacted] *yeah.*

Q. The legal relationship doesn't really matter. [redacted] *in turn is distributing on behalf of* [redacted]

A. Yes.

Q. [redacted] *in turn is distributing on behalf of* [redacted]

A. Correct."

79. The witness agreed that the purpose of the trailer fee was to recognise the ongoing relationship between [redacted] and the investor, and that it was only paid as long as the investor remained.

80. The witness stated that the prospectus documentation was provided by [redacted] to sub-sub-distributors, typically online, but agreed that [redacted] had to ensure that the materials were provided and had appropriate geolocation restrictions to ensure that certain jurisdictions could not access them.

81. Regarding the [redacted] agreement with [redacted] and [redacted], he agreed that it stated that complaints were to be provided to [redacted] but said that in reality he thought any complaints would be forwarded to the management company, i.e. [redacted]

82. In respect of [redacted] "sale guidelines", [redacted] stated that

"*So, the Global Legal Distribution Team in* [redacted] *was exactly that. So, we had responsibility globally for setting the framework within which salespeople in all*

locations could carry on their activities. These were encapsulated in a very detailed document called "The Global Sales Guidelines", which were issued to all salespeople, they had training on them and they had to certify adherence to the guidelines in the conduct of their activities. But we were doing that effectively for had [sic] holding company, for [redacted]

83. Counsel briefly put the [redacted] correspondence to [redacted], who stated that he had not been involved in the correspondence with the Respondent at the time. He stated that he did not know if supplies from the sub-sub-distributors to [redacted] had been treated as VAT-exempt.

84. During re-examination, he stated that, "*once all of the collateral*[4] *was provided to the sub sub distributor and the end distributor, we may not even be aware of the extent to which it is or is not provided to the end distributor, our role essentially ceased and we became aware of the success or otherwise of the activity only through the flow of information that we would receive from* [redacted]

85. He stated that a decision to issue shares/units in a fund was made by the registrar or transfer agent, within the discretion given to them by the management company. In reality, [redacted] could not accept or refuse subscriptions or sales. He agreed that the statement in the [redacted] agreement that [redacted] "*will use its best efforts to promote and distribute the units and shares*" accorded with reality, and stated that it was "*the essence of what the distributor was being asked to do.*" He stated that [redacted] did not give investment advice to people. When an end distributor provided investment advice to a client, it was not doing so on [redacted] behalf.

Witness – [redacted]

86. [redacted] was the Respondent's witness. He stated that he was a lecturer in [redacted]. He taught at undergraduate and postgraduate level, as well as on [redacted]. He confirmed that he adopted his report as part of his evidence to the Commission. His report set out what he described as a "*primer*" on UCITS and then considered whether the activities of the Appellant constituted exempt supplies.

87. On cross examination, the witness stated that his research specialisms were [redacted]

[redacted]e. marketing material

[redacted] He stated that he had a comprehensive knowledge of funds and the funds industry.

88. He was asked about the bibliography to his report, and he stated that he read relevant articles for context and background. In respect of some of the articles referenced, he could not recall what parts, if any, had struck him as relevant. He stated that he may not have finished reading certain articles if he determined them as not relevant. It was put to him that only one of eleven sources referenced was relevant to his report, as he had cut and pasted a table from it. He did not accept that the other referenced documents were irrelevant.

89. He stated that he was instructed by the Respondent to provide a primer on the UCITS regime "*on the basis of somebody who had very, very limited knowledge of UCITS*.*"* He accepted that some of the funds managed by [redacted] were AIFs (i.e. non-UCITS). He had not given expert evidence before. He stated that he was aware of the duties of an expert and had included consideration of the Appellant's argument when coming to his opinions on its activities.

90. He stated that he did not believe that he had used sources other than those referenced in the bibliography. Following further questioning, he accepted that some of the text in his report was taken directly from online resources, including Lexology.com, SoFi.com, BolderGroup.com and SMPG.info. He had not provided these sources in his bibliography, and stated that he was happy to correct the oversight. Regarding SoFi.com:

> "*A. It obviously is a finance website that I came across. I am not particularly familiar with it, notwithstanding that there was information on it that I deemed relevant to doing the primer.*
>
> *Q. If you are not familiar with it how can you vouch for the accuracy of what it says,* [redacted]*?*
>
> *A. Well I wouldn't include what it says unless I believed it to be accurate*."

He did not know if the website was US-based, or who had written the material stated therein.

91. He denied that he had cut and pasted from websites because he did not have the expertise to write the report himself, but accepted that it could give rise to such an apprehension. He stated that he did not have any academic writings on UCITS or the funds management industry.

92. He had stated in his report that funds are usually based in a "*tax-neutral EU country*", and gave the example of Ireland. Under questioning he was not able to give an example of an EU country that was not tax-neutral from a funds perspective. He did not know what taxes were levied on [redacted] funds.

93. In respect of the part of his report proffering an opinion on the activities of the Appellant, he stated that he had focused on the agreements between [redacted] and [redacted] and between [redacted] and the sub-sub-distributors. However he accepted that he had never looked at those types of contracts before and did not read contracts as a matter of course.

Submissions

Appellant

94. In written submissions, the Appellant stated that [redacted] services were supplied abroad, but would have been taxable if supplied in the State because (1) to the extent it was providing management services, it was doing so in respect of non-qualifying funds, and consequently exemption under paragraphs 6(2) and 7(2) of Part 2 of the First Schedule to the VATCA 2010 was precluded, and (2) to the extent it was dealing in shares/securities, it dealt only in new shares/securities, and the activity of dealing in new shares/securities was specifically excluded from exemption under paragraph 6(1), and accordingly 7(1), of Part 2 of the First Schedule. Consequently, the Appellant's services qualified for deduction under section 59(1)(f) of the VATCA 2010.

95. [redacted] was engaged in the provision of fund management services; it provided sub-distribution services to [redacted] with [redacted] acting as representative of its underlying [redacted] funds. The services provided by [redacted] fell into two categories: it was to procure investors to subscribe for units in the funds; and it was to provide marketing, promotional and related services as requested by [redacted] and to provide due diligence and KYC services of any third-party placement or distribution agents appointed.

96. The services were provided for the purpose and result of procuring investors for new units in [redacted] UCITS funds. Indeed, the overriding responsibility of [redacted] was to procure persons to subscribe in units in the funds; the *raison d'etre* of the services was the raising of capital for investment in the funds.

97. [redacted] services were those of fund management in VAT terms. The activities considered to be "management" in Annex II of Directive No 85/611/EEC (now repealed), were cross referenced in paragraph 6(4), part 2, Schedule 1, VATCA 2010, which provided that any one of those activities may be regarded as fund management. Those activities were investment management, administration and marketing. Plainly, [redacted] services were

fund management, falling specifically within the term marketing, according to this definition.

98. Further support for the contention that [redacted] services were exempt could be found from the changes introduced by the Finance Act 2022, which amended paragraphs 6(1) and 6(2) of the First Schedule in order to ensure that the services are exempt. While not the law in force at the time of the events under consideration in this appeal, a clear inference could reasonably be drawn that prior to this change the services provided by [redacted] were not exempt for Irish VAT purposes. If this were not the case, an amendment to the law as it was at the time of the events in this case would not be required.

99. This appeal arose as a result of [redacted] correcting the VAT treatment historically applied to its services. Historically, the services supplied by [redacted] were treated as VAT exempt services - agency services relating to "dealing in … shares" which is exempt under paragraph 7(1)(a), Part 2, Schedule 1, VATCA 2010. [redacted] adopted this view and accordingly, did not recover any input VAT on costs. However, it was apparent (and became apparent to [redacted] first that the services it provided were properly to be regarded as fund management services and second to the extent that [redacted] was regarded as engaged as dealing in shares, [redacted] dealt with new shares for raising capital, specifically excluded from coming within the scope of the exemption under Irish VAT law.

100. In *Bookfinders,* the Court of Appeal held that Schedules to an Act are to be interpreted in the same manner as the other provisions in that Act. This finding was not undermined by the Supreme Court judgment. Therefore, that finding now must take account of the general approach described by O'Donnell J in the Supreme Court with the result that the literal approach applies to Schedules, with resort to the principle against doubtful penalisation where ambiguity arises.

101. The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods or services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged. The common system applies up to and including the final consumer. In principle, VAT should be imposed on all supplies of services for consideration by a taxable person and, as the CJEU had repeatedly stated, the exemptions envisaged by the VAT Directive were to be interpreted strictly (but not so as to deprive them of meaning) since they constituted exceptions to the general principle that turnover tax was levied on all services supplied for consideration by a taxable person; see e.g. *Blasi*.

102. An exemption for financial services transactions could not be extended in a manner which was inconsistent with the purpose of the financial services exemption contained in Article 135 of the VAT Directive; *Bookit v HMRC* Case C-607/14. In considering the nature of a supply for VAT purposes, a tribunal or court had to assess the reality of the situation, taking into account all the circumstances; see e.g. *MacCarthaigh v Cablelink.* In *Blackrock*, the CJEU found that Blackrock received a single supply of management services in respect of qualifying and non-qualifying funds, and that that service could not fulfil the criteria for exemption.

103. As [redacted] activities could not fall under Paragraph 6(1)(a) or 6(2) VATCA 2010, neither could the provision of 7(1) or 7(2) be applied and by default, as the services could not be regarded as falling within any exemptions as provided for under Irish VAT law, recovery in Ireland must apply under the provisions of Section 59(1)(f) VATCA 2010.

104. In oral submissions, counsel for the Appellant stated that [redacted] did not negotiate subscriptions for units in the funds. It was providing the fund management services set out in paragraph 6(2) of Part 2 of the First Schedule, but as it was not doing so in respect of a specified Irish fund, it was taxable. It was necessary to construe exemptions strictly, and it was necessary to fulfil the specific essential function of an exempt service to be exempt. It was important to focus on what the service provider (i.e. [redacted] itself did, rather than the purpose for which it did it.

105. Regarding the exemption in paragraph 6(1)(b), [redacted] was not arranging for the issuance of shares. The purpose of that provision was to capture IPOs and suppliers to IPOs, as set out in guidance provided by the Respondent at the time the provision was enacted. In any event, [redacted] was remote from the transactions, and the issuance of units occurred long after [redacted] had left the scene. [redacted] did not know, in relation to any particular person or entity that received the marketing material it dealt with, whether they were going to subscribe or not. As exemptions must be construed strictly, it was too remote to find that [redacted] arranged for the issuance of shares. Furthermore, section 46(3) of the VATCA 2010 operated to exclude 6(1)(b), on the basis that 6(1)(a) was expressly stated not to apply to the issuance of new shares.

106. The correct way to approach the services provided by [redacted] was to identify them with [redacted] rather than the person at the end of the distribution chain. Consequently, the approach to be followed was that set out in *CSC* rather than in *Ludwig*. [redacted] carried out distribution, which was one of the pillars of fund management as set out in the UCITS Directive. Management in paragraph 6(1) should be read and understood in the same way as stipulated in paragraph 6(2).

107. Regarding the Respondent's expert, he should not be considered as an expert for the purposes of this appeal. He did not have the requisite knowledge and his evidence was a waste of time. His evidence should not be admissible, or alternatively little weight should be afforded to it; *Duffy v McGee* [2022] IECA 254; *James Elliott Construction v Irish Asphalt* [2011] IEHC 269. Additionally, what [redacted] services were was a question of law, and the difficulty with the Respondent's expert being asked to answer those questions was that he had to interpret law in order to do so. However, the only person entitled to interpret the legislation was the Commissioner. Additionally, the [redacted] correspondence was a red herring, but in any event concerned services supplied to [redacted] The Appellant was entitled to change its position over time.

108. The CJEU had held that the economic and commercial reality was to be preferred over contractual terms; *HMRC v Newey* Case C-653/11. The parties had sought to highlight various aspects of [redacted] agreements, but the only witness who gave evidence on the economic and commercial reality of [redacted] services was [redacted].

109. The mere fact that a constituent element was essential for completing an exempt transaction did not warrant the conclusion that the service that element represented was exempt. An exempt service had to be distinguished from a mere physical or technical supply; *SDC*. It was necessary for a service to effect a change in the legal and financial situation, but that was not what [redacted] was doing.

110. In the *CSC* case, CSC was identified with Sun Alliance because there was a contractual relationship and CSC was doing what Sun Alliance could have done itself. That was analogous to the relationship between [redacted] and [redacted] The position was to be contrasted with that in *Ludwig*, which concerned an intermediary. Services of an administrative nature which did not alter the legal or financial position of the parties were not exempt; *CSC.* [redacted] services were the same as CSC's and therefore should not be considered exempt. The fact that [redacted] was paid what might be considered commission was irrelevant to whether or not its services were exempt; *CSC*.

111. The Appellant was making supplies of distribution services, which was an economic activity. Consequently, the Respondent's argument that *Kretztechnik* meant that [redacted] was not engaged in a taxable activity was untenable.

Respondent

112. In its written submissions, the Respondent stated that the Appellant had argued in its statement of case that, because paragraph 6(2) of Part 2 of Schedule 1 of the VATCA 2010 could potentially have applied to the Appellant, but in fact did not apply, and because

this was a “specific exemption”, no regard should be had to the “general exemption” provided for in paragraph 7(1). This was flawed and wrong in law; *Bookfinders*.

113. Paragraph 6(2) comprised a single, unitary exemption for the supply of services that consisted of managing specified types of undertaking. The parties agreed that [redacted] was not supplying specified services. However paragraph 6(2) was not an exemption for “fund management services” *simpliciter*, as contended by the Respondent.

114. Paragraphs 6(1)(a), 6(1)(b) and 7(1) of Part 2, Schedule 1 to the VATCA 2010 implemented Article 135(f) of the VAT Directive. The Appellant sought to claim that the issuance of new shares was specifically excluded from the exemption under paragraph 6(1)(a). However, this failed to have regard to the fact that issuing new shares was not an economic activity and therefore outside the scope of VAT; *Kretztechnik.*

115. However, without prejudice to that argument, the Respondent contended that the Appellant’s activities fell within the exemption set out in paragraph 6(1)(b), which did not exclude the issuance of new shares or securities. There was no definition or specific meaning given to the term “arranging for” in the context of the exemption and therefore the word must be given its ordinary meaning in accordance with the principles of statutory interpretation. As the Respondent understood the services provided by [redacted] did exactly that – arrange for investors to subscribe for shares in funds under the management of [redacted]

116. Where activities fell under either paragraph 6(1)(a) or 6(1)(b), then paragraph 7(1) applied. Paragraph 7(1) exempted agency services relating to the financial services specified in paragraph 6(1).

117. In the submissions made by the Appellant in the [redacted] correspondence, the nature of the services provided by [redacted] was canvassed in detail and it appeared that the distribution services provided by the sub-distributors *to* [redacted] were similar to the distribution services provided *by* [redacted] to the [redacted] fund management company, so that one might expect that the same VAT treatment would apply to both types of services. It was, therefore, appropriate to refer to the submissions made on behalf of [redacted] and the correspondence over a period of time between [redacted] and the Respondent in relation to the “sub-distributor” issue. The purpose of the [redacted] correspondence was to seek an exemption from VAT for other [redacted] entities who provided services to [redacted] in the context of [redacted] carrying out its global sub-distributor function. The Respondent accepted [redacted] submission that the services provided by sub-distributors to [redacted] were exempt from VAT.

118. Regarding whether the Appellant's services constituted "management", article 2(2) of Directive 2009/65/EC (the "UCITS Directive") provided that for the purpose of article 2(1)(b), the regular business of a management company shall include the functions referred to in Annex II. Annex II listed the functions included in the activity of collective portfolio management investment management, administration and marketing. However, this was not relevant to the appeal. Paragraph 6(2) was a single unitary exemption available where (and only where) the financial services supplied consist of "*managing an undertaking of a kind specified*". If there was no special investment fund, the exemption did not apply. As, in this case, [redacted] supplied distribution services to [redacted] a company based in [redacted] in respect of investment funds domiciled (or primarily domiciled) in [redacted] that was, with respect, the end of the matter. The question of what constituted "management" was not in issue in this appeal. In any event (and strictly without prejudice) it was [redacted] (not [redacted] that was the management company and distributor of the (non-specified) funds in question.

119. Negotiation was an act of mediation; *CSC*. In Ireland, that act of mediation fell within "agency services" the subject of exemption under Schedule 1, Part 2, paragraph 6(1) and paragraph (7)(1) of the VATCA 2010, the latter being the relevant exemption applicable to the distribution services provide by [redacted] to [redacted] in respect of funds domiciled (or mostly domiciled) in [redacted]

120. The concept of negotiation did not necessarily presuppose that the negotiator, as subagent of the main agent, enter into direct contact with both parties to the contact, in order to negotiate its terms, provided, however, that his activity was not limited to dealing with some of the clerical formalities related to the contract. The very fact that the terms of the credit agreement had been fixed in advance by one of the parties to the contract could not, as such, preclude the supply of a negotiation service for the purposes of Article 13(B)(d)(1), given that the activity of negotiation might be limited to pointing out to one party to the contact suitable opportunities for the conclusion of a contract; *Ludwig*.

121. While [redacted] engaged "sub-distributors" it retained responsibility for its contractual obligations to [redacted] as "Global Sub-Distributor". [redacted] was paid by [redacted] for the distribution services provided by it to [redacted] and [redacted] remunerated sub-distributors appointed by it. The distribution services provided by [redacted] to [redacted] went beyond "mere clerical formalities" and, consistent with the analysis of CJEU in *CSC* and *Ludwig*, constituted "negotiation" within Article 135(1)(f) and, agency services within paragraph 7(1) of Schedule 1, Part 2 to the VAT Act. As the distribution services were exempt, [redacted]

was not entitled to input credit for VAT incurred by it in the provision of those distribution services to [redacted]

122. In oral submissions, counsel for the Respondent stated that the fee that [redacted] was paid by [redacted] was a percentage of the funds brought in by [redacted] whether directly or through its sub distributors, which was relevant to the analysis of the services being supplied by [redacted] The fact that [redacted] chose to supply the services using sub-sub-distributors did not affect the analysis.

123. It was a remarkable and unusual feature of the appeal that it involved someone trying to extricate itself from an exemption. It was doing so, in truth, solely to get an input credit. While the Appellant stated the services to [redacted] were taxable, the reality was that the reverse charge would apply, so that any invoice issued by [redacted] would not have Irish VAT accounted for. The purpose of the appeal was to achieve a situation where a taxable activity was inserted in the middle of a chain of distribution where everyone else was exempt. There appeared to be an attempt to achieve some sort of arbitrage where an activity should be treated as taxable, but effectively and *de facto* only for the purpose of getting input credit.

124. It was important to bear in mind that the CJEU jurisprudence was not merely that exemptions must be construed strictly. It also stated that one cannot restrict exemptions in a way that is not supported by the provision; *SDC.* Furthermore, the purpose of exemptions as an independent concept of EU law was to avoid divergence in the application of the legislation between Member States; *CPP*.

125. The Appellant had incorrectly sought to conflate “management” in Article 135(f), which concerned portfolio management, with the management of special investment funds in Article 135(g). It was only in that context that Annex II of the UCITS Directive was relevant.

126. In respect of the Appellant’s argument about section 46(3) of the VATCA 2010, that provision concerned rates of VAT, so was not relevant to this appeal. Furthermore, the Appellant’s argument did not agree with the wording of Article 135, which mandated that all of the listed transactions had to be exempted.

127. Regarding the Respondent’s expert, it could not fairly be said that the *indicia* discussed in *Duffy v McGee* [2022] IECA 254 applied in this instance such that it would be appropriate to rule the report inadmissible. Additionally, the Respondent’s expert was criticised for not considering matters that were not part of the Appellant’s case until [redacted] evidence.

128. There was no reasonable basis to conclude that the services provided by [redacted] were merely administrative in nature. They were substantive services that did alter the legal or financial position of the parties, and that ultimately resulted in the issue of a unit to the investor. The appointment of sub-sub-distributors by [redacted] did not diminish its obligations to [redacted] as stated in the appointment clause of the agreement between [redacted] and [redacted] The Appellant was now seeking to claim that its service ended with the appointment of the sub-sub-distributors, but this was not what the agreement between [redacted] and [redacted] provided. The reality was that the rationale for appointing sub-sub-distributors was to better facilitate [redacted] in the provision of its services, because it would be helpful to have someone in, for example, [redacted] who spoke the local language or have local contacts. But this did not diminish the services being provided by [redacted] The sub-distributors were providing their services to [redacted] which in turn provided services to [redacted] There was no disagreement that what issued to the end investor was a contract with [redacted] and that was consistent with the jurisprudence in *CSC* and *Ludwig.*

129. It could not be the case that if [redacted] carried out its distribution services directly to the end investor the supply would be exempt, but that if it used third parties the supply was taxable. The evidence before the Commissioner, including the evidence of [redacted], showed that what [redacted] provided were distribution services. In the statement of facts submitted by the Appellant, which was not agreed and therefore not evidence, it referred to "[redacted] *role as procuring investors to subscribe for units or shares in funds under the management of* [redacted]

Material Facts

130. Having read the documentation submitted, and having listened to the oral evidence and submissions at the hearing, the Commissioner makes the following findings of material fact:

    130.1. The Appellant was engaged in the distribution of funds in the funds management industry, as part of the [redacted] Funds group, during the period of March 2014 – December 2018, the relevant time frame for this appeal. The Appellant was acquired by the [redacted] in [redacted]

    130.2. The management company of the [redacted] was [redacted]. [redacted] was authorised to manage Undertakings for Collective Investments in Transferable Securities ("UCITS"), and Alternative Investment Funds ("AIFs").

130.3. [redacted] appointed the Appellant as Global Sub-Distributor in 2011. In turn, the Appellant appointed sub-sub-distributors, who in turn appointed end-distributors, or else dealt directly with institutional investors. The Appellant also utilised a branch network in certain jurisdictions. The Appellant would pitch to [redacted] to register certain funds in particular jurisdictions.

130.4. Units/shares in the funds were issued by the transfer agent/registrar on the subscription of investors. The price of a unit was arrived at by means of a mathematical calculation (total assets under management ("AUM") / number of units). The Appellant had no role in determining the price of a unit, and there was no negotiation of the price with the investor.

130.5. When an investor wished to redeem their units, they completed a redemption request which was submitted to the transfer agent. A redemption resulted in the cancellation of existing units, and there was no secondary market in units. Therefore, the Appellant was engaged in the process of the issuance of new units in funds.

130.6. The Sub-Distribution Agreement between the Appellant and [redacted] envisaged the Appellant entering into further distribution agreements with sub-sub-distributors, but provided that such further agreements would not diminish the Appellant's obligations and liabilities to [redacted]

130.7. The Sub-Distribution Agreement between the Appellant and [redacted] was entered into for the purpose of procuring investors to subscribe for units in the funds. The various services and obligations of the Appellant set out in the Agreement were elements of the Appellant's role in seeking to procure investors in the funds.

130.8. The Appellant had approximately [redacted] people working in its legal team. It was not credible that such a large and well-resourced legal department would be unaware of, or disregard, provisions of critical importance in the contractual agreements governing the Appellant's activities that gave a misleading or inaccurate account of its true role.

130.9. The Appellant was paid an assets based fee by [redacted] and therefore was directly incentivised to work towards the success of the funds. The sub-sub-distributors were paid a commission/trail fee based on sales of units in the funds, and were therefore being incentivised by the Appellant to procure investment in the funds.

130.10. In its written submissions in the appeal prior to the hearing, the Appellant contended that its services to [redacted] included procuring investors to subscribe for units in the funds. The Appellant's witness, [redacted], made a number of references in his oral evidence to the Appellant's role in the sale or selling of units in the funds.

130.11. The account of the services provided by the Appellant to [redacted] as set out in (i) the contractual agreements between the Appellant and [redacted] and the Appellant and the sub-sub-distributors, (ii) the account provided by the Appellant's previous advisers to the Respondent in the [redacted] correspondence, and (iii) the account provided by the Appellant in written submissions prior to the hearing, was different to the account provided by the Appellant in its evidence at the hearing. No meaningful explanation was provided by the Appellant for this apparent change in its account of its role and activities.

130.12. The Appellant's principal service to [redacted] was to procure investors to buy units in the funds through the means of selling units/shares in the funds. This process was facilitated by the sub-sub-distributors procured by the Appellant. The agreements entered into by the Appellant with the sub-sub-distributors were entered into for the purpose of procuring investors in the funds, in order to facilitate the Appellant's obligations to [redacted] However, the Appellant retained responsibility to [redacted] for the process of procuring investors in the funds, and its role was not limited to merely identifying and procuring sub-sub-distributors. The provision of marketing material by the Appellant to the sub-sub-distributors constituted an ancillary service.

130.13. The relationship between [redacted] the Appellant and the sub-sub-distributors could be considered as a chain of distribution. The Appellant's role in the chain was essential, and investment in the funds would not have been possible without it. The supply of services on behalf of [redacted] via the distribution chain constituted a single service from an economic point of view.

130.14. The Respondent's expert did not demonstrate an expertise in the subject matter of the appeal. Most, if not all, of the first section of his report, which he described as a *"primer*" on UCITS, had been cut and pasted from various websites, a number of which were not referenced in the report's bibliography. He went on in the report to opine on the Appellant's contractual relationships, but accepted on cross-examination that he had not looked at these types of contracts previously. The bulk of the second part of his report consisted, in effect, of the

expert interpreting the Appellant's activities under the relevant statutory provisions. His report did not demonstrate any meaningful engagement with the arguments of the Appellant. Consequently, the expert's report and oral evidence were of no benefit in determining the appeal.

130.15. However, the Respondent's expert was courteous and respectful in his oral evidence. He apologised for the (serious) error in relying on sources not referenced in the bibliography. He repeatedly stressed that he did not seek to contradict the evidence of the Appellant's witness, [redacted].

Analysis

Consideration of certain evidence

131. Before considering the substantive question of whether or not the Appellant's activities constituted exempt services, it is necessary to determine the admissibility/relevance/weight to be attached to certain evidence upon which the Respondent seeks to rely, namely its expert's report and the [redacted] correspondence.

132. The Respondent's expert's report will be considered first. As set out above in the background section of this Determination, the Commissioner did not agree to the Appellant's application prior to the hearing to find the report inadmissible, notwithstanding its very late submission without prior notice, to the Appellant and the Commission. The Commissioner advised the parties that the weight to be given by him to the Respondent's expert's evidence could be addressed by them at the hearing.

133. Unfortunately, the Commissioner has concluded that the expert's report and oral evidence are of no benefit to him in determining this appeal. In coming to this view, the Commissioner has had particular regard to the evidence of the expert under cross-examination. It transpired that most if not all of the first section of the report, which he described as a "*primer*" on UCITS, had been cut and pasted from various websites, a number of which were not referenced in the report's bibliography. The Commissioner does not consider that this is suggestive of someone with an expertise in the area of UCITS, and the expert did not otherwise satisfy the Commissioner that he had any such expertise.[5] The expert went on to opine on the Appellant's contractual relationships, but accepted that he had not looked at these types of contracts previously; therefore the

[5] The Commissioner does consider it appropriate to note, however, that he considered the Appellant's criticism of the Respondent's expert for not being aware that [redacted] also managed AIFs to be rather unfair. In its written submissions in this appeal the Appellant only referenced [redacted] and it was only at the hearing herein that it also stated that [redacted] were managed. Therefore, the Commissioner does not consider that the Respondent's expert is to be faulted for only referring to UCITS in his report.

Commissioner concludes that he could not properly be considered an expert in the area of contractual interpretation of UCITS fund management/distribution agreements. Finally, the Commissioner considers that the bulk of the second part of the expert's report consisted, in effect, of the expert interpreting the Appellant's activities under the relevant statutory provisions. However, the Commissioner considers that the question of statutory interpretation in this appeal is a matter solely for him, and is not properly a matter for a witness, including an expert witness.

134. In light of the findings that the Respondent's expert did not have expertise in the subject matter of this appeal, and that he purported to engage in statutory interpretation where that is properly only a matter for the Commissioner, the question then arises as to whether his evidence should be declared admissible, or alternatively admitted but little weight given to it. In *Duffy v McGee* [2022] IECA 254, Collins J stated that

> "*34. Nothing in the careful judgment of Barton J in Kenneally v DePuy International Ltd is inconsistent with the proposition that where it is evident that an expert witness is either unwilling or unable to comply with their duties as expert, their evidence can – and ordinarily should - be excluded as inadmissible. I am not referring here to minor transgressions, which may properly be seen as going only to weight. Rather, I am speaking of significant departures from the fundamental requirements of objectivity, impartiality and independence*."

135. The Commissioner is not satisfied that the Respondent's expert demonstrated the objectivity, impartiality and independence required of expert witnesses. His report did not demonstrate any meaningful engagement with the arguments of the Appellant, but instead entirely supported the Respondent's view. However, against that, the Commissioner considers that the behaviour of the Respondent's witness was very different to that of the expert in *Duffy v McGee*, which led the Court of Appeal to conclude that the trial judge had been correct to rule that expert's evidence inadmissible. In this appeal, the Commissioner found the Respondent's witness to be courteous and respectful in his oral evidence. He apologised for the (serious) error in relying on sources not referenced in the bibliography. He repeatedly stressed that he did not seek to contradict the evidence of [redacted]; in contrast, the expert in *Duffy* repeatedly accused the other side of lying and deception.

136. In all the circumstances, the Commissioner determines that it would be disproportionate to formally rule the Respondent's expert evidence inadmissible. However, for the reasons set out above, the Commissioner is satisfied that he should afford no weight to the expert's evidence, and no reliance is placed upon his report or oral evidence in the

determination of this appeal. The Commissioner agrees with the Appellant's counsel that the evidence was "*a waste of time*" and concludes that it should not have been proffered by the Respondent. For the avoidance of doubt, however, where [redacted] addressed elements of the report in his own evidence, such evidence remains before the Commissioner and will be afforded equal weight to the rest of his evidence.

137. Regarding the [redacted] correspondence, it was submitted by counsel for the Appellant that it was a "*red herring*" and of little relevance to the appeal. The Commissioner agrees that the Appellant is entitled to change its mind regarding the legal status of the services provided by it, and he does not consider that any reliance should be placed on the legal interpretation submitted in that correspondence; as stated in respect of the Respondent's expert evidence, the matter of statutory interpretation is one solely for the Commissioner in this appeal.

138. However, the Commissioner does consider the [redacted] correspondence to be of potential relevance in terms of its description of the <u>services</u> provided <u>to</u> the Appellant <u>by</u> the sub-sub-distributors. This is a question of fact and potentially relevant to the consideration of the <u>services</u> provided <u>by</u> the Appellant <u>to</u> [redacted] No witness was put forward by the Appellant to explain why the account of the services provided to it in the [redacted] correspondence was rather different to the account provided by [redacted] in his oral evidence. [redacted] stated that he had no involvement in briefing [redacted] for the purposes of the correspondence with the Respondent. The Commissioner was advised that the Appellant's [redacted] was on [redacted] leave at the relevant time. Therefore, he accepts that neither [redacted] nor [redacted] were in a position to address the [redacted] correspondence. Nevertheless, the [redacted] correspondence is before him, and the relevance (if any) of it to the consideration of the services provided by the Appellant to [redacted] is considered below.

Supplies provided by Appellant

139. In considering the nature of the supplies provided by the Appellant to [redacted] it is appropriate to start with the Sub-Distribution Agreement from 2011 between them. Recital C of the Agreement provides that "*It is proposed to procure investments in the Funds through continuing offerings of units of the Funds (the "Units") at such prices (the "Subscription Prices") and on the terms of the prospectus and management regulations of the Funds (the "Prospectus").* Recital D of the Agreement provides that "*The Sub-Distributor* [i.e. [redacted] *has agreed with the Distributor* [i.e. [redacted] *to use all reasonable endeavours to procure persons to subscribe for the Units.*"

140. Section 2.1 of the Agreement is the appointment clause and therefore of critical importance in understanding the nature of the services provided by the Appellant. Accordingly, the Commissioner considers it appropriate to set it out in full:

> "*The Distributor hereby appoints the Sub-Distributor as Sub-Distributor in respect of the Funds and in respect of all the sub-funds of the Funds available according to the current and all future versions of the Prospectus, in relation to Offerings of the Units, and the Sub-Distributor hereby agrees to act as such Sub-Distributor on the terms set out herein and in accordance with the Prospectus and* [redacted] *on market timing and late trading and such other* [redacted] *circulars as may be issued and have application to the Services of the Sub-Distributor hereunder. The Sub-Distributor may, in its sole discretion, enter into further distribution or sales agreements or enter into commitments concerning the conditions applicable to the Offerings with third parties, including brokers, dealers, banks, other financial intermediaries or professional clients or arrange for such parties to conclude contracts direct with the Distributor with respect to the Offering of the Units provided always and on the basis that the obligations and liabilities of the Sub-Distributor hereunder to the Distributor shall not in any way thereby be diminished.*" (emphasis added)

141. Therefore, it can be seen that the Agreement envisaged [redacted] entering into *"further distribution or sales agreements*" etc. with sub-sub-distributors, but that, importantly, such further agreements would be entered into by the Appellant on the basis that its obligations and liabilities to [redacted] "*shall not in any way thereby be diminished*".

142. The Agreement then, under section 2.2, set out the services to be provided by the Appellant on behalf of [redacted]

> "*(a) The Sub-Distributor hereby agrees to provide on behalf of the Distributor the services described in Section 2.1 and such other services regarding the Offering of the Funds as may be from time to time requested by the Distributor during the term of this Agreement.*
>
> *(b) The Sub-Distributor hereby agrees to procure on behalf of the Distributor such marketing, promotional and related services in respect of the Funds as may from time to time be requested by the Distributor during the term of this Agreement*
>
> *(c) The Sub-Distributor shall provide due diligence and know your client review services of any third party placement or distribution agents appointed or to be appointed in respect of the Offerings by the Sub-Distributor or the Distributor upon referral of the Sub-Distributor.*"

143. [redacted] stated that section 2.2 of the Agreement reflected what [redacted] actually did: "*So 2.2(a), I think, just simply reflects the provisions of 2.1, the appointment clause. And then 2.2(b) and (c) refer to additional services.*"

144. Section 3.1 is titled "*Obligations of the Sub-Distributor*" and provides as follows:

> "*On the terms and subject to the conditions hereinafter set out:-*
>
> *3.1.1 the Sub-Distributor will assist the Distributor in the preparation of the Prospectus and will assist and advise the Distributor in the making of Offers and shall arrange for the printing and translation of the Prospectus on behalf of the Distributor at the expense of the Funds;*
>
> *3.1.2 the Sub-Distributor will cause to be made available copies of the Prospectus and any other legally required documentation for the purpose of the Offers;*
>
> *3.1.3 the Sub-Distributor may, in its sole discretion, produce and distribute supplemental sales material relating to the Offering of the Units in any jurisdiction where the Units may be or are sold; provided, however, that any such supplemental sales material shall:-*
>
> *(i) not cause the Funds and/or the Distributor to be in any way in conflict with or in breach of the laws and regulations of* [redacted] *or of any jurisdiction where the Units are sold or in which the Prospectus or supplemental sales material is distributed by the Sub-Distributor;*
>
> *(ii) not conflict with the contents of the Prospectus; and*
>
> *(iii) not contain any untrue statement of material fact or omit to state a material fact required to be stated therein or necessary to make such statement not misleading;*
>
> *3.1.4 the Sub-Distributor shall upon request make available to the Distributor any supplemental sales material as referred to in 3.1.3; and*
>
> *3.1.5 the Sub-Distributor will ensure that all documents required by the Distributor to comply with any relevant anti-money laundering and counter-terrorist financing legislation are furnished to the Distributor.*
>
> *3.1.6 the Sub-Distributor shall prepare and submit to the Responsible Persons periodic reports of its activities in such form as may reasonably be requested by the Distributor in order to enable the Distributor to monitor the activities of the Sub-Distributor under this Agreement*."

145. Section 3.3 is titled "*Compliance*" and includes the provision that "*The Sub-Distributor shall not sell or cause to be sold the Units in any jurisdiction where it would be unlawful for it to do so.*" In his evidence on this provision, [redacted] stated that "[redacted] *role is not to sell anything."*

146. The Agreement was amended in November 2011 to account for changes to section 5, concerning "*Fees of the Sub-Distributor*". The amendment agreement provided that " '*Trail fee' means continuing fees or commissions payable to distributors, placement agents or institutional clients appointed by the Distributor or the Sub-Distributor."* Section 5.1 of the amendment agreement provided that

> "*Where, pursuant to Section 2.1, the Sub-Distributor enters into agreements with placement or distribution agents or institutional clients, the Distributor undertakes to pay or procure the payment of any sales charges, upfront commissions or Trail Fee which are payable pursuant to such agreements and which accord with the levels of authorisation agreed between the Distributor and Sub-Distributor from time to time.*"

147. Section 5.2 of the amendment agreement was titled "*Service Fees*" and stated that

> "*5.2.1 Institutional Clients, Third Party Placement Agents or Third Party Distribution Agents which are not owned or controlled by the [redacted] group*
>
> *…the consideration of the performance of the Services by the Sub-Distributor shall be calculated and remunerated at [redacted] of the Net Management Fee based on average assets under management held in each sub-fund of the Funds for each calendar month and attributable to Services performed in respect of institutional clients…, third party placement agents or third party distribution agents.*
>
> *5.2.2 Institutional Clients, Placement Agents or Distribution Agents which are owned or controlled by the [redacted] group*
>
> *Remuneration for Services performed by the Sub-Distributor…shall be calculated as a fee or fees equal to the cost to the Sub-Distributor for the performance of the Services together with an amount equal to [redacted] of such cost, provided however that such fee or fees do not exceed revenues accruing to the Distributor after payment of Trail Fee and investment management fees has been duly made (the "cap").*"

148. The Commissioner makes the following observations in respect of the Sub-Distribution Agreement between [redacted] and [redacted] and the relevant evidence of [redacted]. The Agreement under sections 2.2 and 3.1 set out a number of the services to be provided by [redacted] and its obligations to [redacted] [redacted] stated that some of these were more or

less relevant in reality; for example, 3.1.2 was not accurate because the prospectus and other documentation were made available on a website rather than directly by [redacted]

149. The Commissioner does not consider it necessary to evaluate each of the services and obligations stipulated and determine how reflective each is of the reality of the Appellant's activities. He considers that those services and obligations were most likely elements, some of which could be seen as ancillary, of the overall principal obligation owed by [redacted] to [redacted] as set out in the appointment clause, section 2.1.

150. Section 2.1 simply appoints [redacted] as Sub-Distributor in respect of the Funds in relation to offerings of the units. It does not specify what precisely this means; however the Commissioner considers that it is necessary to read this in conjunction with the recitals, and in particular Recital D, which provided that "*The Sub-Distributor has agreed with the Distributor to use all reasonable endeavours to procure persons to subscribe for the Units.*" Therefore, it seems to the Commissioner that the appointment of the Appellant as Sub-Distributor was, according to the Sub-Distribution Agreement, for the overall purpose of procuring investors to subscribe for units in the funds. Accordingly, the various services and obligations listed in sections 2.2 and 3.1 should properly be regarded as elements of the Appellant's role in seeking to procure investors in the funds.

151. Regarding Recital D of the Sub-Distribution Agreement, [redacted] stated that it "*simply recites* [redacted] *agreement and commitment to assist the Distributor to procure investment into the funds…Maybe it is the ultimate effect of the service, but the job of* [redacted] *was clearly to go out, prospect for distributor, who in turn would engage with end distributors and encourage them to make investments into the funds.*" However, the Commissioner considers that this explanation does not address the implications of the final sentence of the appointment clause, which provided that the entering into of sub-sub-distribution agreements could not act to diminish [redacted] obligations under the Sub-Distribution Agreement to [redacted]

152. Furthermore, the Commissioner notes, in the description of the fee structure provided to the Respondent on behalf of the Appellant in the [redacted] correspondence (30 July 2014), it was stated that "[redacted] *will be paid an assets based fee by* [redacted] *(and the other relevant management companies) for these distribution services.*" The Commissioner understands this to mean that [redacted] was directly incentivised by [redacted] to work towards the success of the funds.

153. As the Appellant contends that the Sub-Distribution Agreement does not accurately reflect the services provided by it to [redacted] it is necessary to consider other evidence to evince the true nature of the services. The Commissioner is satisfied that such

evidence includes the services provided by the sub-sub-distributors to [redacted] given they were procured by [redacted] to provide services that it in turn had been procured by [redacted] to provide. In considering the services provided *to* [redacted] the Commissioner is conscious that they do not necessarily constitute identical services provided *by* [redacted] However, he is satisfied that the services provided by the sub-sub-distributors are helpful as "*descriptors*", as per the CJEU's judgment in *SDC.*

154. Turning first to consider the various Distribution Agreements between [redacted] (sometimes referred to therein as "[redacted] its predecessor for the purposes of the agreements) and the sub-sub-distributors, the Commissioner considers the following clauses of the agreement with [redacted] to be of particular relevance:

> Recital 2 – "*Set forth below are the terms under which* [redacted] *in accordance with applicable laws and regulations, will accept offers to purchase the Units/Shares as a result of the appointment of the Distributor* [i.e. [redacted]] *pursuant to this Agreement*."
>
> Section 1(a) – "*The Distributor is hereby authorised, on a non-exclusive basis (subject as hereafter provided), to promote and distribute the Units/Shares of the Funds that are specified in Appendix A hereto in accordance with and pursuant to this Agreement and all applicable laws and regulations*."
>
> Section (1)(b) – "*The Distributor shall be entitled to appoint sub-distributors (the "Sub-Distributors") hereunder for the purpose of distributing the Units/Shares, provided that: (i)* [redacted] *shall have given its prior written approval to each such appointment; (ii) each such sub-distributor shall be authorised pursuant to all applicable laws and regulations to conduct the business of distribution of Units/Shares; and (iii) that any act or omission of any such sub-distributor shall, for all purposes of this Agreement, be deemed to be the act or omission of the Distributor*."
>
> Section 2(a) – "*The offer and sale of Units/Shares and any other acts related to the distribution of the Units/Shares will be carried out by the Distributor in accordance with the terms and conditions set forth in the relevant Prospectus, agreed operating procedures, the applicable laws in the relevant jurisdiction and this Agreement. Only unconditional orders for a designated number of Units/Shares or amount of investment shall be accepted*."
>
> Section 2(b) – "*The offer, sale, redemption and exchange of Units/Shares and any other acts or transactions related to the distribution of the Units/Shares by the Sub-Distributors appointed in accordance with Section 1 (b) will be carried out on accounts*

established in the name of the Sub-Distributors at the Registrar and Transfer Agent of the Funds…"

Section 3(a) – "*As compensation for the services rendered, the Distributor shall receive a commission as specified in Appendix B for accepted subscriptions as the same may be amended from time to time by* [redacted]

Section 3(b) – "[redacted] *shall pay the Distributor or procure payment to the Distributor of a trailing fee (the "Trailer Fee") at an annual rate as specified in Appendix B in respect of the Units/Shares of the Funds…*"

Section 4(a) – "[redacted] *will deliver to the Distributor from time to time and without charge copies of the Prospectus, application forms, semi-annual and annual reports and other promotional documentation relating to the Funds in reasonable quantities*."

Section 4(b) – "*Each purchaser of the Units/Shares shall be offered the relevant Prospectus free of charge, accompanied by the relevant Fund's most recent annual report and semi-annual report if the latter is more recent. The Distributor shall distribute to the investors or prospective investors only such material as shall have been provided to the Distributor by* [redacted] *or has otherwise been approved by* [redacted]

155. In respect of recital 2 of the above agreement, [redacted] stated that, "[redacted] *wasn't in a position to accept offers to purchase units or shares, it was in a position to execute distribution agreements with sub distributors or sub sub distributors, as the case may be, depending on the model… the job of accepting offers was the job of the registrar and transfer agent or the management company*."

156. The Commissioner considers the following provisions of the agreement between the Appellant and [redacted] to be of particular relevance:

Section 1 – "*The subject matter of this Agreement is the mediation of transactions for the acquisition and sale as well as the exchange of units of* [redacted] *Funds in accordance with the current complete and simplified sales prospectus.* [redacted] [i.e. [redacted]] *agrees to mediate or provide for the mediation of such transactions between interested investors and the* [redacted] *Funds, and to evidence such opportunities*."

Section 2.1 – "[redacted] *agrees to ensure that every acquirer of units of* [redacted] *Funds is offered the following documents free of charge and without request prior to subscription:*

(a) a simplified sales prospectus (if applicable)…"

Section 2.2 – "[redacted] *is solely responsible for preparing the sales documents (sales prospectuses, simplified sales prospectuses, contractual conditions/management regulations, annual reports, semi-annual reports, application forms, purchase confirmations).* [redacted] *will receive the sales prospectuses, simplified sales prospectuses, management regulations, annual and semi-annual reports free of charge, either electronically or in sufficient quantities to enable it to carry out its activities under this Agreement*."

Section 3.1 – "[redacted] *hereby agrees the following: Use of sales documents: in distributing* [redacted] *Funds in accordance with this Agreement, to use only those sales documents approved by* [redacted] *unless* [redacted] *waives this right*."

Section 4.3 – "*The Management Company of the* [redacted] *Funds is not obliged to execute purchase or redemption orders for* [redacted] *Funds which result from the activities of* [redacted] *pursuant to this Agreement.* [redacted] *is entitled to reject orders of individual investors for good cause. In such cases, the entity/person wishing to acquire units of* [redacted] *Funds will be informed immediately about the rejection of individual orders*."

Section 6.1 – "[redacted] *shall pay or procure payment of any commission and/or trail fees (inclusive of VAT) payable to a Sub-Distributor duly appointed by* [redacted] *in accordance with the terms of this Agreement, provided such Sub-Distributor complies with the policies and procedures, as applicable, set forth in Appendix Ill hereto, as may be amended from time to time by* [redacted]

157. In his oral evidence, the Appellant's witness stated, in respect of the reference to "*the mediation of transactions for the acquisition and sale as well as the exchange of the units",* that "*To me it just reflects that* [redacted] *is being contracted to carry on sub distribution services on behalf of* [redacted] *The word "mediation" is "vermittlung" in German, which to me is distribution, it is another way of - so I think the translation is accurate and accurately reflects what we were asking* [redacted] *to do. It is the same as the activities that* [redacted] *was asked to perform.*" On cross examination, he accepted that the agreement was executed in English but stated that [redacted] was not actually asked to provide for the mediation of such transactions.

158. The Commissioner considers the following clauses in the agreements between the Appellant and [redacted] ([redacted]) to be of particular relevance:

Recital 3 – "*Set forth below are the terms under which* [redacted] *in accordance with applicable laws and regulations, will accept through the Distributor* [i.e. [redacted] *offers to purchase the Units on behalf of investors*…"

Section 1(a) – "*The Distributor is hereby authorised, on a non-exclusive basis, to promote and distribute the Units of the Funds that are specified in Appendix A hereto in the* [redacted] *in accordance with and pursuant to this Agreement and all applicable laws and regulations*."

Section 1(b) – "*The Distributor shall be entitled to appoint sub-distributors hereunder for the purpose of distributing the Units, provided that: (i)* [redacted] *shall have given its prior approval to each such appointment; (ii) each such sub-distributor shall be authorised pursuant to all applicable laws and regulations to conduct the business of distribution of Units; and (iii) that any act or omission of any such sub-distributor shall, for all purposes of this Agreement, be deemed to be the act or omission of the Distributor*."

Section 2 – "*The offer, sale, redemption and exchange of Units and any other acts or transactions related to the distribution of the Units, will be carried out through the Distributor in accordance with the terms and conditions set forth in the relevant Prospectus, agreed operating procedures, the applicable laws in the relevant jurisdiction and this Agreement. Only unconditional orders for a designated number of Units or amount of investment shall be accepted*."

Section 3(a) – "*As compensation for services rendered, the Distributor shall receive a commission amounting to* [redacted] *of any sales charge payable by the subscribers (as a percentage of the subscription amount; hereinafter referred as to the "Entry Fee") for accepted (processed) subscriptions…*"

Section 3(b) – "[redacted] *shall pay or shall procure payment of a trailing fee (the "Trailer Fee") to the Distributor at an annual rate as specified in Appendix B…"*

Section 4(a) – "[redacted] *will make available to the Distributor from time to time and without charge copies of the Prospectus in English, for the* [redacted] *Funds - the Key Investor Information Documents ("KIID") (where applicable), application forms, semi-annual and annual reports relating to the Funds in reasonable quantities*."

Section 4(b) – "*Each purchaser of the Units shall be offered the relevant Prospectus free of charge, accompanied by the relevant Fund' s most recent annual report and semi-annual report if the latter is more recent and shall be given the current KIID… The Distributor shall distribute to the investors or prospective investors only such*

material as shall have been provided to the Distributor by [redacted] *or has otherwise been approved by* [redacted]

159. [redacted] stated that the agreement between the Appellant and [redacted]) was essentially the same as that with [redacted] The Commissioner agrees and therefore will not set out individual clauses which do not differ in any material way from those set out above in respect of [redacted]

160. The Appellant's agreement for [redacted] was a tripartite one for local regulatory reasons. [redacted] was appointed as the Distributor under the agreement. The Commissioner considers the following clauses to be of particular relevance:

Section 2.1.1 – "*The Distributor is engaged to distribute units/shares of the* [redacted] *Funds (the "Units") in and/or from* [redacted] *to non-qualified, in addition to qualified investors, in accordance with the appropriate fund documentation and all applicable laws and regulations...*"

Section 2.2.1 – "*The Distributor is entitled to a fee/retrocessions for its distribution activities in respect of the Units… The Primary Distributor* [i.e. [redacted] *will pay or procure payment of the remuneration to the Distributor*."

Section 2.5.1 – "*The Distributor shall make the documents it receives from the Representative* [i.e. [redacted]] *or, as the case may be, from the Primary Distributor on behalf of the Representative available free of charge to interested investors*..."

Section 3.2 – "*Distribution Support: The Representative and the Primary Distributor must support the Distributor in its activities and must always make the latest versions of the relevant fund documents - e.g. prospectuses, articles or management regulations, KIIDS, annual and semi-annual reports - and information available in electronic form via designated* [redacted] *websites and/or Fund info…"*

161. The Commissioner considers the following clauses in the direct distribution agreement between the Appellant and [redacted] to be of particular relevance:

"*Purchases of the Units shall be made at net asset value in accordance with the current prospectus and management regulations (the "Prospectus") and on the basis of the Key Investor Information Document ("KIID") (where applicable) and any other country specific documentation of the Funds from time to time in issue . No sales charge shall be levied in respect of such purchases*."

"*We shall pay or procure payment to you of a trailing fee for holdings of the Units as set out in Appendix B and in accordance with the terms and conditions established by the Funds and* [redacted] *from time to time…*"

"*Transactions in respect of the Units shall be made in accordance with the relevant Prospectus and on the basis of the KIID (where applicable) and any other country specific documentation valid at the time of the transaction and we draw your attention to the conditions for qualification as an investor set out in the Prospectus*."

"*Further, you represent and warrant that you shall not offer or permit to be offered any Units, or enter any order for the purchase of the Units in any jurisdiction in which such offer or purchase is not permitted by the laws or regulations thereof…*"

162. In his evidence, [redacted] stated that "*the actual purchase of the units is something that needs to be conducted by* [redacted] *with the registrar and transfer agent and management agent of the funds and that is not regulated by this agreement.*"

163. In considering the above provisions of the sub-sub-distribution agreements, the Commissioner considers that, while there are differences between them, they share the common feature that they were entered into by the Appellant for the purposes of distribution of units in the funds. While there were differences between the sub-sub-distributors, in that some were [redacted] group entities ([redacted]), some were external sub-sub-distributors [redacted]) and the agreement with [redacted] involved direct distribution by the Appellant, the Commissioner is satisfied that general principles can be gleaned from them that assist in determining the nature of the services provided by the Appellant to [redacted]

164. Given the wording of the Sub-Distribution Agreement between the Appellant and [redacted] as discussed previously, the Commissioner considers that these sub-sub-distribution agreements were entered into for the purpose of procuring investors in the funds, whether directly ([redacted] or via further sub-distributors or intermediaries. While the sub-sub-agreements set out the obligations of the Appellant to the sub-sub-distributors, primarily the provision of prospectus and other sales documentation, the Commissioner does not consider that these agreements act to limit the obligations of the Appellant to [redacted] under the Sub-Distribution Agreement. It seems to him that the better understanding of the sub-sub-distribution agreements is that they were entered into to facilitate the Appellant's obligations to [redacted]

165. Additionally, the Commissioner notes that the sub-sub-distributors were paid a commission/trail fee based on sales of units/shares in the funds. In this way, the

Commissioner considers that [redacted] was incentivising the sub-sub-distributors to procure investment in the funds.

166. The Commissioner's understanding of those agreements is supported by the account provided on behalf of the Appellant to the Respondent in the [redacted] correspondence. In particular, the Commissioner notes the following extracts from that correspondence:

> "*In order to enable [redacted] to fulfil its distribution functions across various jurisdictions, it will enter into further sub-distribution agreements with local third parties, such as banks, with a view to those third party distributors distributing the Funds via their own distribution networks. By entering into the relationships with the third party local distributors, [redacted] is able to leverage the local distributor's client base and network."*
>
> *"Based on the above, the "sub-distribution" services, should in our view, be considered as an integral part of the distribution chain, which is reflected by the fact that the service providers are remunerated on a success basis. This is based on the fact that "sub-distribution" services do go beyond the mere clerical services as referred to above.*"
>
> "*This function (of getting investors to invest their money into funds) is defined in this context as "distribution" and includes the offering, selling and marketing shares or units in a fund. This would include the sourcing of a distribution channel, i.e., entering into relationships with local third party distributors, such as banks or IFAs in order to encourage those third party distributors or IFAs to get their clients to invest in funds.*
>
> *For [redacted] as "Global Sub-Distributor" is responsible for the above. However, to enable it to perform this function, it has mandated a large portion of this activity in local markets to local functionaries (such as [redacted] and [redacted]*
>
> *"As part of this role, [redacted] and [redacted] look after all branding, all events, promotion and "end client promotion", but, to be clear, their role is not confined to such services. Rather, such activities are undertaken with a view to ultimately "partnering" with local TPDs/IFAs to develop products to be sold to prospective investors. The commercial terms are agreed by [redacted] and [redacted] (within parameters and up to specified limits), whereby the role of [redacted] to formalise the commercial terms in distribution contracts, administer the distributor intake process and retain general responsibility/oversight.*"
>
> "*The Management Company and primary distributor of the [redacted] domiciled [redacted] Funds, [redacted] has delegated the role of sourcing investors to purchase units/shares in these funds across a number of jurisdictions to [redacted]*

in turns performs this function through a combination of direct marketing and distribution using its own employees / branches and representative offices in a number of jurisdictions and, in other jurisdictions for legal or regulatory reasons and operational reasons in the case of [redacted], it has appointed the [redacted] Local Entities to source banks and other financial intermediaries that will sell [redacted] funds to its client base (on both an advisory and discretionary basis)."

"*Firstly, the activities of the [redacted] Local Entities go far beyond the mere marketing of products, or clerical activities in relation to the distribution agreements. The [redacted] Local Entities have authority (within prescribed parameters) to negotiate, as an agent of [redacted] the commercial terms of the distribution agreements with TPD's.*"

"*To answer the above question, we must first begin with the simple and indisputable fact that were it not for the services performed by the [redacted] Local Entities, [redacted] would not be in a position to facilitate the issuance of units/shares by the [redacted] Funds to customers in their respective local markets.*"

"*In summary therefore, the above factors combined lead one to the conclusion that the primary purpose of the commercial agreements between [redacted] and the [redacted] Local Entities must be to facilitate the sourcing of investors and issuing of units/shares to these investors (whether directly, or indirectly via agreements with local TPD's)*."

167. However, this description of the services provided to the Appellant, and, by extension under the Sub-Distribution Agreement, by the Appellant, was disputed by [redacted] in his oral evidence. He contended that [redacted] role was to find sub-sub-distributors, and had no role in selling units in funds. He did not agree that without the activities of [redacted] no issuance of units could occur, because [redacted] could enter into other distribution arrangements. Once the marketing material was provided to the sub-sub-distributor, [redacted] role in the process essentially ceased.

168. In this regard, he submitted a document titled "*Fund life cycle – timeline between establishment of a fund and issuance of fund units/shares*" which set out twelve 'days' (but which he stated were better considered as steps, as each 'day' could in reality take considerably longer). This document stated that "*the majority of [redacted] service*" ended after day 6, with the provision of relevant marketing materials that were frequently sourced from [redacted] He stated that the document was prepared by the "[redacted] *tax team*".

169. The Commissioner accepts that, on a day-to-day basis, the Appellant may well have had little *de facto* engagement with the end stages of the distribution process carried out by sub-sub-distributors and other brokers/intermediaries. However, the Commissioner

considers that [redacted] did not adequately address the ongoing responsibilities that [redacted] had to [redacted] under the Sub-Distribution Agreement. The Commissioner finds the contention set out in the Fund Life Cycle document, that [redacted] involvement ended after day six, very difficult to square with the provision of the Sub-Distribution Agreement that [redacted] could enter into sub-sub-distribution agreements but "*provided always and on the basis that the obligations and liabilities of the Sub-Distributor hereunder to the Distributor shall not in any way thereby be diminished.*"

170. Furthermore, the Commissioner has had regard to the submissions and arguments made by or on behalf of the Appellant during the course of this appeal. While these do not constitute evidence *per se*, the Commissioner considers that they may be of assistance in helping to understand the role of the Appellant. In its Statement of Case dated 17 July 2020, the Appellant stated that "[redacted] *was engaged in the provision of fund distribution services in respect of regulated non-Irish UCITS funds, primarily domiciled in* [redacted]

171. In its original Outline of Arguments dated 15 June 2021, the Appellant stated that "[redacted] *provided sub-distribution services to* [redacted] *in respect of* [redacted] *funds* [redacted] *manages. The services fell into two categories.* [redacted] *was to procure investors to subscribe for units (or shares) which are under the management of* [redacted] [redacted] *was also to procure marketing, promotional or related services in relation to the funds as may be requested by* [redacted] *and to provide due diligence and "know your client" review services of any third party placement or distribution agents appointed or to be appointed in respect of any offerings by* [redacted] *or* [redacted] (emphasis added)

172. In the Appellant's Statement of Facts dated 9 December 2021 (which was not agreed with the Respondent), it stated that "3. [redacted] *provided (sub)distribution services to* [redacted] *in respect of* [redacted] *funds* [redacted] *manages under an agreement dated 14 November 2011. The services fell into two categories:*

    a. [redacted] *procured investors to subscribe for units (or shares) in funds which are under the management of* [redacted]

    b. [redacted] *also procured marketing, promotional or related services in relation to the funds as may be requested by* [redacted] *and provided due diligence and "know your client" review services of any third party placement or distribution agents appointed or to be appointed in respect of any offerings by* [redacted] *or* [redacted]

    4. *The services were carried out by* [redacted] *for the purpose and result of procuring investors for units in* [redacted] *UCITS funds*." (emphasis added)

173. In its consolidated Outline of Arguments dated 9 December 2022, the Appellant stated that "[redacted] *was to procure investors to subscribe for units (or shares) in the funds…The services were provided for the purpose and result of procuring investors for new units in* [redacted] *UCITS funds. Indeed, the overriding responsibility of* [redacted] *was to procure persons to subscribe in units in the funds; the raison d'etre of the services was the raising of capital for investment in the funds."* (emphasis added)

174. Finally, in its unagreed Statement of Facts, also of 9 December 2022, the Appellant reiterated that "[redacted] *procured investors to subscribe for units (or shares) in funds which were under the management of* [redacted] *…The services were carried out by* [redacted] *for the purpose and result of procuring investors for units in* [redacted] *UCITS funds.*"

175. The Commissioner considers that these descriptions of [redacted] activities in its submissions are aligned with his interpretation of the contractual relationships between [redacted] and [redacted] and [redacted] and the sub-sub-distributors, as well as the account provided by the Appellant's previous advisers to the Respondent in the [redacted] correspondence. Consequently, he finds surprising the subsequent attempt by the Appellant at the hearing herein, via the evidence of [redacted], to minimise its role to essentially one of identifying, procuring and onboarding sub-sub-distributors, and he considers that no meaningful explanation was provided by it for this apparent change in its account of its role and activities.

176. Furthermore, while [redacted] was careful to delineate the Appellant's role as described above, the Commissioner notes that he made numerous references to [redacted] role in the sale or selling of units. Many of these are set out in the account of his evidence above, and it is not intended to repeat all of them again; however, the Commissioner considers it sufficient to briefly refer to the following: the reference to sales staff in the Appellant's branches, as well as sales staff in [redacted] *simpliciter*, who *inter alia* assisted the distributors in identifying the correct share classes for them to distribute; that some funds were "*more saleable*" than others; that [redacted] was also "*selling*" hedge funds; and that [redacted] prepared sales guidelines for salespeople in all locations to follow. The Commissioner considers that these references are further indication that the Appellant was engaged in the substantive activity of procuring investment, and was not limited to carrying out administrative activities on behalf of [redacted]

177. In conclusion, therefore, having had regard to all of the evidence and submissions before him, as set out above, the Commissioner finds that the Appellant's services to [redacted] involved the procurement of investors in units in the funds, and were not limited to identifying and procuring sub-sub-distributors. In coming to this view, he has had

particular regard to the terms of the Sub-Distribution Agreement between the Appellant and [redacted] as well as the agreements between the Appellant and the sub-sub-distributors. Insofar as the Appellant sought to minimise aspects of those agreements, including references to the sale/offer of shares in the funds, the Commissioner found its evidence unconvincing. In this regard, he has particular regard to the evidence of [redacted] that [redacted] has around [redacted] people in its internal legal team at its disposal, and the Commissioner does not consider it credible that such a large and well-resourced legal department would be unaware of, or disregard, provisions of such critical importance in the contractual agreements governing its activities that gave such an allegedly misleading or inaccurate account of its true role.

178. The Commissioner also finds more convincing the account of the Appellant's services set out in the written submissions provided to the Commission during the course of this appeal, compared to the "Fund Life Cycle" document handed in at the hearing, as the former accords with the various contractual agreements as well as the description previously provided in the [redacted] correspondence. Insofar as [redacted] sought to minimise the Appellant's role to being one of principally procuring sub-sub-distributors, with no meaningful ongoing responsibilities to [redacted] to oversee distribution to investors, the Commissioner found such evidence unconvincing and rejects it. However, the Commissioner accepts the evidence of [redacted] that the Appellant was engaged in the issuance of new shares, and that there was no secondary market in units/shares in the funds. He also accepts that units were issued by or at the transfer agent/registrar, and that the price of a unit was arrived at by a mathematical formula (total AUM/number of units) so that there was no element of negotiation of the price with the investor.

179. Finally, the Commissioner considers the form of remuneration by [redacted] to [redacted] (a fee based on the assets under management) and the payment by [redacted] to the sub-sub-distributors (commission/trail fees) to further reveal the nature of the relationship between [redacted] and [redacted] He considers that [redacted] was incentivised by [redacted] to ensure the success of the funds, and it in turn sought to incentivise the sub-sub-distributors to procure investors. This fee structure is consistent with a business model where [redacted] role was to procure investors to buy units in the funds. Ultimately, the Commissioner considers that the relationship between [redacted] and the sub-sub-distributors can be considered as a chain of distribution. [redacted] role in that chain was essential, and the Commissioner is satisfied that investment in the funds would not have been possible without it. While [redacted] argued that [redacted] could have utilised alternative distribution channels (and of course it could have chosen to use a different means of distribution), the Commissioner is concerned with what actually took place in the contractual

arrangements under consideration in this appeal. In all the circumstances, therefore, the Commissioner is satisfied on the evidence that the Appellant's principal service to [redacted] was to procure investors to buy units in the funds through the means of selling units/shares in the funds.

Are the Appellant's services exempt under the Principal VAT Directive?

180. Having determined the nature of the services provided by the Appellant, it is now necessary to consider whether they constitute exempt services for the purposes of VAT. The Commissioner considers the appropriate way to proceed is to consider whether the services fall within the exemptions set out in Article 135 of the Principal VAT Directive, before proceeding to consider the domestic provisions under the VATCA 2010.

181. The parties agreed that the Appellant's services did not come within the scope of Article 135(g), and the implications of this will be considered further under the discussion of the relevant Irish provision. Therefore, the relevant exemption is Article 135(f), which provides that

> "*Member States shall exempt the following transactions… transactions, including negotiation but not management or safekeeping, in shares, interests in companies or associations, debentures and other securities, but excluding documents establishing title to goods, and the rights or securities referred to in Article 15(2)*".

182. Some of the CJEU's case law references the predecessor to Article 135(f), being Article 13B(d)(5) of the Sixth VAT Directive, which is set out in paragraph 17 above. The Commissioner is satisfied, for the purposes of this Determination, that there is no substantive difference between the two provisions and accordingly that the jurisprudence of the CJEU considering Article 13B(d)(5) also applies to Article 135(f).

183. The starting point for consideration is that the exemption under Article 135(f) is to be interpreted strictly, as it constitutes an exception to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person; *Blasi*. However, this does not mean that the terms used to specify the exemption should be construed in such a way as to deprive the exemption of its intended effect. This is because the interpretation of the terms must be consistent with the objective pursued by the exemption provided for in Article 135(f) and comply with the requirements of the principle of fiscal neutrality; *DTZ.*

184. In the *SDC* case, most of the services provided by SDC involved no legal relationship between it and the end recipient. The CJEU confirmed that the exemption in (*inter alia*) Article 13B(d)(5) was not subject to the condition that the service be provided by an institution which has a legal relationship with the end customer. However, the mere fact

that a constituent element is essential for completing an exempt transaction does not warrant the conclusion that the service which that element represents is exempt. In order to be characterised as exempt, the service must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service described in the exemption. An exempt service must be distinguished from a mere physical or technical supply. Services consisting in making financial information available to banks and other users are not exempt under Article 13B(d)(5). Transactions in shares and other securities under Article 13B(d)(5) include operations carried out by a data-handling centre if they are separate in character and are specific to, and essential for, the exempt transactions.

185. In *CPP*, the CJEU held that a supply which constitutes a single service from an economic point of view should not be artificially split, so as to distort the functioning of the VAT system. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied. The Commissioner notes that the CJEU reiterated this point in the *Blackrock* case in 2019.

186. The parties agreed that the two most relevant cases were *CSC* and *Ludwig*. The Appellant contended that the cases should be distinguished and that it should be equated to *CSC* rather than *Ludwig*. The Respondent disagreed with the Appellant's proposed approach and stated that under both cases the Appellant's services were exempt.

187. In *CSC*, the applicant provided a call centre service on behalf of a financial institution which handled all the contacts with the general public in relation to the sale of certain financial products, from initial inquiry up to but excluding execution. CSC provided potential investors with all the information they required together with the relevant investment forms. It also processed application forms submitted by prospective investors; however the formalities for issuing the securities were carried out by a separate company. CSC was paid a fee made up of a fixed sum and amount reflecting the number of calls and sales.

188. The CJEU stated that, in order to be exempt, the services provided must have the effect of transferring funds and entail changes of a legal and financial character. The supply of a mere physical, technical or administrative service, which did not alter the legal or financial situation, would not be covered by the exemption under Article 13B(d)(5). This view was supported by the fact that management and safekeeping of shares, transactions

which do not involve alteration of the legal or financial position of the parties, were expressly excluded by Article 13B(d)(5). The words “transactions in securities” referred to transactions liable to create, alter or extinguish parties’ rights and obligations in respect of securities.

189. The reference to “negotiation” in Article 13B(d)(5) referred to the activity of an intermediary who did not occupy the position of any party to the contract, and whose activity amounted to something other than the provision of contractual services typically undertaken by the parties to the contract. Negotiation was a service rendered to, and remunerated by a contractual party as a distinct act of mediation. It could consist of, *inter alia*, pointing out suitable opportunities for the conclusion of a contract, making contact with another party or negotiating, in the name of and on behalf of a client, the detail of the payments to be made. The purpose of negotiation was to do all that was necessary in order for two parties to enter into a contract, without the negotiator having any interest of his own in the terms of the contract. However, it was not negotiation where one of the parties entrusted to a sub-contractor some of the clerical formalities related to the contract, such as providing information and processing applications for subscription. In such a case, the sub-contractor occupied the same position as the party selling the financial product and was not therefore an intermediary who does not occupy the position of one of the parties to the contract.

190. In *Ludwig,* the applicant was a self-employed financial adviser, working on behalf of a financial company. He met potential clients and was paid commission by the company for completed contracts. The court held that the fact that his services were remunerated only when a contract was completed suggested that negotiation was the principal service, and the giving of advice merely ancillary. The activity of negotiation was not, in principle, precluded from being broken down into separate services which could then benefit from the exemption. It followed from the principle of fiscal neutrality that operators must be able to choose the form of organisation which, from a strictly commercial point of view, best suited them, without running the risk of having their operations excluded from the exemption. However, the service provided must, viewed broadly, form a distinct whole, fulfilling in effect the specific and essential functions of the service of negotiation. Furthermore, the fact that the terms of the credit agreement had been fixed in advance by one of the parties to the contract could not preclude the supply of a negotiation service.

191. The Commissioner has found that the principal service provided by the Appellant was the procurement of investment in the funds through the means of selling units/shares to investors. He is satisfied that this activity formed a distinct whole, fulfilling the specific,

essential functions of the service of transacting, including negotiating, in shares/other securities (*SDC*). This is because, notwithstanding the appointment by [redacted] of sub-sub-distributors, [redacted] remained responsible to [redacted] for the distribution of the units in the funds. The Commissioner considers that the supply of distribution services on behalf of [redacted] via the distribution chain of [redacted] and the sub-sub-distributors etc. constituted a single service from an economic point of view, and that it would be artificial to split it in the manner submitted by the Appellant (*CPP*). While there are, at first glance, similarities between the Appellant and CSC, in that both were involved in the supply of financial information etc. to potential investors, the Commissioner considers that, unlike CSC, [redacted] was not engaged in the supply of a mere physical, technical or administrative service, but that its service of seeking to procure investors to purchase units/shares was liable to create, alter or extinguish the relevant parties' rights and obligations in respect of the relevant securities. The Commissioner considers that this was the case, notwithstanding that the units were in fact issued by the transfer agent/registrar. The Commissioner considers that [redacted] evidence, that the Appellant would sometimes pitch to [redacted] to register funds in a particular jurisdiction, was a further indication that it engaged in services that went beyond a mere administrative or technical service. Rather, the Appellant was directly interested and engaged in the success of the funds.

192. Additionally, the Commissioner is satisfied that the Appellant was engaged in "negotiation", as explained in both *CSC* and *Ludwig*. Its activities were remunerated by [redacted] and were based on the overall success of the fund. Similarly, the sub-sub-distributors were remunerated on a success basis. Moreover, [redacted] agreed on cross-examination that the purpose of *inter alia* [redacted] was to "*bring the possibility of investment to the attention of the potential investor*", which the Commissioner considers comes within the scope of the CJEU's judgment in *Ludwig* that negotiation could consist of pointing out suitable opportunities for the conclusion of a contract. While the negotiation with the end investor was carried out by a sub-sub-distributor or some other third party agent or adviser, it was being carried out on behalf of the Appellant, and the Appellant remained responsible to [redacted] for the negotiation carried out on its behalf. The fact that the service of negotiation was broken into separate services involving the Appellant, the sub-sub-distributors and other third parties did not preclude the finding that the activity was exempt from VAT, provided that the service formed a distinct whole, fulfilling the specific and essential functions of the service of negotiation (*Ludwig*). The Commissioner is satisfied that the service provided to [redacted] by [redacted] fulfilled the specific and essential functions of negotiation, and was therefore exempt.

193. Furthermore, the Commissioner finds helpful the *dictum* in *CPP* that there exists a single supply where one or more elements are to be regarded as constituting the principal service, whilst other elements are to regarded as ancillary, and that a service must be regarded as ancillary if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied. The Commissioner considers that the provision of marketing material by the Appellant, such as prospectuses and other documentation, did not constitute an aim in itself for potential investors, but rather was a means of better enjoying the principal service of seeking to procure them to invest. Consequently, the Commissioner is of the view that the provision of such marketing material constituted an ancillary service on the part of the Appellant. In coming to this view, the Commissioner is cognisant that Fennelly J in *MacCarthaigh v Cablelink Ltd* [2003] 4 IR 510 doubted that the *dictum* in *CPP* should be regarded as laying down a principle of general application. However, the Commissioner notes that, subsequent to Fennelly J's judgment, the CJEU reiterated the principle in *Blackrock.* Consequently, the Commissioner considers it appropriate to apply the principle to the facts of this appeal.

194. Finally, the Commissioner also notes that Fennelly J stated in *MacCarthaigh* that "*separate prices may suggest separable supplies*." The Commissioner accepts that separate prices applied between the various stages on the distribution chain involving [redacted] and the sub-sub-distributors. However, for the reasons set out herein, the Commissioner is satisfied that, in this instance, it would be artificial to separate the services in the manner suggested by the Appellant, and that, in so determining, he is applying the principle enunciated by Fennelly J that "*A single economic service should not be artificially divided and ancillary elements should share the tax treatment of the principle service.*"

Are the Appellant's services exempt under the VATCA 2010?

195. While the Commissioner has found that the services provided by the Appellant to [redacted] were in principle exempt from VAT, it is also necessary to consider whether they come within the wording of the exemptions as provided for in Irish law. Schedule 1, Part 2 to the VATCA 2010 provided (at the relevant time) *inter alia* that the following activities were exempt:

> "*(6) (1) Financial services that consist of any of the following:*
>
> *(a) issuing, transferring or otherwise dealing in stocks, shares, debentures and other securities (other than new stocks, new shares, new debentures or new securities for raising capital and documents establishing title to goods);*

(b) arranging for, or underwriting, an issue of stocks, shares, debentures and other securities (other than documents establishing title to goods);

[…]

(2) Financial services that consist of managing an undertaking of a kind specified in this subparagraph…"

The full list of services specified in subparagraph 6(2) have been set out in paragraph 21 above of this Determination.

196. The concept of "negotiation" was incorporated into the Irish legislation by way of the agency provisions of paragraph 7 of Schedule 1, Part 2:

"*(1) The supply of agency services relating to the financial services specified in subparagraph (1) of paragraph 6, excluding management and safekeeping services in regard to the services specified in clause (a) of that subparagraph.*

(2) The supply of agency services relating to the financial services specified in paragraph 6(2)."

197. The principles of statutory interpretation of taxation statutes have been set out by the Supreme Court in *Dunnes Stores v Revenue Commissioners* [2019] IESC 50 and *Bookfinders Ltd v Revenue Commissioners* [2020] IESC 60, and were subsequently summarised by the High Court (McDonald J) in *Perrigo Pharma International Activity Company v McNamara* [2020] IEHC 552 as follows:

"The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd v. The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:

(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;

(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";

(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;

(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.

(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;

(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:

> *"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible".*

198. Bearing those principles in mind, and turning first to the exemptions set out in Paragraph 6(2) of Schedule 1, Part 2 of the VATCA 2010, the parties agreed that the Appellant did not come within the scope of any of the specified services set out therein. The Appellant

had argued in earlier written submissions that this constituted a specific exemption, and that the maxim *generalia specialibus non derogant* should apply to take precedence over the "general exemption" provided for in paragraph 6(1). This argument was not pursued at the hearing, but insofar as the Appellant continues to rely on it (if at all), the Commissioner notes the findings of O'Donnell CJ at paragraph 71 of *Bookfinders* (quoted above at paragraph 32 of this Determination) and is satisfied that the exemptions in paragraph 6(2) do not override those in paragraph 6(1) in the manner contended by the Appellant, but rather that it is necessary to also consider whether the exemptions set out in paragraph 6(1) apply to the Appellant.

199. A more substantive argument made by the Appellant was that the meaning of "management" of a fund should be given that set out in Annex II of Directive No. 85/611/EEC, which included investment management, administration and marketing. It submitted that the Appellant was engaged in marketing, and therefore was expressly excluded from coming within the terms of paragraph 7 of Schedule 1, Part 2.

200. However, the Commissioner considers it necessary to consider paragraph 6(4), which provided that:

> "*In relation to an undertaking specified in subparagraph (2), management of the undertaking can consist of any one or more of the 3 functions listed in Annex II of Directive No. 85/611/EEC of the European Parliament and Council (being the functions included in the activity of collective portfolio management) where the relevant function is carried out by the person who has responsibility for supplied that function in respect of the undertaking.*" (emphasis added)

201. Therefore, it can be seen that "management" as set out in Annex II only applies to those undertakings specified in paragraph 6(2). The Commissioner considers that if the Oireachtas intended that the definition of management from Annex II should also apply to paragraphs 6(1) and 7(1), it would have provided accordingly. However, the Oireachtas decided to restrict that definition to those services specified in paragraph 6(2). The Commissioner does not consider that paragraph 18 of the CJEU's judgment in *CPP* is helpful to the Appellant in this instance. That was concerned with the interpretation of "insurance", which is a specific economic activity. "Management", on the other hand, is a much broader term, the meaning of which depends to a considerable extent on the context in which it is used.

202. Consequently, the Commissioner considers, in considering the exclusion of "management services" under paragraph 7(1), "management" should be given its ordinary, natural meaning, which in the context of funds might include asset management

and associated clerical activities. He considers that helpful guidance is provided by the *CSC* judgment, wherein the CJEU stated that the management and safekeeping of shares were transactions "*which, significantly, do not involve alteration of the legal or financial positions of the parties*." The Commissioner has already found that [redacted] activities, via the chain of distribution and the process of negotiation, did involve the alteration of the legal or financial position of the parties, and therefore it would appear that such activities do not constitute "management" for the purposes of paragraph 7(1).

203. In passing, the Commissioner notes that, under Annex II of Directive No. 85/611/EEC, "Administration" is stated to include "unit issues and redemptions". The Commissioner understood the Appellant's case to be that, as the transfer agent/registrar issued the units in the fund, it was the entity affecting the legal and financial positions of the parties and therefore the entity whose services should be exempt from VAT. However, Annex II provides that such activity constitutes fund administration, and would therefore appear, if the Appellant's arguments are correct, to be excluded from the scope of paragraph 7(1).

204. Therefore, the Commissioner is satisfied that paragraphs 6(2) and 7(2) of Schedule 1, Part 2 of the VATCA 2010 do not apply to the Appellant, but that this does not necessarily mean that paragraphs 6(1) and 7(1) cannot apply. Consequently, it is now necessary to consider those paragraphs.

205. The potentially relevant sub-paragraphs of paragraph 6(1) are (a) and (b). The Commissioner considers that it appears, *prima facie*, that the Appellant's services are excluded from sub-paragraph (a), on the basis that it is stated to apply other than to "*new stocks, new shares, new debentures or new securities for raising capital…*", and he has accepted the Appellant's evidence that it was only involved in the issuance of new units. Therefore, the Commissioner considers it appropriate to consider sub-paragraph (b) in the first instance. In doing so, he is not making any determination on the submission of the Respondent that the effect of the CJEU's judgment in *Kretztechnik* is to render the issuance of new securities outside the scope of VAT.

206. Sub-paragraph (b) exempts the "*arranging for, or underwriting, an issue of stocks, shares, debentures and other securities (other than documents establishing title to goods)*". The Commissioner is satisfied that the Appellant was not engaged in underwriting, and further that documents establishing title to goods are not relevant. Therefore, what must be considered is whether the Appellant was "*arranging for…an issue of stocks, shares, debentures and other securities*".

207. In [redacted] evidence, he stated that he understood the term "arranging for" had a specific meaning within capital markets: "*So where a company is seeking to issue debt*

or issue shares it will arrange the services of an arranger, typically an investment bank whose job is to arrange everything to do with that issuances including determining market appetite, determining the right price and actually arranging for the shares to be issued or the debt or the bond to be issued." He handed in a document he had found on the Lexis website which stated that the "*arranger has a pivotal role in the issuance of the debt into the market and will be expected to take the lead on every aspect of the transaction*."

208. In oral submissions, counsel for the Appellant brought the Commissioner's attention to Revenue Guidance from 1990, which stated that the Finance Act 1997 introduced the exemption applicable to "the arranging for, or the underwriting of" a share issue in order to extend the scope of the exemption to flotation and placement services. In response, counsel for the Respondent stated that the guidance referred to by the Appellant no longer applied, and that in any event it could not be the case that the interpretation of a taxing statute depended on what the Respondent had said it meant. The term "arranging for" did not have a specific meaning and the ordinary meaning of the word should be applied.

209. In ascertaining the correct approach to interpretation of the words "arranging for", the Commissioner considers it to be of critical importance that paragraph 6(1)(b) applies to "*an issue of stocks, shares, debentures and other securities*" (emphasis added). The application is not limited to an initial public offering of shares or to the issuance of debt on the capital markets. While the parties used the words "units" and "shares" interchangeably during the course of the hearing, regarding the securities ultimately issued by the transfer agent/registrar (and these terms have accordingly been used interchangeably heretofore in this Determination), the Commissioner considers it more accurate, in the context of paragraph 6(1)(b), to categorise them as "other securities", as it seems to him that "stocks" and "shares" should be understood as equities arising out of IPOs or other similar events.

210. Therefore, the Commissioner considers that as paragraph 6(1)(b) is not limited to share flotations or debt issuances, the words "arranging for" should not be interpreted as a term of art specific to those activities, but rather should be given its ordinary, plain meaning. In coming to this view, the Commissioner considers that "arranging for" does not have a particular meaning in a particular trade, business or transaction, as described by Lord Esher M.R. in *Unwin v Hanson* [1891] QB 115, as quoted by Henchy J in *Inspector of Taxes v Kiernan* [1981] IR 117 (and included in the quotation from *Dunnes Stores v Revenue Commissioners* [2019] IESC 50 at paragraph 31 of this Determination).

211. Having come to this view, the Commissioner is of the view that the services of the Appellant were "arranging for" an issue of other securities. The purpose of the services was to procure investors to invest in units in the funds, and the activities of the Appellant were directed to that goal. Units in the funds only issued on the subscription of investors, and without such subscription no issuance would occur. Consequently, the Commissioner is satisfied that the Appellant was (via negotiation) arranging for the issue of units in the funds. In so finding, the Commissioner is satisfied that phrase "arranging for" is not ambiguous, and that therefore the rule against doubtful penalisation (insofar as that might be relevant in the rather unusual situation herein where a taxpayer is seeking to extricate itself from an exemption) is not applicable.

212. In oral submissions, counsel for the Appellant argued that the Appellant was too remote from the transactions and did not know whether any particular potential investor would subscribe for units or not. Therefore, as exemptions had to be construed strictly, the Appellant's services were too remote to be captured by it. However, the Commissioner considers it significant that the exemption pertains to "arranging for" an issuance of securities, rather than "arranging" *simpliciter*. This suggests that the exemption includes activities that are directed towards, and with the intention of, an ultimate issuance of securities, rather than limited to those directly involving the issuance itself. The Commissioner is satisfied that the Appellant's services were directed towards, and with the intention of, the issuance of new units in the funds.

213. Therefore, the Commissioner finds that the Appellant's services to [redacted] come within the exemption set out in paragraph 6(1)(b). Insofar as its services under this exemption come under the activity of "negotiation" as interpreted by the CJEU, paragraph 7(1) applies, and as set out above, the Commissioner is satisfied that the exclusion for "management services" in paragraph 7(1) is not applicable. Consequently, the Commissioner determines that the services supplied by the Appellant to [redacted] were exempt from VAT. Given this determination, it is not necessary to consider the potential applicability of paragraph 6(1)(a).

214. Before concluding, it is necessary to briefly address some additional arguments made by the Appellant. Although not included in its written submissions, it was contended in oral submissions at the hearing that section 46(3) of the VATCA 2010 operated to exclude the Appellant from the exemptions set out in paragraph 6(1) of Schedule 1, Part 2, on the basis that it was not in dispute that it was excluded from those set out in paragraph 6(2).

215. The Commissioner is satisfied that this is an incorrect interpretation of section 46(3). Section 46 concerns rates of tax and section 46(1) applies "*in relation to the supply of*

taxable goods and services". The Commissioner considers that subsection (3) therefore also applies to rates of tax in respect of taxable goods and services, and therefore has no applicability where, as he has found in this appeal, the supply is not taxable. Furthermore, he agrees with the Respondent that the Appellant's contended interpretation does not correspond to the wording of Article 135 of the Principal VAT Directive, which requires Member States to exempt all of the transactions listed therein.

216. Finally, in written submissions, the Appellant noted that paragraphs 6(1)(a) and 6(2) of Schedule 1, Part 2 to the VATCA 2010 were to be amended (and have subsequently been so amended) with the result that the Appellant's services have now definitely been brought within scope, and the Appellant argued that this supported its view that its activities were not captured by the provisions at the relevant time. However, the Commissioner is satisfied that the amendments cannot be used as a guide to the construction of the prior statutory provision; see paragraph 85 of *Bookfinders*.

217. In conclusion, the Commissioner is satisfied that the services provided by the Appellant to [redacted] come within the exemption set out in paragraph 6(1)(b) and 7(1) of Schedule 1, Part 2 to the VATCA 2010 and are therefore exempt from VAT.

Determination

218. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the services provided by the Appellant constituted exempt services under Schedule 1, Part 2 to the VATCA 2010. Therefore, the Respondent was correct to refuse the Appellant's claim for repayment of VAT in the total amount of €2,166,230, and its decision stands.

219. The appeal is hereby determined in accordance with section 949AL of the Taxes Consolidation Act 1997 as amended ("TCA 1997"). This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.

Simon Noone
Appeal Commissioner
22nd June 2023

APPENDIX

AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

[redacted]

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Decision on Preliminary Objections to acceptance of appeal

Introduction

1. This Decision addresses the preliminary objections of the Revenue Commissioners ("the Respondent") to the Tax Appeals Commission ("the Commission") admitting the appeal brought by [redacted] ("the Appellant", also "[redacted] in respect of the Respondent's refusal of the Appellant's Value Added Tax ("VAT") repayment claim in the amount of €1,437,618 for [redacted]

2. The Respondent's objections are that (1) the appeal was made late and should not be admitted pursuant to section 949O of the Taxes Consolidation Act 1997, as amended ("the TCA 1997"), and (2) [redacted] no longer existed when the appeal was made and therefore could not file a valid appeal.

3. A hearing in respect of the preliminary objections only was held on 19 and 20 July 2022.

Background

4. On 7 April 2020 the Appellant, in the name of [redacted] appealed the Respondent's refusal of its VAT repayment claim to the Commission. The Notice of Late Appeal ("the NOLA") stated *inter alia* that

"The original submission was made by [redacted] in April 2018, and a denial of the claim was issued by [the Respondent] in Feb 2019. However, due to a mis-communication between [redacted] and [the Respondent], (further details set out in the letter attached), it was [redacted] understanding that this was not a formal denial of the refund submissions which required appeal. As such, no appeal was made within the 30-day appeal window.

Following recent discussions with [the Respondent], it has been agreed that the most appropriate course of action in this case of misunderstanding is the submission of an appeal under the late appeals provisions of Section 949O TCA 1997. As such, this appeal is made with the support of [the Respondent]."

5. On 8 April 2020 the Commission notified the Respondent of the appeal and stated "*Please note, any notice of objection, including the reason as to why this appeal should not be accepted by the [Commission], must be submitted to this office, no later than 30 days from the date of this correspondence.*" There was no objection raised by the Respondent to the acceptance of the Appellant's late appeal in response to this notification.

6. The Appellant, again in the name of [redacted] submitted a Statement of Case on 17 July 2020. The Respondent submitted a Statement of Case on 4 August 2020. Again, there was no objection raised at this time to the Commission accepting the Appellant's appeal.

7. On 15 June 2021, the Appellant submitted its Outline of Arguments ("OOA"). On the OOA, the Appellant's name was now stated to be "[redacted]." There was no explanation provided for the change in the Appellant's name.

8. On 6 September 2021, the Respondent submitted what it termed "Preliminary Outline of Arguments". In a cover letter of the same date, the Respondent stated that "*In the process of preparing an Outline of Arguments on behalf of the Respondents, Counsel identified two issues which relate to the jurisdiction of [the Commission] to deal with this Appeal, including an issue relating to the legal capacity of the Appellant."* The Respondent also suggested that a preliminary hearing to consider its objections might be in the interests of all parties.

9. On 26 October 2021, the Appellant submitted a response to the Appellant's preliminary objections. In the course of its response it submitted that any hearing in respect of the Respondent's objections should take place at the same time as the substantive hearing of the appeal.

10. On 8 December 2021, the Respondent submitted its OOA in respect of the substantive appeal.

11. On 25 April 2022, the Commission notified the parties that the hearing of the appeal would take place on 19 and 20 July 2022. On 20 May 2022, the Respondent requested that its preliminary objections only be dealt with on those dates.

12. On 30 May 2022, the Appellant again objected to the hearing of the preliminary objections prior to the substantive appeal. It also drew attention to a later appeal submitted by it (appeal reference no. [redacted]) which it stated concerned "*precisely the same grounds, and precisely the same facts*" as the appeal herein. It stated that consequently, even if the Respondent's objections in this appeal were upheld, the substantive matter would have to be addressed in the later appeal, and therefore a preliminary hearing would not expedite matters or save resources. It requested the Commission to consolidate the two appeals together.

13. On 1 June 2022, the Commission notified the parties *inter alia* that:

> *"The Appeal Commissioner has considered the parties' submissions on the Respondent's preliminary objections to the [Commission] hearing this case. While the Appeal Commissioner considers it unfortunate that these objections were not raised at an earlier stage, nevertheless he is satisfied that it is necessary to consider whether the [Commission] has jurisdiction to hear the case before any substantive hearing.*
>
> *The Appeal Commissioner considers that it would be a more efficient use of resources to hear the preliminary objections prior to any substantive hearing. Therefore, the Appeal Commissioner directs that the hearing on 19 and 20 July 2022 will only deal with the Respondent's preliminary objections to the [Commission's] jurisdiction to hear this case."*

14. On 9 June 2022, the Appellant submitted its Statement of Case in the later appeal [redacted] and requested that that appeal be heard on 19 and 20 July 2022, instead of the preliminary objections in appeal no. [redacted] (i.e. the instant appeal). It stated *inter alia* that

> *"You will appreciate that our entitlement to VAT refunds has been the subject of considerable delay, and the suggestion we propose makes eminent sense from the perspective of everyone involved, including [the Commission]. Should we not be successful on the VAT issue in appeal* [redacted]*, then the preliminary issue in appeal* [redacted] *will never need to be heard. But there is no doubt that whatever the result of the preliminary issue (if it is heard first) the VAT issue will be determined under appeal* [redacted] *and that cannot be avoided."*

15. On 23 June 2022, the Respondent objected to the Appellant's proposal that the substantive appeal in [redacted] be heard on 19 and 20 July 2022 instead of its preliminary objections in [redacted], on the grounds *inter alia* that two days would not be sufficient to fully hear that matter.

16. On 27 June 2022, the Commission notified the parties that the Commissioner had considered the submissions on the proposal to hear appeal no. [redacted] instead of the preliminary hearing in [redacted]. It stated that the Commissioner was satisfied that it would be more efficient to proceed, as previously directed, to hear the preliminary issues in [redacted] on 19 and 20 July, and therefore he was not willing to set aside that previous direction.

17. Consequently, the hearing to consider the Respondent's preliminary objections in appeal no. [redacted] was held on 19 and 20 July 2022.

Legislation and Guidelines

18. Section 119() of the Value-Added Tax Consolidation Act 2010 ("the VATCA 2010") provides *inter alia* that:

> *"Any person aggrieved by a determination of the Revenue Commissioners in relation to—*
>
> *[…]*
>
> *(h)a claim for repayment of tax,*
>
> *against which an appeal to the Appeal Commissioners is not otherwise provided for under this Act may appeal the determination to the Appeal Commissioners, in accordance with section 949I of the Taxes Consolidation Act 1997, within the period of 30 days after the date of the notice of that determination."*

19. Section 949H(1) of the TCA 1997 states that:

> *"The Appeal Commissioners shall, subject to the provisions of this Part, endeavour to the best of their ability to manage and conduct proceedings in a way that will meet the reasonable expectations of members of the public (and in particular tax payers) with regard to—*
>
> > *(a)undue formality being avoided, and*
> >
> > *(b)a flexible approach being adopted by the Commissioners in respect of procedural matters."*

20. Section 949I of the TCA 1997 states that

"(1)Any person who wishes to appeal an appealable matter shall do so by giving notice in writing in that behalf to the Appeal Commissioners.

(2)A notice of appeal shall specify—

(a)the name and address of the appellant and, if relevant, of the person acting under the appellant's authority in relation to the appeal,

(b)in the case of an appellant who is an individual, his or her personal public service number (within the meaning of section 262 of the Social Welfare Consolidation Act 2005) or, in the case of any other person, whichever of the numbers in respect of the person specified in paragraphs (b) and (c) of the definition of "tax reference number" in section 885(1) is appropriate,

(c)the appealable matter in respect of which the appeal is being made,

(d)the grounds for the appeal in sufficient detail for the Appeal Commissioners to be able to understand those grounds, and

(e)any other matters that, for the time being, are stipulated by the Appeal Commissioners for the purposes of this subsection.

(3)Where the provisions of the Acts relevant to the appeal concerned require conditions specified in those provisions to be satisfied before an appeal may be made, a notice of appeal shall state whether those conditions have been satisfied.

(4)Where an appeal is a late appeal, the notice of appeal shall state the reason the appellant was prevented from making the appeal within the period specified by the Acts for doing so.

(5)A copy of the notification that was received from the Revenue Commissioners (that is to say, the notification in respect of the matters the subject of the appeal) shall be appended to a notice of appeal.

(6)A party shall not be entitled to rely, during the proceedings, on any ground of appeal that is not specified in the notice of appeal unless the Appeal Commissioners are satisfied that the ground could not reasonably have been stated in the notice."

21. Section 949J of the TCA 1997 states that

"(1)For the purposes of this Part, an appeal shall be a valid appeal if—

(a)it is made in relation to an appealable matter, and

(b)any conditions that are required (by the provisions of the Acts relevant to the appeal concerned) to be satisfied, before an appeal may be made, are satisfied before it is made.

(2)References in this Part to an appeal being accepted by the Appeal Commissioners shall be construed as references to their determining that, for the time being (on the facts and information then available to them)—

(a)the appeal is a valid appeal, and

(b)there are no grounds for their invoking section 949N(1)(c) as a basis for not proceeding as subsequently mentioned in this subsection,

and, accordingly, that they should proceed to deal with the appeal.

(3)However, any such determination of the Appeal Commissioners may be reversed by them as and when facts and information become available to them that, in their opinion, warrant that course of action.

(4)Subsection (3) shall not affect the operation of section 949N(3) (provision with regard to finality of Appeal Commissioners' refusal to accept an appeal)."

22. Section 949K of the TCA 1997 states that

"The Appeal Commissioners shall send a copy of each notice of appeal, and any item that was appended to the notice, to the Revenue Commissioners as soon as practicable after they have received them."

23. Section 949L of the TCA 1997 states that

"(1)Where the Revenue Commissioners consider that—

(a)an appeal is not a valid appeal, or

(b)the appellant has not complied with the requirements of section 949O,

they may send to the Appeal Commissioners a written notice of objection to the making of the appeal and that notice shall state the reason for their objection.

(2)Where the Revenue Commissioners do not send the notice referred to in subsection (1) to the Appeal Commissioners within 30 days after the date on which the Appeal Commissioners send the notice of appeal to them, the Appeal Commissioners shall not be required to have regard to the objection in deciding whether to accept an appeal.

(3)Where the Revenue Commissioners send a notice of objection in accordance with subsection (1), the Appeal Commissioners shall notify such objection to the appellant."

24. Section 949M of the TCA 1997 states that

"Subject to sections 949N and 949O, the Appeal Commissioners shall accept an appeal after the end of the period referred to in section 949L(2) where they have no reason to believe that the appeal is not a valid appeal."

25. Section 949N of the TCA 1997 states that

"(1)Where the Appeal Commissioners—

(a)are satisfied that an appeal is not a valid appeal,

(b)become aware, having previously formed the view that an appeal was a valid appeal, that it is not a valid appeal, or

(c)are satisfied that an appeal is without substance or foundation,

they shall refuse to accept the appeal.

(2)Where the Appeal Commissioners refuse to accept an appeal, they shall notify the parties in writing accordingly stating the reason for the refusal.

(3)Where, in respect of a refusal on their part to accept an appeal, the Appeal Commissioners declare that their decision in that regard is final, then that decision shall be final and conclusive.

(4)For the avoidance of doubt—

(a)references in the preceding subsections to the Appeal Commissioners' refusing to accept an appeal include references to a member or members of staff of the Commission, pursuant to an authority granted under section 5(2) of the Finance (Tax Appeals) Act 2015, refusing to accept an appeal, and

(b)the Appeal Commissioners may make a declaration under subsection (3) in respect of a foregoing refusal by a member or members of staff to accept an appeal as they may make such a declaration in respect of such a refusal on their part."

26. Section 949O of the TCA 1997 states that

"(1)The Appeal Commissioners may accept a late appeal where—

(a)they are satisfied that—

(i)the appellant was prevented by absence, sickness or other reasonable cause from making the appeal within the period specified by the Acts for the making of that appeal, and

(ii)the appeal is made thereafter without unreasonable delay,

and

(b)the appeal is made within a period of 12 months after the end of the period specified by the Acts for the making of that appeal.

(2)Notwithstanding the period specified in paragraph (b) of subsection (1) for the making of an appeal, the Appeal Commissioners may accept an appeal made after the end of that period where paragraph (a) of that subsection applies and—

(a)any return that was required to be delivered to the Revenue Commissioners under the Acts has been so delivered, and

(b)the requirement in subsection (3)(a) or (b) (or both as the case may be) has been complied with.

(3)Each of the following is a requirement mentioned in subsection (2)(b)—

(a)where, in the opinion of the Appeal Commissioners, the return referred to in subsection (2)(a) is insufficient to enable the appeal to be determined, such other information as, in the opinion of the Appeal Commissioners, would enable the appeal to be determined by them without undue delay has been provided, and

(b)where an appeal is made against an assessment, any tax charged by the assessment has been paid together with any interest on that tax chargeable under—

(i)section 1080,

(ii)section 159D of the Stamp Duties Consolidation Act 1999,

(iii)section 103 of the Finance Act 2001,

(iv)section 51 of the Capital Acquisitions Tax Consolidation Act 2003,

(v)section 114 of the Value-Added Tax Consolidation Act 2010, or

(vi)section 149 of the Finance (Local Property Tax) Act 2012,

as the case may be, at the time the appeal is made.

(4)For the purpose of deciding whether to accept a late appeal, the Appeal Commissioners may make such enquiries as they consider necessary or appropriate and may do so by holding a hearing.

(5)Nothing in this section derogates from the functions of the Appeal Commissioners under section 949N."

27. Section 949Q(1) of the TCA 1997 states that

"Where an appeal is accepted in accordance with section 949M, the Appeal Commissioners may give a direction to a party to provide to them such information (in this Part referred to as a "statement of case") in relation to the matter under appeal as they specify in the direction."

Submissions

28. At the oral hearing the Commissioner heard evidence on behalf of the Appellant as well as submissions from counsel for the Appellant and the Respondent. Written submissions had previously been submitted. As the Commissioner considered that the purpose of the hearing was to consider the Respondent's application to reverse the Commission's previous decision to admit the Appellant's appeal, he asked the Respondent to commence the hearing, with the Appellant following.

Respondent's Submissions

29. The Respondent stated that there were two questions as to the jurisdiction of the Commission to admit the Appellant's appeal. Firstly, the Appellant's application for a late appeal was submitted over twelve months of the end of the thirty day period for the making of the appeal. Secondly, as [redacted] ceased to exist on [redacted], it could not make the application for a late appeal that it purported to make.

30. In its written submissions, the Respondent stated that the refusal letter of 28 February 2019 from the Respondent to the Appellant ("the 28 February 2019 letter") was clear and unequivocal that [redacted] application for repayment of VAT was refused and that there was a right of appeal to the Commission. It referred to section 949O(1)(b) of the TCA 1997 and stated that the Appellant had not made its application for an appeal within what was in effect a mandatory thirteen month period from the date of the decision under appeal, and that consequently the Commission had no power to accept any appeal.

31. It also stated that [redacted] ceased to exist in [redacted] but did not purport to bring its appeal until April 2020. Consequently, as a matter of law there was no valid application for a late appeal before the Commission.

32. At the hearing herein, counsel for the Respondent stated that no appeal was made within the time limit prescribed by section 119 of the VATCA 2010, and the appeal was manifestly out of time. A late appeal could be made pursuant to section 949O of the TCA 1997 but only if certain criteria were met. The Appellant had to demonstrate that it had been "*prevented by absence, sickness or other reasonable cause from making the appeal…"* However, the Respondent's submission was that no reasonable cause had been established on the papers, and certainly nothing that operated to prevent the Appellant from making its appeal in time. The Appellant is a member of a [redacted] group and has access to both in-house and external advisers.

33. Counsel then addressed some of the relevant provisions of the TCA 1997 concerning the powers of the Commission and/or the Appeal Commissioners themselves. Any decision by the Appeal Commissioners to admit an appeal may be reversed by them as and when facts and information become available to them that in their opinion warrant that course of action (section 949J). Counsel submitted that this can include becoming aware that there is an issue with lateness. Section 949L clearly shows that the legislature had distinguished between a valid appeal and the requirements of section 949O in respect of late appeals. Section 949L does not support a construction that a failure of the Respondent to raise a point within thirty days deprives the Appeal Commissioners of their statutory duty to decide whether or not to admit the appeal.

34. Section 949O clearly requires an Appeal Commissioner, rather than a member of staff of the Commission, to make the decision on whether to admit a late appeal. It was essentially an inquisitorial process, and while the legislature had conferred a considerable discretion on the Appeal Commissioners both as to the timing of the exercise and how it might be carried out, a decision had to be made. This was irrespective of whether or not the Respondent had raised the issue. The Appellant had assumed that a decision under section 949O had already been made but this was incorrect as a matter of law, and involved a conflation of two separate concepts: the concept of a valid appeal and the concept of a late appeal.

35. Regarding the name of the appellant, counsel submitted that the difference between [redacted] and [redacted] in relation to the appeal was not simply a matter of an incorrect name, but was fundamentally an issue of identity. She opened section 15 of the VATCA 2010. She stated that [redacted] was nominated as the VAT remitter for the [redacted] group in Ireland and was therefore the person who was obliged to file returns and pay tax and was also the person who was entitled to claim a refund. She stated that [redacted] had filed the supplementary VAT 3 return, and that its VAT registration number, [redacted],

appeared on the return. She stated that the reference on the 28 February 2019 letter was also [redacted]

36. Section 949I requires that a notice of appeal shall specify the name and address of the appellant and its tax registration number. The Respondent's objection to the appeal being brought in the name of [redacted] was not a technical or pedantic one but was a matter of substance. The reason given by the Appellant, that the name on the appeal reflected that it was [redacted] activities that were in question, did not explain or excuse why the remitter which was the only entity that exists for the purposes of VAT was not named as the appellant. It was submitted that there was nothing in the documents that supported the contention that the appeal was brought on behalf of [redacted] It seemed that at some stage in 2021 the Appellant realised there was a problem because the name on its documentation changed. At that stage, it should have sought to make an application for a late appeal in the name of [redacted]

37. Counsel opened and/or referred to a number of cases on *inter alia* statutory interpretation, including *Bookfinders Ltd v Revenue Commissioners* [2020] IESC 60, *Revenue Commissioners v O'Flynn* [2011] IESC 47, *Inspector of Taxes v Kiernan* [1982] ILRM 13, *Dunnes Stores v Revenue Commissioners* [2019] IESC 50, *People (DPP) v TN* [2020] IESC 26, *People (DPP) v AC* [2021] IESC 74, *Law Society of Ireland v Motor Insurers' Bureau of Ireland* [2017] IESC 31*, Kenny Lee v Revenue Commissioners* [2021] IECA 18 and *Keogh v Criminal Assets Bureau* [2004] IESC 32.

Appellant's Evidence Provided at the Hearing on the Preliminary Issue

[redacted]

38. [redacted] stated that she is the [redacted] with the [redacted]. She has held that position for three or four years. Prior to that she was with the [redacted] for fourteen years where she was the [redacted] for the [redacted] entities [redacted] the [redacted].

39. Between 2017 and 2020, she mainly dealt with [redacted], an [redacted] Officer in the [redacted] Division, in her engagements with the Respondent. The Appellant had a meeting with the Respondent in July 2017 which was when the question of whether [redacted] might have an entitlement to VAT recovery first arose. The Appellant then submitted a supplementary VAT 3 return on 30 April 2018.

40. She stated that following the submission of the supplementary return, she had various conversations with [redacted], which mainly consisted of him requesting more information to understand the nature of the services provided by the Appellant. In August

2018, the Respondent refunded the VAT sought by the Appellant in error. The Appellant repaid the amount received to the Respondent.

41. [redacted] continued to follow up with [redacted] to receive a decision from the Respondent on the request for VAT repayment. She spoke to him by telephone on 27 February 2019:

> *"What he called a courtesy call to let me know that our VAT refund claim would be denied. He said he would get something to that effect to me in writing over the next couple of days but that what I was going to receive wasn't going to be a formal denial, they didn't have somebody at the appropriate level of seniority within Revenue who was available to sign a formal denial. So that while I would get confirmation the VAT refund payment was being refused it wasn't officially a denial and so it wasn't appealable."*

[redacted] stated that she was "*absolutely*" sure that this description of the call with [redacted] was correct.

42. Following the receipt of the 28 February 2019 letter, [redacted] stated that, based on her call with [redacted], she understood that the letter did not constitute a formal denial of the repayment request and that the Respondent would follow up in due course with "*an appealable denial issued by [the Respondent]*"; "*We had always had a very good, open, very good working relationship with each other. There was a lot of trust I think in both directions so that was the frame of mind that I read this letter in. I took what* [redacted] *had said to me in good faith and at face value*."

43. [redacted] continued to correspond with [redacted] after receiving the 28 February 2019 letter, both in writing and in telephone calls. In July 2019 she provided a submission setting out the Appellant's methodology underpinning its claim for VAT repayment. Additionally, she stated that the Appellant notified the Respondent in [redacted] that [redacted], that [redacted] would transfer its [redacted] based trade to [redacted] and that [redacted] would be dissolved. She also stated that the Appellant confirmed to the Respondent on [redacted] that [redacted] had taken place and that [redacted] had been dissolved.

44. In December 2019 the Appellant's tax affairs were moved to a different office of the Respondent and therefore the contact changed, from [redacted] to [redacted]. [redacted] asked the new contact for an update on the VAT repayment request. Following a telephone call, she sent a letter on 4 February 2020 which set out her

understanding of the history of engagement between the Appellant and the Respondent on the repayment request. In that letter, she also confirmed that [redacted] ceased to exist.

45. On 6 March 2020, the Respondent issued a letter to the Appellant. The letter referenced [redacted] and its VAT reference number ([redacted]), and also noted that the VAT return was submitted under group remitter [redacted] ([redacted]). This letter stated that the 28 February 2019 letter constituted a formal denial of the Appellant's VAT refund claim. It also stated that a further letter in the same terms as the 28 February 2019 letter issued on 6 March 2019. The letter also stated that the author had spoken to [redacted] and that the awaited Principal Officer approval that [redacted] had referred to in her letter of 4 February 2020 concerned a request from the Appellant for non-application of claw back provisions under section 70 of the Stamp Duty Consolidation Act 1997. The letter stated that, as no appeal to the 28 February 2019 letter had been received, the Respondent considered the matter closed.

46. In relation to that letter, [redacted] stated that she had never received the letter that the Respondent stated issued on 6 March 2019. She also stated that the reference to the approval concerning the stamp duty issue did not make sense to her because the Respondent had agreed with the Appellant on that issue, so the question of the Respondent requiring Principal Officer approval did not arise. Rather, she stated that [redacted] had told her that he would need Principal Officer approval to formally refuse the VAT claim.

47. Subsequent to receiving the letter of 6 March 2020, [redacted] stated that she had a telephone call with [redacted]. She stated that they agreed there had been genuine confusion and that the best option at that point was for the Appellant to submit a late appeal to the Commission, and that the Respondent would support such an appeal. Subsequently the Appellant appealed to the Commission on 7 April 2020.

48. She stated that the Appellant's intention was to appeal the refund refusal that had issued to [redacted] The reason [redacted] was inserted for the Appellant's details was that it concerned [redacted] activities. She stated that she was subsequently surprised and disappointed to receive the Respondent's preliminary objections to the admittance of the appeal.

49. On cross examination, counsel for the Respondent clarified that the letter of 6 March 2019 **never** issued to the Appellant. Regarding the 28 February 2019 letter, [redacted] accepted that on its face it denied the Appellant's VAT repayment claim. She also accepted that the letter stated that it was appealable, but stated that [redacted] had told her 24 hours previously that it was not appealable. She agreed that the letter referred to section 119 of the VATCA 2010 and accepted that she did not read that provision. When asked

what prevented the Appellant from making an appeal within thirty days of that letter, she stated

> *"A.* [redacted] *telling me I had no right to appeal is what prevented me from appealing it and I took that.*
>
> *Q. Did it occur to you to make an appeal anyway?*
>
> *A. It didn't because [*[redacted]*] had told me I cannot appeal this. [*[redacted] *had said to me this is not appealable. When a Revenue official tells you something like that, certainly when he tells me something like that I accepted it."*

50. She stated that after the 28 February 2019 letter she continued to engage with [redacted]: *"he knew I didn't understand it to be a formal denial and I don't think he understood it to be a formal denial. We had numerous conversations over the following months and not once did he say to me look, you have your denial on this, this case is closed."*

51. [redacted] accepted that, following the receipt of the letter of 6 March 2020, she understood the Respondent's position to be that the 28 February 2019 letter constituted a formal denial of the Appellant's repayment claim. She stated that, following the telephone call with [redacted], which took place either on Friday 13 March 2020 or Monday 16 March 2020, the Appellant tried to submit its appeal as quickly as possible: "*That is when Covid hit, everything was up in the air, things got delayed*."

52. Also regarding the Appellant's attempts to issue the appeal at the time that the Covid-19 pandemic was developing, there was the following exchange on cross-examination:

> *"Q. Now I fully appreciate what you say about Covid,* [redacted]*, but it is fair to say that is not something that is mentioned in covering letter to [the Commission]?*
>
> *A. No, I mean I am not trying to put this on Covid, just it is a factor in the reality we had at that time."*

Appellant's Submissions

53. In its written submissions, the Appellant contended that the Commissioner was not obliged to have regard to the objections of the Respondent, under section 949L of the TCA 1997, and given the way in which the Respondent had approached the case he should disregard them. If the objections were entertained, the Appellant submitted that the criteria for allowing a late appeal were clearly entertained, and that the appeal should proceed under [redacted] name, as VAT remitter for the [redacted] VAT group.

54. In her oral submissions, counsel for the Appellant stated that the Respondent took substantially longer to object to the lateness of the appeal than the Appellant took to bring the appeal; the Appellant took thirty days plus a year plus seven days to appeal, whereas the Respondent took seventeen months to object. Counsel contended that this gave rise to a strong concern regarding fair procedures.

55. Counsel stated that there was no new information available to the Respondent regarding the appeal that it did not know in April 2020. The NOLA stated that it was brought with the consent and support of the Respondent, who was copied on the appeal. Section 949J(3) is premised on the Commission exercising its jurisdiction to reverse a decision to accept an appeal in the event of new information becoming available; however in this instance the Respondent always knew that the appeal was late, and it always knew that [redacted] had been dissolved.

56. Regarding the Appellant's name, counsel submitted that the import of the Respondent's submission was that if there was an error in box 1 of the Notice of Appeal, it could not subsequently be corrected and the appeal must not be accepted. Such an argument could not be correct and flew in the face of the law about interpretation of documents. [redacted] name and tax reference number appeared on the NOLA, but in box 10 rather than box 1. Section 949H of the TCA 1997 was relevant in looking at the NOLA and the appendices to it, as [redacted] name was apparent on the face of those documents.

57. Counsel stated that the Respondent had created the circumstances that prevented the Appellant from appealing, and was now seeking to rely on those circumstances to have its appeal thrown out. [redacted] evidence was that the Respondent had stated that it would support a late appeal, and this evidence was not contradicted or disputed. It was her evidence that she had been prevented from appealing by what she had been told by the Respondent.

58. Regarding section 949O, there was no suggestion that any of the administrative prerequisites or conditions of an appeal had not been met, so the conditions in subsections 3(a)/(b) were satisfied. What was at issue was whether the Appellant had been prevented on reasonable grounds from appealing within time. It was disappointing that the Respondent's written submissions had not acknowledged that section 949O(2) allows for the bringing of a late appeal outside of the twelve months envisaged in subsection (1).

59. Counsel opened and/or referred to a number of judgments concerning *inter alia* the interpretation of documents, including *Law Society of Ireland v Motor Insurers' Bureau of Ireland* [2017] IESC 31*, Dublin Port Company v Automation Transport Ltd* [2019] IEHC

499*, Point Village Development Ltd v Dunnes Stores Unlimited Company* [2021] IEHC 628*,* and *Keogh v Criminal Assets Bureau* [2004] IESC 32*.*

Material Facts

60. Having read the documentation submitted, and having listened to the oral evidence and submissions at the hearing, the Commissioner makes the following findings of material fact:

    60.1. Prior to the issuance of the 28 February 2019 letter, the Respondent (*via* [redacted]) told the Appellant (*via* [redacted]) that it would not constitute a formal, appealable refusal of the Appellant's claim for VAT repayment. As a result, [redacted] understood that she could not appeal the Respondent's decision as stated in the 28 February 2019 letter.

    60.2. The Appellant did not understand that the Respondent had formally refused its VAT claim until it received the Respondent's letter of 6 March 2020.

    60.3. The Appellant notified the Respondent in [redacted] that it was intended to dissolve [redacted]. In [redacted] the Appellant notified the Respondent that [redacted] had been dissolved.

    60.4. The Appellant issued a late appeal on 7 April 2020. This was, at that time, on notice to and with the support of the Respondent

Analysis

61. The first matter to be decided is the correct characterisation of the application. The Commissioner's understanding of the Respondent's submission was that no decision on whether to accept the Appellant's late appeal under section 949O of the TCA 1997 had been made, as any such decision had to be made by an Appeal Commissioner rather than a member of staff of the Commission. Consequently, the hearing should be understood to have constituted an application by the Appellant for the admittance of its late appeal. The Appellant contended that its appeal had been accepted by the Commission and that the Respondent was seeking to set this prior decision aside.

62. The Commissioner is satisfied that the Appellant's understanding of the application is correct. The Appellant's NOLA was submitted to the Commission on 7 April 2020. On 8 April 2020 the Commission notified the Respondent of the appeal and stated "*Please note, any notice of objection, including the reason as to why this appeal should not be accepted by the [Commission], must be submitted to this office, no later than 30 days from the date of this correspondence*."

63. There was **no response** received from the Respondent to the notification of 8 April 2020. Section 949M of the TCA 1997 provides that "*Subject to sections 949N and 949O, the Appeal Commissioners shall accept an appeal after the end of the period referred to in section 949L(2) where they have no reason to believe that the appeal is not a valid appeal*." The NOLA was forwarded by the Commission to the Respondent and was stated to have issued with the consent and support of the Respondent, and no objection was received from the Respondent to the acceptance of the appeal by the Commission. Consequently, the Commission had no reason to believe that the appeal was not valid and accepted it.

64. That the appeal was accepted by the Commission can be seen from the request that issued to the parties on 22 May 2020 to submit a Statement of Case. Section 949Q(1) of the TCA 1997 provides that *"Where an appeal is accepted in accordance with section 949M, the Appeal Commissioners may give a direction to a party to provide to them such information (in this Part referred to as a "statement of case") in relation to the matter under appeal as they specify in the direction.*" Therefore, the Commission may only direct the provision of a Statement of Case where it has accepted an appeal pursuant to section 949M. In this instance, both parties complied with the Commission's direction and submitted their respective Statements of Case.

65. Further, the Commissioner does not agree with the Respondent that a decision under section 949O is reserved to the Appeal Commissioners only. Section 949A of the TCA 1997 provides *inter alia* that *'"Appeal Commissioner" has the same meaning as it has in the Finance (Tax Appeals) Act 2015'*. Section 5(2) of the 2015 Act states that "*Any function assigned by this Act or the Taxation Acts to the Commission or the Commissioners, other than a function specified in section 6 (2)(b), (f), (g), or (j), may be performed by any one or more of the Commission's staff acting under the Commission's authority."*

66. The functions specifically reserved to the Appeal Commissioners are:

    - *(b) deciding whether to declare… that a refusal to accept an appeal is final;*
    - *(f) hearing an appeal where the Commissioners have decided that a hearing is the appropriate method of adjudicating on the appeal;*
    - *(g) determining appeals,* and
    - *(j) stating and signing cases stated for the opinion of the High Court.*

    Importantly in this instance, functions <u>not</u> specifically reserved to the Appeal Commissioners include:

    - *(a) deciding whether or not to accept an appeal,* and

- *(d) giving directions to the parties to an appeal.*

67. Therefore, a member of staff of the Commission may make a decision to accept a late appeal under section 949O, and may give directions on foot of such a decision. The Commissioner is satisfied that this is what happened in this instance. Consequently, the Commissioner finds that the Appellant's late appeal was accepted by the Commission, and that this Decision concerns an application by the Respondent to set aside that decision.

68. In considering the Respondent's application (which has two principal elements), the Commissioner considers it useful to set out a timeline of what he considers to be the key engagements between the parties. The timeline is taken from that which was submitted by the Appellant as part of the documents submitted by it prior to the hearing, as well as other submitted documentation and the evidence and submissions provided at the hearing, and it did not appear to the Commissioner that the Respondent disputed the Appellant's account of the following engagement:

    - 25 July 2017: Meeting between the Appellant and the Respondent which considered *inter alia* whether [redacted] had an entitlement to VAT refunds.
    - 30 April 2018: The Appellant submitted a supplementary VAT 3 for its January/February 2018 refund claim (for the periods [redacted] for €1,437,618.
    - August – September 2018: The Respondent refunded the amount sought in error (to [redacted] and the Appellant repaid the monies to the Respondent.
    - November 2018 and January 2019: Further communication by the Appellant with the Respondent regarding the VAT refund claim.
    - [redacted] The Appellant wrote to the Respondent to inform it that it was intended that [redacted] and be dissolved [redacted]
    - 27 February 2019: Verbal communication by phone call from [redacted] to [redacted] that written communication of the refund refusal of the Appellant's VAT refund request would issue.
    - 28 February 2019: Letter from the Respondent to the Appellant notifying the denial of the refund claim.

- 11 March 2019: Email from [redacted] to [redacted] acknowledging receipt of 28 February 2019 letter and further discussing the Appellant's position on the refund claim.
- 29 July 2019: Submission of further letter from the Appellant to the Respondent explaining the basis for the Appellant's claim for full VAT recovery.
- July – December 2019: The Appellant made a number of requests to the Respondent for an update on its refund claim.
- [redacted]: The Appellant wrote to the Respondent to inform it that [redacted] therefore been dissolved. It also stated that "*the remaining* [redacted] *trade of* [redacted] *transferred to* [redacted]."
- December 2019 – March 2020: The Respondent's case officer changed from [redacted] to [redacted]. The Appellant engaged in correspondence with [redacted] to advise of the [redacted] between [redacted] and [redacted] and to request that the VAT refund claim be progressed.
- 3 February 2020: Telephone call between [redacted] and [redacted] to discuss the VAT refund claim.
- 4 February 2020: Letter from the Appellant to the Respondent setting out the Appellant's understanding of the circumstances surrounding the issuance of 28 February 2019 letter.
- 6 March 2020: The Respondent re-stated its refusal of the refund claim by letter and stated that it considered the case closed.
- 13 or 16 March 2020: Telephone call between [redacted] and [redacted] during which it was agreed that the Appellant would submit a late appeal to the Commission and that the Respondent would support the making of the late appeal.
- 7 April 2020: Late appeal submitted by the Appellant to the Commission.

69. The Commissioner also considers it useful to set out in more detail the principal correspondence at issue:

70. The 28 February 2019 letter from the Respondent to the Appellant:

"Re: [redacted]

Reference: [redacted]

VAT Return: January / February 2018

VAT repayment claim amount: €1,437,618

Dear [redacted]*,*

I hereby wish to inform you that the VAT repayment claim for €1,437,618 submitted in the January / February 2018 VAT period has been formally refused, on the basis that the services provided by [redacted] *to* [redacted] *in respect of the* [redacted] *domiciled funds are VAT exempt services in accordance with Paragraph 7(1) of Schedule 1 of the VAT Consolidation Act 2010. In this way,* [redacted] *is not entitled to VAT recovery in respect of these services.*

An appeal, subject to the VAT appeal procedures set out in Section 119 of the VAT Consolidation Act, of the above decision may be made to the Tax Appeals Commission. The notice of appeal application form can be downloaded from their website www.taxappeals.ie and they can be contacted via email at info@taxappeals.ie.

Yours sincerely,

[redacted]

[redacted]*"*

71. Letter dated 6 March 2020 from the Respondent to the Appellant:

[redacted]

(VAT return submitted under group remitter – [redacted]*)*

VAT Return January / February 2018

VAT Repayment Claim €1,437,618

Dear [redacted]

I refer to previous correspondence and telephone conversation regarding [redacted] *and in particular your letter of 4th February 2020. A copy of this letter is attached together with markers referencing various paragraphs.*

Note 1: Letter of 28 February 2019

This letter clearly contains a formal denial of the VAT refund claim for the period January/February 2018, outlining the reason why and also advises of the right to appeal the refusal. No appeal notification was received within the specified period of

30 days as provided in Section 119 VAT Consolidation Act 2010. As no appeal was received the decision was considered final and no further communication issued.

Note 2: Letter of 6 March 2019

Attached is a copy of the letter of 6 March 2019 that I referred to in our telephone conversation of 3 February 2020. You will note that the content of this letter is exactly the same as the letter sent to you on 28 February 2019 and only differs in relation to that date.

Note 3: Telephone conversation with [redacted]

I have discussed this matter with [redacted] *and reviewed his notes of the conversation. The Principal Officer approval that you refer to was in relation to the request on February 21 February 2019* [sic] *for non-application of clawback provisions contained under Associated Companies Relief, under Section 79 Stamp Duty Consolidated Act 1997.*

As regards your submission of July 2019, I understood that as a formal denial of the VAT refund claim was issued to you on 28 February 2019 and as no appeal was received, the decision was considered final and the case closed.

Yours sincerely,

[redacted]

[redacted]*"*

72. Extracts from the NOLA submitted on 7 April 2020:

"Notice of Late Appeal

Section 1: Appellant's details

Name (individual / company / or organisation): [redacted]

PPS / Tax Reference Number: [redacted]

[…]

Section 10: Grounds for appeal

[redacted] *is a member of a VAT group, with* [redacted] *acting group remitter.* [redacted] *was engaged in the provision of Fund Management services to non Irish UCITS funds located in* [redacted] *and, in particular, the provision of fund distribution services…*

In April 2018, a submission was made by [redacted] setting out the company's position that VAT had been under-recovered for the period from 2014 to the date of submission…

The company engaged in various discussions with the [Respondent] post submission of the claim. The claim was denied by [the Respondent] in February 2019. [redacted] is appealing the denial of this refund claim. (Please see above and attached cover letter re late notice of appeal request).

73. Extracts from the cover letter to the NOLA (on [redacted] headed paper):

"Re: [redacted] – VAT submission and appeal under Section 949O of the Taxes Consolidation Act 1997 ("TCA 1997")

Tax ref: [redacted]

We are writing to you to lodge an appeal under the late appeal provisions provided under Section 949O of the Taxes Consolidation Act 1997 ("TCA 1997").

The late appeal relates to the denial by the [Respondent] of a VAT refund claim made by [redacted] in April 2018. We are filing this request with the agreement and support of [the Respondent]. We explain the background to the matter under appeal below.

[…]

In early March 2019 a denial of the VAT3 submission was received (attached, and dated 28 Feb 2019). However, the company had engaged in discussion with [the Respondent] prior to the issue of this letter and based on this discussion, it was understood the letter to issue by [the Respondent] was not a formal denial of the refund submission which required appeal. In fact, with agreement from [the Respondent], the company made a further submission on the matter in July 2019 (also attached) and engaged in further discussions with [the Respondent] on the matter.

[…]

<u>Appeal under Section 9490 TCA 1997</u>

Following discussion with the [Respondent] it has been agreed that there has been a genuine misunderstanding of the position between the parties, and that the most appropriate course of action at this point is submission of an appeal under the late appeals provisions of Section 949O TCA 1997.

[The Respondent] indicated that they would support such a submission. We include the Revenue contact handling the case [redacted] in copy.

As such, we now formally lodge an appeal under Section 949O and we attach a notice of appeal.

As per the conditions of Section 949O TCA 1997, we confirm that all [redacted] VAT filings are up to date.

Cessation of [redacted]

We also note that [redacted] ceased trading in [redacted] as a result of [redacted].

If any further detail is necessary at this point to facilitate this request, please let me know."

74. The first element of the Respondent's application is that the Appellant's late appeal does not satisfy section 949O of the TCA 1997 and that therefore the decision to admit the appeal should be reversed.

75. The Commissioner is satisfied that the 28 February 2019 letter was clear on its face that it constituted a refusal of the Appellant's VAT claim, and that this was a decision that was appealable to the Commission. If this letter had constituted the only engagement between the parties in respect of the Appellant's claim, then that would have clearly consisted a formal denial of the claim, which if the Appellant wished to appeal would have to be brought within thirty days.

76. However, the Commissioner cannot ignore the clear and consistent evidence of [redacted] on behalf of the Appellant that she was informed by [redacted] of the Respondent that the 28 February 2019 letter would not constitute a formal, appealable denial of the claim as the Respondent did not have somebody of the requisite seniority available to sign a formal denial. The Commissioner considers it noteworthy, and significant, that **there was no evidence provided on behalf of the Respondent, whether by [redacted], to contradict [redacted] claims**.

77. Consequently, the Commissioner finds as a matter of fact that [redacted] informed [redacted], in advance of the issuance of the 28 February 2019 letter, that it would not constitute a formal, appealable denial of the Appellant's claim. The Commissioner found [redacted] to be a credible and convincing witness. As a result, he also accepts that she did not believe, on receipt of the 28 February 2019 letter, that it constituted a formal denial of the VAT claim, and that this was as a result of what [redacted] had previously told her.

78. Furthermore, the Commissioner notes that [redacted] continued to correspond with [redacted] following the issuance of the 28 February 2019 letter. It is apparent from that correspondence (e.g. the email of 11 March 2019 from the Appellant to the Respondent) that [redacted] did not consider the matter closed. Given the position subsequently adopted by the Respondent, the Commissioner considers it surprising that [redacted] did not tell [redacted] that the Appellant's claim had been formally denied and that the Respondent considered the matter closed. However, there was no evidence before the Commissioner to suggest that any such response was provided by [redacted] or any other representative of the Respondent during 2019. The Commissioner notes the evidence of [redacted] that "*the fact that [redacted] continued to engage with us, it certainly wasn't our understanding that [redacted] considered it to be final and closed.*" In the circumstances, the Commissioner considers that this was a reasonable understanding to have.

79. Having considered the coherent and consistent evidence of [redacted], the Commissioner is satisfied that she and the Appellant were "*prevented*" by "*reasonable cause*" from making the appeal within the time period specified by section 119 of the VATCA 2010. The Commissioner accepts that [redacted] relied upon [redacted] assurance that the 28 February 2019 letter would not constitute a formal denial of the VAT claim, and he considers that she was further supported in this reliance by the subsequent failure of [redacted] to inform her that the claim had been formally refused when she continued to correspond with him about it. The Commissioner does not accept that "*prevented*" in section 949O(1)(a)(ii) means in effect that an appellant must necessarily be incapable of making an appeal, and in this regard he accepts the evidence of [redacted] that "*[redacted] had said to me this is not appealable. When a Revenue official tells you something like that, certainly when he tells me something like that I accepted it*." While it would have been advisable for the Appellant to have issued a protective appeal following receipt of the 28 February 2019 letter, notwithstanding its understanding of what it meant, the Commissioner is satisfied that [redacted] relied on [redacted] assurance that the letter was not appealable, and given the significance that many, if not most, people would give to such an assurance emanating from a relatively senior representative of the Respondent such as [redacted], he is satisfied that she was prevented from issuing the appeal within time as a result.

80. [redacted] accepted that the Appellant understood that the Respondent had formally refused its claim when it received the letter of 6 March 2020. She spoke by telephone to [redacted] on the 13 or 16 March 2020, during which conversation she stated it was agreed that the Appellant would submit a late appeal and that this would be supported by

the Respondent. Again, this evidence was not contradicted by the Respondent and the Commissioner finds as a matter of fact that the Respondent agreed to support the making of a late appeal at that stage.

81. Subsection (2) of section 949O acts to effectively disapply the twelve month timeline stipulated by section (1)(b) where certain administrative conditions as set out in subsections (2) and (3) are met. It was not contended by the Respondent that the administrative requirements set out in subsections (2) and (3) of section 949O had not been met by the Appellant and therefore the Commissioner accepts the Appellant's submission that those conditions have been satisfied. As already stated, the Commissioner is satisfied that the Appellant has demonstrated that it was prevented by reasonable cause from making the appeal within time. Subsection (1)(a)(ii) also requires that "*the appeal is made thereafter without unreasonable delay.*" Following the receipt of the letter of 6 March 2020, the Appellant discussed the situation with the Respondent on 13 or 16 March 2020 and thereafter prepared the appeal, which was submitted on 7 April 2020. Given the relative complexity of the appeal, and the disruption encountered by the Appellant and indeed the whole country following the onset of the Covid-19 pandemic, the Commissioner is satisfied that the Appellant issued the appeal without unreasonable delay after it was no longer prevented from doing so by its understanding of the Respondent's position. Consequently, the Commissioner is satisfied that the Commission was correct to accept the Appellant's application for a late appeal, and he refuses the Respondent's application to set that decision aside.

82. The second element of the Respondent's application concerns the name of the appellant. On the NOLA, the appellant was stated to be [redacted] However, by that time [redacted] and the VAT group remitter was [redacted] As a result, the Respondent contended that [redacted] could not have made the late appeal to the Commission.

83. The Commissioner is satisfied that the Appellant was in error in inserting the name of [redacted] as appellant on the NOLA. It seems apparent that at some stage between the submission of the Appellant's Statement of Case and its OOA that the Appellant became aware of the error, as its name was changed from [redacted] to [redacted]." No explanation was provided by the Appellant for the change of name, and the Commissioner considers that the Appellant should have drawn the Commission's attention to the change and explained the rationale for it.

84. Nevertheless, the Commissioner is satisfied that he should consider the wider circumstances surrounding the choice of name stated by the Appellant on the NOLA,

rather than taking a narrow approach of focusing solely on the name entered in section 1 of the NOLA to the exclusion of all other factors. In coming to this view, the Commissioner has had regard to section 949H(1) of the TCA 1997, which states that

> *"The Appeal Commissioners shall, subject to the provisions of this Part, endeavour to the best of their ability to manage and conduct proceedings in a way that will meet the reasonable expectations of members of the public (and in particular tax payers) with regard to—*
>
> *(a)undue formality being avoided, and*
>
> *(b)a flexible approach being adopted by the Commissioners in respect of procedural matters."*

85. The Commissioner is satisfied that the Respondent was on full notice and was aware of the position regarding [redacted] the fact that it [redacted] dissolved and that [redacted] was (and remains) the VAT group remitter. The Appellant notified the Respondent before the dissolution of [redacted] and again after it had taken place. In its correspondence to the Appellant, the Respondent often referenced both [redacted] and [redacted] For example, in the letter of 6 March 2020 [redacted] the reference is given as

> "[redacted]
>
> *(VAT return submitted under group remitter –* [redacted]

Therefore, the Commissioner is satisfied that the Respondent fully understood who the Appellant was when it received the NOLA. He does not consider that the Respondent was unfairly prejudiced by the insertion of [redacted] name (and, in fairness to it, he did not understand the Respondent's argument to be that it had been so prejudiced).

86. Furthermore, it is necessary to consider the entirety of the NOLA, including the cover letter and other appendices. Under section 10, the Appellant stated "[redacted] *is a member of a VAT group, with* [redacted] *acting group remitter.*" Furthermore, the cover letter was on headed [redacted] paper and stated *inter alia* that

> *"Cessation of* [redacted]
>
> *We also note that* [redacted] *ceased trading in* [redacted] *."*

The other appendices included the letter of 6 March 2020, which as stated above referenced both [redacted] and [redacted] as VAT group remitter.

87. Section 949I(2)(a) of the TCA 1997 provides that a notice of appeal shall specify "*the name and address of the appellant…"* The TCA 1997 does not prescribe a particular format that the notice of appeal must take. While the Commission does have a template notice of appeal / notice of late appeal that it requires appellants to complete, the Commissioner considers that consideration of whether or not an appellant has properly completed the template notice of appeal / notice of late appeal should be carried out with reference to the requirements of section 949H, and that undue or overly strict formality should be avoided.

88. In this instance, the Commissioner is satisfied that the NOLA contained a number of references to [redacted] as well as [redacted] and also stated that [redacted] dissolved. In the circumstances, given the parties' awareness of the dissolution of [redacted] and of the relationship between [redacted] and [redacted] and given the information provided in the NOLA (including its appendices), he does not consider that it would be fair or proportionate to decide that the Appellant's appeal is invalid due to its failure to insert the correct name in section 1 of the NOLA, and he refuses the Respondent's application in this regard. He is satisfied, and accordingly directs that that the appeal should continue under the version of the Appellant's name included in its OOA and subsequent documents.

89. Finally, the Commissioner notes that the Appellant argued that, given the manner in which the Respondent engaged with it and subsequently raised its preliminary objections, he should decline to have regard to the objections pursuant to section 949L(2). The Commissioner has concerns about aspects of how the Respondent dealt with this matter, including that (as he has found) it previously advised the Appellant that it would support its application for a late appeal before objecting to it, the amount of time taken to raise the objections, which has led to delay and increased costs, and the repeated incorrect assertion that it had issued a letter to the Appellant on 6 March 2019, which was only corrected during cross-examination of [redacted]. However, given the significance of the objections raised for the jurisdiction of the Commission to hear the appeal, as well as the important matters raised by the parties in their written submissions and at the hearing herein, the Commissioner is satisfied that it is appropriate and preferable to consider and decide upon the Respondent's objections to the appeal continuing.

Decision

90. Having considered the written submissions of the parties, as well as the evidence and submissions heard at the hearing herein, the Respondent's preliminary objections to the Commission hearing the Appellant's appeal are not upheld.

Simon Noone
Appeal Commissioner
25/08/2022