APPROVED

THE HIGH COURT

[2024] IEHC 192

[2022/110 R]

BETWEEN

THE REVENUE COMMISSIONERS

APPELLANT

AND

COVIDIEN LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Nolan delivered on the 11th day of April, 2024

Introduction

1. This judgement concerns a case stated for the opinion of the court pursuant to Section 949AQ of the Taxes Consolidation Act 1997 (as amended), in relation to a determination of the Tax Appeal Commissioner ("TAC") dated the 28th of July 2022. The matter relates to an appeal as to whether Covidien Ltd ("the taxpayer") was liable for VAT on foot of assessments for VAT made by the Revenue Commissioners ("Revenue") between the 26th of March 2015 and the 16th of March 2017, in respect of periods from the 1st of July 2011 to the 31st of December 2014 inclusive. The total amount of VAT assessed by Revenue in respect of the said periods was €45,936,882, full details of the various assessments were set out in the second paragraph of the determination of the TAC.

2. The TAC found the taxpayer received a single composite supply of services from an entity known as Tyco Healthcare Group LP ("Tyco"), but rather confusingly referred to in the determination as THGLP, and that those services were used in their entirety for the purpose of the taxpayer's economic activity. He further found that the planning and execution of, what was known as "Project Jameson"**,** constituted economic activity on the part of the taxpayer and had a direct and immediate link to the taxpayer's taxable output supplies and in turn to its direct and indirect subsidiaries and that therefore the taxpayer was entitled to a full 100% deduction in respect of VAT as it occurred on the costs of the services it received in relation to that project. Finally, he found that the taxpayer was entitled to a full 100% deduction in respect of the VAT it incurred and the cost of services it received in relation to a transaction known as "Medtronic". On that basis, he allowed the taxpayer's appeal from the VAT assessments made by Revenue.

3. There was also a fourth series of transactions relating to VAT incurred by the taxpayer which related to Irish and other suppliers, which although before the TAC, he never dealt with.

4. It is from his determination that Revenue now appeals.

Background

5. From June 2009 until January 2015, the taxpayer was Irish incorporated and an Irish resident ultimate holding company of a group of companies known as the Covidien Group. The taxpayer's ordinary shares were listed on the New York stock exchange ("NYSC") and were registered within the United States Securities and Exchange Commission.

6. The Covidien Group was at all material times a global healthcare products group and manufacturer of medical devices and supplies. During the periods under appeal, it operated in three market segments, namely (a) medical devices, (b) medical supplies and (c)

pharmaceuticals. At all material times the taxpayer held 100% of the share capital of a number of companies including the Covidien Group Holdings Ltd ("CGHL") and 100% of the share capital of USSC Medical GmbH, a company registered in Germany. From June 2013 until the end of March 2016, the taxpayer held 100% of the share capital of Covidien Belgium BVBA. From July 2012 until April 2014, it held 100% of the share capital of Covidien JJE Plc, an Irish registered company. The taxpayer had no other direct subsidiaries.

7. CGHL was a company incorporated in Bermuda and resident in Ireland for tax purposes. It was formally the NYSC – listed parent of the Covidien Group, which became Irish tax resident by moving its central management and control to Ireland in late 2008.

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

(a) As the parent of the Covidien Group, it directly or indirectly held shares in all of the subsidiaries of the Covidien Group. This comprised approximately 300 subsidiaries, although there was some controversy over the exact number, the majority of which were owned directly or indirectly by CGHL; and,

(b) It also provided management services to four of its indirect subsidiaries, namely Nellcor Puritan Bennett Ireland, Mallinckrodt Medical Imaging Ireland, Mallinckrodt Medical BV and Covidien AG, all known as "the Service Recipients". Again, rather confusingly, these entities were referred to throughout the case as the four Foreign Principal Entities or FPEs, however in order to avoid confusion, I shall refer to them as defined in the agreements namely the Service Recipients.

9. In order to provide the management services to the Service Recipients, the taxpayer entered into an agreement effective as of the 26th of September 2009 ("the first service agreement") with a company within the Covidien Group namely Tyco. It then entered a

second agreement with the service recipients also dated the 26th of September 2009 ("the second service agreement"). The costs incurred by the taxpayer in carrying on the two activities set out above arose in all of the VAT periods the subject of the appeal before the TAC and were referred to as "ongoing costs".

10. In 2013, the Covidien Group was restructured by means of a spin-off of the group's nuclear medicine business and pharmaceutical business into a newly formed company, Mallinckrodt Plc, which had been established for that purpose. This restructuring was Project Jameson. The costs incurred by the taxpayer in relation to Project Jameson are relevant to the assessments for the VAT periods from November-December 2012 to July-August 2013 inclusive, January-15 2014 and May-June 2014. This is the second series of transactions which form part of this appeal.

11. On the 26th of January 2015, by virtue of a transaction agreement dated the 15th of June 2014, the taxpayer was acquired by Medtronic Plc, the Medtronic transaction. This acquisition was affected by means of a cancellation scheme of arrangement under Section 72 of the Companies Act 1963, approved by the High Court and by the taxpayer shareholders. Costs incurred by it in relation to the Medtronic transaction are relevant to the assessments for the VAT periods from July-August 2014 to November-September 2014 inclusive. This is the third series of transactions which form part of this appeal.

12. Following an audit carried out by Revenue, it determined that only partial VAT recovery by the taxpayer was allowable in respect of ongoing costs, and none of the VAT inputs arising in relation to Project Jameson and the Medtronic transaction were recoverable.

13. The assessments for VAT are the subject of this appeal which were duly raised by the Revenue. It contends that the assessments of VAT were raised in accordance with the approach used by the taxpayer when undertaking a detailed annual exercise in order to

determine the appropriate quantum of costs attributable to the provision of the management services to the Service Recipients.

The Hearing

14. The hearing before the TAC took 9 days. Both parties were represented by very eminent senior counsel who also appeared before me. The TAC heard from four witnesses who had intimate knowledge of the taxpayer and its relevant operations outside the US. Further, the TAC had the benefit of 32 lever arch files, the two full-service agreements, the structure of all the companies, a cost centre analysis, very large board packs prepared for the various board meetings in Dublin together with reports prepared by PwC and Mayer Brown. He also had written submissions from both sides. I will return to the evidence.

Material Findings of Fact

15. The TAC made the following material findings of fact:-

(a) The evidence of Mr. Oldaker and Ms. Campi (two of the four witnesses who gave evidence) in relation to the manner in which the business of the Covidien Group was conducted was correct. The evidence which he accepted as correct was summarised in paras. 296 to 299 of the determination.

(b) Decisions were made by the Board of the taxpayer in relation to all aspects of the Covidien Group's business were then actioned by the executive officers and the appropriate personnel in the relevant subsidiaries.

(c) There was a detailed and ongoing involvement of the taxpayer's board in the management of the Covidien Group as a whole and in relation to specific projects, and initiatives within the Covidien Group.

(d) The taxpayer was at all material times actively engaged in the management of all aspects of the business of the Covidien Group and was an active holding company.

(e) Through the first service agreement and the second service agreement, the taxpayer was providing management services, not only to the four Service Recipients, but also to the 84 subsidiaries who are connected to them.

(f) The evidence before the TAC did not support a finding that the taxpayer was engaged in non-economic activity.

(g) The taxpayer was not just a passive holding company but was instead at all material times actively engaged and directly and indirectly involved in the management of its subsidiaries and sub subsidiaries.

(h) The taxpayer's engagement and involvement in managing those companies was for the purposes of the exploitation of its holdings in those companies for the purpose of obtaining income therefrom on a continuing basis.

(i) The taxpayer received a single composite supply of services from Tyco.

(j) There was a direct and immediate link between the input costs suffered by the taxpayer on the single composite supply of services it received from Tyco through the first service agreement and the supply of management services by the taxpayer to the four service recipients and their 84 subsidiaries through the second services agreement.

(k) The services received by the taxpayer from Tyco in the first service agreement were used in their entirety for the purposes of the taxpayer's economic activity.

(l) The Project Jameson's transaction was not a share for share exchange at the ultimate shareholder level but was instead a three-cornered demerger. Under a three-cornered demerger, therefore, a new holding company is formed separately

to the existing company, and the demerging business is then declared as a dividend in specie by the existing company to the new holding company, which simultaneously reduces its capital and the spin off was affected by way of the distribution of a dividend "*in specie*".

(m) The initial decision to divest the taxpayer's pharmaceutical business by way of sale or spinoff, the subsequent decision to proceed by way of spinoff and the subsequent implementation of that decision were all integral part of the active management by the taxpayer's board of the Covidien Group's business as a whole.

(n) The structuring of the Covidien Group into global business units meant that the divestiture of the pharmaceuticals business effected not only the four Service Recipients but also their subsidiaries throughout the group.

(o) The services supplied to the taxpayer in relation to Project Jameson had a direct and immediate link to the taxpayer's taxable output supplies to its direct and indirect subsidiaries.

(p) The board's initiation, oversight and execution of the disposal to Medtronic by way of the Medtronic transaction was an integral part of the active management of the taxpayer's board of the Covidien Group business as a whole.

The Questions for determination

16. The questions of law which the TAC wishes to seek the opinion of the High Court are as follows:-

I. Was I correct in law in my approach to issues of fact on the one hand and issues of law on the other, and, in particular, in my identification of material findings of fact in my determination?

II. Was I correct in law in identifying as the relevant issues for determination those contained in para. 287 of my determination?

III. Was I correct in law in the approach taken at paras. 289 to 333 inclusive of my determination to addressing and answering the following questions of law:-

(a) What is an economic activity for VAT purposes?

(b) What is an economic activity giving rise to right to deduct for VAT purposes.

(c) What is the appropriate legal consideration when determining whether

(i) ongoing costs comprising input costs of a supplies made to the taxpayer by Tyco and other foreign and domestic service providers,

(ii) costs incurred in relation to Project Jameson, and

(iii) costs incurred in relation to the Medtronic Transaction had been used for the purposes of taxable output transactions?

IV. Was I correct in law when concluding that the taxpayer was at all material times wholly engaged in economic activity for VAT purposes?

V. Was I correct in law in considering that the receipt of a single composite service from Tyco and the supply of a single composite service by the taxpayer was relevant for the purposes of ascertaining the level of input VAT deductible by the taxpayer?

VI. Was I correct in law in concluding that there was a direct and immediate link between the entirety of the input costs suffered by the taxpayer on the supply of services it received from Tyco under the first agreement and the supply of taxable management services by the taxpayer under the second agreement to the Service Recipients and, through them, to the other 84 legal entities connected to the Service Recipients?

VII. Was I correct in law in concluding that the taxpayer was entitled to deduct the VAT inputs it incurred in respect of services it received in relation to Project Jameson?

VIII. Was I correct in law in concluding that the taxpayer was entitled to deduct the VAT inputs it incurred in respect of services it received in relation to the Medtronic Transaction?

The Legal Principles Applicable to a Case Stated

17. In *McMullin Brothers Ltd*, Blayney J. (O'Flaherty and Denham J.J. concurring) distilled from *Hummingbird* and the English authorities five principles of law which were endorsed in *Cablelink.* These were:-

> *"(1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.*
>
> *(2) Inferences from primary facts are mixed questions of fact and law.*
>
> *(3) If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside.*
>
> *(4) If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.*
>
> *(5) Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the court does not agree with them, for we are not retrying the case) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law."*

In this case, one can read the TAC for references to the Circuit Judge.

18. In their submission, both parties have referred to the case of *Cintra Infraestructueras Internacional SLU v. Revenue Commissioners* [2023] IEHC 72, a decision of Butler J. Indeed, it is perhaps the only area within their submissions where the parties agree.

The pertinent part of her decision reads as follows:-

> *"accepting findings of primary fact made by the Commissioner unless there is no evidence to support them but the court being at large as regards purely legal questions. The more difficult category for the appellate court lies in between primary facts and purely legal questions and comprises secondary facts or inferences drawn from primary facts by the Appeal Commissioner which are characterised as mixed questions of fact and law. Indeed, it seems to me that a mixed question of fact and law will not necessarily comprise an equal division between matters legal and matters factual and the extent to which an inference is predominantly factual or predominantly legal will vary, not just on a case-by-case basis, but as regards different findings in a single case. If inferences are based on an incorrect view of the law they can be set aside but if the Appeal Commissioner has taken a correct view of the law, the resulting inferences should not be set aside unless they are such that no reasonable Commissioner could have drawn them."*

What is VAT?

19. Value-Added Tax (VAT) is a tax, which is payable on sales of goods or services within the territory of the Member States of the EU. The tax, in all cases, is ultimately payable by the final consumer of the good or service. Each party in the chain of supply (manufacturer, wholesaler and retailer) acts as a VAT collector.

20. They collect VAT from their customers and include that VAT in their VAT returns to Revenue. When returning the VAT collected, they can reclaim, as appropriate, VAT which has been charged to them by their suppliers.

21. If one is making taxable supplies of goods and services or is engaged in what are described as "qualifying activities", which are not relevant in this case, one can reclaim VAT. One may not reclaim VAT on goods or services used for making exempt supplies or for one's non-business activities, an argument which is relevant in this case. Certain costs may relate to both taxable and non-taxable activities. One can reclaim the portion of the VAT that relates to one's taxable supplies. In order to reclaim the VAT, one needs to keep records to support the claim which include a valid VAT invoice or relevant customs receipt.

The Statutory Framework

22. The fundamental statutory framework for VAT in this jurisdiction is the Council Directive 2006/112/EC of 28th November 2006 on the Common System of Value Added Tax (the Directive).

23. Title III is headed "*Taxable persons*". Article 9 of which says as follows: –

(1) "*taxable person" shall mean any person who, independently, carries out in any place any activity, whatever the purpose or results of that activity.*

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

Article 24 reads as follows: –

(1) *""supply of services" shall mean any transaction which does not constitute a supply of goods"*

The key article for consideration in this judgement is Article 168, headed *'Deductions'.* It reads as follows:-

"insofar as the goods and services are <u>used for</u> the purposes of the taxed transaction of a taxable person, the taxable person shall be entitled, in the member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

I. *the VAT due or paid in that member state in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person."*

24. For the purposes of this judgement, I will refer to the Directive, but it is agreed between the parties that the wording of the Irish legislation is identical in regard to the key aspects in this case and therefore I shall refrain from setting it out.

<u>The Relevant EU Cases</u>

25. The parties have very helpfully referred me to over 47 decisions of both the Irish and European Courts. The main cases are *Cipo Participations [2001] ERC I- 6663, Cases C-465/03 Kretztechnik AG v Finanzamt Linz, C – 98/21, Finanzamt R v W Gmb H, C-108/14 and C-109/14, Larentia & Minerva v Finanzamt Nordenham and Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG (hereinafter "Larentia &Minerva/Marenave"), Case C-496/11 Portugal Telecom C-28/16 MVM, Case C-60/90 Polysar, Case C-29/08 Skatteverket v AB*

SKF and Case 28/16 MVM Magyar Villamos Muvek Zrt v Nemzeti Ado-es-Vamhivatal Fellebbvitli Igazgatosa.

26. It had been my intention to extract from the various decisions the key principles of VAT law which the European Court has laid down, however it seems to me that Lord Justice Hodge in *Revenue and Customs Commissioners v Frank A Smart & Son Ltd* [2018] STC 806, has neatly set out the principles.

He said as follows: -

"*From the foregoing authorities, it is possible in our opinion to identify five basic principles that govern the recoverability of input tax.*

First, at a general level, the deduction of input tax is intended to relieve a trading entity entirely of the VAT that is payable in the course of all of its economic activities; this ensures overall neutrality of taxation in respect of all activities that are subject to VAT.

Secondly, if VAT paid on an input transaction is to be deductible, there must be a direct and immediate link between that input transaction and the output transactions that give rise to a right of deduction. This is necessary because, if deduction of the input tax is to be permitted, the expenditure on the relevant inputs must be a component in the cost of the output transactions that are charged with the output VAT from which the input VAT is to be deducted.

Thirdly, such a link will be broken if the goods or services obtained through the input transaction are used by the taxpayer for the purposes of an exempt transaction or a transaction that does not fall within the scope of VAT, including activities that are not economic activities in the sense in which that expression is used in dealing with VAT.

Fourthly, the direct and immediate link will not be broken if the goods or services in question form part of the general overheads of the taxpayer's business, <u>in such a way that they form</u>

component parts of the price of the taxpayer's product. This represents common sense (emphases added). When goods or services are supplied to a customer, the costs incurred by the supplier in providing the relevant goods or services will include not only the cost of purchasing or manufacturing the goods or providing the services but also general overheads. To take a simple example, if the supplier manufactures goods, the cost of providing the goods will include not merely the cost of raw materials but also the cost of plant and equipment. This is a general proposition that has been recognised throughout the case law of the Court of Justice.

Fifthly, if the goods or services in question are used partly as general overheads of the taxpayer's business and partly for the purposes of exempt or zero-rated transactions, the input tax must be apportioned between those two uses. The reasons for this are obvious and straightforward."

27. Since that case was decided, the European Court returned to the subject in *C – 98/21, Finanzamt R v W GmbH, 8th of September 2022.* The respondent company was involved in the acquisition, management and use of properties as well as the design, remediation and realisation of building projects. It held shares in two associated companies whose activities consisted of the construction of the properties and the sale of the properties and were largely VAT exempt. Through a labyrinth of company structures, various companies made contributions. One of those companies supplied accounting and management services and the issue that arose was the deductibility of those services.

28. At para. 46 the court said: – "*However, a taxable person also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct where the costs of the services in question are part of his or her general costs and are, as such, components of the*

price of the goods or services which he or she supplies. Such costs do have a direct and immediate link with a taxable person's economic activity as a whole".

29. In what seems to me to be an important observation at paras. 49, the court said as follows: – "*The court has further specified that the existence of such a link between transactions must be assessed in the light of the objective content of those transactions. More specifically, the court can take account only of the transactions which are objectively linked to the taxable person's taxable activity. To that effect, the court has held that account be taken of the actual use of the goods and services purchased by the taxable person and of the exclusive reason for the transaction in question, since that reason must be regarded as a criterion for determining the objective content*".

The Service Agreements

30. As noted above, in this case there were two service agreements, the first between Tyco and the taxpayer, and the second between the taxpayer and its four Service Recipients. The agreements are very similar.

4. Article 3 of the second Agreement provided that:-
"THGLP("Tyco") shall provide to (or at its discretion, procure for) the Service Recipient ("the taxpayer"), various services as described in this Article 3 (the "Services"). Services shall include only those activities that provide a benefit to the Service Recipient, i.e., provide an increment of economic or commercial value that enhances the Service Recipient's commercial position, or is reasonably anticipated to do so, and may include but shall not be limited to the following…" It goes on to list of 10 services.

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

"*4.1 Compensation*

(a) The Service Recipients shall collectively pay to Covidien a service fee (the "Fee") equal in amount to Covidien's total services costs incurred in connection with providing the Services to the Service Recipients ("total services costs"), plus a markup percentage, as set forth in Exhibit A, of such costs. For the purposes of calculating the Fee, costs incurred by Covidien shall be allocated to the Services using a reasonable and consistent method of allocation as provided in Section4.1(c) below.

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

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

31. In truth, the effect of the second service agreement is that the Service Recipients paid to the taxpayer the sums it paid to Tyco plus a markup of 10%.

The Decision of the TAC

32. Having set out the facts, the EU law, the contents of the service agreements and the legal submissions by both parties, the TAC posed myself five questions. The first was whether taxpayer engaged in economic activity. He said that the jurisprudence of the European Court made it clear that a holding company whose sole purpose was to acquire holdings in other undertakings and which does not involve itself directly or indirectly in the management of those undertakings, without prejudice to its rights as a shareholder, does not have the status of a taxable person and had no right to deduct tax. He noted that it was equally

clear from the jurisprudence that the mere acquisition and holding of shares in the company was not to be regarded as an economic activity, conferring on the holder the status of a taxable person. He further noted that the mere acquisition of financial holdings in other undertakings did not amount to exploitation of property for the purpose of obtaining income on a continuing basis because any dividend yielded by that holding is merely the result of ownership of the property. But the situation was different where the holding is accompanied by direct or indirect involvement in the management of companies in which the holding had been acquired.

33. He then considered the oral evidence of the four witnesses. He accepted the evidence that the business was structured by dividing it into a number of global business units and it was not a case that a particular subsidiary would have responsibility for a particular aspect of business. The Covidien Group was driven by ownership of intellectual property and the recognition of risk. The principal entities engaged and directed manufacturers and covered the costs of those manufacturers, including the costs of any negative issues which might arise during the manufacturing process, and paid the manufacturers a profit of approximately 10%. He accepted the evidence of Mr. Oldaker and Ms. Campi that the decisions made by the board were in relation to all aspects of the taxpayer's business. These decisions were then communicated to the executive officers who in turn communicated decisions onto the relevant subsidiaries. He felt it was relevant that the executive officers were, in the main, employees of Tyco, which meant that they were persons who were in charge of the principal business units or who performed policy-making functions and were deemed to be officers of the taxpayer. He felt that the large business packs which he saw showed the detailed and ongoing involvement of the taxpayer's board in the management of the Covidien Group as a whole, as well as specific projects and initiatives within the Covidien Group.

34. He found as a material fact that through the first service agreement with Tyco and the second service agreement, that the taxpayer was providing management services not only to the four Service Recipients but also to the 84 subsidiaries who are connected to the four.

35. He rejected the submission of the Revenue that the taxpayer was a mixed holding company. Having referenced *Larentia & Minerva* and *MVM*, He accepted the statements of principle contained in the two judgements, but he did not believe that the evidence supported a finding that the taxpayer was engaged in non-economic activity.

36. He found as material fact that the appellant was not just a passive holding company but was instead at all material times actively engaged and directly and indirectly involved in the management of the subsidiaries and sub subsidiaries. He further found as material fact that the engagement and involvement in managing those companies was for the purpose of the exploitation of its holdings in those companies for the purposes of obtaining income therefrom on a continuing basis. He therefore concluded that the taxpayer was wholly engaged in economic activity at all times material to the appeal. This finding seems to me to include the other two matters namely Project Jameson and the Medtronic Transaction which also form part of this appeal.

37. The next question which the TAC asked himself was what was the supply received by the taxpayer from Tyco. He felt that Article 3 of the second service agreement, quoted above, was key, namely that the Services shall include only those activities that provided a benefit to the Service Recipient, i.e., provided an increment of economic or commercial value that enhanced the Service Recipient's commercial position, or was reasonably anticipated to do so, as set out in the list of 10 services.

38. He accepted the evidence of Ms. Campi in relation to the provision of economic and commercial value and the allocation of costs where reflective of transfer pricing concepts and were included for corporation tax purposes. Having read all the documentation, the evidence,

the submissions and applying the principles of *The Commissioners for HM Revenue and Customs v The Honourable Society of Middle Temple* [2013] UKUT 0250 (TCC), he was satisfied and found as material fact that the taxpayer received a single, composite supply of services from Tyco. He noted it was appropriate to record that the Revenue did not contend that the taxpayer had received multiple supplies from Tyco.

39. The next question was whether the taxpayer used the supply from Tyco for its economic activity. He interpreted this to mean whether the taxpayer used a single composite supply received from Tyco for the purpose of its output supplies. The taxpayer's entitlement to deduct VAT it suffered on the purchase of the first service agreement from Tyco was contingent upon those services being used for its taxable supplies to its subsidiaries or for other qualifying activities.

40. He quoted from *Cibo, Larentia &Minerva* and the case of *Dial Phone Ltd* in relation to the "used for" test and whether there was a direct and immediate link between the input costs and the supply of services; alternatively, the cost was a "cost component" of supply.

41. In a crucial finding he said that the fact that the 84 subsidiaries were not party to the service agreement and the fact that the cost of the management services supplied by the taxpayer did not require him to reach a different conclusion. In relation to the latter point he accepted the taxpayer's submission that its operating structure and intracompany transfer pricing policy meant there was a logic and a benefit to the four Service Recipients paying for the management services received by their 84 subsidiaries.

42. He did not believe that the allocation of costs referred to in the PwC report, affected his finding and accepted that the report was prepared for transfer pricing and corporate income tax purposes and did not have direct relevance to the issues of VAT which arose in the appeal. He found that the services received by the taxpayer from Tyco were used in their entirety for the purposes of the taxpayer's economic activity.

43. In relation to the taxpayer's entitlement to a deduction in respect of Project Jameson, he did not accept that this was a share for share exchange and that based upon the evidence of Mr. Ranalow, it was a three-cornered demerger. The spin off was affected by way of the distribution of a dividend "*in specie*".

44. He found as a material fact that the initial decision to divest the taxpayer's pharmaceutical business and the subsequent decision to proceed by way of spinoff were all an integral part of the active business management of the taxpayer's board of the Covidien Group' business as a whole. He therefore found that the planning and execution of Project Jameson constituted economic activity on the part of the taxpayer. He accepted the evidence that the structuring of the Covidien Group into Global Business Units meant that the divestiture of the pharmaceuticals business affected not only the four service recipients but also their subsidiaries throughout the Group.

45. He found that there was a benefit to the four Service Recipients and 84 subsidiaries. Therefore, he found that the services supplied in regard to Project Jameson had a direct and immediate link to the taxpayer's taxable output supplies to its direct and indirect subsidiaries. Therefore, found the taxpayer was entitled to a deduction in respect of the VAT.

46. In relation to the third matter, namely the Medtronic Transaction, he was satisfied that the taxpayer's board in initiation, oversight and execution of the disposal to Medtronic was an integral part of the active management by the taxpayer's board of the group as a whole. He quoted from the case law set out above and therefore found as material fact that the taxpayer was wholly engaged in economic activity at all times and therefore was entitled to full deduction in respect of VAT.

Revenue's Submissions - Ongoing costs

47. The Revenue's case is quite simple. It submits that the TAC failed to address the issues which were agreed by the parties to be determined and failed to examine the evidence through the prism of EU law. This is a fundamental error which vitiates his conclusions. It argues that the TAC failed to engage with and apply Article 168 of the Directive, in that he failed to identify what the taxed transaction of the taxpayer was, failed to engage with the interpretation and application of the "*used for*" test, insofar as the goods and services are used for the purposes of the taxed transaction of a taxable person.

48. It says that the terms of the service agreements are binding and are meant to represent the totality of the cost of the services contracted for in the first service agreement which were meant to be passed on to the four Service Recipients by way of the second service agreement with a mark-up.

49. The contract says nothing about the 84 subsidiaries and therefore Revenue challenges the TAC's finding, that the 84 received a benefit. It should be noted however that there is no appeal on this finding of fact, simply Revenue says that the TAC made a mistake of law in coming to that conclusion.

50. Given that the cost of services received from Tyco were far in excess of what was charged to the four Service Recipients, it must be the case that not all of the services were used and therefore the TAC was wrong in law in finding that the taxpayer was wholly engaged in economic activity. The taxpayer had to manage all its other entities outside the US and did so without charge and therefore it could not be said that was wholly engaged in economic activity, when clearly it must have been engaged in partial economic activity as a holding company and therefore is only entitled to partial VAT deductibility or recovery.

51. Revenue challenges the finding that what was supplied was a single composite service which could not be broken down into constituent or component parts. This is an error in law

because you cannot be one hundred percent engaged in economic activity if you are carrying out other activities for which you do not charge.

52. Finally, Revenue submits that there was no analysis of the taxable services supplied so as to give rise to a direct and immediate link or that the costs form part of the general overheads.

The Taxpayer's Submissions - Ongoing costs

53. In response, the taxpayer emphasises the role of this court in determining a case stated. It says the Revenue is simply annoyed and frustrated that it lost. All of the arguments that were made to this Court were made to the TAC. He had three days of evidence, 9 days of hearing, read all the documents, correctly stated the appropriate EU law, and considered the evidence in detail. The TAC interrogated the evidence.

54. Revenue have not challenged any of his findings of fact and therefore unless the TAC was wrong in law, his conclusions can only be set aside if this court were to find that no reasonable TAC could have found as he so found, based upon the evidence.

55. In relation to the submission that the difference between the costs arising from the first agreement with Tyco and the costs paid by the four Service Recipients pursuant to the second agreement, it argues that a taxpayer does not have to make a profit on a transaction. Just because it seems that the charge to the four Service Recipients was approximately 40% of the cost of purchasing the supply, it does not mean that the 60% of the service was used for some other purpose. The supply was entirely used by the four and their 84 subsidiaries.

56. The service which was supplied covered a full range of management and professional services in the form of a single composite supply, a concept well known in VAT law, all of which was used by the four Service Recipients. There was consideration and the TAC was

correct in finding that the taxpayer was wholly engaged in economic activity and therefore entitled to 100% deductibility.

57. In regard to Revenue's argument that the strict terms of the agreements should be interpreted against the taxpayer, particularly Articles 3 and 4, the taxpayer says that this is to ignore the EU and Irish case law which states that the court must consider the economic realities as a fundamental criterion for the application of VAT.

58. Having heard all the evidence the TAC was satisfied that the taxpayer was not just a holding company and that the nature of the service was a single supply of management services which would in turn relate to the management of the four Service Recipients and the 84 subsidiaries.

59. Therefore, the TAC knew the law, applied the law, made his findings of fact, which have not been appealed and correctly found that the taxpayer was not engaged in non-economic activity. The taxpayer used the single composite supply of professional services wholly for the benefit of the four and in turn the 84 only.

Discussion and Decision – Ongoing Costs

60. The first submission made by the Revenue relates to the failure on the part of the TAC to deal with the agreed set of questions that were put to him. While this argument wasn't made with any degree of force at the hearing of the case, I think for the sake of completeness I should deal with it. The TAC is the person in charge of the hearing. Whilst the parties may agree many issues, it is imperative that his or her discretion should not be curtailed by what the parties agree. The question is whether or not he dealt with the substantive issues before him. I believe he did. Therefore, I see no merit in this argument.

61. The next submission relates to Article 168 of the Directive. The opening line of which sets out the key requirement namely "*Insofar as the goods and services are used for the*

purposes of the taxed transactions of a taxable person," Thus there must a taxable person, a taxable transaction and the goods and services must be used for the purposes of the taxed transactions. This is the "*used for"* test as set out in Article 24 of the Directive.

62. This forms a central part of Revenue's argument that the TAC failed to deal with the issues through the prism of EU law. In this regard, there are a number of important matters which I need to address. These include the economic activity of the taxpayer, the service agreements, the single composite supply, and whether the taxpayer was wholly engaged in economic activity.

63. The TAC took as his starting point Article 9 (1) of the Directive, the key part of it being: "*The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."*

64. He therefore held that the taxpayer must be considered to have been carrying on an economic activity if it was exploiting its tangible property, namely its shareholding in direct and indirect subsidiaries, for the purposes of obtaining income therefrom on a continuing basis. He considered the decision in *Cibo,* which held that the involvement of a holding company in the management of companies in which it has acquired a shareholding constitutes economic activity within the meaning of the directive, where it entails carrying out transactions which are subject to VAT, by virtue of Article 2 of the Directive, such as the supply by a holding company to its subsidiaries of administrative, financial, commercial and technical services.

65. It is hard to see where the TAC went wrong in regard to his interpretation of the law on this issue. Indeed, it is one of the tenets of the European Court's approach to the law relating to VAT, that a taxpayer is exploiting its assets when it is acting in the manner that this taxpayer did. Therefore, I cannot agree that the TAC misapplied the law or

misinterpreted it. Neither did he misapply the "*used for"* test when he found that services supplied were used by the four Service Recipients.

66. In relation to the service agreements, Revenue says that these dictate the legal framework in which the supplies were to be delivered. Put simply that the taxpayer is bound by its own agreements. But the taxpayer says one must look to the economic reality. Throughout the hearing these issues were canvassed in great detail. It would seem that the manner in which the service agreements were actually carried out varied from the precise wording of the agreements themselves. This is how the disparity between the costs of purchasing the first agreement as opposed to the cost attached to the second agreement arose. That was not done for the purposes of avoiding VAT. The evidence was clear, it was done for transfer pricing and corporate income tax purposes.

67. In *Vera v Donagain [2021] IECA 334,* the Court of Appeal noted that the European Court of Justice has emphasised that the national court must consider all the circumstances surrounding the transaction. Egan J. in *Revenue Commissioners v Novartis [2022] IEHC 642* followed this approach where she said that the consideration of economic realities is a fundamental criterion for the application of VAT.

68. It seems to me that is exactly what the TAC did in this case. What happened in practice was different to the precise wording of the agreements. The economic realities were different to the wording of the agreements. That does not mean that they somehow are contrary to European VAT law. The TAC, in my view, is entitled to come to that view based upon the evidence he heard.

69. In regard to the argument that since the costs of the services received were far in excess of what was charged, and therefore, the taxpayer could not be wholly engaged in economic activity since not all of the services were used, I cannot agree. The TAC found that the taxpayer was at all material times only engaged in the activities of its subsidiaries and the

Service Recipients. There was no evidence, despite probing from Revenue, that the taxpayer was engaged in partial economic activity. As the taxpayer argued it does not have to make a profit. Clearly it did not make a profit on these transactions but that is its right. There was no evidence that the supply was used for some other purpose and therefore the TAC had little option but to come to the conclusion he came to namely that the supply of services was used as he found.

70. In relation to single composite supply, this must be seen from the context of the consumer. In this case that was the four Service Recipients. In my view the TAC clearly considered this matter when he said that the starting point was the first service agreement. He went to the trouble of setting out the pertinent terms in some detail. It cannot be said that he didn't understand those terms, he clearly did. Further he applied the case of *Middle Temple* which raised this very issue.

71. He accepted, as he was entitled to do, the evidence of Ms. Ciampi that the wording of the agreement was reflective of transfer pricing concepts and was included for corporation tax purposes.

72. In fact her evidence is important on a number of fronts. The TAC recorded it as follows:- *She further went on to state that outside of the US, there were four "Foreign Principal Entities" (the four Service Recipients"), with most of the non-US intellectual property being owned by CovAG. She stated that there were 84 active legal entities which were directly connected to the FPEs, which supported the 84 subsidiary entities either through services, such as research and development services and some finance services. The 84 legal entities were the distributors to the ultimate customers and also the manufacturers and marketers of the products".*

73. He noted that she said the following:- "*Ms Ciampi gave evidence in relation to a cost centre analysis which had been performed in relation to the costs which THGLP("Tyco")*

applied to the Appellant, which was required because there was a need to determine from a corporate tax perspective where the expenses belonged in order to support a tax deduction. She stated that in order to support tax deductions, a transfer pricing exercise was required to establish how the expenses were allocated to legal entities for corporate tax purposes."

74. Whilst Revenue is critical of this approach, and argue that the purpose is irrelevant, the manner in which the TAC arrived at his decision, having taken into consideration the UK Upper Tax Tribunal in *Middle Temple*, is not an approach which in my view is wrong in law. Nor is it a finding which no other reasonable TAC could not have arrived at given the evidence, which was not significantly challenged in cross examination. Nor as noted above, has there been any appeal from the findings of fact, just the inferences drawn from those findings.

75. The evidence of Ms Ciampi was important in that she set out the structure of the group, the service providers and their interaction with the key 84 subsidiaries. She also explained how it was that the services agreements were structured. None of which related to VAT liability but instead was done to support tax deductions, transfer pricing and corporate tax purposes. It may be the Revenue does not like this approach but it is perfectly legal and therefore in my opinion the TAC can not be criticized in his approach.

76. Returning to the issue of economic activity, the question to be asked was whether the taxpayer was wholly engaged. Again, this issue was canvassed in detail before the TAC, both in submissions and orally. The case of *Cibo* is clearly relevant here as the European Court found that direct or indirect involvement in the management of subsidiaries must be regarded as an economic activity where it entails the carrying out of transactions which are subject to VAT. The TAC distinguished the case of *MVM*, which I've referred to above, on the basis that the taxpayer in that case did not charge subsidiaries for the management of services

incurred nor did it impose a general charge for strategic management, however in this case there was a charge for the services supplied, just not in keeping with the wording of the service agreements.

77. None the less he carefully considered the submissions, the evidence and the law. While he used a phrase given in evidence by Mr Brodie, the tax consultant, that the taxpayer was an active holding company, I do not see this as being in any way fatal, as Revenue have suggested. Nor do I see it as being in any way contrary to the EU framework. The use of that term appears in the EU case law.

78. There are no grounds of appeal in relation to his findings of fact. The threshold to challenge such a finding of fact is that it should not be disturbed unless there is no evidence to support it. Here there was plenty of evidence to support his findings indeed evidence which was not challenged either before the TAC or in this case stated. The submission is that he failed to see the case through the prism of the EU caselaw.

79. Taking all matters into consideration, it seems to me that the TAC, based upon credible evidence, found that the services received by the taxpayer from Tyco were used in their entirety for the purposes of the taxpayer's economic activity, and in those circumstances, he did not have to consider that the costs incurred were part of the general costs linked to the taxpayer's overall economic activity. He thoroughly analysed the evidence and, on that basis, made his findings of fact.

80. Given that my role in this case is not to rehear the appeal but simply to ascertain whether the TAC erred in the way set out in *Mara v Hummingbird*, it cannot be said that there was no evidence to support those findings. Whilst Revenue have complained about the lack of significant interrogation and errors of analysis, I cannot agree. It is not the role of this court to challenge or even worse change the findings, it is simply to see if the TAC erred in law.

81. In this regard, I take into consideration the views of Stack J in *Glynn v Revenue Commissioners [2021] IEHC 780* in relation to the drafting of the notice pursuant to Section 949AP TCA 1997, where she pointed out that alleged errors of law should be pleaded with particularity. That did not happen in this case, perhaps for a reason, namely that it was hard to be particular.

82. The TAC was perfectly entitled, based upon the evidence, to form the opinion that the taxpayer was wholly engaged in economic activity and that the taxpayer was not just a holding company but was actively engaged in the management of its companies outside of the US irrespective of whether they be the four Service Recipients, its subsidiaries, or subsidiaries of subsidiaries. Further he was entitled to come to the view that the taxpayer was not engaged in non-economic activity.

83. This is not a case of the TAC not knowing the law, he clearly did and set it out in great detail. Nor is it a case in which the TAC ignored the submissions made by either party, he clearly didn't, and set them out in great detail too. I do not agree that he failed to either interrogate or analyse the evidence. He set out clearly and explained how he reached his findings of fact.

84. White J in *Last Passive Ltd v the Revenue Commissioners [2014] IEHC 685,* said "*it is not open to this Court even though the arguments as to an alternative approach where persuasive, to substitute the appeal Commissioner's findings from primary facts, for conclusions drawn by this court*."

85. Therefore, in answer to question (i) I believe that he was correct in law in his approach to the issues of fact on the one hand and the issues of law on the other, and, in particular to his identification of the material findings of fact in his determination.

86. I believe he was correct in law in identifying the relevant issues for determination contained in paragraph 287 of his determination.

87. I believe he was correct in law in the approach taken in paragraphs 289 to 333 inclusive of his determination in addressing and answering the three questions posed. For sake of completeness, I believe he correctly answered the question as to what an economic activity for VAT purposes was, what was an economic activity giving rise to the right to deduct for VAT purposes and the appropriate legal consideration when determining whether (i) ongoing costs comprising input costs of supplies made to the taxpayer by Tyco.

Project Jameson – Revenue's submissions

88. Revenue argues that the TAC was wrong in his characterisation of the planning and execution of the Jameson project when he determined that it constituted economic activity. The question which he was bound to ask in relation to those costs was whether they were used for the taxed transactions of the taxpayer.

89. It submits it is especially hard to see how the planning and execution of the project constituted economic activity.

90. The costs were clearly not used by the taxpayer for the purposes of providing management services to the Service Recipients. Nor did the taxpayer receive any consideration for the transaction.

Project Jameson-the Taxpayer's submissions

91. The taxpayer submits that the TAC made two findings of fact which have not been appealed. These are that the taxpayer's initial decision to divest itself of the pharmaceutical business by way of sale or spinoff, and the subsequent decision to proceed were all an integral part of the active management of the taxpayer's board of the Covidien group's business as a whole and that the services supplied to the taxpayer in relation to the project

had a direct and immediate link to its taxable output supplies to its direct and indirect subsidiaries.

92. These findings, allied to the finding that the transaction itself did not result in any exempt supplies, meant that the costs were part of the taxpayer's overheads and are fully deductible.

Discussion and Decision – Project Jameson

93. Revenue's argument is that the TAC did not apply the "used for" test in regard to Project Jameson. The costs were not used for any management purposes since they related to potential restructuring of the various enterprises. In his determination he noted that Revenue's submission in part was incorrect where it argued that there had been a share for share exchange at the ultimate shareholder level. In fact, it was a three-cornered demerger.

94. He said as follows "*the appellant (the taxpayer) did not receive any shares or cash as part of the transaction. The appellant's shareholders did not exchange shares; they retained their existing shareholding in the appellant and received additional shares in Mallinckodt plc proportional to the shareholding the appellant."*

95. He went on to accept the evidence of Mr. Ranalow that the spin-off was effected by way of the distribution of a dividend *in specie.* He said that the initial decision to divest the appellant's pharmaceutical business, and the subsequent decision to proceed by way of spinoff and the further subsequent implementation of that decision were all integral parts of the active management by the appellant's board of the Covidien group's business as a whole. He then found that the planning and execution of project Jameson constituted economic activity. He found that this affected not only the four Service Recipients but also their subsidiaries throughout the group.

96. On that basis, he found that the planning and execution of Project Jameson constituted economic activity and had a direct and immediate link to the taxpayer's taxable output supplies to its direct and indirect subsidiaries. In reaching his finding, he referred and applied the relevant caselaw.

97. Whilst I initially had some concerns in relation to the brevity of the TAC's determination on the issue, it seems to me that in fact he did consider this matter through the prism of EU law, when he took as a starting point article 9 of the directive, "*that the expectation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as economic activity."* Further he considered the evidence of Mr Oldaker and Ms Ciampi in relation to the manner in which the business of the group was conducted. He noted that this was not a case in which a particular subsidiary had responsibility for a particular aspect of business. He found it was clear from the documentary and oral evidence in the appeal that decisions made by the board of the taxpayer in relation to all aspects of the group's business and he found it was of note that the executive officers, who in the main were employees of Tyco, were deemed to be officers of the taxpayer.

98. The board packs demonstrated the detailed and ongoing involvement of the taxpayer's board in the management of the group as a whole and in relation to specific projects and initiatives within the group. Thus, he came to the view that the taxpayer was at all material times engaged in the management of all aspects of the Covidien group, and therefore, was wholly engaged in economic activity at all material times to this appeal. That included Project Jameson. Indeed, it cannot but have included Project Jameson giving the findings of fact. It would be illogical to be wholly engaged in economic activities at all material times, yet not be wholly engaged in economic activities during the course of a crucial reconstruction of the business of the taxpayer which formed Project Jameson.

99. It seems to me that Project Jameson falls four square into the category of economic activity set out in *Larentia & Minerva,* namely that a taxable person has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions, where the cost of the services in question are part of his or her general costs and are, as such, components of the price of the goods or services which he or her supplies. Such costs do have a direct and immediate link with a taxable person's economic activity as a whole. Restructuring of the company had as its goal, the benefit to the group as a whole and thus to the price of the goods and services which the taxpayer supplied.

100. Therefore, I am of the opinion that the TAC was correct in law in concluding that the taxpayer was entitled to deduct the VAT inputs it incurred in respect of services it received in relation to Project Jameson.

Medtronic-Revenue's Submissions

101. These costs were not used by the taxpayer in providing management services to the Service Recipients and so the transaction was not an economic activity. He made a mistake in law when he came to the view that the board's initiation oversight and execution was an integral part of the active management of the board as a whole. He further made a mistake in law in equating this transaction with the *Kretechnik* case, which was one which involved raising capital for the business. There was no capital raising proposal in this case. Fatally, he made no findings that the transaction affected group companies. On that ground alone, he failed to appreciate his role and it should be overturned.

Medtronic-the Taxpayers Submissions

102. The taxpayer submitted that this transaction was similar to the Project Jameson transaction and therefore the taxpayer was entitled to deduct VAT incurred on overhead costs of a fully Vatable business.

103. Since the TAC had found that the taxpayer was fully engaged, then he was correct when he determined that was part of the oversight and execution of the disposal to Medtronic which was an integral part of the active management of Covidien's group's business as a whole. There was no challenge to the finding of fact, and therefore, since the TAC found that the taxpayer was fully engaged in economic activities at all times material to the appeal, it follows that the taxpayer is entitled to a full deduction in respect of VAT incurred.

Discussion and Decision – Medtronic

104. In regard to the Medtronic transaction, this was affected by way of a cancellation scheme of arrangement approved by the High Court. Existing shares in the taxpayer were cancelled and the resulting reserve was capitalised and used to issue fully paid new shares in the taxpayer to two Medtronic companies.

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

106. He found that the board's initiation, oversight and execution of the disposal of Medtronic was an integral part of the active management by the taxpayer's board of the Covidien Group's business as a whole. In my view this is a logical finding bearing in mind that he found that at all material times in this appeal, the taxpayer was engaged in wholly economic activity. The fact that he did not find that the transaction affected the group companies does not have the effect of allowing this court to overturn a finding of fact which in my view he was entitled to come to, based upon the evidence. Neither does that failure mean that his conclusion means that he adopted a wrong view of the law such that his finding should be set aside. Certainly, no authority was opened to me to that effect.

107. The Medtronic transaction was clearly a transaction for the benefit of the group as a whole which in my view clearly arises from his finding that that the taxpayer was at all times wholly engaged in economic activity. Therefore, it seems to me that this is a finding that I cannot set aside since I do not believe that no reasonable commissioner could have come to the same conclusion.

108. Therefore, I find that the TAC was correct in law in concluding that the taxpayer was entitled to deduct the VAT inputs it incurred in respect of services it received in relation to the Medtronic Transaction.

The Other Foreign and Domestic Providers

109. As I noted above, the taxpayer also incurred VAT on domestic purchases of goods and services and to other non-Tyco services from abroad. This was noted by the TAC but was not dealt with in the determination. I asked the parties for submissions on this issue and thankfully they limited their submissions to one page as requested. I have considered them. It is common case that the court has jurisdiction to remit this matter to the TAC notwithstanding that he is retired. Another TAC will be able to hear the matter. The taxpayer

argues that there is no merit in remitting the matter since the TAC found that the taxpayer was engaged exclusively in economic activity and by reference to the Project Jameson and Medtronic transaction was entitled to full deduction.

110. That argument seems to be premised on a view that this court may find that the taxpayer was entitled to full deduction for Project Jameson and Medtronic.

111. Revenue argued it can and should be remitted to the TAC and referred me to the case *Revenue v Henry Walsh* [2022] IEHC 305.

112. However, since I have concluded that the TAC did not err in law in regard to either Project Jameson or the Medtronic transaction it seems to me that there is no merit in remitting the balance of the potential tax liability to a new TAC.

Conclusion

113. I answer the questions set out the case stated as follows: –

I. Yes.

II. Yes.

III. a. Yes.

b. Yes.

c.

i. Yes.

ii. Yes.

iii. Yes.

IV. Yes.

V. Yes.

VI. Yes.

VII. Yes.

VIII. Yes.

I shall hear the parties as to costs.