Neutral Citation: [2023] UKFTT 44 (TC)

Case Number: TC08699

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2020/03048 (V)

*Value Added Tax Act 1994: sections 24, 26 and 43. Value Added Tax Regulations 1995: regulation 101. Whether section 43 of the VAT Act 1994 allows the actual intention of the VAT group representative as to economic activity and as to taxable supplies could be matched to the deemed supply of services to the group representative. Held: no. Whether services received and paid for by an acquiring company for a takeover, and for fundraising associated with the takeover, are services used or to be used for the purpose of any business carried on or to be carried on by the acquiring company via the acquired company for the purposes of section 24 of the VAT Act 1994, and whether taxable supplies to be made by the acquired company can be relied on as taxable supplies of the acquiring company for the purposes of section 26 of that act. Applied: BAA Limited v HMRC [2013] EWCA Civ 112; MVM Magyar Villamos Művek Zrt v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság [2017] EUECJ C-28/16; Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG v Finanzamt Nordenham (C 108/14) and Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG (C 109/14); Kretztechnik AG v Finanzamt Linz [2005] EUECJ C-465/03; HMRC v Frank A Smart & Son Ltd [2019] UKSC 39. Held: (a) the fundraising was a purpose of the takeover and was a purpose of the acquiring company; (b) the taxable supplies, and the economic activity, of the acquired company could in principle be relied on by the acquiring company to satisfy sections 24 and 26 and regulation 101; (c) but the funds raised were used to acquire assets in the form of entities that would be customers of the acquired company; (d) the use of those acquired assets for that purpose did not bring the acquired company's taxable supplies and its economic activity (or intention as to both) within the authorities that enabled such supplies and such activity to be relied on as "downstream" taxable supplies and "downstream" economic activity of the acquiring company. Frank Smart distinguished on the facts: the assets acquired with the funds raised in Frank Smart were assets that would be used by the acquiring body for its own economic activity whereas in the present case the assets acquired with the funds raised were to be used as consumers of the acquired company's taxable supplies.*

**Heard on:** 2 August 2022
**Judgment date:** 5 November 2022 (summary)
16 January 2023 (full)

**Before**

**TRIBUNAL JUDGE RACHEL PEREZ**
**MR NOEL BARRETT**

**Between**

**INCE GORDON DADDS LLP**

**Appellant**

**and**

**THE COMMISSIONERS FOR**
**HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

| | |
|---|---|
| For the Appellant: | Mr Michael Firth of counsel |
| For the Respondents: | Mr David Saldanha of HMRC (oral submissions), Ms Shazana Hussain of HMRC (statement of case), Ms Sabha Kanvel of HMRC (skeleton) |
| Oral evidence: | Mr Simon Howard for the appellant |

## DECISION

1. The appeal is dismissed. We gave a summary decision. We now give our full decision at the appellant's request. HMRC did not object to the appeal being admitted late. We omitted expressly to admit it late, but confirm now that we admitted it.

2. I apologise that this full decision has not been done sooner. The request for it was passed to us on 17 November 2022. The decision was ready for final agreement by 9 December, but then holiday and illness intervened.

## REASONS

### A. INTRODUCTION: SUMMARY OF APPEAL AND OUTCOME

3. This appeal is against HMRC assessments dated 11 March 2020. The reasons for the assessments were notified in advance by a letter dated 12 November 2019. The assessments disallowed input VAT as follows—

- for period 10/17: £69,241
- for period 01/18: £3,997.

4. The parties agree that those were the individual amounts. The total we arrive at from those individual amounts is £73,238. That total matches the total calculated by the appellant and the total stated in some of HMRC's documents[1]. Nothing turns on the exact figure, however. There was also £325 said in HMRC's statement of case (paragraph 69) to be excluded from the common ground as to time of supply. Nothing appeared to turn on that amount either.

5. The VAT denied relates to Project Kappa. Project Kappa was the flotation of Gordon Dadds Group Limited on the Alternative Investment Market and the simultaneous raising of £20 million. The flotation was effected in a reverse takeover in which Work Group plc acquired Gordon Dadds Group Limited (previously and subsequently named Culver Holdings Limited). There were further name changes, immaterial to this appeal[2]. For ease of reference, we adopt the approach taken in oral argument and refer to Culver Holdings Limited ("Culver") as the company that was acquired and is now the appellant, and we refer to Work Group plc ("WG") as the company which incurred the VAT in question and acquired Culver.

6. WG joined the Culver Holdings Limited VAT group on the same day as that on which the takeover took effect. WG received and paid for services in relation to the takeover, and sought, via the VAT group representative member, Culver (the company that WG acquired), to recover the input tax. HMRC denied the claim on the basis that WG itself did not make or intend to make supplies within the scope of VAT. The appellant appealed on the bases that (i) the supplies are treated as made to the VAT group representative (Culver) which was carrying on the taxable economic activities of the group as a whole; (ii) the cost of the supplies to WG formed part of the overheads of the VAT group representative and are recoverable as such; (iii) VAT grouping can affect VAT recovery; and (iv) even looking at the position prior to the takeover, the input VAT is recoverable. The parties' arguments are set out in more detail at paragraphs 52 to 60 below.

[1] The notice of appeal and Mr Firth's skeleton for the appellant both gave the correct total: £73,238. The assessments themselves, dated 11 March 2020 (page 163 to 167), gave the same individual amounts of £69,241.00 and £3,997.00, and correctly added those up to £73,238 on pages 165 and 167, as did HMRC's witness at paragraph 45 of her statement (page 69). But one of the pages of the same assessment notice gave the total as £73,239.00 (page 163), and HMRC's skeleton gave the total as £73,329.21 (at paragraph 2).

[2] Following the takeover, Gordon Dadds Group Limited changed its name back to Culver Holdings Limited, and Work Group plc changed its name to Gordon Dadds Group plc. Culver Holdings Limited, the company that WG took over, is now called Ince Gordon Dadds LLP and is the appellant. WG is now called The Ince Group Plc.

7. We found in our summary decision that section 43 did not assist the appellant. As to the other arguments, we accepted that WG had an intention to join the VAT group (bringing this case within *BAA Ltd v HMRC* [2013] EWCA Civ 112, [2013] BVC 48; see paragraph 108). We accepted too that fundraising was WG's intention and not merely Culver's intention. But we had no evidence that any of the funds to be raised were intended to be used as working capital (to fund "downstream" operations) as opposed to being intended to be used for acquisitions; the evidence left the intention open for each. Nor did the evidence to which we were taken show that the funds raised were actually used for anything other than acquisitions. So we considered the intended use of those acquisitions. We found that their intended use was so that the acquisitions could be additional customers of Culver's services. We distinguished, because of that, the acquisitions in the present case from those in *Frank A Smart & Son Ltd v Commissioners for Her Majesty's Revenue and Customs* [2019] UKSC 39, [2019] 1 WLR 4849). So we dismissed the appeal.

**B. FACTUAL BACKGROUND**

8. Culver was, prior to the reverse takeover, the holding company of a group of companies which provided legal and professional services and financial advice. Culver supplied management services to its subsidiaries for consideration.

9. WG had previously carried on similar activities to those of the Culver group, but had ceased carrying on those activities about 20 months before the reverse takeover.

10. By a letter dated 22 August 2016, WG made an offer to acquire the whole issued share capital of Culver "*through a share for share exchange under a Takeover Code offer… and simultaneously raise approximately £20 million in cash through a placing … by Arden Partners plc of new ordinary shares in Work Group*". The proposed transaction was referred to as Project Kappa. That 22 August letter has been referred to in these proceedings as the heads of terms document. We reproduce it as a useful explanation of the project (page 598, emphasis in original)—

> "22 August 2016
>
> The Directors
> Culver Holdings Limited
> 5 Agar Street
> London
> WC2N 5NH
>
> Dear Sirs,
>
> **Proposed acquisition of the whole of the issued share capital of Culver Holdings Limited ("Project Kappa")**
>
> Further to our recent discussions and assuming that the affairs of neither party changing [sic] significantly from the positions we have disclosed as of today, this letter sets out the main terms under which it is intended that [WG] PLC ("[WG]") would acquire the whole of the issued share capital of Culver Holdings Limited registered no. 02611363 ("Culver") through a share for share exchange under a Takeover Code offer (the "Offer") and simultaneously raise approximately £20 million in cash through a placing (the "Placing") by Arden Partners plc ("Arden") of new ordinary shares in [WG].

Project Kappa would constitute a reverse takeover pursuant to Rule 14 of the AIM Rules for Companies and will require the production of an appropriate admission document.

The Offer will be subject to completion of due diligence by both parties on the other to the satisfaction of Arden, upon the usual terms and conditions applicable to a reverse takeover under the Takeover Code and the specific conditions set out below.

Arden will be appointed Nominated Adviser to [WG] immediately prior to the readmission of the enlarged group and will control the admission document process throughout Project Kappa.

It is envisaged that irrevocable undertakings to accept the offer will be received from shareholders in respect of between 70 and 80 per cent of the issued share capital of Culver.

**Terms**

Full acceptance of the Offer would involve the issue of 500,000,000 new ordinary shares of [WG] to rank *pari passu* in all respects with the existing issued ordinary shares of [WG]. The Placing will be undertaken at 7p per new ordinary share of [WG]. It is assumed that the ordinary shares currently held by the Employee Benefit Trust ("EBT") of [WG] will either be cancelled in consideration of the cancellation of the loan or that they will be sold by the EBT at 7p per share at the same time as, or as part of, the Placing although consideration may be given, with your approval, to the EBT and its shareholding being left undisturbed. For the avoidance of doubt, the 7p price and the number of shares shall be varied proportionately if the share capital is to be consolidated or otherwise reconstructed ahead of the Offer becoming unconditional in all respects.

**Specific conditions**

The Offer will be subject to the following specific conditions being satisfied:

a. Approval by [WG] shareholders of the resolutions required to implement the Offer (including for the avoidance of doubt a whitewash resolution if required);

b. Acceptances being received in respect of not less than 90% of the issued share capital of Culver (or such lesser amount being not less than 75% as shall be accepted by [WG]);

c. The London Stock Exchange admitting the enlarged issued ordinary share capital to trading on AIM ("Admission");

d. Approvals as necessary for the change of control of Culver by the Financial Conduct Authority and by the Solicitors Regulatory [sic] Authority;

e. Final approval by the Board of [WG]; and

f. Completion of the Placing raising £20m in cash or such lesser sum as Culver shall agree in writing after consultation with [WG].

**Control of costs and indemnity**

Both parties are intent on controlling the costs of the transaction. Save as otherwise provided in this paragraph, if the transaction or the Placing does not complete before expiry of the Exclusivity Period referred to below for any reason (including without limitation failure of any of the conditions listed above other than condition a. or, except because of discovery of a materially adverse liability of Culver or its group of entities, condition e.) or in the event the Offer is not declared unconditional in all respects within

the Takeover Code timetable, Culver hereby agrees to pay to us by way of full indemnity all fees, expenses and valued added tax thereon not recoverable by us as an input payable by us to each adviser appointed by us whose terms of engagement you had approved. Culver's indemnity obligation in this paragraph shall not apply if (i) [WG] withdraws from the proposed transaction (other than because of failure of any of the conditions listed above other than condition a. or, except because of discovery of a materially adverse liability of Culver or its group of entities, condition e.) or discovery of a materially adverse liability of Culver or its group of entities or in the event the Offer is not declared unconditional in all respects within such timetable) including for the avoidance of doubt because of the failure of [WG's] shareholders to approve the acquisition of Culver or (ii) Culver withdraws because of the discovery of a materially adverse liability of [WG] not already known to you or (iii) if failure of the conditions listed above is due to a materially adverse liability of [WG] not already known to you.

**Name and board**

[WG's] name shall be changed to Astarga PLC and Adrian Biles, Christopher Yates and David Furst will be appointed directors of [WG] and [redacted] will retire as a director upon the Offer becoming unconditional in all respects.

**Timetable**

It is the intention of both parties to proceed as quickly as possible with the transaction as outlined herein with a view to the publication of the offer document and related documents by 31 October 2016, although both parties acknowledge that the timetable may prove ambitious.

**Exclusivity**

WG confirms that it has terminated all discussions with other parties with respect to a corporate transaction of any sort described below and in consideration of the indemnity outlined above and Culver's incurring fees, expenses and other costs in connection with, and committing management time and resources to, progressing to its board recommending the Offer to its shareholders, [WG] undertakes that it will not, during the Exclusivity Period defined below, enter into or continue any discussions or negotiations which might give rise to any corporate transaction, being an offer for the share capital of [WG] or the issue of new ordinary shares by [WG] or the acquisition of any entity other than Culver by [WG] or the incurring (other than in the ordinary course of its continuing activities) of any indebtedness by [WG]. [WG] further undertakes that it will procure that no subsidiary of [WG] shall enter into or continue any such discussions.

Culver confirms that it is not engaged in any discussions with other parties and will not during the Exclusivity Period engage in any discussions with third parties which might give rise to an acquisition of any shares or other equity interest in Culver or any member of its group of entities or any substantial part of its or their undertaking and assets. It further confirms that, save for completion of the acquisition of the economic interests of all of the members of Brook Street Holdings LLP, during such period it will not enter into any heads of terms or binding agreements for an acquisition by Culver or by any member of its group of entities of any shares or other equity interest in, or of any substantial part of the undertaking and assets of, any third party without the prior consent of [WG].

The "Exclusivity Period" is the period from the date of our receipt of your acceptance of this letter to midnight on 31 October 2016, or such later date as [WG] and Culver agree in writing from time to time provided That [WG] or Culver may terminate the Exclusivity Period at any time by written notice to the other with immediate effect if (a)

the other states that it will not proceed with the transaction upon the terms outlined in this letter or (b) if any of the conditions listed above fails.

**Confidentiality**

Both parties have entered into non-disclosure agreements in respect of the discussion leading to these heads of terms. It is agreed that the terms of those agreements continue without any alteration and it is, for the avoidance of doubt, agreed that neither party will make any statement to any party, either spoken or written, acknowledging these heads of terms (including their existence) or their contents without the approval of the other party save where required to do by law or a relevant regulatory authority. Where such statement is so required the party required to make the disclosure will give the other notice of the requirement and, to the extent possible, agree how and when the disclosure shall be made.

**Binding clauses**

This clause and the clauses headed "Control of costs and indemnity", "Exclusivity", "Confidentiality" and "Governing Law" [sic] are legally binding. The remainder of the letter is considered by both parties to fairly represent the intentions of the parties but is not binding.

**Governing law**

These heads of terms and any dispute or claim arising out of or in connection with them or their subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales. [WG] and Culver irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with these heads of terms or their subject matter or formation (including non-contractual disputes or claims).

Yours faithfully".

11. That 22 August 2016 heads of terms document confirmed that this was a reverse takeover for the purposes of the AIM listing rules. That is to say, it was a mechanism whereby a private company could become a publicly-traded company by being taken over by a public company.

12. By an engagement letter dated 19 October 2016 (page 602), Arden Partners were instructed as "*Financial Adviser, Nominated Adviser and Sole Broker to [WG] in connection with the reverse takeover of Culver … readmission to trading on AIM … and the associated fund raise [sic] of up to £20 million by way of an equity placing*". Arden Partners' services were to be supplied only to WG, although Culver was jointly and severally liable for paying Arden Partners (clause 3(I) on page 606, and schedule 1).

13. An Admission Document was prepared in connection with the reverse takeover. The Admission Document included the following description of itself, on its first page (page 619, sixth paragraph)—

> "This document comprises an AIM admission document and has been prepared in accordance with the AIM Rules in connection with an application for admission to trading on AIM of the issued and to be issued ordinary shares in the capital of the Company.".

14. The Admission Document summarised the proposal thus (page 619, emphasis in original)—

"**Work Group plc**

***(to be renamed Gordon Dadds Group plc)***

*(Incorporated and registered in England and Wales with registered no. 03744673)*

**Offer for Gordon Dadds Group Limited**

**Conditional Placing to raise £20.0 million**

**Application for Admission of the Enlarged Share Capital to trading on AIM**

*Nominated Adviser and Broker*

**Arden Partners plc**".

15. The Admission Document said, among other things, that Arden Partners' only obligations were to WG (apart from Arden Partners' overall obligation to the London Stock Exchange) (page 619, final paragraph)—

> "Arden Partners plc ("Arden Partners"), which is authorised and regulated in the United Kingdom by the Financial Conduct Authority, is acting as nominated adviser and broker to the Company in connection with the proposed Placing and the proposed admission of the Enlarged Share Capital to trading on AIM. Its responsibilities as the Company's nominated adviser under the AIM Rules are owed solely to the London Stock Exchange and are not owed to the Company [WG] or to any Director or to any other person in respect of his decision to acquire shares in the Company in reliance on any part of this document. Arden Partners is not acting for anyone else and will not be responsible to anyone other than the Company [WG] for providing the protections afforded to their clients or for providing advice in relation to the contents of this document or the admission of the Enlarged Share Capital to trading on AIM.".

16. HMRC were informed of Project Kappa by a letter dated 2 February 2017 from Roger Harding of Gordon Dadds LLP (page 2, letters bundle)—

> "Project Kappa is a proposal (pursuant to heads of terms signed in summer 2016) for the acquisition of Culver Holdings Limited by a small public company in consideration of the issue of new shares in "Kappa PLC" (as it is known for confidentiality reasons) together with a market fund raising which is expected to enable the acquisition of further businesses to which Culver Holdings Limited will continue to supply management services. The acquisition of Culver Holdings Limited will require a formal take-over under the rules of the Panel on Take-overs and Mergers and a further "whitewash".

17. Culver Holdings Limited changed its name to Gordon Dadds Group Limited on 31 March 2017.

18. On 4 August 2017, the reverse takeover of Gordon Dadds Group Limited completed and—

- WG changed its name to Gordon Dadds Group plc; and
- Gordon Dadds Group Limited changed its name back to Culver Holdings Limited.

19. On 4 August 2017, the same day as that on which the takeover took effect, WG joined the Culver Holdings Limited VAT group.

20. The representative member of that VAT Group was Culver but is now the appellant (following a restructuring in February 2019).

21. Following completion of the takeover, WG received invoices in respect of services supplied to WG in connection with the reverse takeover and its associated fundraising. It was said to be common ground that the time of supply of those services was treated as being after WG joined the VAT group (HMRC letter of 13 September 2019). As to how that affects our consideration of intention, see paragraph 80 below).

22. Total input tax claimed was £69,241 for the period 10/17 and £3,997 for the period 01/18.

23. Mr Firth explained for the appellant that the largest invoices were as follows (we have reproduced his table)—

| "Date | Supplier | Amount (VAT) | Description |
|---|---|---|---|
| 4 August 2017 | Arden Partners | £95,070.04 (£19,014) | Project Kappa legal fees and recharge of expenses |
| 8 August 2017 | London Stock Exchange | £26,666 (£5,333) | AIM – UK - Readmission |
| 29 August 2017 | Saffery Champness | £213,104.84 (£42,620.97) | Fees for acting as reporting accountants on Project Kappa |
| 1 December 2012 | Computershare Investor Services Plc | £10,186.73 (£2,037.35) | Project Kappa management fee |
| 1 December 2012 | Computershare Investor Services Plc | £7,500 (£1,500) | Project Kappa management fee" |

24. The total VAT from those largest invoices was £70,505.53 (out of the total £73,238 in issue). Neither party suggested that there was anything in the remaining invoices (totalling £2,732.47) that materially differed from those largest ones.

25. HMRC disallowed the input VAT on the basis that, they said, WG itself did not, at the time of the takeover, make or intend to make supplies within the scope of VAT.

## C. LAW

### (1) Legislation: Input tax deduction

26. Domestic law relating to input tax deduction is contained in the Value Added Tax Act 1994 ("the VAT Act 1994") and the Value Added Tax Regulations 1995.

27. Section 4(1) of the VAT Act 1994 provides for VAT to be charged on any taxable supply of goods or services by a taxable person in the course or furtherance of any business carried on by him. Taxable person is defined in section 3. Section 24(1) defines input tax. Sections 25 and 26 provide for recovery of input tax. Section 26 and regulation 101 provide for input tax allowable and for attribution of it to taxable supplies (the parties did not cite regulation 101, but it is needed strictly speaking because section 26 works by operation of regulations referred to in it). Sections 24 and 26, and regulation 101, (as in force at the relevant time) are set out below.

28. Section 24 of the VAT Act 1994 provided, so far as material—

"**24 Input tax and output tax**

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

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

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

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

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

29. Section 26 of the VAT Act 1994 provided, so far as material—

"**26 Input tax allowable under section 25**

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

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

(a) taxable supplies;

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

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

30. Regulation 101 of the Value Added Tax Regulations 1995 provided, so far as material—

"**Attribution of input tax to taxable supplies**

**101.—**(1) Subject to regulations 102, 103A, 105A and 106ZA, the amount of input tax which a taxable person shall be entitled to deduct provisionally shall be that amount which is attributable to taxable supplies in accordance with this regulation.

(2) Subject to paragraph (8) below and regulation 107(1)(g)(ii), in respect of each prescribed accounting period—

(a) goods imported or acquired by and, goods or services supplied to, the taxable person in the period shall be identified,

(b) there shall be attributed to taxable supplies the whole of the input tax on such of those goods or services as are used or to be used by him exclusively in making taxable supplies,

(c) no part of the input tax on such of those goods or services as are used or to be used by him exclusively in making exempt supplies, or in carrying on any activity other than the making of taxable supplies, shall be attributed to taxable supplies…".

**(2) Legislation: VAT groups**

31. Section 43 of the VAT Act 1994 deals with VAT groups and with deemed supply to the VAT group representative member—

> "**43.—**(1) Where under sections 43A to 43D any persons are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and—
>
> (*a*) any supply of goods or services by a member of the group to another member of the group shall be disregarded; and
>
> (b) any supply which is a supply to which paragraph (a) above does not apply and is a supply of goods or services by or to a member of the group shall be treated as a supply by or to the representative member;…".

**(3) Case law**

***(i) Case law: Authorities cited***

32. The following authorities were cited—

Cited for the appellant:

(1) *Commissioners of Her Majesty's Revenue & Customs v Mayflower Theatre Trust Ltd* [2006] EWCA Civ 116;

(2) *Abbey National plc v Commissioners of Customs and Excise* [2001] EUECJ C-408/98; [2001] STC 297;

(3) *Commissioners of Customs and Excise v Redrow Group Plc* [1999] UKHL 4; [1999] 1 WLR 408, 416F;

(4) *Cantor Fitzgerald International* C-108/99; EU:C:2001:526; [2001] BTC 5540;

(5) *Kretztechnik AG v Finanzamt Linz* [2005] EUECJ C-465/03; [2005] 1 WLR 3755;

(6) *Ampliscientifica Srl and Amplifin SpA v Ministero dell'Economia e delle Finanze and Agenzia delle Entrate* [2008] EUECJ C-162/07; [2011] STC 566

(7) *Le Crédit Lyonnais v Ministre du Budget, des Comptes publics et de la Réforme de l'État* [2013] EUECJ C-388/11; [2014] STC 245;

(8) *Standard Chartered PLC and others v the Commissioners for Her Majesty's Revenue & Customs* [2014] UKFTT 316 (TC);

(9) *Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG v Finanzamt Nordenham* (C 108/14), and *Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG* (C 109/14), [2015] EUECJ C-108/14, [2015] STC 2101 ("Larentia + Minerva");

(10) *Heating Plumbing Supplies Ltd v the Commissioners for Her Majesty's Revenue & Customs* [2016] UKFTT 753 (TC);

(11) *Commissioners for Her Majesty's Revenue and Customs v Taylor Clark Leisure Plc* [2018] UKSC 35 [2018] 1 WLR 3803;

(12) *Hotel La Tour Ltd v the Commissioners for Her Majesty's Revenue and Customs* [2021] UKFTT 451 (TC); [2022] SFTD 465;

(13) *Commissioners for Her Majesty's Revenue and Customs v Frank A Smart & Son Ltd* [2019] UKSC 39, [2019] 1 WLR 4849;

Cited for HMRC:

(14) *BAA Limited v the Commissioners for Her Majesty's Revenue and Customs* [2013] EWCA Civ 112, [2013] BVC 48;

(15) *MVM Magyar Villamos Művek Zrt v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság* [2017] EUECJ C-28/16; [2017] STC 452;

(16) *Polysar Investments Netherlands BV v Inspecteur der Invoerrechten en Accijnzen (Inspector of Customs and Excise), Arnhem* [1991] EUECJ C-60/90; [1993] STC 222;

(17) *Cibo Participations SA v Directeur régional des impôts du Nord-Pas-de-Calais* [2001] EUECJ C-16/00; [2002] STC 460 (also cited indirectly for the appellant, in citing *Kretztechnik*); and

(18) *Skatteverket v AB SKF* [2009] EUECJ C-29/08, [2010] STC 419.

***(ii) Case law: Direct and immediate link / economic activity***

33. The starting point for VAT to be recoverable under sections 24 and 26 and regulation 101 is that there has to be a direct and immediate link between, on the one hand, the VAT paid on inputs and on the other, onward taxable supplies, and the VAT must be incurred in the course of an economic activity or preparatory to carrying on an economic activity, according to *BAA Limited v HMRC* [2013] EWCA Civ 112. In *BAA*, Mummery LJ, with whom the other members of the Court of Appeal agreed, said (our underlining)—

> "**(2) Economic activity**
>
> [22] To be able to recover the input tax on the professional and advisory services supplied it is common ground that ADIL must have incurred the VAT in the course of an 'economic activity' and it must be a taxable person i.e. a person registered, or required to be registered, for VAT purposes.
>
> [23] Merely *acquiring and holding* shares is not regarded as an economic activity for VAT purposes. The economic activity position is different where the acquisition and holding of shares is also accompanied by direct or indirect involvement in the management of the companies in which the holding has been acquired. Such involvement may include acts preparatory to carrying on an economic activity.
>
> **(3) Direct and immediate link**
>
> [24] The relevant services, on which input tax was incurred by ADIL, must be attributable to onward taxable supplies that are made by, or attributed to, ADIL. To be deductible the supplies on which the input tax was incurred by ADIL must have a 'direct and immediate' link to onward taxable supplies by the BAA VAT Group on which the output tax is charged and which are made by, or attributed to, ADIL.
>
> […]
>
> **Conclusions**
>
> [95] From that excursion into the authorities I turn to the resolution of the two issues. In the light of the resumes of the tribunals' judgments and the earlier summaries of fact,

law and argument, the conclusions can be stated in quite spare and, hopefully, reasonably clear terms.

**(1) Economic activity**

[96] Proper respect is obviously accorded to the extensive experience of the FTT and the UT in this specialist area of VAT Law. They regularly hear and decide complicated tax cases. They do so more in the round than this court, which hears only occasional appeals and even then tends to focus more on discrete legal points than on the whole picture.

[97] Even so, I am unable to agree with the FTT, the UT or Mr Cordara QC, himself a specialist in VAT, that, on the facts found by the FTT, it was correct in law to hold that ADIL was carrying on an economic activity at the relevant date. That conclusion seems to be contrary to the findings of fact and to principle and authority. On this point I accept the submissions of HMRC and hold that the FTT and the UT erred in law.

[98] To start at the beginning with the relevant date. That was the date on which ADIL incurred the liability to VAT on the services supplied to it. ADIL's only evident and proven intention at that time was to take over BAA by acquiring the shares in it. Acquiring the BAA shares was an *act* which would have economic consequences, but that is not the same as carrying on an *economic activity* for VAT purposes: ADIL's activities at that time neither involved the making of, nor even the intention of making, taxable supplies of goods or services.

[99] The FTT found that there was no evidence before it of the making of taxable supplies or of an intention, at the relevant date, to make taxable supplies. That finding is fatal to the contention that ADIL was, for VAT purposes, carrying on an economic activity. The attempt to reclaim input tax on the supplies of professional services to ADIL in connection with the take-over fails on that ground alone.

**(2) Direct and immediate link**

[100] In a rather loose sense there was a sort of link between the services supplied to ADIL and the services supplied by BAA. The services to ADIL, on which liability to input tax was incurred, were supplied in connection with its takeover of BAA, which itself was making supplies of services. Though supplies were not actually made, or even intended to be made, by ADIL at the relevant date, the outward services, on which VAT was charged, were made by BAA, which was the target of ADIL's successful take-over.

[101] However, the facts so clearly found by the FTT send out quite a different message, which makes it impossible to describe or assess any link that existed at the relevant date between the VAT input and the VAT output as either 'direct' or 'immediate'. On this point I agree with the UT and HMRC that the FTT erred in law in holding that there was a direct and immediate link between the input tax on the supplies of services to ADIL and the output tax on the supplies of taxable services made by BAA.

[102] At the relevant date when ADIL incurred the liability to VAT on fees for professional and advisory services, the supplies to ADIL were only in connection with the act of taking over BAA. They were unconnected with any supply that ADIL intended at that date to make, let alone had actually made. BAA's outward supplies in the course of its economic activity were not connected at the relevant date with the supplies to ADIL on which input tax was incurred.

**(3) Faxworld**

[103] I agree with the UT and HMRC that BAA's outward supplies and the VAT charged on them could not be attributed to ADIL to produce the requisite direct and immediate link between them, either by virtue of the VAT grouping provisions or by reason of any feature of the factual situation of the kind that was present in Faxworld. I am in full agreement with the UT's analysis of what was decided by the Court of Justice in Faxworld and why it does not assist the case advanced by ADIL of supplies received in connection with preliminary preparatory activities.

[104] The general rule is that the inputs of one taxable person acquired for its own purposes may not be treated as the cost components of the supplies of another taxable person made for its own purposes; see Faxworld at [40] and Abbey National at [32]. Where, however, there is a transfer of a going concern, the transferee stands for VAT purposes in the shoes of the transferor; and the inputs of the taxable transferor may be treated as having been acquired for the purposes of the taxable supplies of the transferee: see Faxworld at [42]. In the present case BAA was not the successor of ADIL, and the inputs acquired by ADIL (which was not in any event a taxable person: see above) were not acquired for the purposes of BAA's taxable supplies.

**Result**

[105] I would dismiss the appeal.

[106] I would dismiss BAA's appeal against the finding of the FTT that there was no evidence of an intention on the part of ADIL prior to the share acquisition to join the BAA VAT Group. There are no grounds for interfering with that finding.

[107] To sum up, the UT correctly overturned the decision of the FTT as erroneous in law. It correctly held that BAA was not entitled to recovery of input tax incurred and paid by p. 66 → ADIL on supplies made to it in connection with the acquisition of shares in BAA. The input tax was not incurred on supplies to BAA and there was no direct and immediate link between the services supplied to ADIL which incurred the input tax, and the outward supplies made by BAA, on which VAT was charged. The link with 'the general overheads' of BAA was not direct and immediate, nor was the fact of any continuing benefit beyond the take-over. I reject the contention that Faxworld extended the legal principles in a way that enables taxable supplies made by BAA to be attributed to ADIL.

[108] Departing from the decisions of both the FTT and the UT on the 'economic activity' point I would dismiss BAA's appeal on the additional ground that, at the relevant date, ADIL had no economic activity enabling it to recover the input tax. At the relevant date it simply existed and acted to acquire the shares in BAA without carrying on any economic activity that involved actual taxable supplies in its own right and without forming any intention, prior to the completion of the takeover, either to do so, or to join the BAA VAT group.".

### *(iii) Case law: Overheads*

34. Where however there is no direct and immediate link with taxable supplies made by the person who incurred the costs, a direct and immediate link with the taxable person's economic activity as a whole will suffice: so-called overheads cases. A number of authorities explain this general proposition, including *HMRC v Mayflower Theatre Trust Ltd* [2006] EWCA Civ 116) and *CCE v Redrow Group plc* [1999] 1 WLR 408, 416F, both cited by Mr Firth for the appellant.

35. The overheads principle was summarised in, among other cases, *MVM Magyar Villamos Művek Zrt v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság* (Case C-28/16) [2017] BVC 65 and in *Volkswagen Financial Services (UK) Ltd v Revenue and Customs Commissioners* (C-153/17).

36. In *MVM*, the overheads principle was summarised thus—

> "[39] In this regard, it must be noted that, as the Court held in paragraph 24 of the judgment of 16 July 2015, Beteiligungsgesellschaft Larentia + Minerva mbH & Co KG v Finanzamt Nordenham; Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG (Joined Cases C-108/14 and C-109/14) [2015] BVC 33), a taxable person has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the costs of the services in question are part of his general overheads and are, as such, components of the price of the goods or services which he supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole."

37. In *Volkswagen*, the overheads principle was summarised from paragraph 42 onwards (we include 41 for context)—

> "41 In accordance also with the Court's settled case-law, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to the right to deduct is necessary, in principle, before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement. The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct (judgment of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C-132/16, EU:C:2017:683, paragraph 28 and the case-law cited).
>
> 42 A taxable person also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole (judgment of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C-132/16, EU:C:2017:683, paragraph 29 and the case-law cited).
>
> 43 In this case, it is apparent from the order for reference that the general costs at issue in the main proceedings have a direct and immediate link with the activities of VWFS as a whole, and not merely with some of them. In that regard, the fact that VWFS decided to include those costs not in the price of the taxable transactions, but solely in the price of the exempt transactions, can have no effect whatsoever on such a finding of fact.
>
> 44 Thus, in so far as those general costs were in fact incurred, at least to a certain extent, for the purpose of the supply of vehicles, which are taxed transactions, those costs are, as such, components of the price of those transactions. Accordingly, a right to deduct VAT arises, in principle, in accordance with the considerations set out in paragraphs 38 to 42 of this judgment.
>
> 45 So far as concerns the fact that the general costs at issue in the main proceedings are not clearly reflected in the price of the taxed transactions of supplies of vehicles, it should be recalled that the result of those economic transactions is irrelevant for the right to deduct provided that the activity itself is subject to VAT (judgment of 22 June 2016, *Gemeente Woerden*, C-267/15, EU:C:2016:466, paragraph 40 and the case-law cited).

> 46 As the Court has already held, the right to deduct VAT must be guaranteed, without it being subjected to a criterion relating, inter alia, to the result of the economic activity of the taxable person, in accordance with Article 9(1) of the VAT Directive under which a taxable person 'shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity' (judgment of 5 July 2018, *Marle Participations*, C-320/17, EU:C:2018:537, paragraph 44).
>
> 47 Nevertheless, the extent of the right to deduct varies according to the intended use of the goods and services at issue. Whilst, for goods and services intended to be used exclusively for the carrying out of taxable transactions, taxable persons are entitled to deduct all the tax that has been charged on their acquisition or supply, for goods and services intended for a mixed use, it is apparent from Article 173(1) of the VAT Directive that the right to deduct is limited to such proportion of the VAT as is attributable to the transactions in respect of which VAT is deductible that are carried out by means of those goods or services (see, to that effect, judgment of 9 June 2016, *Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft*, C-332/14, EU:C:2016:417, paragraph 25).".

38. Lord Millett in *Redrow* gave – as "obvious examples" of overheads – audit and legal fees and the cost of the office carpet—

> "These provisions entitle a taxpayer who makes both taxable and exempt supplies in the course of his business to obtain a credit for an appropriate proportion of the input tax on his *overheads*. These are the costs of goods and services which are properly incurred in the course of his business but *which cannot be linked with* any goods or services supplied by the taxpayer to his customers.
>
> Audit and legal fees and the cost of the office carpet are obvious examples." (at 416F).

***(iv) Case law: Fundraising as "overheads"***

39. In *Kretztechnik AG v Finanzamt Linz* C-465/03 (26 May 2005), the CJEU held that inputs relating to a finance-raising transaction have a direct and immediate link with the activity for which finance is being raised. On the facts of that case, issuing shares was not an economic activity (paragraph 27). But Mr Firth pointed out that the purpose of the transaction in *Kretztechnik* was to raise money to finance the general business of the company and, because that business consisted of making taxable supplies, the input VAT was recoverable (paragraphs 36 to 38 of *Kretztechnik).* The CJEU said—

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

only that proportion of the VAT which is attributable to the former transactions (*Abbey National*, paragraph 37, and *Cibo Participations*, paragraph 34).

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

40. The principles in fundraising cases were set out in *Frank Smart* by Lord Hodge (with whom the rest of the Supreme Court agreed)—

"1. This appeal is concerned with the entitlement of a taxpayer to deduct input VAT and claim repayment of surplus input VAT. It concerns the interpretation of articles 167 and 168(1) of Council Directive (EC) 2006/112/EC of 28 November 2006 on the common system of value added tax ("the Principal VAT Directive" or "the PVD") and the case law of the Court of Justice of the European Union ("CJEU") relating to those articles. In short, the question is whether a taxpayer can deduct as input tax the VAT which it has incurred in purchasing entitlements to an EU farm subsidy, the Single Farm Payment ("SFP"). The taxpayer has used those entitlements to annual subsidies over several years and intends to use money resulting from the receipt of those subsidies to fund its current and future business activities, which currently involve only taxable supplies.

2. The factual background to this appeal involves an interesting business model. Frank A Smart & Son Ltd ("FASL") is a Scottish company which carries on a farming business in Aberdeenshire. FASL is wholly-owned by Mr Frank Smart, who is its sole director. Mr Smart and his wife are the partners in a partnership which owns Tolmauds Farm, a farm of about 200 hectares which the partnership leases to FASL for a rent of £30,000 per year. FASL produces beef cattle and certain crops at Tolmauds Farm. FASL's whole output from its business was and is taxable under the VAT regime.

3. FASL received SFPs from the Scottish Government. SFPs were agricultural subsidies which between 2005 and 2014 were paid to farmers who had eligible land at their disposal on 15 May of each year and who met the requirements of ensuring plant and animal health and maintaining the land in question in "Good Agricultural and Environmental Condition" ("GAEC"). The farmer did not have to cultivate the land or stock it with animals in order to meet the GAEC requirement. When the scheme was initiated in 2005, farmers in the United Kingdom were allocated initial units of entitlement to single farm payments ("SFPEs") for no consideration. The SFPEs were tradeable and a market in them developed over time.

4. FASL took advantage of the market in SFPE units to accumulate a fund for the development of its business. With the assistance of bank funding, it spent about £7.7m between 2007 and 2012 on purchasing 34,477 SFPE units in addition to its initial allocation of 194.98 units for Tolmauds Farm. In this period FASL paid VAT on the SFPE units which it purchased and it has sought to deduct that VAT as input tax. In order to receive the SFPs to which the purchased SFPE units entitled it, FASL leased a further 35,150 hectares of land under seasonal lets. FASL did not cultivate or stock this land. The leases were typically qualified by an agreement, entered into after the lease, which allowed the landlord to stock the land or cultivate it himself, provided that the ground was kept in GAEC. This was done to preserve FASL's entitlement to SFPs. The rent payable for the seasonal lets was generally about £1 per acre but could be up to £10 per acre.

[…]

7. The First-tier Tribunal ("FTT"), to whom FASL appealed against HMRC's refusal to allow it to deduct VAT of £1,054,852.28 in its quarterly VAT returns between

December 2008 and June 2012, made important findings of fact (in para 38 of its decision) which have a bearing on the outcome of this appeal. The FTT found that when it purchased the SFPE units, FASL intended to apply the income which it received from the SFPs to pay off its overdraft and to develop its business operations. The SFPs were accumulated in FASL's bank account and have been used to pay off its overdraft. Tolmauds Farm was worked during the relevant period by Mr Smart and one of his sons, Roderick, on a full-time basis and another son assisted for part of that period. FASL had no other employees. During the relevant period FASL did not increase its stock numbers on the farm significantly. But FASL had been contemplating three principal developments of its business. First, from about 2011, FASL was considering establishing a windfarm. It spent over £119,000 on preliminary investigations, including technical information and costings, on investigating community responses and on a planning application and enquiries. Secondly, other proposed developments have included the construction of further farm buildings, including cattle courts and a Dutch barn. FASL has undertaken site preparation works for an additional cattle court and has made the needed planning applications. Thirdly, FASL has been considering the purchase of neighbouring farms, which were expected to come on to the market for sale.

[…]

49. In my view, it is clear that in *SFK* the CJEU has not extended the reasoning of *BLP* to apply it to fund-raising transactions which are outside the scope of VAT. On the contrary, in order to avoid discriminatory treatment of taxable persons, it has extended the reasoning in the cases about share disposals that are outside the scope of VAT to share disposals which are exempt, by requiring an examination as to whether the costs associated with the input services are incorporated in the price of the shares sold in the initial transaction or in the prices of the taxable person's products in downstream transactions. If the latter, the costs would be "among only the cost components of transactions within the scope of the taxable person's economic activities".

[…]

59. I am satisfied that there is no need for a reference in the present appeal. This is because, as I will seek to show, there are findings of fact that entitled the FTT to conclude that FASL when it acquired the SPFEs was acting as a taxable person because of its aim of accumulating sums to develop its taxable business through capital expenditure on assets which it would use to generate taxable output transactions.

[…]

61. Since the hearing in this appeal and the preparation of this judgment in draft, the Eighth Chamber of the CJEU has issued its judgment on the Court of Appeal's reference in the *University of Cambridge* case on 3 July 2019 (Case C-316/18) EU:C:2019:559. As the CJEU records (para 9) the university is a not-for-profit educational institution whose principal activity is the provision of educational services, which are VAT exempt, but which also makes taxable supplies including commercial research, the sale of publications, etc. The university's activities are financed in part by charitable donations and endowments, which it places in a fund and invests. The university has claimed a right to deduct input VAT relating to fees which it has paid to third party managers of the fund on the basis that the income generated by the fund has been used to finance the whole range of its activities.

[…]

63. … But, referring to the documents before the court, it concluded that the costs of management of the funds were not incorporated into the price of a particular output transaction. It also concluded, by reference to those documents, that the costs were incurred to generate resources to finance all of the university's output transactions, thereby allowing the price of its goods and services to be reduced. The costs therefore

were not components of the price of goods and services provided by the university and could not form part of its overheads. The VAT therefore was not deductible (para 32).

64. In my view, the ruling that the income was used to reduce all of the costs of the university's goods and services prevented the fund managers' fees from being a component of the costs of those goods and services and thus part of the university's overheads, which is the second alternative in *Kretztechnik*. The *University of Cambridge* judgment, which the CJEU has delivered without requiring an opinion from an Advocate General, is therefore an application of established CJEU jurisprudence which I have discussed above and summarise below.".

41. Continuing with *Frank Smart*: Lord Hodge in *Frank Smart* distinguished between the "initial fundraising transaction" (the fundraising activity) and the "downstream" transactions (the activities for which the funds raised were to be used). He said—

"65. I derive the following propositions which are relevant to this appeal from the case law:

i) As VAT is a tax on the value added by the taxable person, the VAT system relieves the taxable person of the burden of VAT payable or paid in the course of that person's economic activity and thus avoids double taxation. This is the principle of deduction set out in article 1(2) and operated in article 168 of the PVD and vouched, for example, in *Rompelman v Minister van Financien* (Case C-268/83) [1985] ECR 655, para 19; *Abbey National*, para 24; *Kretztechnik*, para 34 and *SKF*, paras 55-56.

ii) There must be a direct and immediate link between the goods and services which the taxable person has acquired (in other words the particular input transaction) and the taxable supplies which that person makes (in other words its particular output transaction or transactions). This link gives rise to the right to deduct. The needed link exists if the acquired goods and services are part of the cost components of that person's taxable transactions which utilise those goods and services: see for example *Midland Bank*, paras 24 and 30; *Abbey National*, para 28; *Kretztechnik*, para 35; *Securenta*, para 27; *SFK*, para 57 and *HMRC v University of Cambridge*, para 31.

iii) Alternatively, there must be a direct and immediate link between those acquired goods and services and the whole of the taxable person's economic activity because their cost forms part of that business's overheads and thus a component part of the price of its products: see for example *BLP*, para 25; *Midland Bank*, para 31; *Abbey National*, paras 35 and 36; *Kretztechnik*, para 36; *SKF*, para 58 and *HMRC v University of Cambridge*, para 31.

iv) Where the taxable person acquires professional services for an initial fund-raising transaction which is outside the scope of VAT, that use of the services does not prevent it from deducting the VAT payable on those services as input tax and retaining that deduction if its purpose in fund-raising, objectively ascertained, was to fund its economic activity and it later uses the funds raised to develop its business of providing taxable supplies. See, for example, *Abbey National*, paras 34-36; *Kretztechnik*, paras 36-38; *Securenta*, paras 27-29 and *SKF*, para 64. The same may apply if an analogous transaction involving the sale of shares is classified as an exempt transaction: *SKF*, para 68.

v) Where the cost of the acquired services, including services relating to fund-raising, are a cost component of downstream activities of the taxable person which are either exempt transactions or transactions outside the scope of VAT, the VAT paid on such services is not deductible as input tax. See for example *Securenta*, paras 29 and 31; *SKF*, paras 58-60 and *Sveda*, para 32.

> Where the taxable person carries on taxable transactions, exempt transactions and transactions outside the scope of VAT, the VAT paid on the services it has acquired has to be apportioned under article 173 of the PVD.
>
> vi) The right to deduct VAT as input tax arises immediately when the deductible tax becomes chargeable: article 167 of the PVD, *Securenta*, paras 24 and 30 and *SKF*, para 55. As a result, there may be a time lapse between the deduction of the input tax and the use of the acquired goods or services in an output transaction, as occurred in *Sveda*. Further, if the taxable person acquired the goods and services for its economic activity but, as a result of circumstances beyond its control, it is unable to use them in the context of taxable transactions, the taxable person retains its entitlement to deduct: *Midland Bank*, paras 22 and 23.
>
> vii) The purpose of the taxable person in carrying out the fund-raising is a question of fact which the court determines by having regard to objective evidence. The CJEU states that the existence of a link between the fund-raising transaction and the person's taxable activity is to be assessed in the light of the objective content of the transaction: *Sveda*, para 29; *Iberdrola*, para 31. The ultimate question is whether the taxable person is acting as such for the purposes of an economic activity. This is a question of fact which must be assessed in the light of all the circumstances of the case, including the nature of the asset concerned and the period between its acquisition and its use for the purposes of the taxable person's economic activity: *Eon Aset Menidjmunt OOD v Direktor na Direktsia "Obzhalvane I upravlenie na izpalnenieto" - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* (Case C-118/11) EU:C:2012:97; [2012] STC 982, para 58; *Klub OOD v Direktor na Direktsia "Obzhalvane I upravlenie na izpalnenieto" - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* (Case C-153/11) EU:C:2012:163; [2012] STC 1129, paras 40-41 and *Sveda*, para 21.".

42. Lord Hodge went on in *Frank Smart* to apply to the facts of that case the principles he had set out—

> "*Application to the facts of this case*
>
> 66. I have set out the factual background in paras 2-7 above. There was objective evidence that FASL when carrying out its fund-raising activity was carrying out a taxable business and was contemplating using the funds raised on three principal developments - a windfarm, the construction of further farm buildings and the acquisition of neighbouring farmland.
>
> 67. I do not detect in the jurisprudence of the CJEU any basis for distinguishing expenditure incurred in a fund-raising exercise which takes the form of a sale of shares from a fund-raising exercise that involves the receipt of a subsidy over several years. The fact that the subsidies were included in FASL's profit and loss account and counted as the business's income for income tax purposes is not a basis for distinguishing the share sale cases such as *Kretztechnik* and *Securenta*. I do not view the annual payment of the subsidies under the SFP scheme as a separate transaction from the acquisition of the entitlement to those subsidies which is capable of breaking the link between the purchase of the SFPE units and the deployment of the net proceeds of the subsidies in FASL's subsequent economic activities. In any event the FTT was not bound to hold that the acquisition of the SFPE units and the receipt of the subsidies were separate transactions. On the FTT's findings of fact, the purchase of the SFPE units was part of an exercise raising funds for FASL's economic activities. The underlying principle is the principle of neutrality which relieves the taxable person of the burden of VAT payable and paid in the course of all its economic activities: *Rompelman*, para 19; *Belgian State v Ghent Coal Terminal NV*, para 15; *Gabalfrisa SL v Agencia Estatal*

*de Administración Tributaria* (Cases C-110/98 to C-147/98) EU:C:2000:145; [2000] ECR I-1577; [2002] STC 535, para 44.

68. While it is not clear from the FTT's findings when any of FASL's projects will come to fruition, I am persuaded that the FTT was entitled to conclude that FASL when it incurred the costs of the purchase of the SFPE units was acting as a taxable person because it was acquiring assets in support of its current and planned economic activities, namely farming and the windfarm. On that basis FASL was entitled to an immediate right of deduction of the VAT paid on the purchase of the SFPE units and is entitled to retain that deduction or repayment so long as it uses the SFPs which it received as cost components of its economic activities. A start-up business can acquire goods and services to support its future taxable supplies and claim VAT paid on those acquisitions as input tax; so too in principle can an existing business which proposes to expand its economic activity. On the facts found, FASL does not carry out and does not propose to carry out downstream non-economic activities or exempt transactions. Therefore, no question of apportionment under article 173 of the PVD arises.".

43. Turning next to one of the First-tier Tribunal decisions cited for the appellant in relation to fundraising, in *Hotel La Tour Ltd* [2021] UKFTT 451 (TC), the First-tier Tribunal said—

"3. At the material time, HLT was a holding company and owned the whole of the share capital of HLTB. HLT and HLTB formed a VAT group, with HLT as the representative member. HLTB owned and operated a luxury hotel in Birmingham under the name "Hotel La Tour". HLT provided HLTB with management services. These management services included the provision of key personnel such as the general manager of the hotel.

[…]

5. In about mid-2015, HLT decided to construct and develop a new hotel in Milton Keynes ("the Milton Keynes Development"). It was anticipated that this would cost approximately £34,500,000. Various finance options were considered. Ultimately, the preferred option was to sell HLTB and to borrow the shortfall from a bank. This choice was reinforced by the fact that the decision to build in Milton Keynes coincided with HLT concluding that HLTB's business had reached the stage where it could not grow any further.

[…]

7. On 17 May 2017, HLT agreed heads of terms with Dalata UK Ltd ("Dalata") for the purchase of the shares. The sale was completed by a share purchase agreement dated 21 July 2017 ("the Share Purchase Agreement").

[….]

14. HLT appealed to the Tribunal by a notice of appeal received on 2 November 2018. In essence, the grounds for appeal were as follows:

> (1) The input tax on the Professional Fees was incurred as part of the sale process with the intention of using the funds to construct and run the Milton Keynes Development.

[…]

35. We find that there is a direct and immediate link between the Services and HLT's downstream taxable general economic activities and that the chain is not broken by the share sale. This is for the following reasons.

[…]

42. We apply the above legal principles to the facts of the present case as follows.

43. We find that, objectively ascertained, the purpose of the share sale was to fund HLT's taxable general activities. HMRC appear to accept that HLT was carrying out a downstream taxable business, as this was the basis of the concession that the second

stage of consideration was met if the chain had not been broken at the first stage. In any event, we agree that HLT was carrying out a downstream taxable business of the building, development and ultimately management of the Milton Keynes Development. Crucially, HLT's financial position was that it could not afford to develop the Milton Keynes Development without entering into the Share Purchase Agreement. It is right that the Share Purchase Agreement stretched further than just the transfer of the Shares, as it included a means of ensuring that HLTB paid its inter-company loan to HLT and that HLTB paid its own indebtedness to Coutts. However, this is still part of the fundraising purpose as it is clear from the terms of the Share Purchase Agreement and the completion accounts that the terms of the transaction were intended to result in a total sum being paid to HLT on completion, either directly or by placing HLTB in funds to pay the inter-company debts to HLT. It is of note that there is no suggestion that the Net Proceeds were for any purpose other than the Milton Keynes Development. The use of the Net Proceeds to pay for the costs of sale is not a purpose in its own right; the overall purpose of the fundraising was to result in monies being payable to HLT which could then be used for the Milton Keynes Development and so any monies used for the costs of sale represented by the Professional Fees were to facilitate that purpose. This is because, objectively analysed, the Services were only necessary to facilitate the sale itself. Indeed, Miss McArdle rightly makes the point that the Services were purchased (and so the Professional Fees incurred) in order to maximise the selling price of the Shares.

44. Miss McArdle also makes the valid point that the Services were all part of the process of selling the Shares. However, this goes to the question of whether or not the Services were used in the fundraising transaction. Whilst we agree that they were so used, this does not prevent deduction.

45. As set out in paragraph 11 above, we find that the Net Proceeds were used in respect of the Milton Keynes Development. HMRC accepted that activities relating to the Milton Keynes Development constituted taxable activities.

46. We find that the cost of the Services was not incorporated in the price of the shares sold in (and were not cost components of the price of the shares in) the initial transaction. The agreed evidence is that the Shares were sold for the best price achievable in the market. The price was not increased in order to provide for the costs of the Services and there was no allocation for such costs within the sale price. We note in this regard that although there is no requirement for such increased price or allocation in order for the costs to be components of the price of the Shares, the presence of such increase or allocation would support the cost of the Services being cost components of the initial transaction. Instead, the Services were paid for out of the proceeds of sale, thus reducing the amount available for the taxable transactions and so being a cost of those taxable transactions. Further, for the reasons set out above, the objective purpose of incurring the costs of the Services was in order to raise the funds to pay for the downstream transactions.

47. These findings are sufficient to allow the appeal. In deference to the well-argued submissions in respect of the VAT group and to the transfer of a going concern we briefly set out our findings as to those issues below.".

***(v) Case law: Time as at which intention to be considered***

44. In *BAA*, the Court of Appeal held that the intention to make taxable supplies is to be considered as at "*the date on which ADIL [the company effecting the takeover] incurred the liability to VAT on the services supplied to it*" (paragraph 98). The Court of Appeal went on to consider that question at paragraph 102. The Supreme Court too, in *Frank Smart*, considered

intention as at the time the costs were incurred, that is, the time when the SFPE units were purchased: "*when it purchased the SFPE units, FASL intended…*" (paragraph 7), "*FASL when it acquired the SPFEs was acting as a taxable person because of its aim*", (paragraph 59), "*the FTT was entitled to conclude that FASL when it incurred the costs of the purchase of the SFPE units was acting as a taxable person because…*" (paragraph 68 of *Frank Smart*).

***(vi) Case law: Economic activity***

45. In *MVM*, the CJEU said (our underlining)—

> "[23] By its four questions, which it is appropriate to examine together, the referring court asks, in essence, whether articles 2, 9, 26, 167, 168 and 173 of Directive 2006/112 must be interpreted as meaning that the involvement of a holding company, such as that at issue in the main proceedings, in the management of its subsidiaries, where it has charged those subsidiaries neither for the cost of the services procured in the interest of the group of companies as a whole or in the interest of certain of its subsidiaries, nor for the corresponding VAT, may be regarded as an 'economic activity', within the meaning of that directive, which gives rise to the right to deduct the input VAT paid for such services.
>
> […]
>
> [28] As regards the material conditions to be met for a right to deduct VAT to arise, it is apparent from article 168(a) of Directive 2006/112 that the goods and services relied on to give entitlement to that right must be used by the taxable person for the purposes of his own taxed transactions, and that, as inputs, those goods or services must be supplied by another taxable person (judgment of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos SA v Autoridade Tributária e Aduaneira* (Case C-516/14) [2016] ECR I-00000, para. 40 and the caselaw cited).
>
> […]
>
> [30] More specifically, as regards the right of a holding company to deduct, the Court has previously held that a holding company which has as its sole purpose the acquisition of shares 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 either the status of taxable person, within the meaning of article 9 of Directive 2006/112, or the right to deduct tax under article 167 of that directive (judgment of 16 July 2015, *Beteiligungsgesellschaft Larentia + Minerva mbH & Co KG v Finanzamt Nordenham; Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG* (Joined Cases C- 108/14 and C-109/14) [2015] BVC 33, para. 18 and the case-law cited).
>
> [31] The mere acquisition and holding of shares in a company are not to be regarded as economic activities, within the meaning of Directive 2006/112, conferring on the holder the status of a taxable person. The mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis because any dividend yielded by that holding is merely the result of ownership of the property (judgment of 16 July 2015, *Beteiligungsgesellschaft Larentia + Minerva mbH & Co KG v Finanzamt Nordenham; Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG* (Joined Cases C-108/14 and C-109/14) [2015] BVC 33, para. 19 and the case-law cited).
>
> [32] The position will be otherwise where the holding is accompanied by direct or indirect involvement in the management of the companies in which the holding has been acquired, without prejudice to the rights held by the holding company in its capacity as shareholder (judgment of 16 July 2015, *Beteiligungsgesellschaft Larentia + Minerva mbH & Co KG v Finanzamt Nordenham; Finanzamt Hamburg- Mitte v Marenave*

*Schiffahrts AG* (Joined Cases C-108/14 and C-109/14) [2015] BVC 33, para. 20 and the case-law cited).

[…]

[34] Thus, the mere involvement of a holding company in the management of its subsidiaries, without carrying out transactions subject to VAT under article 2 of Directive 2006/112, cannot be regarded as an 'economic activity' within the meaning of article 9(1) of that directive (see, to that effect, order of 12 July 2001, *Welthgrove BV v Staatssecretaris van Financiën* (Case C-102/00) [2001] ECR I- 05679, paras. 16 and 17). Accordingly, such management does not come within the scope of Directive 2006/112.".

46. HMRC cited *Cibo Participations* as authority for the proposition that a holding company would be considered to be undertaking an economic activity for VAT purposes where the company makes or intends to make supplies of management services for consideration to its subsidiaries. In fact, the appellant's position that that was so in relation to WG in the present case appeared to have been abandoned by the time of the hearing (but we deal with it for completeness at paragraph 151 below).

47. Moreover, the Court of Appeal appeared to accept, in *BAA*, that the taxable supplies of a subsidiary could be relied on by the holding company where the holding company intended to join the VAT group of which the subsidiary was a member (our emphasis, we set out again the relevant paragraphs for ease of reference)—

"[106] I would dismiss BAA's appeal against the finding of the FTT that there was no evidence of an intention on the part of ADIL prior to the share acquisition to join the BAA VAT Group. There are no grounds for interfering with that finding.

[…]

[108] Departing from the decisions of both the FTT and the UT on the 'economic activity' point I would dismiss BAA's appeal on the additional ground that, at the relevant date, ADIL had no economic activity enabling it to recover the input tax. At the relevant date it simply existed and acted to acquire the shares in BAA without carrying on any economic activity that involved actual taxable supplies in its own right and without forming any intention, prior to the completion of the takeover, either to do so, or to join the BAA VAT group.".

48. In paragraph 108 of *BAA*, the Court of Appeal appears to say that intention to join the VAT group could in principle have been relied on as – or instead of – ADIL's own economic activity. As we indicate later in this decision, we need not consider whether, without such an intention, *BAA* permits only the taxable supplies of the acquired company to be relied on by the acquiring company, as opposed to permitting reliance by the acquiring company on both the acquired company's taxable supplies and its economic activity (if and to the extent that there is any difference between Culver's taxable supplies and economic activity on the facts).

### *(vii) Case law: VAT grouping*

49. The Supreme Court held in *Commissioners for Her Majesty's Revenue and Customs v Taylor Clark Leisure plc (Scotland)* that the VAT group representative is the single taxable person for VAT purposes—

"23. In *Ampliscientifica Srl v Ministero dell' Economia e delle Finanze* (Case C- 162/07) [2008] ECR I-4019; [2011] STC 566, … It followed that the national implementing legislation had to provide that "the taxable person is a single taxable person and that a single VAT number be allocated to the group".

24. In the UK the model which achieves that result is that of the representative member. The words in section 43(1) are clear beyond question: "any business carried on by a member of the group shall be treated as carried on by the representative member"…

27. …Section 43 of VATA does not make the group a taxable person but treats the group's supplies and liabilities as those of the representative member for the time being.".

50. In *Larentia + Minerva*, the CJEU said—

"35 … As the Advocate General stated in point 55 of his Opinion, contrary to the doubts expressed in that regard by Ireland in its written observations, the answer to that question is likely to be of relevance to the solution of the disputes in the main proceedings. The status of VAT group conferred on the holding company and its subsidiaries could result in that group, in respect of transactions effected for remuneration between the subsidiaries and third-party undertakings, being eligible to the benefit of full deduction of input VAT linked to capital transactions carried out by the holding company.".

51. In another First-tier Tribunal decision cited for the appellant, *Heating Plumbing Supplies Ltd* [2016] UKFTT 753 (TC), the First-tier Tribunal said—

"4. The management-led buyout was presented to staff on the basis that it would create an independent company wholly owned by the staff and management. All staff were given the opportunity to invest and approximately 50% took up that opportunity.

[…]

9. A group registration for VAT was issued on 19th April 2011, with effect from 1st April 2011. The Appellant is the representative member of that group.

[…]

23. The Appellant submitted that the input VAT was recoverable because:

(1) The Services were supplied to a single taxable person; and/or

(2) Within the group, the supplies were made to the Appellant; and/or

(3) HPSGL always intended to make supplies that would have been taxable if it were a separate entity.

[…]

52. The Appellant's first argument was that the VAT group was a single taxable person and that it was inappropriate to look through the group to its individual members and assess them as if they were taxable persons in their own right.

[…]

56. In this case, there is a VAT group and any supplies made to HPSGL (a member of the group) are to be treated as having been made to the Appellant (the representative member).

57. Whether the input tax is recoverable then depends on whether the services to which it relates were used in connection with the making of taxable supplies (SI 1995/2518). HMRC are correct that there must be a direct and immediate link between the services received and the making of taxable supplies. The authorities cited support this and the Appellant did not dispute the point.

[…]

66. In the BAA case the court held that the holding company, ADIL, was not engaged in any economic activity because its sole purpose was the acquisition of the shares and it neither engaged nor intended to engage in economic activity. That is not the case here.

HPSGL was formed for the purpose of furthering the Appellant's business by motivating staff and the intention was…[sic]

67. Had the Services been provided solely to facilitate the acquisition of shares with a view to receiving a dividend (as in BAA) there would have been no direct and immediate link with taxable supplies made by the Appellant. However, in this case, the Services were provided for the direct benefit of the Appellant's business and as such can be viewed as overheads of it.

68. Taking the test in BAA , as set out in HMRC's submissions at paragraph 43 above:

> (1) The input tax was incurred by a taxable person (the VAT group, or, within it, the Appellant as the representative member) in the course of an economic activity (the furtherance of the Appellant's business); and
>
> (2) The Services have a direct and immediate link to the taxable supplies made by the taxable person (the VAT group, or, within it, the Appellant as the representative member), specifically to the Appellant's business since they were sought for its benefit.

69. The interests of the underlying business were at the heart of the restructure. The advice was sought and the restructure conceived for the purpose of developing the business, at the instigation of the Appellant itself. There is a direct and immediate link between the Services and the Appellant's business. The Services were provided for the purpose of furthering that business. Since the Appellant's business consists wholly of the making of taxable supplies the input tax in question is recoverable by the Appellant.".

## D. SUBMISSIONS, COMMON GROUND, BROAD QUESTIONS, ISSUES

### (1) The appellant's position

52. Mr Firth argued for the appellant—

(1) Section 43 of the VAT Act 1994 assists the appellant, as follows—

(a) WG is in a VAT group with Culver, and so the services are treated by section 43 of the VAT Act 1994 as having been supplied to Culver;

(b) Culver makes taxable supplies and carries on an economic activity and the costs of the services to WG (being treated as supplied to Culver) are overheads of Culver (according to oral submissions) or overheads of the VAT group (according to the heading to paragraph 22 of Mr Firth's skeleton argument);

(c) the input tax on the supplies to WG is linked to Culver's economic activity because of section 43 and so the tax is within the definition of input tax in section 24 and is recoverable in accordance with section 26 because attributable to taxable supplies made by Culver in the course or furtherance of Culver's (or the VAT group's) business;

(d) Mr Firth summarised his section 43 arguments thus: it is immaterial that WG was not carrying on any economic activity for the 20 months or so prior to the takeover, or at the time of the takeover, because "*the supply is treated as made to Culver Holdings Ltd as representative of the VAT group and the transactions were plainly for the benefit of Culver Holdings Ltd's business (as group representative)*"[3].

[3] Appellant's skeleton argument, paragraph 40.

(2) Alternatively, disregarding the section 43 VAT group argument, Mr Firth argued for the appellant that the input tax was incurred by WG on services received by WG in fundraising to further the downstream economic activity of WG, being the activity of Culver, which company WG owned—

> "41. Even if one did disregard the fact that the supply is treated as made to Culver Holdings Ltd and look at the position of WG, the outcome is the same because the supplies were received for the purpose of funding an intended taxable economic activity.
>
> 42. WG acquired these supplies in order to raise capital to support and fund the expansion of the taxable economic activity of the VAT group it intended to join and did join upon acquisition." (skeleton argument)

> "12. … an intention to for the acquiring company to join the VAT which group, being a group that makes taxable supplies, demonstrates an intention to make taxable supplies and justifies input recovery (see *BAA Limited v. HMRC* [2013] EWCA Civ 112, §§106)" (grounds of appeal)

> "43. Indeed, HMRC's analysis appears to lead to the conclusion that WG incurred the input for no purpose (because, they say, it had no activity at the relevant date). With respect, that is an economically unreal analysis. These transactions only make sense on the basis that they had the purpose of raising funds for the benefit of the taxable activities of the VAT group which WG joined. A reverse takeover to list on AIM and associated fund-raising were simply the means by which that purpose was achieved.
>
> 44. BAA Limited v. HMRC [2013] EWCA Civ 112 does not suggest a different result because it concerned a simple share acquisition rather than a transaction intended to raise funds for the purpose of a taxable activity. Further, the supplies were made to the holding company before it joined the VAT group and it did not join the VAT group until six months after the acquisition (§§2 – 3), having had no intention to do so at the time of acquisition." (Mr Firth's skeleton argument for the appellant).

(3) For the appellant's argument in the alternative to section 43, Mr Firth pointed to paragraph 65(iv) of *Frank Smart* as containing the principles applicable to the present case. For what the outcome should be, Mr Firth relied on paragraphs 52 to 69 of the First-tier Tribunal decision in *Heating Plumbing Supplies*, and submitted that paragraph 28 of the First-tier Tribunal decision in *Hotel La Tour* is the answer in the present case. That paragraph of *Hotel La Tour* said—

> "28. In *Kretztechnik AG v Finanzamt Linz (Case C-465/03), [2005] 1 WLR 3755 ("Kretztechnik")*, it was held that where (as in that case) a share issue is outside the scope of VAT and the objective purpose of the share issue is to raise capital for the benefit of taxable activity as a whole (and where it is so used), the costs of the supplies relating to the share issue are part of its overheads. The CJEU stated as follows at [36]: …".

53. The appellant adduced documentary evidence including the Admission Document created for the reverse takeover.

54. Mr Simon Howard, former chairman of WG, made a witness statement dated 5 June 2020 for the appellant, saying (page 62, hearing bundle)—

"Work Group … the Directors always had an intention to make taxable supplies up to and beyond the reverse takeover by Ince Group plc (formerly Gordon Dadds Group plc)

[…]

At no time did the Directors ever consider the company was or would become a pure investment entity. Investing entity status was a necessary condition for retention of the listing on the London Stock Exchange. The listed status gave the company more market access and potential capital raising ability for future trading and merger/takeover opportunities.

It was the Directors [sic] intention to use their experience to provide management services and they actively pursued suitable targets with a group company structure requiring Board level expertise. The reverse takeover resulting in what is today Ince Group plc, bears witness to this for which Heads of Terms were signed in mid-2016. Final implementation was delayed until August 2017 while a number of due diligence and structural issues were resolved but the substantial transaction was as agreed in the Heads".

**(2) HMRC's position**

55. Mr Saldanha argued for HMRC—

(1) *BAA* [2013] EWCA Civ 112 is authority for the proposition that there are two conditions for the recovery of VAT. First, the tax must be incurred by a taxable person in the course of an economic activity and, second, the goods and services must have a direct and immediate link with taxable supplies made by that person.

(2) WG's position is analogous to the position of ADIL (the acquiring entity in *BAA*).

(3) As to section 43, HMRC argued that joining a VAT group does not, of itself, give rise to an entitlement to recover VAT in a case such as this. It cannot change a non-economic (that is, outside the scope of VAT) activity into an economic activity. Nor does it automatically create a direct and immediate link between all input costs of a holding company and the taxable outputs of other VAT group members, unless (i) such a link can be traced through the intra-group supplies, or (ii) the input costs are such that they are properly and naturally attributable to the VAT group's taxable outputs. VAT grouping has the effect that all supplies are treated for VAT purposes as made to and by the representative member and imposes joint and several liability on all the members. But if a member of a VAT group incurs costs which it uses for non-economic activities, then the VAT on those costs still relates to the non-economic activities and VAT grouping does not change that. The supplies are treated as being used by the representative member for non-economic purposes.

(4) As to the appellant's arguments in the alternative to section 43, Mr Saldanha argued for HMRC as follows—

(a) as to current economic activity: HMRC accepted that the appellant (Culver as was) is a taxable person as it is registered for VAT within the United Kingdom. But HMRC said the appellant had not provided sufficient evidence to show that WG was engaged in economic activity, at the relevant time. In particular—

(i) the appellant had produced a management services agreement between Gordon Dadds Group plc (previously WG) and Ince Gordon Dadds LLP (previously Culver) dated 4 June 2019 (pages 16 to 24, letters bundle). It post-dated the takeover by almost two years, but backdated supplies to the takeover date and specified for them a

value of £350,000, to be invoiced within 30 days, so by 4 July 2019 and the invoice to be paid within 30 days of receipt. The related invoice was also produced (page 44, letters bundle). HMRC did not accept that that agreement or the invoice showed that WG in fact had its own economic activity in supplying management services to Culver in return for payment that was separate from any dividends or from any increase in dividends; and

(ii) WG's accounts showed that no services were provided to any of the Culver entities either at the time of, or after, the takeover.

(By the time of the hearing however, Mr Firth did not appear to rely for the appellant on the argument that WG had its own economic activity in the last 20 months or so before the takeover, or at the time of the takeover.)

(b) as to planned or intended activity and planned or intended supplies: Mr Saldanha submitted for HMRC that the shareholder statement from 2015 stating that WG may look to acquire a company where it may influence the management board did not show that, when WG's acquisition of Culver took place in August 2017, WG had an intention to make taxable supplies. Equally, said Mr Saldanha, WG's accounts showed that no services were provided by WG to any of the Culver entities after the takeover. He submitted that there was no planned taxable supply or planned economic activity by WG and so—

(i) not even the future reference in section 24 is met, that is "services … to be used for the purposes of any business…to be carried on by him"; and

(ii) the future reference in section 26 is not met either: "Supplies … to be made by the taxable person in the course of or furtherance of his business".

56. HMRC cited *MVM* as authority for the proposition that active involvement by a holding company in the management of subsidiaries is not an economic activity unless it entails the making of supplies that are within the scope of VAT (*MVM,* paragraph 34). In fact, by the time of the hearing in the present case, involvement in the management of subsidiaries was not asserted, or at least did not appear to be relied on, for the appellant.

57. HMRC cited *Polysar Investments Netherlands BV v Inspecteur der Invoerrechten en Accijnzen (Inspector of Customs and Excise), Arnhem* [1991] EUECJ C-60/90; [1993] STC 222 as authority for the propositions (i) that a holding company is a company that acquires and holds shares in one or more subsidiary companies and (ii) that the basic functions of a holding company are to acquire and hold shares in subsidiaries (from which it may receive dividends), to defend itself and its subsidiaries from takeovers, and to dispose of shares in subsidiaries. These activities, said HMRC, are investment activities and are non-economic activities for VAT purposes.

58. HMRC appeared in paragraph 101 of their statement of case (page 40, hearing bundle) to accept that the "*downstream taxable supplies of the Appellant's VAT group*" can be the economic activity in question, as long as there is a sufficient link between those downstream taxable supplies and WG's acquisition costs (which is how HMRC describe the costs, although the appellant says WG also was fundraising to help with those downstream taxable supplies). Similarly in paragraph 114 of their statement of case, HMRC appeared to accept that input costs of the holding company can have a direct and immediate link to the taxable outputs of another VAT group member if "*the input costs are such that they are properly and naturally*

*attributable to the VAT group's taxable outputs*". It was unclear however whether Mr Saldanha maintained that "downstream" activity position at the hearing, so we include that point in the issues section below.

59. HMRC adduced a witness statement from Lindsey Chapman, HMRC officer, dated 23 July 2021 (page 64, hearing bundle).

## (3) Common ground

60. The following were common ground—

(1) WG was not, at the time of the takeover (nor for some 20 months prior to that) carrying on an economic activity or making taxable supplies (it was argued in the correspondence, and evidence supplied, that WG was doing both, but that seemed to have been abandoned by the time of the hearing).

(2) WG was the actual recipient of the supplies in respect of which input tax is sought.

(3) WG did not (leaving aside arguments that it intended to do so via a subsidiary in the VAT group), at the time WG received the supplies in question or at the time of the takeover, intend to carry on an economic activity or intend to make a taxable supply.

(4) For "the invoices relating to the acquisition, the time of supply is August, September, October, December 2017 and January 2018" (HMRC letter, 13 September 2019[4]).

(5) Culver carried on, and intended to carry on, economic activity in the form of providing management services to its subsidiaries for consideration and Culver made, and intended to make, taxable supplies in the form of those services.

(6) The appellant (Culver) is a taxable person.

(7) Overheads: A "taxable person has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the costs of the services in question are part of his general overheads and are, as such, components of the price of the goods or services which he supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole" (paragraph 39 of *MVM*, summarising *Larentia + Minerva*[5])[6].

(8) The cost of fundraising can in principle be an overhead, depending on the circumstances.

(9) The burden of proof is on the appellant.

## (4) Broad questions

61. The broad questions arising out of sections 24 and 26, and regulation 101, are—

(a) is the VAT "input tax" within the meaning of section 24(1)? That is to say, in relation to the services which WG received and on which WG paid VAT, were

[4] Page 39, letters bundle.

[5] Paragraph 24 of the 16 July 2015 judgment in *Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG v Finanzamt Nordenham* (C 108/14), and *Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG* (C 109/14), [2015] EUECJ C-108/14, [2015] STC 2101.

[6] Mr Firth for the appellant also cited for this proposition: *Commissioners of Her Majesty's Revenue & Customs v Mayflower Theatre Trust Ltd* [2006] EWCA Civ 116; *Commissioners of Customs and Excise v Redrow Group Plc* [1999] UKHL 4; [1999] 1 WLR 408 (at 169 per Lord Millett), *Abbey National plc v Commissioners of Customs and Excise* [2001] EUECJ C-408/98; [2001] STC 297 (at 35 to 36), and *Kretztechnik AG v Finanzamt Linz* [2005] EUECJ C-465/03; [2005] 1 WLR 3755, as summarised in paragraph 28 of *Hotel La Tour*.

those services used or to be used for the purposes of any business carried on or to be carried on by WG? (section 24(1)); and

(b) is section 26(2)(a) satisfied (as implemented in regulation 101)? That is to say, are there "taxable supplies" "made or to be made by the taxable person in the course or furtherance of his business" so that the input tax is deductible against them?

62. To recap so far: The VAT claimed has to have a direct and immediate link with taxable supplies (*BAA*, paragraph 108). But there need not be a direct and immediate link to specific supplies where the costs of the services in question are part of the general overheads of the person who incurred the tax and are, as such, components of the price of the goods or services which he supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole (*MVM* paragraph 39 citing *Larentia + Minerva*; and *Kretztechnik* as summarised in paragraph 28 of *Hotel La Tour*).

63. Mr Firth's submission for the appellant was that this is an overheads case: the overheads being the cost incurred by WG in fundraising as part of the takeover.

64. We accept that, as held in *Frank Smart*, the cost of fundraising can, in principle, be an overhead. The test applicable in the present case is contained in paragraph 65(iv) of the Supreme Court judgment in *Frank Smart*, which we set out again here for ease of reference (our underlining)—

> "iv) Where the taxable person acquires professional services for an initial fund-raising transaction which is outside the scope of VAT, that use of the services does not prevent it from deducting the VAT payable on those services as input tax and retaining that deduction <u>if its purpose in fund-raising, objectively ascertained, was to fund its economic activity and it later uses the funds raised to develop its business of providing taxable supplies</u>. See, for example, *Abbey National*, paras 34-36; *Kretztechnik*, paras 36-38; *Securenta*, paras 27-29 and *SKF*, para 64. The same may apply if an analogous transaction involving the sale of shares is classified as an exempt transaction: *SKF*, para 68.".

65. Moreover, although much of the case law involved the entity incurring the VAT being the one then to make the taxable supplies, we accept that in the present case that does not have to be so. We accept that, where *BAA* applies, the following principle will apply: where a company acquires another company, the taxable supplies or future taxable supplies, and the economic activity or future economic activity, of the company acquired can be relied on as the intended "downstream" taxable supplies and intended "downstream" economic activity of the acquiring company, where the acquiring company intends to join the VAT group of which the company acquired is a member. (In *BAA*, ADIL acquired BAA. On the facts, ADIL did not at the relevant time intend to join the VAT group of which BAA was a member.) Given our finding below that there <u>was</u> such an intention in the present case, we need not consider whether, without it, *BAA* permits only the taxable supplies of the acquired company to be relied on by the acquiring company, as opposed to permitting reliance by the acquiring company on both the acquired company's taxable supplies <u>and</u> its economic activity (*BAA* dealt with each separately).

**(5) Issues**

66. In view of the principles that we accept from *Frank Smart* and *BAA* (paragraphs 64 and 65 above), and in view of what was common ground (paragraph 60 above), the following issues fall to be decided—

(1) Can Culver's current or intended taxable supplies, and current or intended economic activity, be relied on as "downstream" economic activity of WG and as "downstream" taxable supplies of WG? The answer depends in turn on the answers to the following questions—

    (a) does the principle in *BAA* apply in the present case?

    (b) did WG have an intention to join the VAT group of which Culver was a member and group representative?

(2) Are the costs that were incurred for the purposes of the takeover by WG "overheads" within the meaning of the case law? The answer depends in turn on the answers to the following questions—

    (a) was fundraising a purpose of the takeover?

    (b) if so, was fundraising WG's purpose or (if at all) only Culver's purpose?

    (c) was fundraising a purpose for which the services were supplied to and received by WG?

    (d) what was the intended use of the funds to be raised?

    (e) what was the actual use of the funds raised?

    (f) does the way in which the funds were intended to be used and were actually used fall within the Supreme Court's reasoning in *Frank Smart*?

(3) Does section 43 of the VAT Act 1994 mean that deemed supply to the VAT group representative member can be matched to that member's actual intentions in place of the intentions of the actual recipient of the supplies?

## E. ANALYSIS

### Analysis: Introduction

67. Mr Firth's case is that the services provided to WG were all provided for the benefit of WG's business because the services were to raise £20million for use in the subsidiaries' businesses. We were not addressed on whether WG was a taxable person at the actual time of supply of the services to WG. The focus was on the deemed supply to Culver – which it was common ground was a taxable person – on WG joining the VAT group of which Culver was the representative member.

68. Paragraphs 22 to 24 and 99 of *BAA* appear to treat as separate the taxable supplies of a subsidiary on the one hand and the intended economic activity of the holding company on the other, whereas the appellant's position in the present case was that the taxable supplies of Culver were WG's intended economic activity. Moreover, the Court of Appeal in *BAA* appeared to view an intention to make taxable supplies as one of the ways in which there could be a current economic activity, rather than only a way in which there could be future or intended economic activity (paragraph 99 of *BAA*). The case law also in some cases appears to conflate the "onward taxable supplies" with current or future economic activity, perhaps because taxable supplies and economic activity can both be evidenced by the same facts. We bear in mind that the ultimate question is whether the conditions in sections 24 and 26 and regulation 101 are met.

**(1) Analysis: Question 1: Can Culver's current or intended taxable supplies, and current or intended economic activity, be relied on as "downstream" economic activity of WG and as "downstream" taxable supplies of WG?**

69. The answer is yes, in view of the answers to the following questions.

***(a) Does the principle in BAA apply in the present case?***

70. Yes. The principle in *BAA* applies in the present case, for the following reasons.

71. Mr Firth for the appellant sought to distinguish *BAA* on the basis that it involved a third party takeover which, he said, was not so in the present case. He also however relied on *BAA* for his submission that an intention on the part of WG, the acquiring company, to join the VAT group of which Culver, the acquired company, was a member, enables WG to rely on Culver's economic activity and taxable supplies as WG's "downstream economic activity" and "downstream taxable supplies".

72. We do not accept that *BAA* can be distinguished from the present case.

73. In *BAA*, the services supplied to the holding company (ADIL) which took over BAA were supplied "in connection with its takeover of BAA, which itself was making supplies of services" (paragraph 100, *BAA*, our emphasis). We were not persuaded that the nature of the supply in the present case distinguishes the present case from *BAA*. In the present case, the services were supplied in connection with the takeover (and fundraising), as in *BAA*[7], but also in connection with readmission on the Alternative Investment Market (paragraphs 109 to 112 below). We were not persuaded that the additional element in the present case – readmission on the AIM – made the supply of services in the present case materially different from the supply of services to the holding company in *BAA;* readmission was intended as part and parcel of the takeover in the present case.

74. We were also not persuaded that the present case is to be distinguished from *BAA* on the basis that, as Mr Firth argued for the appellant, *BAA* involved a third party takeover, which was he said materially different from the reverse takeover in the present case. In *BAA*, the company taken over had "*continuing benefit beyond the take-over*" (*BAA*, paragraph 31(4)), and those managing the company effecting the takeover, ADIL, had an interest in developing the business as a whole beyond the takeover. ADIL does not appear to have bought BAA merely as an investment vehicle. The Court of Appeal said at paragraph 15, and paragraph 31(1) and (4) (our underlining)—

> "[15]… The completion of the takeover put ADIL in charge of the strategic and financial direction of the BAA's group business of running airports in the UK and overseas. The acquisition formed part of a continuum of onward investment.
>
> […]
>
> "**31 … (1) Purpose of ADIL**
> ..[ADIL's] purpose was not only to acquire the BAA shares, but also to provide 'high level strategic governance of the ongoing group'. It saw the take-over not as an end in itself: it was a 'first, necessary step towards long term, large investment in UK airport infrastructure'. Its role was to acquire, manage and operate the BAA airports. Its strategic input was evidenced by re-financing and

[7] Although the funds raised in *BAA* were used at least in part to make the acquisition, which did not appear to be so in the present case.

post-transaction internal re organisation. After acquisition ADIL assumed direction and leadership of the ongoing BAA group as a whole and took over its strategic governance as a long term business undertaking without a break. It was an active management company. There was a single overall transaction as a means to an end and the business plan covered both the acquisition and subsequent management developments."

[…]

**(4) Continuing benefit of services supplied to ADIL**

The services supplied by Macquarie to ADIL were concerned mainly with the take-over 'but the resulting work product did have continuing benefit beyond the take over.' The transaction costs were not written off, but were capitalised and that pointed to perceived continuing benefit of that expenditure.".

75. In the present case, Mr Firth for the appellant took us to the following parts of the Admission Document (which had been prepared for and preceded the takeover) to show WG's thinking prior to the takeover—

> "The Directors believe that there is significant opportunity for consolidation within the UK legal services market in both the high-end advisory space through Gordon Dadds and the smaller, independent firms sector through the Prolegal model." (page 632[8], third paragraph under heading "2. Gordon Dadds")

> "The Directors believe that there is an opportunity to continue to acquire and integrate other larger, high-end firms in the same way." (page 632, fourth paragraph under heading "2. Gordon Dadds").

76. "The Directors" in those two passages in the Admission Document are defined at the start of that document as the Existing Directors (that is, WG's directors) and the Proposed Directors (page 625). "The Proposed Directors" are defined thus in the document (page 627)—

> "the proposed new directors of the Company with effect from Admission whose names are listed on page 11 [page 629] of this document".

Cross-checking that definition with the names on page 11 of the Admission Document shows that the Proposed New Directors were Culver's directors.

77. So, in the Admission Document, it is both WG's and Culver's directors saying on page 632 (third and fourth paragraphs under heading "2. Gordon Dadds") what they see for the future following the reverse takeover. That is not materially dissimilar to the thinking of the holding company in *BAA*.

78. We also, therefore, do not distinguish *BAA* from the present case on the basis that the holding company which received the services in *BAA* was a third party that was purely investing.

79. That means that we apply *BAA*. That helps the appellant in two ways. First, the authorities higher than the First-tier Tribunal cited by Mr Firth for linking overheads to "downstream" economic activity, or to "downstream" taxable supplies, all envisaged the downstream activity or downstream taxable supplies to be those of the entity that incurred the overheads and the VAT on them. The Court of Appeal accepted however in *BAA* that VAT incurred on supplies to the holding company can in principle be linked to onward taxable

[8] Internal page 14 of the Admission Document.

supplies by a company other than the holding company. Second, in principle an intention on the part of the acquiring company to join the VAT group of which the company acquired is a member is, or is evidence of, an intention on the part of the acquiring company to carry on economic activity. In *BAA,* that intention was not there on the facts. But was it there in the present case?

***(b) Did WG have an intention to join the VAT group of which Culver was a member and group representative?***

80. Before answering this question, we deal with a preliminary point about the time as at which intention is to be assessed. We noted at paragraph 44 above that the Court of Appeal held in *BAA* that the intention to make taxable supplies is to be considered as at "*the date on which ADIL [the company effecting the takeover] incurred the liability to VAT on the services supplied to it*" (paragraph 98). Although it was said to be common ground in the present case that for "*the invoices relating to the acquisition, the time of supply is August, September, October, December 2017 and January 2018*" (HMRC letter, 13/9/19[9]), it was unclear how the parties expected that "time of supply" to affect the tribunal's consideration of intentions. The intention that the takeover would include fundraising could not exist once the intention became a reality, which was on completion of the takeover. Similarly, the intention to join the VAT group could not exist after 4 August 2017, the date on which WG did join that group, because on WG joining the group the intention had converted into a reality. We have therefore considered (i) intentions that existed at the time that WG received the services supplied and (ii) intentions that existed at the time of the takeover. The post-takeover situation is nonetheless relevant in considering what the funds were in fact used for – the second consideration in *Frank Smart*. We come to that at paragraph 129 below.

81. Turning then to whether WG had an intention to join the VAT group:

82. Yes, we accept that WG did have an intention, immediately before and at the time of completion of the takeover, to join the VAT group of which Culver was a member (and group representative). We accept too that WG had that intention when receiving the supplies on which VAT is sought. We say that for the following reasons.

83. We were not taken to, and could not find, specific evidence of an intention on the part of WG to join the VAT group. But WG joined the VAT group on the same day as that on which the takeover took effect, 4 August 2017 (the takeover agreement having become final on 3 August 2017). It is highly unlikely that WG formed that intention after the takeover was completed on 4 August and before WG joined the VAT group on that same day. Even if the two events were not simultaneous, a period of minutes or hours was not sufficient to form a considered intention to join the group. We find that that intention was not formed only on the day of the takeover. As to whether that intention was there at the time the supplies were received by WG, which was self-evidently some time before completion of the takeover, we accept that it was. The Admission Document refers repeatedly to the "Enlarged Group" that WG envisaged would exist on completion of the takeover. We accept that that did not show a specific intention as to VAT grouping. But WG's intention that the Enlarged Group would come into being on completion of the takeover is consistent with an intention for WG to join the VAT group whose membership broadly reflected that of the intended Enlarged Group.

84. Given that the condition specified in *BAA* – intention to join the acquired company's VAT group – is met in the present case, we accept that Culver's economic activity can be relied on in principle as "downstream" current or intended economic activity of WG. We also accept

[9] Page 39, letters bundle.

that Culver's taxable supplies can be relied on as "downstream" current or intended taxable supplies of WG.

85. There still however remain the question of whether fundraising was a purpose of the takeover, and if it was, the questions arising from what the Supreme Court said in paragraph 65(iv) of *Frank Smart*: Was WG's "*purpose in fund-raising, objectively ascertained, ... to fund its economic activity and [did] it later [use] the funds raised to develop its business of providing taxable supplies*"? We deal with those questions next.

**(2) Analysis: Question 2: Are the costs that were incurred for the purposes of the takeover by WG "overheads" within the meaning of the case law?**

86. The answer is yes, in view of the answers to the following questions.

***(a) Was fundraising a purpose of the takeover?***

87. Yes, we accept that fundraising was a purpose of the takeover, for the following reasons.

88. The letter dated 2 February 2017 from Roger Harding of Gordon Dadds LLP to HMRC explained, prior to the takeover, that (our emphasis)—

> "5. Project Kappa is a proposal (pursuant to heads of terms signed in summer 2016) for the acquisition of Culver Holdings Limited by a small public company in consideration of the issue of new shares in "Kappa PLC" (as it is known for confidentiality reasons) together with a market fund raising which is expected to enable the acquisition of further businesses to which Culver Holdings Limited will continue to supply management services" (page 2, letters bundle).

89. A further letter to HMRC from Roger Harding – this time signing off as Tax Director of Ince Gordon Dadds LLP – was dated 10 April 2019 and explained (our emphasis)—

> "I refer to your letter of 4 March and apologise for the delay
>
> I believe you have misunderstood the nature of the transaction resulting in our business being listed on the stock exchange. Work Group Plc acquired the business and assets of what was then Culver Holdings Ltd/Gordon Dadds Group Ltd, not as you imply, the other way around.
>
> The listing allowed the company to raise capital in the market for further expansion. The capital has a direct and immediate link as a whole to the running and active management of all subsidiaries in the group and payment for management services is not contingent on the profitability of the entities. (Larentia & Minerva ECJ rulings). This accords with HMRC guidance of 20 April 2O17, which we reviewed in connection with the takeover. The enlarged group following the takeover had increased sales and therefore additional output tax. Consequently monthly VAT payments were imposed by HMRC as a result of exceeding the annual threshold …" (page 15, letters bundle).

90. A letter from "Ince" dated 18 September 2019 to HMRC said—

> "As previously stated, the reverse takeover was done to obtain a public listing giving greater access to capital for further (economic activity) expansion." (page 42, letters bundle).

91. Although only the first of the three letters cited above (paragraph 88) preceded the takeover, all three letters are broadly consistent with each other in saying that the proposal was "*for ... a market fund raising*", that the listing "*allowed the company to raise capital*" and that the "*takeover was done to obtain a public listing giving greater access to capital*". The statement in the second of the three letters that the takeover had "*allowed the company to raise capital*" was not strictly a statement of what had been intended, but it was not inconsistent with the other two letters.

92. The fundraising was also mentioned in the Admission Document, which of course preceded the takeover. Mr Firth took us to the following passages in the Admission Document as evidence that fundraising was a purpose of the takeover (emphasis in original, pages 631 and 649)—

> "The Company announced on 12 July 2017 that:
>
> […]
>
> - it has conditionally raised £20.0 million via the Placing of 14,285,714 New Ordinary Shares at a price of 140 pence per share. The net proceeds of the Placing are expected to be approximately £17.9 million which will be used to repay borrowings and to fund further acquisitions and the working capital requirements of the Enlarged Group;" (page 631, third bullet)

> "**16. Use of the proceeds of the Placing**
>
> The Enlarged Group expects to receive gross proceeds of approximately £20.0 million from the Placing. The net proceeds of the Placing receivable by the Enlarged Group after the costs and expenses of Admission are expected to be approximately £17.9 million and are intended to be used as follows:
>
> £4.0 million to repay existing borrowings
> £6.0 million to be used as cash consideration to fund acquisitions
> £7.9 million to be used as working capital to support the roll-out and integration of acquisitions and maintain a strong balance sheet
>
> The split between funds used as consideration for acquisitions and for working capital purposes may shift depending on the nature and shape of specific acquisitions." (page 649).

93. We accept that fundraising was a purpose of the takeover in view of the letters, and the parts of Admission Document, cited at paragraphs 88 to 92 above.

94. But whose purpose was it?

### *(b) Was fundraising WG's purpose or (if at all) only Culver's purpose?*

95. HMRC submitted that, if at all, fundraising was only Culver's purpose, not WG's purpose, and that its being only Culver's purpose would not suffice.

96. We disagree. We accept that fundraising was one of WG's purposes of the takeover, for the reasons below. Since we accept that it was WG's purpose, we need not decide whether its being only Culver's purpose would suffice.

97. HMRC pointed out in their letter of 6 February 2019 that WG's annual report for the year ended 31 December 2016 described the sale of the group's UK trading activities and overseas subsidiaries with a view to being "*an attractive cash shell for a reverse takeover*". That report said, in relation to the sale on 31 December 2015 of its UK business and overseas subsidiaries (page 4 of its internal numbering, page 908 hearing bundle)—

> "In order to ensure that the Company would be an attractive cash shell for a reverse takeover transaction we had negotiated limited timescales to any warranties and indemnities given as part of the sale transaction".

98. Moreover, the Admission Document which had been prepared for the takeover said (page 632)—

> "The Existing Directors [ie "the current directors of the Company [WG] as at the date of this document whose names are listed on page 11 of this document"] consider that the acquisition of Gordon Dadds [ie Culver] would be consistent with the Company's aim of making investments within the support and business services sector and should be value-enhancing for shareholders. They believe that Gordon Dadds has many opportunities for growth, both organically and through acquisition.".

99. "Gordon Dadds" is defined at the start of the Admission Document as "*Gordon Dadds Group Limited, a private limited liability company incorporated in England and Wales with registered number 02611363*". And on page 619, it is said to be Gordon Dadds Group Limited that WG was acquiring. So, "Gordon Dadds" in the extract at paragraph 98 above is Culver. So, the extract from the Admission Document on page 632 (paragraph 98 above) is the directors of WG saying that the acquisition of Culver is consistent with WG's aim of making investments in support and business services.

100. We accept that, as Mr Saldanha submitted for HMRC, WG's investment strategy is shown by (i) the reference to WG as "*an attractive cash shell*", together with (ii) the statement that the acquisition of Culver would be consistent with WG's aim of making investments within the support and business services sector.

101. But just because the acquisition of Culver in the reverse takeover was within WG's investment strategy does not of itself mean that WG's purpose in becoming involved in the takeover did not include fundraising.

102. The key letter, dated 22 August 2016, in which WG made the offer to Culver, suggests that fundraising <u>was</u> one of WG's purposes in becoming involved in the takeover (page 598)—

> "this letter sets out the main terms under which it is intended that [WG] would acquire the whole of the issued share capital of Culver Holdings Limited registered no. [..] through a share for share exchange under a Takeover Code offer … and simultaneously raise approximately £20 million in cash through a placing … by Arden ... of new ordinary shares in [WG].
>
> The Offer will be subject to completion of due diligence by both parties on the other…"

103. Moreover, the letter even went so far as to say that it was WG that would be <u>doing</u> the fundraising—

> "it is intended that [WG] would … simultaneously raise approximately £20 million".

104. The first of the extracts from the Admission Document cited at paragraph 92 above is evidence that WG did the fundraising. The second of those extracts is evidence of the Enlarged Group's expectation that funds would be raised, and uses "*intended*" passively without attributing the intention to WG as opposed to the Enlarged Group. But in our judgment, that means only that the intention to raise funds was not WG's alone. It does not detract from the other evidence we have cited which suggests that the fundraising was one of WG's purposes in becoming involved in the takeover.

105. Having accepted that fundraising was one of WG's purposes in becoming involved in the takeover, we turn to the next question: whether fundraising was a purpose for which the services were supplied to and received by WG.

***(c) Was fundraising a purpose for which the services were supplied to and received by WG?***

106. Yes, we accept that fundraising was a purpose for which the services were supplied to and received by WG, for the following reasons.

107. We have found that fundraising £20 million (gross) was one of WG's purposes in becoming involved in the takeover. The services were provided to WG. That does not of course of itself mean that fundraising was a purpose for which the services were supplied to and received by WG. Whether they were or not depends on an examination of what the services were said to be supplied for.

108. Mr Firth pointed us to page 72 for a complete list of the invoices in question. We have reproduced that list at the **annex** to this decision. Mr Firth took us to the five biggest invoices, which were from Arden Partners, the London Stock Exchange, Saffery Champness, Chartered Accountants, and two from Computershare Investor Services PLC. We reproduced at paragraph 23 above Mr Firth's helpful summary table. We have created the following more detailed table from those five biggest invoices—

| | Invoice date | Supplier | General description on invoice | Breakdown description | Breakdown of amounts excl VAT | Total on which VAT charged **(VAT)** | |
|---|---|---|---|---|---|---|---|
| (1) | 4 August 2017 | Arden Partners | To: **Project Kappa**<br><br>Placing of 14,285,714 Ordinary Shares at 140 pence per share | Placing commission | £762,499.99 | Nil | Page 73 |
| | | | | Corporate finance fee | £200,000.00 | | |
| | | | | Legal fees (Vatable) | £90,000.00 | £95,070.04 **(£19,014.01)** | |
| | | | | Recharge of expenses (Vatable) | £5,070.04 | | |
| (2) | 8 August 2017 | London Stock Exchange | AIM - UK - Readmission | Work Group Plc: 10009250001 | No breakdown of amounts | £26,666.00 **(£5,333.20)** | Page 74 |
| | | | | Approval Date: 03/08/2017: Admission Date: 04/08/2017 | | | |
| | | | | ISIN:GB00BZBY3Y09 Market Cap:41666375.58 | | | |
| | | | | Classes:1=Fee: NOT DEFINED | | | |
| (3) | 29 August 2017 | Saffery Champness, Chartered Accountants | Fees for acting as reporting accountants on **Project Kappa** | No further description | £212,500.00 | £213,104.84 **(£42,620.97)** | Page 80 |
| | | | Disbursements | No further description | £604.84 | | |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| (4) | 31 October 2017 | Computershare Investor Services PLC | Gordon Dadds Group PLC **Takeover** | Project Fees | Management Fee<br><br>Nominal Code: Acquisition costs: **Project Kappa** | £10,000.00 | £10,186.73 **(£2,037.35)** | Page 119 |
| | | | | Envelopes | Correspondence | £1.89 | | |
| | | | | | BRE's (Offer Doc & 980s if applicable) | £16.52 | | |
| | | | | Postage | Correspondence | £17.28 | | |
| | | | | | BRE's (Issued with Offer Doc & 980s if applicable) | £151.04 | | |
| (5) | 31 October 2017 | Computershare Investor Services PLC | Gordan Dadds Group PLC **Consolidation** | Project Fees | Management Fee<br><br>Nominal Code: Acquisition costs: **Project Kappa** | No breakdown of amounts | £7,500.00 **(£1,500.00)** | Page 123 |
| | Total VAT From these five largest invoices = £70,505.53 (out of the total £73,238 in issue) | | | | | | | |

109. Four of those five biggest invoices mentioned Project Kappa (the exception being the invoice at item 2, from the London Stock Exchange). It was common ground that Project Kappa was the name for the entire reverse takeover, including its fundraising aspect. Within the four invoices in the table at paragraph 108 above which mention Project Kappa, one was for "*Placing of 14,285,714 Ordinary Shares at 140 pence per share*" (Arden Partners, item 1), the second was for fees for acting as reporting accountants on Project Kappa, plus a comparatively nominal amount for disbursements (Saffery Champness, item 3) and the third says "*Gordon Dadds Group PLC Takeover*" (Computershare Investor Services PLC, item 4). We accept that the Arden Partners invoice (item 1) was for fundraising because that was the intention and effect of the share placing: "*simultaneously raise approximately £20 million in cash through a placing … by Arden ... of new ordinary shares in [WG]*" (letter 22 August 2016, page 598). We accept that the Saffery Champness invoice (item 3) and one of the Computershare Investor Services PLC invoices (item 4) were each for the takeover, and since the takeover included the fundraising, we accept that those two invoices were also for the fundraising. So that deals with three of the five largest invoices.

110. As to the fourth invoice that mentioned Project Kappa, from Computershare Investor Services PLC, (item 5 in the table at paragraph 108 above), that invoice said it related to a consolidation. The consolidation was billed separately from the takeover, the subject of the other Computershare Investor Services PLC invoice (item 4). As to the fifth and final invoice of the largest five, the one from the London Stock Exchange (item 2), that one did not mention Project Kappa at all; it simply mentioned readmission to the AIM. However, (i) one would not necessarily expect the London Stock Exchange to mention the company's own project name when billing for readmission; and (ii) generally, the readmission was part of the entire operation, which we have found was intended by WG to include fundraising, and did in fact include fundraising. Moreover, Mr Saldanha took no point for HMRC that either the "consolidation" invoice or the London Stock Exchange invoice did not relate generally to the reverse takeover, that is to say, to Project Kappa. We accept therefore that, in addition to the three invoices at items 1, 3 and 4 in our table at paragraph 108 above, the remaining two

invoices in that table, items 2 and 5, were also for Project Kappa generally. Had the "consolidation" invoice been the subject of argument, we might have found differently. But it was not. And given that we are dismissing the appeal in any event, and that that invoice represented just £1,500 of the total VAT in issue, we did not consider it proportionate to seek further submissions about that invoice.

111. Mr Saldanha equally took no point for HMRC to the effect that the remaining amounts (totalling £2,732.47) not represented by the five biggest invoices did not relate to Project Kappa. We have not seen a need therefore to split off the remaining amounts from the amounts in the five largest invoices to which Mr Firth took us.

112. So, we accept that fundraising was a purpose for which all of the services were supplied to and received by WG.

***(d) What was the intended use of the funds to be raised?***

113. As to what was intended to be done with the £20 million that WG were to raise (or more accurately, with the £17.9 million net that WG were to raise), we are looking for an intention that falls within the purpose permitted by the Supreme Court in *Frank Smart*. That purpose was "*to fund its economic activity and it later uses the funds raised to develop its business of providing taxable supplies*". So the VAT on costs of fundraising is, pursuant to *Frank Smart*, recoverable where the economic activity intended was of the same company as raised the funds and received the supplies on which the VAT is sought. But *Frank Smart* did not undo *BAA* which had envisaged that – instead of an intention for the holding company itself to carry on an economic activity involving actual taxable supplies – an intention at the relevant date to join the VAT group would suffice. We read *Frank Smart* with the rider – from the Court of Appeal in *BAA* – that economic activity by Culver and taxable supplies by Culver can be relied on as "downstream" economic activity, and "downstream" taxable supplies, of WG.

114. Mr Firth took us to three pieces of evidence for the intended use of the funds to be raised. Two were part of the Admission Document, the third was a letter. We take each in turn.

115. The first piece of evidence to which Mr Firth took us for the appellant was this text in the Admission Document (page 631, third bullet point)—

> "The Company announced on 12 July 2017 that:
>
> […]
>
> - it has conditionally raised £20.0 million via the Placing of 14,285,714 New Ordinary Shares at a price of 140 pence per share. The net proceeds of the Placing are expected to be approximately £17.9 million which will be used to repay borrowings and to fund further acquisitions and the working capital requirements of the Enlarged Group;".

116. So, from that part of the Admission Document, the funds to be raised by "The Company", that is to say by WG, as part of the reverse takeover had three intended uses—

(i) "to repay borrowings":

(ii) "to fund further acquisitions" or perhaps "to fund further acquisitions … of the Enlarged Group"; and

(iii) "to … fund … the working capital requirements of the Enlarged Group".

117. The first of those three items, "*to repay borrowings*", was not grammatically linked to "*the Enlarged Group*" which appeared later in the same bullet point. We find the first item to be a reference to repaying WG's borrowings (WG being the "Company" as defined at the start

of the document, page 624). As to the second of those three items, "*to fund further acquisitions…*", we gave at paragraph 116(ii) above two alternative constructions of that phrase: one construction refers to funding further acquisitions without saying by whom, the other construction refers to funding further acquisitions "*of the Enlarged Group*". The reference to funding further acquisitions seems probably – although it is unclear – to mean funding further acquisitions by WG because "*of the Enlarged Group*" at the end of the paragraph starts with "*of*" whereas acquisition could be said to require "*by*". As to the third of those three items – "*to … fund … the working capital requirements of the Enlarged Group*" – *Enlarged Group*" is defined in the same document as "*the Company and its subsidiary undertakings on Admission, including the Gordon Dadds Group*" (page 624). So that includes Culver. So the third of WG's intended uses for the funds to be raised, according to the part of the Admission Document we were taken to on page 631, was "to … fund … the working capital requirements of the Enlarged Group" including Culver. That third item, taken with the second at paragraph 116 above, did not make clear whether only the working capital was to be for the Enlarged Group (in other words, for companies in addition to WG) or whether also the funding of acquisitions was for acquisitions by the Enlarged Group (companies in addition to WG). We resolve the ambiguity by choosing what seems to us to be the probable meaning of item 2: that "*to fund further acquisitions*" was not qualified by "*of the Enlarged Group*".

118. So, the first of the pieces of evidence to which Mr Firth took us to show the intended use of the funds raised – the text in the third bullet point on page 631 – did specify an intention for some of the funds to be used for the Enlarged Group (the working capital part in item 3) and so not just for WG. But the rest of that first piece of evidence – given what we say in paragraph 117 above – was not to the express effect that the funds raised were to be used to repay the borrowings of a company other than WG, and was not to the express effect that the funds raised were to fund further acquisitions by a company other than WG.

119. Mr Firth took us, however, to a second piece of evidence for further detail of the purpose of the fundraising. It was the following text in the Admission Document, which he said gave a more detailed breakdown of the intended use of the funds to be raised (page 649, emphasis in original)—

> "**16. Use of the proceeds of the Placing**
> The Enlarged Group expects to receive gross proceeds of approximately £20.0 million from the Placing. The net proceeds of the Placing receivable by the Enlarged Group after the costs and expenses of Admission are expected to be approximately £17.9 million and are intended to be used as follows:
>
> £4.0 million to repay existing borrowings
> £6.0 million to be used as cash consideration to fund acquisitions
> £7.9 million to be used as working capital to support the roll-out and integration of acquisitions and maintain a strong balance sheet
>
> The split between funds used as consideration for acquisitions and for working capital purposes may shift depending on the nature and shape of specific acquisitions.".

120. Although this part of the Admission Document, on page 649, was relied on as giving a more detailed breakdown of the intended use of the funds to be raised, it was in one sense less clear than the part on page 631 set out at paragraph 115 above; the part on page 649 did not say whose borrowings would be repaid of the companies in the Enlarged Group (in respect of the £4 million specified for that) nor which of those companies would use the remaining £13.9 million to fund, roll out and integrate acquisitions, and whose balance sheet was intended to be maintained strong. It referred only to the Enlarged Group at the start. In view of that, this second, purportedly more detailed, piece of evidence of intention, did not contradict the first piece of evidence of intention, on page 631, which we found above: (i) showed an intention to

repay WG's borrowings; (ii) was not to the express effect that the funds raised were to fund further acquisitions by a company other than WG; (iii) but did express an intention for some of the funds to be used for the Enlarged Group (the working capital part in item 3 of the first piece of evidence) and so not just for WG.

121. Moreover, having specified £6 million to be used "*as cash consideration to fund acquisitions*" and £7.9 million to be used "*as working capital to support the roll-out and integration of acquisitions and maintain a strong balance sheet*", this second piece of evidence of intention specifically declined to say – in its concluding sentence – how much of that £13.9 million (6 + 7.9) was to be used "*as consideration for acquisitions*" and how much was to be used "*for working capital purposes*".

122. So, taking together the first two pieces of evidence to which Mr Firth took us for the intended use of the funds to be raised – on pages 631 and 649 – those pieces of evidence showed that WG intended to use the funds that WG were to raise—

(a) to repay WG's borrowings (using £4 million);

(b) to make acquisitions (and not specifying that a company other than WG would make them); and

(c) to fund the working capital requirements of the Enlarged Group (but specifically declining to say how much if any of the funds were to be used for this).

123. The third piece of evidence to which Mr Firth took us as evidence of the intended use of the funds to be raised was the letter dated 2 February 2017 from Roger Harding to HMRC. As with the two Admission Document extracts to which Mr Firth took us on pages 631 and 649 (paragraphs 115 and 119 above), this 2 February letter predated the reverse takeover. That letter went further than those Admission Document extracts by specifying what the intended acquisitions would be used for. We set out the extract again here, for ease of reference (page 2, letters bundle)—

> "5. Project Kappa is a proposal (pursuant to heads of terms signed in summer 2016) for the acquisition of Culver Holdings Limited by a small public company in consideration of the issue of new shares in "Kappa PLC" (as it is known for confidentiality reasons) together with a market fund raising which is expected to enable the acquisition of further businesses to which Culver Holdings Limited will continue to supply management services.".

124. That letter made no mention of the acquired further businesses themselves making taxable supplies on which WG sought to rely. Rather, the further businesses to be acquired were envisaged as being new customers of Culver's taxable supplies.

125. There was also the letter from "Ince" dated 18 September 2019, post-dating the takeover and so post-dating the fundraising. It said (page 42, letters bundle)—

> "As previously stated, the reverse takeover was done to obtain a public listing giving greater access to capital for further (economic activity) expansion.".

126. That letter described "*further ... expansion*" as the intended use of the capital to be raised. It could have meant "expansion" in the form of further acquisitions or "expansion" in the form of increased sales. It takes us no further than the three pieces of evidence to which Mr Firth took us (and is presumably why he did not take us to this letter as evidence of the intended use of the funds).

127. So, taking together all three pieces of evidence to which Mr Firth took us for the intended use of the funds to be raised, those pieces of evidence showed in our judgment – and we find—

(a) that WG's intention as to the funds that WG was to raise was to use those funds to repay WG's borrowings (using £4 million);

(b) that WG did not have a firm intention to use the remaining funds to make acquisitions (by WG) as opposed to using them to fund the working capital requirements of the Enlarged Group, and nor did WG have a firm intention to use the remaining funds to fund the working capital requirements of the Enlarged Group as opposed to using them to make acquisitions (by WG).

128. Without firm evidence one way or the other as to the intended use of the £13.9 million as between making acquisitions on the one hand, and working capital on the other, we turn to the next question to resolve matters. That is, what were the funds raised actually used for?

***(e) What was the actual use of the funds raised?***

129. As to what the funds raised were actually used for, Mr Firth took us to two pieces of evidence.

130. The first piece of evidence of actual use of the funds to which Mr Firth took us was the Report and Financial Statements 2018 on page 957 (fifth paragraph) as evidence of what was done with the money raised—

"The acquisitions we have completed during the year were:

- Alen-Buckley: in June 2017 we acquired the business and certain assets of this leading South London firm of solicitors
- CW Energy: in October 2017 we acquired the business and certain assets of this highly profitable specialist corporate tax advisory firm
- White & Black: in January 2018 we acquired this firm of specialist corporate FinTech solicitors
- Metcalfes: also in January 2018 we acquired the business and certain assets of this well established Bristol firm of solicitors which had just acquired with our guidance the business of a local competitor
- Thomas Simon: in February 2018 we acquired the share capital of this Cardiff based firm of solicitors which has doubled the size of our Cardiff office to become a significant firm in the Cardiff market

These acquisitions have settled in well and the level of interaction between the businesses continues to develop as the partners in them develop a better awareness of and respect for the skills elsewhere in the Group. Our innovative remuneration model has been specifically designed to foster this behaviour.".

131. That page said only what businesses the group had acquired. It did not say how much was spent on each one (and included the purchase of WG, which conflicts with the notion that WG was the one doing the purchasing). Nor did that page say what was done with the remaining money of the net £17.9 million mentioned on page 631 in the Admission Document (paragraph 115 above).

132. Mr Firth however pointed us to a second piece of evidence, on pages 992 and 993, for the cost of acquisitions. These were extracts from the Gordon Dadds Group plc Report and Financial Statements 2018. The acquisitions which post-dated 4 August 2017 (the takeover completion date) were: £7,106,000 (acquisition of CW Energy LLP), £200,000 (acquisition of 100% of Culver Limited), £3,485,000 (acquisition of White & Black Limited), £4,733,000 (acquisition of Metcalfes Solicitors LLP), and £1,797,000 (acquisition of Thomas Simon Limited), totalling £17,141,000. This evidence gave us no information however about how

much – if any – of the net £13.9 million mentioned in the Admission Document as being intended for making acquisitions or for funding working capital requirements or for both (pages 631 and 649) had been used for making acquisitions and how much had been used for working capital.

133. The letter signed by Roger Harding from Ince Gordon Dadds, International Law Firm, to HMRC dated 10 April 2019, which was after the takeover, said (we set it out again for ease of reference, our emphasis)—

> "I refer to your letter of 4 March and apologise for the delay
>
> I believe you have misunderstood the nature of the transaction resulting in our business being listed on the stock exchange. Work Group Plc acquired the business and assets of what was then Culver Holdings Ltd/Gordon Dadds Group Ltd, not as you imply, the other way around.
>
> The listing allowed the company to raise capital in the market for further expansion. The capital has a direct and immediate link as a whole to the running and active management of all subsidiaries in the group and payment for management services is not contingent on the profitability of the entities. (Larentia & Minerva ECJ rulings). This accords with HMRC guidance of 20 April 2OL7, which we reviewed in connection with the takeover. The enlarged group following the takeover had increased sales and therefore additional output tax. Consequently monthly VAT payments were imposed by HMRC as a result of exceeding the annual threshold …" (page 15, letters bundle).

134. That letter did not say whether the "*further expansion*" consisted only in making further acquisitions or consisted also in other types of expansion.

135. In view of what we say at paragraphs 131 to 134 above, we did not have evidence of whether any of the net £13.9 million intended to be left over after repayment of borrowings had been used for working capital for Culver (or anyone else) as opposed to being spent only on cash consideration for acquisitions. We are unable therefore, for lack of evidence, to find that the funds raised were used for anything other than to make further acquisitions, that is, to buy further companies or entities.

136. The only finding we can make – and do make – as to actual use of the funds raised is that the actual use included the making of further acquisitions, that is, the purchase of further companies or entities. We are unable to make a finding as to how much was so used, but that need not be resolved given what we say below.

137. The question then is whether that actual use of the funds comes within the Supreme Court's reasoning in *Frank Smart*. We turn to that question next.

### *(f) Does the way in which the funds were intended to be used and were actually used fall within the Supreme Court's reasoning in Frank Smart?*

138. No. We find that the making of further acquisitions in the present case is not a use of funds within the Supreme Court's reasoning in *Frank Smart*, for the following reasons.

139. As to the actual use of the funds raised in *Frank Smart*, Lord Hodge said in that case (our emphasis)—

> "4. FASL took advantage of the market in SFPE units to accumulate a fund for the development of its business. With the assistance of bank funding, it spent about £7.7m between 2007 and 2012 on purchasing 34,477 SFPE units in addition to its initial allocation of 194.98 units for Tolmauds Farm. In this period FASL paid VAT on the SFPE units which it purchased and it has sought to deduct that VAT as input tax. In order to receive the SFPs to which the purchased SFPE units entitled it, FASL leased a

further 35,150 hectares of land under seasonal lets. FASL did not cultivate or stock this land. The leases were typically qualified by an agreement, entered into after the lease, which allowed the landlord to stock the land or cultivate it himself, provided that the ground was kept in GAEC. This was done to preserve FASL's entitlement to SFPs. The rent payable for the seasonal lets was generally about £1 per acre but could be up to £10 per acre.

[…]

7. …The FTT found that when it purchased the SFPE units, FASL intended to apply the income which it received from the SFPs to pay off its overdraft and to develop its business operations. … During the relevant period FASL did not increase its stock numbers on the farm significantly. But FASL had been contemplating three principal developments of its business. First, from about 2011, FASL was considering establishing a windfarm. … Secondly, other proposed developments have included the construction of further farm buildings, including cattle courts and a Dutch barn. FASL has undertaken site preparation works for an additional cattle court and has made the needed planning applications. Thirdly, FASL has been considering the purchase of neighbouring farms, which were expected to come on to the market for sale.".

140. So, in *Frank Smart*, the funds to be raised were in the form of Single Farm Payments. In order to obtain those Single Farm Payments, the taxpayer purchased units of Single Farm Payment Entitlement. In order to crystallise those units into funds, the taxpayer also acquired further land (by way of lease) to enable it to receive the Single Farm Payments to which the purchased Single Farm Payment Entitlement units entitled the taxpayer. The Single Farm Payments that were in consequence made to the taxpayer – the funds raised – were not used or intended to be used to acquire that additional leased land, and the additional leased land acquired was not envisaged as then being used for economic activity; the taxpayer did not cultivate or stock the additional leased land acquired, but merely agreed to keep the land in Good Agricultural and Environmental Condition (one of the requirements for eligibility to a Single Farm Payment). The additional leased land was leased (acquired) to enable the funds to be raised, rather than the other way round. So, that first acquisition, a lease of further land, was not one of the acquisitions in respect of which there was an issue as to what the acquisition was used for. It was the later acquisitions (of additional land for a wind farm and of neighbouring farms), made using the Single Farm Payments (that is, the funds actually raised), whose purpose was being considered.

141. As to the applicable considerations when looking at the purpose and use of those later acquisitions, Lord Hodge said in *Frank Smart*, among other things (our underlining, we repeat the extract for ease of reference)—

"49. In my view … in *SFK* the CJEU … has extended the reasoning in the cases about share disposals that are outside the scope of VAT to share disposals which are exempt, by requiring an examination as to whether the costs associated with the input services are incorporated in the price of the shares sold in the initial transaction or in the prices of the taxable person's products in downstream transactions. If the latter, the costs would be "among only the cost components of transactions within the scope of the taxable person's economic activities".".

[…]

59. …there are findings of fact that entitled the FTT to conclude that FASL when it acquired the SPFEs was acting as a taxable person because of its aim of accumulating sums to develop its taxable business through capital expenditure on assets which it would use to generate taxable output transactions.

[…]

63. …But [in the *University of Cambridge* case] referring to the documents before the court, [the CJEU] concluded … that the costs were incurred to generate resources to finance all of the university's output transactions, thereby allowing the price of its goods and services to be reduced. The costs therefore were not components of the price of goods and services provided by the university and could not form part of its overheads. The VAT therefore was not deductible (para 32).

64. In my view, the ruling that the income was used to reduce all of the costs of the university's goods and services prevented the fund managers' fees from being a component of the costs of those goods and services and thus part of the university's overheads, which is the second alternative in *Kretztechnik*. The *University of Cambridge* judgment, which the CJEU has delivered without requiring an opinion from an Advocate General, is therefore an application of established CJEU jurisprudence which I have discussed above and summarise below.

65. […]
iii) Alternatively, there must be a direct and immediate link between those acquired goods and services and the whole of the taxable person's economic activity because their cost forms part of that business's overheads and thus a component part of the price of its products: see for example *BLP*, para 25; *Midland Bank*, para 31; *Abbey National*, paras 35 and 36; *Kretztechnik*, para 36; *SKF*, para 58 and *HMRC v University of Cambridge*, para 31.

iv) Where the taxable person acquires professional services for an initial fund-raising transaction which is outside the scope of VAT, that use of the services does not prevent it from deducting the VAT payable on those services as input tax and retaining that deduction if its purpose in fund-raising, objectively ascertained, was to fund its economic activity and it later uses the funds raised to develop its business of providing taxable supplies. See, for example, *Abbey National*, paras 34-36; *Kretztechnik*, paras 36-38; *Securenta*, paras 27-29 and *SKF*, para 64. The same may apply if an analogous transaction involving the sale of shares is classified as an exempt transaction: *SKF*, para 68.".

142. So, the Supreme Court in *Frank Smart* envisaged the entity doing the fundraising as being the same entity as went on to carry on economic activity and make taxable supplies. The Court of Appeal in *BAA* however appeared to accept that services received and paid for by a holding company could be matched to onward taxable supplies by a subsidiary, if among other things the holding company had had an intention to join the subsidiary's VAT group.

143. We have already accepted that intended supplies and intended activity by Culver can be relied on by WG as WG's downstream activity and WG's downstream supplies, applying *BAA*. In view of that, and of the underlined parts of *Frank Smart* at our paragraph 141 above, if in the present case the funds raised by WG had been used as working capital (or under any other label) to fund Culver's expenses of making taxable supplies of management services (or other taxable supplies by Culver), then the VAT on the cost of WG's fundraising would, to the extent so attributable, be recoverable.

144. We do not however make such a finding.

145. Instead, we find that the purpose of making further acquisitions in the present case was so that the further acquired entities would be additional customers of Culver's services (which services we have accepted can be WG's downstream activity). This finding is fatal to this appeal.

146. The reason we find that that was the purpose is because Roger Harding himself said so in his 2 February 2017 letter to HMRC (page 2, letters bundle)—

> "5. Project Kappa is a proposal (pursuant to heads of terms signed in summer 2016) for the acquisition of Culver Holdings Limited by a small public company in consideration of the issue of new shares in "Kappa PLC" (as it is known for confidentiality reasons) together with a market fund raising which is expected to enable the acquisition of further businesses to which Culver Holdings Limited will continue to supply management services.".

As we pointed out earlier in this decision, that letter showed that the further businesses to be acquired were envisaged by WG as being new customers of Culver's taxable supplies. None of the evidence to which we were taken showed that anything other than that actually happened.

147. The reason we find that using the funds raised to buy new customers of downstream activity is fatal is that such use is not in our judgment within the reasoning of *Frank Smart*. We say that both in view of the principles set out in *Frank Smart*, and in view of the facts in that case. We take each in turn—

(1) As to the principles in *Frank Smart*, Lord Hodge referred at paragraph 59 to "*develop[ing] its taxable business through capital expenditure on assets which it would use to generate taxable output transactions*". And at paragraph 65(iv) he set out considerations in fundraising cases. What Lord Hodge said at paragraph 65(iii), taken with the parts of the CJEU ruling in the *University of Cambridge* case that he cited at paragraphs 63 and 64, suggests that, when read with "*thus a component part of the price of its products*", the reference to "*developing its business of providing taxable supplies*" in paragraph 65(iv) of *Frank Smart* is not a reference to making acquisitions of entities that might be additional consumers of taxable supplies. That is so whether those taxable supplies are made by the same entity that expended the VAT on fundraising (as in *Frank Smart*) or are made by a subsidiary of that entity.

(2) As to the facts, the acquisitions in *Frank Smart* were to be used for the taxpayer to carry on "*farming and … wind farm[ing]*" (we do not include the additional land leased in *Frank Smart* because that was to raise the funds, not a use to which the funds were to be put). The Supreme Court accepted that both "*farming*" and "*wind farm[ing]*" were economic activity (paragraph 68 of *Frank Smart*). It was the taxpayer in that case who would be doing the farming and the wind farming. In other words, the acquisitions in *Frank Smart* were to be <u>used by the acquiring person</u> for future activity <u>by that person</u>. In the present case, the further entities acquired (the "*further businesses*" in the 2 February 2017 letter) were not themselves to be used by WG or Culver to conduct any activity; the further entities were intended only to be recipients of activity.

148. Acquiring assets for those assets to be new recipients of economic activity and of taxable supplies, as in the present case, is not in our judgment using those assets "*to generate … transactions*" in the way meant by Lord Hodge in *Frank Smart*. It is true that the acquired assets would conduct activity in the sense of purchasing Culver's services, if the acquired assets were willing to purchase them. But that purchasing activity is done by the assets acquired, and not by WG or Culver.

149. For those reasons, we find that the fundraising in the present case is not within the reasoning in *Frank Smart*. This is not because the taxable supplies were intended to be made by WG's subsidiary rather than by WG. Rather, it is because the funds raised were used to buy assets which WG envisaged would be new customers of Culver's economic activity and of Culver's taxable supplies. Although acquisition of assets is in principle within *Frank Smart*, that particular use of the assets is not in our judgment the kind of use of assets envisaged by the Supreme Court in *Frank Smart*.

### *(g) Observations*

150. Before moving on to question 3 – whether section 43 helps the appellant – we make a few concluding observations about question 2. First, if we had been with the appellant in principle, we would have considered whether pro-rating was needed to exclude VAT on amounts for so much of the services received as related to the due diligence and advice for WG for the takeover. The due diligence and advice were to protect WG since each party was required – as set out in the offer letter (paragraph 10 above) – to do its own due diligence. The question would have arisen as to whether WG's costs of doing its own due diligence were a cost of the fundraising.

151. Second, had the appellant maintained the position it had taken in correspondence, that WG did provide services to Culver for consideration, we would have rejected that assertion. For the reasons given by HMRC (paragraph 55(4)(a) above), we would not have been persuaded by the purported management services agreement, and invoice, both drawn up long after the event.

152. Third and finally, in relation to the non-section 43 arguments, had we attributed the acquisitions to Culver, that would have made no difference.

## (3) Analysis: Question 3: Does section 43 of the VAT Act 1994 mean that deemed supply to the VAT group representative member can be matched to that member's actual intentions in place of the intentions of the actual recipient of the supplies?

153. No. We do not accept the appellant's VAT group representative argument. It matches deemed supply to the VAT group representative member with the actual intention and actual economic activity of that member (rather than deeming to that member the intention and economic activity of the company that actually received the supply). That exercise would convert all VAT into recoverable input tax in VAT-group cases. HMRC's position was that that is not the effect of the group representative provisions in section 43. And Mr Firth cited no binding authority to the effect that VAT grouping has this effect.

154. Mr Firth did cite two First-tier Tribunal decisions: *Heating Plumbing Supplies Ltd* [2016] UKFTT 753 (TC) and *Hotel La Tour Ltd* [2021] UKFTT 451 (TC). In *Heating Plumbing Supplies*, the First-tier Tribunal did appear to accept at paragraphs 66 and 67 that section 43 has the effect for which Mr Firth contended. But we confess we do not understand quite how the First-tier Tribunal's reasoning in *Heating Plumbing Supplies* fits within the authorities. Moreover, the decision in *Heating Plumbing Supplies* seems partly to rely on the (wrong) proposition that the VAT group itself is the single taxable person, which the Supreme Court in *HMRC v Taylor Clark Leisure Plc* [2018] UKSC 35 said is wrong (and which Mr Firth would, it seems, accept is wrong[10]). The remainder of the First-tier Tribunal's reasoning in *Heating and Plumbing Supplies* does match deemed supply to a company with the actual intention of that company. But we do not accept that that can be right.

155. *Hotel La Tour* was the only other authority that Mr Firth cited in support of his section 43 VAT-group argument. But (a) that too was a First-tier Tribunal decision, and (b) more importantly, the holding company that incurred the input tax on payment for services was the same company as was going to use the services received to build a hotel, not a subsidiary as in the present case. Moreover, the holding company that actually incurred the tax and received the services was also the VAT group representative member. So *Hotel La Tour* (even apart from its being a First-tier Tribunal decision) is not authority for matching the deemed supply

[10] Appellant's skeleton, paragraph 20.

to a VAT group representative member on the one hand to the actual intention of that member on the other. Both the supply and the intention were actual in *Hotel La Tour*.

## F. CONCLUSION

156. It is for all of the above reasons that we dismissed the appeal.

## G. APPEALING AGAINST THIS DECISION

157. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by the First-tier Tribunal not later than 56 days after this decision is sent to the party making the application. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**RACHEL PEREZ**
**TRIBUNAL JUDGE**

**Release date: 16th JANUARY 2023**

## Annex to tribunal decision

List of invoices from page 72 of hearing bundle

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| (1) | Bill | 04/08/2017 2620/2017 | Arden Partners | Standard Purchases | 20.0% | 95,070.04 | 19,014.01 |
| (2) | Bill | Bill 08/08/2017 4701029046 | London Stock Exchange | Standard Purchases | 20.0% | 26,666.00 | 5,333.20 |
| (3) | Bill | 23/08/2017 I-4490 | Virtual DCS (Paid by DDR) | Standard Purchases | 20.0% | 400.00 | 80.00 |
| (4) | Bill | 23/08/2017 I-4491 | Virtual DCS (Paid by DDR) | Standard Purchases | 20.0% | 177.06 | 35.41 |
| (5) | Bill | 23/08/2017 I-4492 | Virtual DCS (Paid by DDR) | Standard Purchases | 20.0% | 852.84 | 170.57 |
| (6) | Bill | 29/08/2017 538377 | Saffery Champness | Standard Purchases | 20.0% | 213,104.84 | 42,620.97 |
| (7) | Bill | 31/08/2017 UK_CIS404460 | Computershare Investor Services Plc | Standard Purchases | 20.0% | 557.18 | 111.44 |
| (8) | Bill | 01/09/2017 Nov'16 Exps | Exps - Anthony Edwards | Standard Purchases | 20.0% | 31.67 | 6.33 |
| (9) | Bill | 01/09/2017 Feb'17 Exps | Exps - Anthony Edwards | Standard Purchases | 20.0% | 51.67 | 10.33 |
| (10) | Bill | 01/09/2017 Jun'17 Exps | Exps - Anthony Edwards | Standard Purchases | 20.0% | 39.14 | 7.83 |
| (11) | Bill | 01/09/2017 Jul'17 Exps | Exps - Anthony Edwards | Standard Purchases | 20.0% | 104.77 | 20.95 |
| (12) | Bill | 01/09/2017 Aug'17 Exps | Exps - Anthony Edwards | Standard Purchases | 20.0% | 25.58 | 5.12 |
| (13) | Bill | 01/09/2017 Aug'17 Exps | Exps - Anthony Edwards | Standard Purchases | 20.0% | 124.17 | 24.83 |
| (14) | Bill | 23/09/2017 I-4570 | Virtual DCS (Paid by DDR) | Standard Purchases | 20.0% | 1,429.90 | 285.98 |
| (15) | Bill | 29/09/2017 88533_ACO_DCF | Sterling Financial Print | Standard Purchases | 20.0% | 672.85 | 134.57 |
| (16) | Bill | 30/09/2017 UK_CIS407345 | Computershare Investor Services Plc | Standard Purchases | 20.0% | 90.58 | 18.12 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| (17) | Bill | 01/10/2017 069143 | Laytons Solicitors LLP | Standard Purchases | 20.0% | 1,250.00 | 250.00 |
| (18) | Bill | 06/10/2017 17677 | Alliance | Standard Purchases | 20.0% | 3,346.40 | 669.28 |
| (19) | Bill | 06/10/2017 4701035611 | London Stock Exchange | Standard Purchases | 20.0% | 385.00 | 77.00 |
| (20) | Bill | 23/10/2017 I-4647 | Virtual DCS (Paid by DDR) | Standard Purchases | 20.0% | 1,429.90 | 285.98 |
| (21) | Bill | 31/10/2017 UK_CIS410420 | Computershare Investor Services Plc | Standard Purchases | 20.0% | 398.13 | 79.63 |
| (22) | Bill | 01/12/2017 Nov'17 Exps | Exps - Anthony Edwards | Standard Purchases | 20.0% | 31.67 | 6.33 |
| (23) | Bill | 01/12/2017 UK_CIS408496 | Computershare Investor Services Plc | Standard Purchases | 20.0% | 10,186.73 | 2,037.35 |
| (24) | Bill | 01/12/2017 UK_CIS408500 | Computershare Investor Services Plc | Standard Purchases | 20.0% | 7,500.00 | 1,500.00 |
| (25) | Bill | 31/12/2017 UK_CIS416596 | Computershare Investor Services Plc | Standard Purchases | 20.0% | 1,933.19 | 386.64 |
| (26) | Bill | 31/01/2018 UK_CIS419828 | Computershare Investor Services Plc | Standard Purchases | 20.0% | 336.71 | 67.34 |
| | | | | | | | 73,239.21 |

**[End of Annex]**