[2022] UKUT 41 (TCC)

Appeal number: TC/2019/00787
TC/2019/00786
TC/2019/00788
TC/2019/00789
TC/2019/00791
TC/2019/00798

VALUE ADDED TAX – preliminary issues hearing –VAT grouping rules - interpretation of "established" and "fixed establishment" in section 43A Value Added Tax Act 1994 – relevance of any failure to consult VAT Committee – measures which are permissible to prevent tax evasion or avoidance – relevance and interpretation of section 84(4D) VATA

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

HSBC ELECTRONIC DATA PROCESSING (GUANGDONG) LTD
HSBC ELECTRONIC DATA PROCESSING INDIA PRIVATE LTD
HSBC ELECTRONIC DATA PROCESSING (LANKA) PRIVATE LTD
HSBC ELECTRONIC DATA PROCESSING (MALAYSIA) SDN BHD
HSBC ELECTRONIC DATA PROCESSING (PHILIPPINES) INC
HSBC BANK PLC — **Appellants**

- and -

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

TRIBUNAL: MR JUSTICE ZACAROLI
JUDGE THOMAS SCOTT

Sitting in public by way of video hearing treated as taking place in London on 5 to 8 October 2021, with further written submissions received on 13 October 2021

Melanie Hall QC and Christopher Leigh, instructed by KPMG LLP, for the Appellants

Hui Ling McCarthy QC, Katherine Apps, Michael Ripley and Edward Waldegrave, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is the hearing of four preliminary issues ordered by Judge Greg Sinfield, President of the First-tier Tax Tribunal ("FTT"), by a decision dated 12 October 2020. The trial of the preliminary issues was transferred to be heard by the Upper Tribunal by order of Judge Sinfield with the agreement of the President of the Upper Tribunal.

2. The preliminary issues arise in the context of an appeal by HSBC Bank Plc and five entities within the HSBC group carrying out global services for the group (the five entities together will be referred to as the "GSCs" and, together with HSBC Bank Plc as "HSBC"). The appeals are against HMRC's decisions dated 22 December 2017 that removed the GCSs from the HSBC VAT Group with effect from 1 October 2013 or, alternatively, with effect from 1 January 2018.

3. HMRC's primary case is that the GSCs have not been established or had a fixed establishment in the UK since at least 1 October 2013 and accordingly ceased to be eligible to be members of the HSBC VAT Group from that date. HMRC's alternative case is that HMRC had made decisions to remove the GSCs from the HSBC VAT Group with effect from January 2018 in exercise of their powers for the protection of the revenue under section 43C(1) of the Value Added Tax Act 1994 ("VATA").

4. The issues raised by HSBC's appeals include, in summary, the following:

> (1) Are the GSCs, or any of them, "established" or do they have a "fixed establishment" in the UK within the meaning of those expressions in section 43A VATA?
>
> (2) Are sections 43C(1) and (2) of VATA ultra vires?
>
> (3) Were HMRC entitled to remove the GSCs from the HSBC VAT Group on the grounds that this was necessary for the protection of the revenue?

5. The terms of the preliminary issues that have been ordered to be determined were agreed between the parties and are as follows:

> **(1) How is the concept of two or more bodies corporate being "established" or having a "fixed establishment" in section 43A of VATA, which it is common ground purports to implement the words "any persons established in the territory of that Member State" in Article 11 of Council Directive 2006/11/EC (the Principal VAT Directive, or "PVD"), to be interpreted? (the "*Section 43A Issue*")**
>
> **(2) Is the question of whether the UK discharged its obligation to consult the VAT Committee relevant? If it is relevant what would be consequences of any breach of the obligation to consult? (the "*VAT Committee Issue*")**
>
> **(3) Are the measures which a Member State may adopt under the second paragraph of Article 11 of the PVD to prevent tax evasion or**

avoidance through the use of Article 11 limited to those needed to prevent tax evasion and avoidance caused by an abusive practice under *Halifax*[1] principles, or any concept of avoidance arising from *Direct Cosmetics Limited and Laughtons Photographs Limited v Customs and Excise Commissioners* C-138 and C-139/86? (the "*Abusive Practice Issue*")

(4) Is section 84(4D) VATA engaged in relation to these appeals and, if so, what are the factors that the Tribunal must take into account in considering whether or not HMRC decided on an appropriate date? (the "*Section 84(4D) Issue*").

6. After the trial of preliminary issues had been transferred to the Upper Tribunal, HMRC sought to introduce a further preliminary issue: does the wording of VATA contain a territorial limitation such that a UK VAT group does not include establishments outside the UK? HMRC's application was stated to be based on the Judgment of the Court of Justice of the European Union ("CJEU") on 11 March 2021 in *Danske Bank A/S v Skatteverket* C-812/19 EU:C:2021:196 ("*Danske Bank*"). By a decision dated 14 July 2021 (reported at [2021] UKUT 58 (TCC)), the Upper Tribunal (Judge Thomas Scott) refused permission to include that further issue. The decision noted, however, that to the extent that *Danske Bank* was relevant to the parties' arguments on the transferred preliminary issues they were of course free to make submissions on it.

7. It is agreed that the preliminary issues raise pure points of law, save as indicated at paragraph 116 below. The parties have provided an agreed statement of facts and issues. This is reproduced as the Annex to this decision. The essential points to note for the purposes of setting the scene for the preliminary issues are: (1) each of the GSCs is incorporated in one or other foreign jurisdiction; (2) the GSCs were incorporated as part of a programme of relocating the provision of various functions and processes from the UK to offshore, lower cost jurisdictions; (3) the GSCs provide services to and for the benefit of entities within the HSBC Group; and (4) the GSCs have registered branches in the UK with Companies House under Part 34 of the Companies Act 2006 and the Overseas Companies Regulations 2009[2].

8. HSBC and HMRC are not agreed, however, as to the extent of the functions which are in fact carried out by each of the GSCs. That is not a matter for determination at this trial of preliminary issues. We have not found it necessary to rely on any facts, other than those set out in the Annex, in reaching our conclusions on the preliminary issues.

VAT Grouping: Relevant legislation

9. The legislation set out below is that in force for the accounting periods covered by HSBC's appeal, namely 1 October 2013 to 31 December 2017.

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[1] *Halifax plc and others v Commissioners of Customs & Excise* C-255/02.

[2] SI 2009/1801.

10. Article 11 of the PVD provides as follows:

> After consulting the advisory committee on value added tax (hereafter, the 'VAT Committee'), each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.
>
> A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision.

11. Under section 43 VATA, supplies made between members of a VAT group fall to be disregarded. Section 43 provided as follows:

> (1) Where under sections 43A to 43D any bodies corporate 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; and
>
> (c) any VAT paid or payable by a member of the group on the acquisition of goods from another member State or on the importation of goods from a place outside the member States shall be treated as paid or payable by the representative member and the goods shall be treated—
>
> (i) in the case of goods acquired from another member State, for the purposes of section 73(7); and
>
> (ii) in the case of goods imported from a place outside the member States, for those purposes and the purposes of section 38,
>
> as acquired or, as the case may be, imported by the representative member;
>
> and all members of the group shall be liable jointly and severally for any VAT due from the representative member.

12. Section 43A VATA set out the requirements for eligibility of a VAT group as follows:

(1) Two or more bodies corporate are eligible to be treated as members of a group if each is established or has a fixed establishment in the United Kingdom and—

(a) one of them controls each of the others,

(b) one person (whether a body corporate or an individual) controls all of them,

or

(c) two or more individuals carrying on a business in partnership control all of them.

(2) For the purposes of this section a body corporate shall be taken to control another body corporate if it is empowered by statute to control that body's activities or if it is that body's holding company within the meaning of section 1159 of and Schedule 6 to the Companies Act 2006.

(3) For the purposes of this section an individual or individuals shall be taken to control a body corporate if he or they, were he or they a company, would be that body's holding company within the meaning of those provisions.

13. Section 43C VATA set out HMRC's powers and obligations in relation to termination of VAT group membership as follows:

(1) The Commissioners may, by notice given to a body corporate, terminate its treatment as a member of a group from a date—

(a) which is specified in the notice, and

(b) which is, or falls after, the date on which the notice is given.

(2) The Commissioners may give a notice under subsection (1) above only if it appears to them to be necessary for the protection of the revenue.

(3) Where—

(a) a body is treated as a member of a group, and

(b) it appears to the Commissioners that the body is not, or is no longer, eligible by virtue of section 43A to be treated as a member of the group,

the Commissioners shall, by notice given to the body, terminate its treatment as a member of the group from a date specified in the notice.

(4) The date specified in a notice under subsection (3) above may be earlier than the date on which the notice is given but shall not be earlier than—

(a) the first date on which, in the opinion of the Commissioners, the body was not eligible to be treated as a member of the group, or

(b) the date on which, in the opinion of the Commissioners, the body ceased to be eligible to be treated as a member of the group.

(1) How is the concept of two or more bodies corporate being "established" or having a "fixed establishment" in section 43A of VATA, which it is common ground purports to implement the words "any persons established in the territory of that Member State" in Article 11 of Council Directive 2006/11/EC (the Principal VAT Directive, or "PVD"), to be interpreted?

14. Different Member States have implemented Article 11 in different ways. The UK has chosen by the terms of section 43A (as then in force) to permit grouping for bodies corporate and to require each body corporate to be "established" or to have a "fixed establishment" in the UK, and it has enacted the close links requirement via a test of common control.

15. In brief summary, HMRC's reasons for removing the GSCs from the HSBC VAT Group under its primary decision are as follows:

(1) Since section 43A implements Article 11 of the PVD, it is to be given an interpretation which is consistent with the purpose and wording of Article 11;

(2) In particular, the jurisprudence of the CJEU which is relevant to the interpretation of Article 11 of the PVD will also inform the interpretation of section 43A;

(3) There is no jurisprudence of the CJEU on the meaning of the phrase "persons established in the territory of that Member State". However, there is jurisprudence on the phrases "has established a business" and "a fixed establishment" which appear in Article 44 of the PVD (concerned with the place of supply), and that jurisprudence should inform the interpretation of "established in" and "a fixed establishment" in section 43A;

(4) HMRC say that on the basis of the case law relating to the meaning of "fixed establishment", primarily in the context of the place of supply rules, in order for a UK branch of an overseas company to be regarded as a "fixed establishment" it must (i) have a real trading presence in the UK and must supply goods or services in its own right, those goods or services being neither preparatory or auxiliary, but material to the business of the person in question; (ii) have sufficient permanent resources to be able to supply those

goods or services; and (iii) have sufficient permanent resources to receive the supplies required to enable it to provide those goods or services.

16. As we have noted above, HMRC were refused permission to add a further preliminary issue, following the issue of the decision of the CJEU in *Danske Bank*, as to whether there is a territorial limitation in Article 11 of the sort suggested by HMRC. While we have taken *Danske Bank* into account insofar as it is necessary to determine the four preliminary issues, for reasons we develop below it is unnecessary in determining the first preliminary issue to consider whether it has the consequence for which HMRC contended in their proposed additional preliminary issue.[3]

HSBC's interpretation: Summary

17. HSBC's approach to the question raised by the first issue can be summarised as follows:

(1) Although it is "challenging" to reach any other conclusion than that Parliament, in enacting section 43A, intended that the reference to bodies corporate being "established" or having a "fixed establishment" in the UK should be to those concepts as understood in the place of supply rules in the PVD, section 43A must nevertheless be interpreted, so far as possible, compatibly with Article 11 and a compatible interpretation precludes reference to the definition of those concepts in the place of supply rules.

(2) Central to HSBC's case is the proposition that Article 11 contains only one substantive condition (which HSBC call the "Substantive Condition") and it is impermissible for a Member State when implementing Article 11 to import any other condition except through the "tailpiece" to Article 11 permitting measures to prevent tax evasion or avoidance.

(3) The Substantive Condition is that persons sought to be included in the VAT group are closely bound to one another by financial, economic and organisational links ("close links").

(4) Critically, the reference in Article 11 to "persons established in the territory of that Member State" is to the persons within the group *collectively* and not to each person individually. There is thus no requirement in Article 11 additional to the Substantive Condition that each member of the putative VAT group must itself be "established in" (whatever that expression may mean) the relevant territory. Instead, the territorial requirement imposed by the words in Article 11 ("established in the territory…") is satisfied if the close links between the members of the group are "forged in" the relevant territory.

(5) Accordingly, to the extent that section 43A imposes a requirement that "each" body corporate is established or has a fixed establishment in the UK

[3] *Danske Bank* was decided after 31 December 2020, but the parties agreed, albeit for different reasons, that we should consider the judgment, to the extent relevant, as if the UK had not left the European Union.

it is *ultra vires* and incompatible with Article 11. Section 43A must be read therefore, compatibly with Article 11, as not imposing such a requirement.

(6) In order to be compatible with the Substantive Condition, that means that section 43A should be interpreted as requiring that to be included in a VAT group bodies corporate are closely bound to one another by financial, economic and organisational links *forged within the UK*.

(7) HSBC's alternative case, if section 43A is to be interpreted as requiring that each member is established or has a fixed establishment in the UK, is that a fixed establishment means no more than the physical presence of a body corporate through its branch, for which registration under the Companies Acts is sufficient.

(8) HSBC have a further alternative case, which is that insofar as section 43A is to be interpreted as requiring a fixed establishment in the UK, the definition of that term found in the cases on place of supply must be modified.

Approach to construction

18. There was much common ground between the parties as to the approach to construction. In particular, it was agreed that a teleological approach should be adopted, and that in considering a conforming interpretation the principles in *Marleasing v Comercial Internacional de Alimentacion* (C-106/89) ("*Marleasing*") should be applied.

19. Pursuant to the teleological approach, Article 11 is to be interpreted by reference to its wording, context and objectives (see, for example, *EC v Ireland* (C-85/11*) ("Ireland")* at [35]). In *Olympus UK Ltd & Others* [2014] EWHC 1350 (Ch), Hildyard J helpfully summarised the position as follows:

> 47. As is well known, the approach of the ECJ/CJEU to interpretation is teleological: the search is for an interpretation that gives effect to the objectives of the Directive. These include (a) uniformity in the application of EU law (b) "effectiveness" or *"effet utile"* and (c) the achievement of the aims of the Directive, as expressed in its recitals, being to enable, facilitate and reduce the complexity of cross-border mergers.
>
> 48. Thus, literal meaning may have to yield to a teleological or purposive approach: see again *Re Itaú* at paragraph 5. Even if the wording in EU legislation may, as a matter of purely semantic analysis, seem clear, it is still necessary to refer to the spirit, general scheme and the context of the provision or the practicalities of its operation: see *Vaughan and Robertson, 'Law of the European Union'* at 3[81]; and *Gebrueder Knauf Westdeutsche Gipswerke v Hauptzollamt Hamburg-Jonas* [1980] ECR 1183 at para 5.
>
> 49. Further, the text of a provision of EU legislation comprises all authentic versions expressed in the official EU languages: preference is not to be given to any one version, and the search is for a meaning best consonant with all the versions: see *Vaughan and Robertson, 'Law of the*

> *European Union'* at 3[82]; and *Jany and Others v Staatssecretaris van Justitie* [2001] ECR 1-8615 at para 47. Care must be taken to identify an autonomous meaning where appropriate, rather than any specific domestic meaning.

20. In *Abbey National plc & Others v The Office of Fair Trading* [2009] EWCA Civ 116, the Court of Appeal emphasised that a teleological construction and a literal construction are not mutually exclusive alternatives, at [84(ii)] of its judgment:

> It is wrong to set up a teleological or purposive interpretation on the one hand and a literal interpretation on the other as if they were mutually exclusive alternatives. It is not as simple as that. A literal interpretation of legislative wording may be required in order to achieve the legislative purpose. In that event a teleological approach would require a literal interpretation. A teleological interpretation does not necessarily mean an expansive interpretation. It simply means giving effect to the intended purpose of the legislative instrument, which may or may not involve simply giving its words their literal meaning.

21. The *Marleasing* approach to an interpretation which conforms with EU law was described by the Court of Appeal in *Vodafone 2 v HMRC* [2009] EWCA Civ 446, having reviewed the relevant case law, as follows:

> 37. The principles which those cases established or illustrated were helpfully summarised by counsel for HMRC in terms from which counsel for V2 did not dissent. Such principles are that:
>
> > "In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular: (a) it is not constrained by conventional rules of construction (per Lord Oliver of Aylmerton in the *Pickstone* case, at p 126B); (b) it does not require ambiguity in the legislative language (per Lord Oliver in the *Pickstone* case, at p 126B and per Lord Nicholls of Birkenhead in *Ghaidan's* case, at para 32); (c) it is not an exercise in semantics or linguistics (per Lord Nicholls in *Ghaidan's* case, at paras 31 and 35; per Lord Steyn, at paras 48—49; per Lord Rodger of Earlsferry, at paras 110—115); (d) it permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in the *Litster* case, at p 577A; per Lord Nicholls in *Ghaidan's* case, at para 31); (e) it permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in the *Pickstone* case, at pp 120H—121A; per Lord Oliver in the *Litster* case, at p 577A); and (f) the precise form of the words to be implied does not matter (per Lord Keith of Kinkel in the *Pickstone* case, at p 112D; per Lord Rodger in *Ghaidan's* case, at para 122; per Arden LJ in the *IDT Card Services case*, at para 114)."
>
> 38. Counsel for HMRC went on to point out, again without dissent from counsel for V2, that:
>
> > "The only constraints on the broad and far-reaching nature of the interpretative obligation are that: (a) the meaning should go with the grain of the legislation and be compatible with the underlying thrust

> of the legislation being construed: see per Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 33; Dyson LJ in *Revenue and Customs Comrs v EB Central Services Ltd* [2008] STC 2209, para 81. An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment (see per Lord Nicholls, at para 33, Lord Rodger, at paras 110—113 in *Ghaidan's* case; per Arden LJ in *R (IDT Card Services Ireland Ltd) v Customs and Excise Comrs* [2006] STC 1252, paras 82 and 113); and (b) the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate: see the *Ghaidan* case, per Lord Nicholls, at para 33; per Lord Rodger, at para 115; per Arden LJ in the *IDT Card Services* case, at para 113."

HSBC's interpretation: Discussion

22. At the heart of HSBC's case is their contention that the Substantive Condition (close links) is the only condition contained in, and permitted by, Article 11. This in turn is based on the contention that "persons established in" in Article 11 refers only to the collective of persons forming the VAT group, and not to the individual members.

23. We start with the wording of Article 11, which refers to a VAT group being comprised of "persons established in" the relevant territory "who, while legally independent, are closely bound to one another…". A plain reading of this wording indicates that the persons to be comprised within a VAT group must satisfy two requirements: (a) each must be established in the relevant territory; and (b) they must be closely linked with one another.

24. HSBC's reading, which involves identifying as that which must be "established in" the relevant territory the forging of the close links between the members of the group, is simply not what the Article says. In effect, HSBC's interpretation asks us to redraft Article 11 so that it refers to persons (wherever established) who, while legally independent, are closely bound to one another by links forged (or established) in the Member State.

25. We do not think that the context and objectives of Article 11 indicate anything other than this plain reading of the words. It is common ground that the twin objectives of Article 11 are (a) simplifying administration for VAT group members and the tax authorities and (b) helping to combat abuses such as splitting up one undertaking into several taxable persons: see *EC v Sweden* (C-480/10) ("*Sweden*") at [37]. Neither of those twin objectives supports or points towards HSBC's interpretation of Article 11.

26. While (as is common ground) the words "established in the relevant territory" in Article 11 import a territorial restriction of some kind, we do not find anything in those twin objectives, or in the context of Article 11, which points to a conclusion that the territorial restriction is to be satisfied only by the close links between the persons, collectively, being forged in the relevant territory, as opposed to by each member of

the group being "established in" the relevant territory (whatever that may mean as applied to a specific member). Accordingly, on the teleological approach, the Article contains the two conditions we have identified in paragraph 23 above.

27. We are fortified in that conclusion by the fact that the CJEU in *Ireland* said exactly that. At [36] it stated:

> …it is apparent from the wording of the first paragraph of Article 11 of [the PVD] that that directive permits each Member State to regard a number of persons as a single taxable person if they are established in the territory of that Member State and if, although they are legally independent, they are closely bound to one another by financial, economic and organisational links.

28. Ms Hall initially submitted that the words "and if" were a "translation" error, because they did not reflect the wording of Article 11, which refers to "persons established in the territory … who, while legally independent, are closely bound to one another…" (emphasis added). It seems unlikely that the English language report of the decision contains a mistranslation, and Ms Hall did not point to any foreign language version to support that proposition, which we reject.

29. Ms Hall maintained in the alternative that the CJEU had, in [36], simply failed to record accurately the words of Article 11, because it inserted the words "and if", instead of "who". We reject this submission. The Court was not purporting to record the precise wording of Article 11. It was instead paraphrasing or describing the requirements laid down by the Article and, in so doing, identified the two conditions for treating "a number of persons" as a VAT group, namely that (1) those persons must be established in the relevant territory and (2) they must be closely bound to one another.

30. Similarly, it is irrelevant in our view that in other cases (for example in *Danske* at [23]) the Court has repeated the precise wording of Article 11 ("persons established in the territory of the country who…") rather than paraphrasing the two conditions contained in it in the way that the CJEU did in *Ireland*. As we have already noted, the natural reading of Article 11 is that it contains those two conditions, and the fact that on occasions, where the meaning of the phrase "established in" was not in issue, the Court has not identified it as a separate condition, is no support for the contention that the only condition in Article 11 is that there must be close links forged, in the relevant territory, between the members of the group.

31. HSBC rely, in support of their contention that there is one such Substantive Condition, principally upon the CJEU decision in *Ireland* and subsequent cases which Ms Hall submitted "bedded down" that condition. In *Ireland*, the European Commission contended that, by permitting non-taxable persons to be members of a group of persons regarded as a single taxable person for VAT purposes, Ireland had failed to fulfil its obligations under Articles 9 and 11 of the PVD. The CJEU disagreed, finding that it was not necessary for "persons" in Article 11 to be taxable persons.

32. HSBC contend that, in so doing, the Court focused on the "persons" collectively and that this supports their contention that, in Article 11, the reference to "persons established in" is only a reference to the persons collectively being established in the territory. Ms Hall pointed in particular to [45] of the judgment, in which, she contended, the CJEU rejected the proposition that in interpreting "persons" in Article 11 it is necessary to look at the status of each individual member.

33. We disagree. Paragraph [45], together with the subsequent paragraph, reads as follows:

> 45. As regards the relationship, within Title III of the VAT Directive, between Articles 9(1) and 11 of that directive, it must be stated that a combined reading of those articles does not support the conclusion, drawn by the Commission, that the persons referred to in Article 11 must individually satisfy the general definition of a taxable person set out in Article 9(1) of that directive. A comparison of those two provisions does not preclude the interpretation that, as submitted by Ireland and the interveners, it is those persons, taken together and closely bound to one another by financial, economic and organisational links, who must collectively satisfy that definition.
>
> 46. Consequently, it is not possible to uphold the Commission's arguments that, having regard to the context of Article 11 of the VAT Directive, that article must be interpreted as meaning that non-taxable persons cannot be included in a VAT group.

34. As is clear from those paragraphs, the CJEU was addressing the question of whether it was a separate requirement of Article 11 that each individual member needed to be a *taxable* person. It said nothing about what was meant by "persons established in…".

35. More broadly, Ms Hall submitted that one of the themes that underlies the *Ireland* decision (and many other cases) is that on entering a VAT group, legally independent persons who would individually qualify as taxable persons under Article 9 lose that independent identity to the group. She contended that HMRC's position must therefore be wrong, because it involves imposing the very status of independence that is relinquished on becoming a VAT group member. We do not accept this submission, which we consider confuses the *conditions* for inclusion a VAT group with the *consequences* of such inclusion. To the extent that the CJEU in *Ireland* was focused on the collective "persons" that formed a VAT group, the CJEU was merely identifying that the *consequence* of persons being included within VAT group under Article 11 was that they were treated as a single taxable person for the purpose of Article 9. The fact that, upon inclusion in a VAT group, a member loses its independent status, so that supplies between it and other group members are disregarded for tax purposes, in no way precludes a requirement imposed on individual members as a condition of inclusion in a VAT group.

36. Ms Hall contends, nevertheless, that to impose such a requirement would contradict the conclusion of the CJEU in *Ireland* that a VAT group is not restricted to taxable persons. As Ms McCarthy pointed out, this objection fails because, while it is

the case that the place of supply rules definition for a person with a *fixed establishment* may well lead to the conclusion that such a person would be a taxable person within Article 9 of the PVD, that definition is only relevant to a person who is not otherwise "*established in*" a territory. Consistently with *Ireland*, a person may be established in a territory without undertaking any economic activity there and, thus, without being a taxable person. Dormant companies or pure holding companies that do not themselves carry on any economic activity, for example, may satisfy the definition of a person "established in" a territory so as to be eligible for inclusion in a VAT group.

37. Ms Hall's response was that this missed the point, because in HSBC's appeal the preliminary issue is really focused on the meaning of "fixed establishment" and the question whether it is necessary (as HSBC submit) to focus on the ability of the *collective* within a Member State to engage in economic activities, having forged close links in that State in order to enable them to do so. That, however, is the primary case of HSBC which we have rejected; it does not answer HMRC's point (which we accept) that interpreting section 43A by reference to the definitions in the place of supply rules does not contradict the CJEU's decision in *Ireland* that a VAT group may include non-taxable persons.

38. Further, while we accept (and HMRC did not contend otherwise) that Member States are not permitted to add further conditions to those laid down in Article 11 other than pursuant to the tailpiece to Article 11 (see, for example, *M-GmbH v Finanzamt für Körperschaften Berlin* (C-868/19) at [53]), we do not find anything in the *Ireland* decision that support's HSBC's contention that the only condition in Article 11 is the Substantive Condition. On the contrary, as we have already noted, to the extent that the CJEU addressed this question (at [36]), it expressly identified two conditions.

39. Ms Hall referred to a number of authorities which, she submitted, reinforced HSBC's central proposition that the *only* condition in Article 11 is that there must be close links, forged in the relevant territory, between the member of the group. In our judgment, the authorities she cited do not support that proposition. In deference to the careful argument of Ms Hall, we briefly address the authorities cited in turn:

> (1) The Advocate General's opinion in *Ireland* which, at [16], refers to Article 11 containing "exhaustive prerequisites for separate persons to be regarded as a single taxable person". This supports the (uncontroversial) proposition that the conditions in Article 11 are exhaustive, but provides no support for the proposition that it contains only one condition. If anything, the language used - "prerequisites" for "separate" persons to be included in a VAT group - supports the proposition that there is more than one condition, which each person must fulfil.
>
> (2) *EC v United Kingdom* (C-86/11), at [27], in which the CJEU stated that "the member of a VAT group must simply be closely bound to one another…"[sic]. This was in the context of recording the UK's position and rejecting the same proposition that the CJEU rejected in *Ireland*, namely there is an additional condition in Article 11 that all members of a VAT group must be engaged in activities that fall within the scope of the PVD.

The CJEU was not addressing the nature of the conditions that *are* contained in Article 11.

(3) *Beteiligungsgellschaft Larentia + Minerva mbH & Co. KG v Finanzamt Nordenham* (C-108/14 and C-109/14) ("*Larentia + Minerva*"), at [37] to [39] and [41], in which the CJEU concluded that "persons" in Article 11 did not exclude entities such as limited partnerships which did not have a legal personality, so that the relevant question was whether the exclusion of such partnerships could be justified as falling within the objective of preventing abusive practices and behaviour or combatting tax evasion or tax avoidance. Nothing in these paragraphs, however, addresses the content or scope of the conditions already contained in Article 11.

(4) Ms Hall also referred to [50] of *Larentia + Minerva*, which endorsed [112] of the Advocate General's opinion. In that paragraph, the Advocate-General referred to "the" substantive condition under what is now Article 11 that "…the financial, economic and organisational links between several persons must be 'close' in order for them to form a single taxable person…", noting that it was for Member States to specify the substantive condition, in the sense of identifying the "close links" mentioned. In referring to "the" substantive condition, we do not think it can be said that the Advocate General was intending to say that the only condition of substance in Article 11 is the requirement of close links between members. It just so happens that that was the only condition he was addressing in [112]. That is reinforced by the context: [112] appears in a section of the opinion where the Advocate General was discussing whether Article 11 is sufficiently precise and unconditional to create directly effective rights. In the preceding paragraphs he noted that other aspects of what is now Article 11 are sufficiently precise for this purpose. At [112], he specifically contrasted that position with the requirement for close links. Similarly, the reference to "the" condition laid down in Article 11, in *M-GmbH v Finanzamt für Körperschaften Berlin* (C-868/19) ("*M-GmbH*") at [43], cannot be read as identifying only one condition (that of close links) in Article 11.

(5) *Skandia America Corp (USA), filial Sverige v Skatteverket* (C-7/13), at [16], [30]-[31] and [37]. In the first of those passages, far from endorsing the contention now made by HSBC, the CJEU said that "only the fixed establishment, in Sweden, of an economic operator may belong to a VAT group, and such a group may consist only of economic operators which are closely bound to one another by financial, economic and organisational links". That expressly reinforces the point that there are two conditions in Article 11: establishment of the relevant persons in the Member State and close links between them. In the later paragraphs relied on, the CJEU concluded that where a company based abroad supplied services to its branch in Sweden, where that branch formed part of a VAT group in Sweden, the services must be considered as being supplied to the group, and it is the group that is liable for the VAT. This is dealing with the consequences of group registration, and again there is nothing which supports HSBC's case as regards the Substantive Condition.

(6) The passages relied on by Ms Hall from *Danske Bank* (at [29]-[30] and [32]-[33]) add nothing, since they merely apply the conclusion in *Skandia* to the different circumstance that it was Danske's principal establishment, rather than its branch, that formed part of the VAT group.

(7) For completeness, there is nothing in the other cases cited to us to in this context (*Christine Nigl and Others v Finanzamt Waldviertel* (C-340/15) at [30]; *ARO Lease BV v Inspecteur der Belastingdienst Grote Ondernemingen* (C-190/95) ("*ARO Lease*") at [20]-[21]; *Titanium Limited v Finanzamt Osterreich* (C-931/19) ("*Titanium*") at [42] or *M-gmbH* at [53] and [64]) which supports HSBC's contention as to the "Substantive Condition".

40. Accordingly, we reject HSBC's contention that for the purposes of Article 11, "persons established in" the relevant territory means that the persons, collectively, comprising the group are closely bound to one another by financial, economic and organisational links forged within that territory. Therefore, we reject HSBC's contention that the phrase "each is established or has a fixed establishment in the United Kingdom" in section 43A is to be construed as requiring only that the members of a group be connected by close links forged in the UK.

41. Ms Hall contended that, regardless of our decision on HSBC's primary case, "established" and "fixed establishment" in section 43A ought not to be interpreted by reference to the meaning of "established in" and "fixed establishment" in the place of supply rules. She relied on the differences in the wording between Article 11 and Article 9(1) of the Sixth Directive, which identifies the place where a supply shall be deemed to occur. Whereas Article 11 refers to "persons established in" the relevant territory, Article 9(1) refers to the place where a supplier has "established his business" or has a "fixed establishment".

42. The difficulty with this submission is that Ms Hall did not offer any alternative meaning for the phrase "persons established in the territory" in Article 11, if her primary submission – that it meant the members collectively having forged links in the territory – was rejected. She accepted that, in that event, the choice facing us was a "binary" one, between: (1) HSBC's case as to the Substantive Condition, such that provided that close links are forged in the relevant territory between members, those members may form a VAT group in that territory; and (2) HMRC's case that the meaning of "established" in Article 11 incorporates the concepts of "established in" and "fixed establishment" under the place of supply rules. Since we have rejected HSBC's primary case, it follows that HMRC's case is to be preferred.

43. Although HSBC did not suggest any alternative meaning of "established" in Article 11, they advanced an alternative submission as to the interpretation of section 43A if (contrary to their principal submission) the concepts used in the place of supply rules are incorporated into section 43A. They contend that those concepts " must be adjusted to accommodate the nature of a VAT group". Specifically, as developed in HSBC's skeleton argument, the concept of a fixed establishment required "the combination of UK resources … capable of supporting engagement in identifiable activities in a continuous and stable fashion", and consistent with the concept of a VAT group this may be based upon the creation of close financial economic and

organisational links between two or more members of the same group. No authority was cited for this proposition which, on analysis, is merely a restatement of the proposition that the requirement that there is an establishment of the necessary quality within a territory is satisfied by reference to the close links between entities, and not the attributes of each entity. We reject it for the same reasons we have set out above.

44. To the extent that HSBC sought to draw support from the Advocate General's opinion in *Jennifer Gregg and Mervyn Gregg v Commissioners of Customs and Excise* (C-216/97), at [27], we do not accept that there is anything of relevance in that case. It concerned the VAT exemption for medical or surgical treatment and closely related activities in hospitals or "duly recognised establishments of a similar nature". The issues considered by the CJEU therefore related to the interpretation of Article 13 of the Sixth Directive: [8] of the decision. As the Court observed, the terms used to describe the exemptions in Article 13 must be interpreted strictly as they constitute exceptions to the general rule: [12] of the decision. That requirement, together with the specialist nature of the issues in question, means that in our opinion there is no good reason (and none was put to us) why the Court's decision regarding the meaning of "establishment" in Article 13 should be read across to Article 11.

45. HSBC advanced a further alternative case on the construction of section 43A, if we rejected their contention that it is to be construed so as to be compatible with the Substantive Condition. HSBC argued that a body corporate may satisfy the requirement of being "established in" or having a "fixed establishment" in the UK merely by having a physical presence through a branch here, which may be demonstrated by that branch being registered under the Companies Act 2006 ("Companies Act").

46. This alternative case is based upon domestic legislation relating to the registration of overseas companies. Section 1046(1) of the Companies Act provides that the Secretary of State may make provision by regulations requiring an overseas company to deliver to the Registrar for registration a return containing specified particulars and certain other specified documents. Those regulations, by section 1046(2), must require the company[4] to register particulars if it opens a branch in the UK. Section 1046(3) defines "branch" as a branch within the Eleventh Company Law Directive. There is no definition of "branch" within the Eleventh Company Law Directive.

47. By section 1067 of the Companies Act, the Registrar is required to allocate a number to every "UK establishment" of an overseas company whose particulars are registered under section 1046. Section 1067(3) again defines an "establishment" as a branch within the meaning of the Eleventh Company Directive, or a place of business that is not such a branch. A UK establishment is then defined as an establishment in the UK. Similar definitions appear in the Overseas Companies Regulations 2009. HSBC referred to case law which establishes, in the absence of a statutory definition of either a branch or a place of interest, that a branch is a more permanent establishment than a mere place of business.

[4] Unless it is a Gibraltar company.

48. As we understand it, HSBC's contention is that since the branches of the GSCs are registered at Companies House pursuant to the above provisions of the Companies Act and the Overseas Companies Regulations 2009, they therefore constitute an establishment under those provisions. That is sufficient, it is contended, to satisfy the requirement in section 43A that the GSCs are established in and/or have a fixed establishment in the UK.

49. We reject this contention. Parliament's intention in enacting section 43A was to reference the concepts of "established in" and "fixed establishment" in the place of supply rules (and HSBC acknowledged that it was challenging to suggest otherwise). While not determinative, we agree with HMRC that it is also inconsistent with the legislative history of section 43A. In particular, the Explanatory Notes to the Finance Act 1999 (which introduced section 43A) explained that the new requirement that companies must be established or have a fixed establishment in the UK was intended to replace previous tests which had their roots in company law with tests more consistent with VAT law. On notifying this change to the VAT Committee (in VAT Committee Working Paper no.279, at paragraph 3.5), the UK explained that it was proposed to move from a test that stemmed from company law to tests of "established" or "fixed establishment" which already existed within VAT law.

50. We therefore conclude that in interpreting in Section 43A the concept of bodies corporate being established or having a fixed establishment in the UK, and in Article 11 the concept of being established in a Member State, such interpretation is informed by the concepts of establishment and fixed establishment found largely in the place of supply rules. The CJEU case law on those terms as applicable in the context of place of supply is relevant, including *Berkholz v Finanzamt Hamburg-Mitte-Alstadt* (C-168/84) at [18], *ARO Lease* at [15] and *Titanium* at [41]-[43].

51. That is not to say that those concepts, as understood in the place of supply rules, are simply "imported" into section 43A and Article 11. Rather, the CJEU case law on the meaning of establishment and fixed establishment must be taken into account in determining the question raised by the first preliminary issue. Similarly, in determining the meaning of those concepts, case law outside the place of supply rules which considers those terms is also relevant: see, for example, *Planzer Luxembourg Sarl v Bundeszentralamt fur Steuern* (C-3/06), which concerned the eligibility to be reimbursed VAT in a Member State where the claimant was not registered.

52. HMRC consider that Articles 10 and 11 of Council Implementing Regulation 282/2011 (the "Implementing Regulation") contain an accurate and succinct description of the meaning of those terms in Article 44, as developed in prior case law. They provide in summary as follows:

> (1) The place where the business of a taxable person is *established* shall be the place where the functions of the business's central administration are carried out, for which purpose account shall be taken of the place where essential decisions concerning general management of the business are taken, the place where the registered office of the business is located and the place where management meets;

> (2) A *fixed establishment* shall be any establishment, other than the place of establishment of a business, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs and to provide the services which it supplies.

53. The definitions in the Implementing Regulation are not directly applicable to Article 11, as they apply in determining the place of supply. We agree, however, that they provide a helpful starting point, when read in the light of the CJEU case law, in interpreting "established" and "fixed establishment" in section 43A. We do not think it is appropriate to go further than this, in a decision dealing only with preliminary issues. The precise meaning of the terms "established" and "fixed establishment" in any given case is highly fact sensitive, and better determined in the context of all the relevant circumstances in any given case.

(2) Is the question of whether the UK discharged its obligation to consult the VAT Committee relevant? If it is relevant, what would be consequences of any breach of the obligation to consult?

54. Article 11 permits Member States to implement measures for VAT grouping "after consulting" the VAT Committee. The VAT Committee is an advisory committee consisting of representatives from Member States and the Commission, established pursuant to Article 398 of the PVD.

55. HSBC contend that the UK failed to consult the VAT Committee in numerous respects. These include when it amended the VAT grouping eligibility rules in 1991 such that a company was eligible to join a VAT group if it had an "established place of business" in the UK; when introducing the concept of a company established or having a fixed establishment in the UK; in its adoption of certain policies relating to tax avoidance and grouping, and in relation to policy changes in 2014. Ms Hall clarified that these contentions were contingent in HSBC's appeal in that if we were to determine Issues 1 and 3 in favour of HSBC, they would fall away.

56. HMRC denies that there was any failure to consult and in any event contends that the consultation requirement relates only to legislation introducing VAT grouping or when it is substantially modified or substantially amended. It does not, therefore, apply to administrative practices, to policy changes or to case law.

57. It is no part of the preliminary issue to determine whether there has in fact been any failure to consult the VAT Committee. Issue 2 asks only whether a failure to consult has any relevance and, if so, what are its consequences. We do not, therefore, consider whether the UK was required to consult the VAT Committee in advance of any change in HMRC's policy or administrative practices.

58. Although at one point it appeared that HSBC contended that the issue was "relevant" simply because they had pleaded a *prima facie* case of breach (denied by HMRC), it is accepted that "relevant" means that it has consequences in the substantive appeal. In other words, assuming a failure to consult was established, if it

would have no impact on the FTT's decision in the substantive appeal then it would not be relevant.

59. HSBC contend that consultation is relevant because of the consequences of any breach. HSBC argue that if, in the substantive appeal to the FTT, they establish a failure to consult in respect of any provision in section 43A or the adoption of a policy relating to section 43A by HMRC, then HMRC would be unable to rely upon that provision or policy to the detriment of HSBC. As Ms Hall put it in her oral submissions, "the Tribunal must interpret the national provisions so as to ensure that HMRC is only permitted to exclude VAT group members on grounds which are properly notified to the VAT Committee".

60. HSBC's starting point is that each Member State is obliged to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty: Article 5 of the EC Treaty (now Article 4(3) of the Treaty on European Union). Pursuant to Article 189 of the EC Treaty (now Article 288 of the Treaty on the Functioning of the European Union), a Directive "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".

61. There was some debate before us as to whether the duty to consult in Article 11 is what Ms Hall described as a "condition precedent". This, however, does not take the argument very far as it begs the question: condition precedent to what and in relation to whom? Ms Hall referred to this, at one point in her submissions, as "an EU form of estoppel". That is not a recognised term in EU law, and we did not find the importation of an equitable concept from domestic law helpful in shedding light on the issue before us. The critical question is whether, as Ms Hall submitted, a Member State's failure to consult in accordance with a requirement to do so contained in Article 11 of the Directive results in the national tax authority being unable to rely upon that provision to the detriment of a taxable person.

62. HSBC referred us in this connection to the following cases:

> (1) *Direct Cosmetics Ltd v Commissioner of Customs and Excise* (C-5/84) ("*Direct Cosmetics*").
>
> (2) *Metropol Treuhand Wirtshaftstreuhandgmb H v Finanzlandesdirektion für Steiermark* (C-409/99) ("*Metropol*").
>
> (3) *Stradasfalti Srl v Agenzia delle Entrate–Ufficio di Trento* (C-228/05) ("*Stradasfalti*").
>
> (4) *Hansgeorg Lennartz v Finanzamt München III* (C-97/90) ("*Lennartz*").
>
> (5) *Cookies World Vertriebsgesellschaft mbH iL v Finanzlandesdirektion für Tirol* (C-155/01) ("*Cookies World*").
>
> (6) *Beteiligungsgellschaft Larentia + Minerva mbH & Co. KG v Finanzamt Nordenham* (C-108/14 and C-109/14) ("*Larentia*").

63. Ms Hall relied on *Direct Cosmetics*, *Metropol*, *Stradasfalti*, *Lennartz* and *Cookies World* as establishing that any failure to consult by the UK when obliged to do so by

Article 11 would have the result that HMRC, and the courts and tribunals, could not rely on section 43A to the detriment of HSBC in relation to any legislation, policy or practice in respect of which such a failure had occurred.

64. Without accepting that the duty to consult extends beyond the introduction or substantial modification of legislation, HMRC accept that the conclusion reached in each of those cases, in the context of a failure by a Member State to comply with a consultation obligation contained in a Directive, was that the tax authorities in the Member State were precluded from relying on the relevant provision of domestic law to the detriment of a taxpayer. They submit, however, that (1) each of the cases involved a right under a Directive with *direct effect* in the Member State; (2) the reasoning in those cases was anchored in the directly effective nature of the relevant right and (3) accordingly the principle to be derived from those cases has no application to Article 11 of the PVD, which it is common ground does not create rights of direct effect. HSBC, in contrast, contend that (1) the conclusion reached in those cases did not depend upon the fact (which they accept) that the right in question in each case was of direct effect; (2) on the contrary, the reasoning is based purely on the general obligation in Article 189 of the EC Treaty;[5] so (3) the conclusion applies equally to Article 11.

65. *Direct Cosmetics* concerned rights conferred by Article 11 of the Sixth Directive. Article 11 A 1. (a) identified the taxable amount in respect of certain supplies. That created a right which taxpayers in a Member State could rely upon directly before a national court. Article 27 of the Sixth Directive permitted Member States to derogate from the rights created by Article 11, subject to a prior obligation (in Article 27(2)) to inform the Commission of the proposed measures. Ms Apps, who presented HMRC's case on this issue, submitted, by reference to various parts of the judgment of the CJEU, that the fact that the rights under Article 11 were of direct effect was critical to the conclusion in the case. First, the question posed for the court was whether the failure by a Member State to comply with Article 27(2) gave "…rights to an individual which may be relied upon before the national courts of a Member State, which rights would be founded directly upon the provisions of Article 11 A 1.(a)". Second, at various points in the judgment (for example at [36]-[38]), the conclusion of the CJEU was framed in terms of the Member State being unable to rely on a measure "derogating" from rights under Article 11. She submitted that the CJEU's conclusion could not be divorced from the fact that the right under Article 11 of the Sixth Directive was one which was enforceable by the taxpayer in the UK (indeed, was a right which the UK had duly incorporated into legislation in the UK: see [35] of the judgment). Ms Hall in contrast emphasised that at [37] the CJEU refers specifically to a Member State's obligations under Article 189 as the basis for its inability to rely on the provision in question.

66. We consider that it is apparent from the decision read as a whole that the directly effective nature of the rights was critical to the decision. The CJEU's reference to the binding nature of directives in Article 189 makes sense in relation to a right conferred by a directive which (unlike Article 11) is sufficiently unconditional and precise to be

[5] Now Article 288 of the Treaty on the Functioning of the European Union.

of direct effect. Article 189 can be seen as underpinning the direct effect of such rights. However, we agree with Ms Apps that both the terms of the question referred and the language used by the Court in determining it are inextricably linked with the directly effective nature of the right.

67. The directly effective rights in question in *Metropol* were rights under Article 17(6) of the Sixth Directive relating to the expenditure eligible for deduction of VAT. Article 17(7) gave Member States "subject to the consultation provided for in Article 29" the discretion to exclude all or some capital goods from the system of deductions. The CJEU, in concluding that the obligation to consult was a condition precedent to the adoption of any measure on the basis of the provision in Article 17(7), relied on the fact that "the right of deduction provided for in Article 17 et seq of the Sixth Directive is an integral part of the VAT scheme and in principle may not be limited. Derogations are permitted only in the cases expressly provided for in the Sixth Directive" (see [58] of the judgment) and that provisions laying down derogations from the principle of the right to deduct VAT are to be interpreted strictly (see [59] of the judgment). In contrast, there is no directly effective right to VAT grouping, which is a right described in *Larentia* as "conditional", and there is no requirement to interpret Article 11 strictly. We accept Ms Apps' submission that it is integral to the reasoning of the CJEU on this point that the case concerned provisions of domestic law which purported to restrict what would otherwise be a directly effective right.

68. *Stradasfalti* also concerned the directly effective right in Article 17(6) of the Sixth Directive. The CJEU in this case expressly dealt with the consequences of a failure by a Member State to comply with the obligation to consult. At [66], the CJEU said (with emphasis added to the original): "By virtue of the general duty stated in the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC), Member States are bound to observe all the provisions of the Sixth Directive …. In so far as an exception from the system of deductions has not been established in accordance with Article 17(7) of the Sixth Directive, the national tax authorities may not rely as against a taxable person on *a provision derogating from the principle of the right to deduct VAT* set out in Article 17(1) of that directive." We consider that the decision in this case is to be interpreted in the same way as that in *Metropol*, which was referred to by the Court. Again, the Commission in its submissions had emphasised (at [57]) that "the right to deduct is an integral part of the VAT scheme and confers in principle on the taxpayer a right which can only be subject to limitations established by the directive itself".

69. *Lennartz* again concerned domestic legislation which sought to derogate from a directly effective right of deduction, where the Member State had failed to comply with a relevant consultation requirement. The CJEU's reasoning and conclusion was materially similar to that in *Stradasfalti* (see [33] and [34] of the judgment in *Lennartz*). The relevance to its reasoning of the fact that the right in question was one that was directly enforceable is apparent from the way the Court's answer to the question was expressed at the end of the judgment: "A taxable person who uses goods for the purposes of an economic activity has the right on the acquisition of those goods to deduct input tax in accordance with the rules laid down in Article 17 of the Sixth Directive, however small the proportion of business use. A rule or administrative

practice imposing a general restriction on the right of deduction in cases where there is limited, but none the less genuine, business use constitutes a derogation from Article 17 of the directive and is valid only if the requirements of Article 17(1) or Article 27(5) of the directive are met."

70. One of the issues in *Cookies World* was again Article 17(6) of the Sixth Directive. The CJEU confirmed that in that case the Austrian Government's failure to consult meant that it could not rely on Article 17(7) to the detriment of taxable persons, citing *Lennartz*: [67] of the judgment. We do not consider that the decision adds anything material to the other decisions we have discussed.

71. It is important to note that the above cases all involved domestic legislation that sought to derogate from a directly effective right to deduct for VAT purposes. That is very different to the present case, where there is no directly effective right to become or remain a member of a VAT group, and so no directly effective right to be exempted from the reverse charge.

72. Since none of the cases relied on by HSBC involved a right that did *not* have direct effect, it is not surprising that they do not articulate expressly what the position would be in such a case. *Larentia*, however, did raise the question of the consequences of a Member State's failure to consult in the context of a right that was not of direct effect. One of the questions raised for the consideration of the CJEU in that case was whether national law, which excluded partnerships from inclusion within a VAT group, was compatible with Article 4(4) of the Sixth Directive (a predecessor to Article 11 of the PVD). As we have noted, the CJEU answered that question by concluding that Article 4(4) precluded Member States from restricting participation in a VAT group to entities with legal personality, unless that could be justified as needed to prevent abusive practices or to combat tax evasion or tax avoidance. The CJEU was also asked (by the third question posed for its consideration) to determine whether Article 4(4) might be considered to have direct effect. It concluded as follows:

> 47. By its third question, the referring court asks, in essence, whether Article 4(4) of the Sixth Directive may be considered to have direct effect allowing taxable persons to claim the benefit thereof against their Member State in the event that that State's legislation is not compatible with that provision and cannot be interpreted in a way compatible with it.
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> 48. In that regard, it should be noted that, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, inter alia, judgment in *GMAC UK*, C-589/12, EU:C:2014:2131, paragraph 29).
>
> 49. A provision of EU law is unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States (see, inter

> alia, judgment in *GMAC UK*, C-589/12, EU:C:2014:2131, paragraph 30).
>
> 50. As stated by the Advocate General in point 112 of his Opinion, the condition laid down in Article 4(4) of the Sixth Directive that the formation of a VAT group is subject to the existence of close financial, economic and organisational links between the persons concerned needs to be specified at national level. That article is thus conditional inasmuch as it involves the application of national provisions determining the actual scope of such links.
>
> 51. As a consequence, Article 4(4) of the Sixth Directive does not satisfy the conditions necessary for it to produce direct effect.
>
> 52. Therefore, the answer to the third question is that Article 4(4) of the Sixth Directive may not be considered to have direct effect allowing taxable persons to claim the benefit thereof against their Member State in the event that that State's legislation is not compatible with that provision and cannot be interpreted in a way compatible with it.

73. This, in our judgment, is a compelling answer to HSBC's contention that the failure to consult under Article 11 means that HMRC cannot rely on HMRC's interpretation of section 43A as against HSBC. We consider that it would be anomalous and without justification if there were a material distinction in this respect between legislation in a Member State which is incompatible with a Directive, *per se*, and legislation which is enacted in breach of the Member State's obligation to consult before enacting it. In both cases, the Member State is in breach of the treaty obligations referred to at [45] above. In *Larentia*, it was determined that the former situation would not permit a taxable person to claim the benefit of Article 11 because it is not of direct effect. It follows that the position would be the same in the latter situation; there is no logical reason to confer enhanced rights on a taxable person as against the Member State in the case of breach of a procedural requirement.

74. Nor do we consider there to be a substantive distinction between the conclusion reached in *Larentia* (that a taxable person cannot "claim the benefit" against their Member State of a right that does not have direct effect) and the principle which HSBC seek to rely on (that the tax authorities of a Member State cannot rely on a provision enacted in breach of the Member State's obligation to consult the VAT Committee to the detriment of a taxable person). In this regard it is important to appreciate that, absent VAT grouping, the relevant HSBC entity is liable for the reverse charge on services supplied to it by the GSCs. HSBC's ability to avoid the reverse charge depends upon being able to claim the benefit of Article 11. Where, as in this appeal, the question is whether the GSCs satisfy the conditions laid down in section 43A, we do not think it makes any difference whether that question arises in the context of the GSCs seeking to form, or join, a VAT group or in the context of a decision by HMRC to de-group the GSCs. In either case, the question whether HMRC can "rely upon" section 43A against HSBC, notwithstanding the UK's failure to consult the VAT Committee under Article 11, is in substance the mirror image of the question whether HSBC can "claim the benefit" of Article 11.

75. For completeness, we note two further authorities cited in which the relevant Article had no direct effect, but which do not assist on this point. The first is *Ampliscientifica Srl and Amplifin SpA v Ministero dell' Ecconomia e delle Finanze and Agenzi delle Entrate* (C-162/07) ("*Ampliscientifica*"). This concerned Article 4(4) of the Sixth Directive, a predecessor to Article 11 of the PVD and therefore a provision without direct effect. In that case, a decree had been implemented by the Italian government without prior consultation with the VAT Committee. One question was whether that decree was or was not a measure implementing Article 4(4). The CJEU said that that issue fell to be determined by the national courts in Italy: [22] of the judgment. It then stated as follows, at [23]:

> It is for the national court to determine whether national legislation, such as that at issue in the main proceedings, satisfies those criteria, subject to the qualification that, where there has been no prior consultation of the Advisory Committee on VAT, national legislation which meets those criteria constitutes legislation adopted in breach of the procedural requirement laid down in the second subparagraph of Article 4(4) of the Sixth Directive.

76. *Ampliscientifica* therefore provides no guidance as to the consequences of a breach of the duty to consult in relation to what is now Article 11 of the PVD. We observe that, having explicitly made the point that if there had been a failure to consult then the decree would be "legislation adopted in breach of the procedural requirement", the CJEU did not go on to add or imply that as a consequence the Italian tax authorities would be unable to rely on the decree to the detriment of taxable persons.

77. The second authority is *EC v Kingdom of the Netherlands* (C-65/11). This also involved an allegation of a failure to consult the VAT Committee in relation to Article 11, as regards a provision relating to the inclusion of a top holding company in a VAT group. However, the CJEU found that a breach of the duty to consult had not been established: [57] of the judgment. Therefore, the decision again sheds no light on the consequences of any failure to consult in relation to a right which is not of direct effect.

78. Ms Apps developed additional arguments at the domestic level, based upon principles of Parliamentary sovereignty. HMRC also raised other additional arguments. In light of our rejection of HSBC's contention that there is an EU principle which precludes HMRC relying on section 43A against HSBC, assuming that the UK breached the obligation to consult in Article 11, we do not need to consider these additional arguments.

79. In conclusion, we determine in relation to Issue 2 that any failure to consult the VAT Committee would not be relevant to these appeals.

(3) Are the measures which a Member State may adopt under the second paragraph of Article 11 of the PVD to prevent tax evasion or avoidance through the use of Article 11 limited to those needed to prevent tax evasion and avoidance caused by an abusive practice under *Halifax* principles, or any concept of avoidance arising from *Direct Cosmetics Limited and Laughtons Photographs*

Limited v Customs and Excise Commissioners **C-138 and C-139/86 ("*Direct Cosmetics*")?**

80. Having permitted Member States to introduce VAT grouping measures in the first paragraph of Article 11, the second paragraph (which we refer to below, sacrificing technical correctness for convenience, as Article 11(2)) provides as follows:

> A Member State exercising the option provided for in the first paragraph may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision.

81. The domestic measure which it is agreed is relevant in these appeals is that contained in section 43C(2) which provides that HMRC may give a notice terminating group membership under section 43C(1) "if it appears to them to be necessary for the protection of the revenue". In HSBC's appeal, the issue is therefore relevant (only) to HMRC's alternative decision under which notice was served terminating group membership on that basis from 1 January 2018.

82. However, it is important to note at the outset that the third preliminary issue is not by its terms addressed to whether a "protection of the revenue" ("POR") provision is a measure compatible with Article 11(2) and relevant EU law principles such as proportionality. Indeed, the POR wording was not a measure introduced in reliance on Article 11(2), since it pre-dates Article 11(2). Rather, it requires us to determine whether (as HMRC say) Article 11(2) permits Member States to adopt measures to prevent tax avoidance as that concept is described in *Direct Cosmetics*, or whether (as HSBC say) it only permits measures to prevent tax avoidance or evasion caused by an abusive practice as defined in *Halifax*.

83. It is no part of the third preliminary issue for us to express any view on the reasons for or basis on which HMRC has reached its alternative decision to terminate group membership in this appeal, and we do not do so. That is entirely a matter for the FTT.

84. We begin by summarising how the CJEU described the applicable concepts in *Halifax* and *Direct Cosmetics*.

Halifax

85. In *Halifax*, the second question referred to the CJEU was whether under the Sixth Directive a taxable person has no right to deduct input VAT where the transactions on which that right is based constitute an abusive practice. An "abusive practice" was a reference to the Community law principle of abuse of rights which was well-established outside the field of tax.

86. The Court decided as follows:

> 68 … it must be borne in mind that, according to settled case-law, Community law cannot be relied on for abusive or fraudulent ends (see, in particular Case C-367/96 *Kefalas and Others* [1998] ECR I-2843,

paragraph 20; Case C-373/97 *Diamantis* [2000] ECR I-1705, paragraph 33; and Case C-32/03 *Fini H* [2005] ECR I-1599, paragraph 32).

69 The application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law (see, to that effect, Case 125/76 *Cremer* [1977] ECR 1593, paragraph 21; Case C-8/92 *General Milk Products* [1993] ECR I-779, paragraph 21; and *Emsland-Stärke*, paragraph 51).

70 That principle of prohibiting abusive practices also applies to the sphere of VAT.

71 Preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see Joined Cases C-487/01 and C-7/02 *Gemeente Leusden* and *Holin Groep* [2004] ECR I-5337, paragraph 76).

72 However, as the Court has held on numerous occasions, Community legislation must be certain and its application foreseeable by those subject to it (see, in particular, Case C-301/97 *Netherlands v Council* [2001] ECR I-8853, paragraph 43). That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them (Case 326/85 *Netherlands v Commission* [1987] ECR 5091, paragraph 24, and Case C-17/01 *Sudholz* [2004] ECR I-4243, paragraph 34).

73 Moreover, it is clear from the case-law that a trader's choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations relating to the VAT system (see, in particular, *BLP Group*, paragraph 26, and Case C-108/99 *Cantor Fitzgerald International* [2001] ECR I-7257, paragraph 33). Where the taxable person chooses one of two transactions, the Sixth Directive does not require him to choose the one which involves paying the highest amount of VAT. On the contrary, as the Advocate General observed in point 85 of his Opinion, taxpayers may choose to structure their business so as to limit their tax liability.

74 In view of the foregoing considerations, it would appear that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions.

75 Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in point 89 of his Opinion, the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages.

> 76 It is for the national court to verify in accordance with the rules of evidence of national law, provided that the effectiveness of Community law is not undermined, whether action constituting such an abusive practice has taken place in the case before it (see Case C-515/03 *Eichsfelder Schalchtbetrieb* [2005] ECR I-7355, paragraph 40).

87. The CJEU in *Halifax* therefore laid down a general principle of interpretation, which applies regardless of any specific provision in the relevant legislation relating to tax avoidance, evasion or abuse. An abusive practice arises only where the two conditions described at [74] and [75] of the decision apply, which is to be determined on a case-by-case basis.

88. As Advocate General Bobek vividly observed in 2017:

> Tax authorities do not fall in love easily. There is (arguably at least) one notable exception to this rule: the 2006 judgment in *Halifax*, in which this Court confirmed the existence of the principle of prohibition of abusive practices in the area of value added tax (VAT) law. That judgment appears to have been embraced with a passion by tax authorities across the Member States[6].

Direct Cosmetics

89. *Direct Cosmetics* was decided some years before *Halifax*, in 1988. It concerned Article 27 of the Sixth Directive and was a reference by the UK. Both taxpayers had implemented sales arrangements interposing non-taxable persons between the company and its consumers which had the effect of reducing VAT. The UK introduced specific measures aimed at such arrangements by way of derogation from Article 11 of the Sixth Directive.

90. Article 27 provided that "the Council…may authorise any member State to introduce special measures for derogation from the provisions of this directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance". The first question referred to the CJEU was whether Article 27 permitted a derogating measure "where the taxpayer carries on business in a certain manner not with any intention of obtaining a tax advantage but for commercial reasons". That question was therefore addressing whether "tax evasion or avoidance" included situations where in objective terms VAT was reduced but where that was not the taxpayer's intention.

91. The Court was clear that it did, stating at [20]-[24] as follows:

> 20 The concept of tax avoidance as expressed in Article 27 (1) of the Sixth Directive is a concept of Community law. Hence the definition of that concept is not left to the discretion of the Member States.
>
> 21 The wording of Article 27, in all the language versions, draws a distinction between the concept of avoidance, which represents a purely

[6] Advocate General's Opinion, *Edward Cussens and others v T G Brosman* (C-251/16).

> objective phenomenon, and that of evasion, which involves an element of intent.
>
> 22 That distinction is confirmed by the historical background to Article 27. Whilst the Second Council Directive on value-added tax (67/228/EEC) of 11 April 1967 (Official Journal, English Special Edition 1967, p. 16) referred exclusively to the concept of 'fraud', the Sixth Directive mentions in addition the concept of tax avoidance. This means that the legislature intended to introduce a new element in relation to the pre-existing concept of tax evasion. That element lies in the inherently objective nature of tax avoidance; intention on the part of the taxpayer, which constitutes an essential element of evasion, is not required as a condition for the existence of avoidance.
>
> 23 That interpretation is in conformity with the principle governing the system of value-added tax according to which the factors which may lead to distortions of competition at national and Community level are to be eliminated and a tax which is a neutral as possible and covers all the stages of production and distribution is to be imposed. The title of the Sixth Directive, refers to a 'uniform basis of assessment' of value-added tax. Furthermore, the second recital in the preamble to the directive refers to 'a basis of assessment determined in a uniform manner according to Community rules' and the ninth recital specifies that 'the taxable base must be harmonized so that the application of the Community rate . . . leads to comparable results in all the Member States'. It follows that the system of value-added tax is concerned principally with objective effects, whatever the intentions of the taxable person may be.
>
> 24 The answer to the first question must therefore be that Article 27 (1) of the Sixth Directive permits the adoption of a measure derogating from the basic rule set out in Article 11. A. 1 (a) of that directive even where the taxable person carries on business, not with any intention of obtaining a tax advantage but for commercial reasons.

92. The main distinction between the concepts discussed in *Halifax* and *Direct Cosmetics* is therefore that an abusive practice can arise only where "the essential aim of the transactions concerned is to obtain a tax advantage" whereas tax avoidance as formulated in *Direct Cosmetics* does not require an intention on the part of the taxpayer to avoid tax.

Arguments of the parties

93. HSBC submit that measures which are permitted under Article 11(2) are limited to those needed to prevent tax evasion or avoidance caused by an abusive practice under *Halifax* principles. They say that the concept of avoidance in *Direct Cosmetics* is "uniquely concerned with Article 27 and the facts of that case" and is therefore irrelevant to these appeals. The history of Article 11(2), they contend, supports this view, and the wording of Article 11(2) "clearly aligns with the core features of the *Halifax* principle".

94. HSBC argue that the concept of tax avoidance expressed in Article 27 takes its colour from its context, and it cannot be assumed that the type of tax avoidance which

justifies a special derogating measure is the same as that which would justify a measure under Article 11(2). Article 27 concerns "certain types" of tax evasion or avoidance, and contains no equivalent wording to the requirement in Article 11(2) that the avoidance must have arisen "through the use of [that] provision". Unlike Article 27, Article 11 has not been classified by the CJEU as a derogating measure, so the rule that derogating measures must be interpreted strictly does not apply to Article 11.

95. Ms Hall submits that it is inherent in Article 11 that VAT will not be accounted for on transactions within a VAT group; that is an inevitable consequence of treating a VAT group as a single taxable person. Characterising the VAT saved by belonging to a VAT group as tax avoidance would contradict the central features of the grouping envisaged by Article 11.

96. HMRC argue that "avoidance" in Article 11(2) is not confined to transactions which constitute an abuse of rights. The power to remove a company from a VAT group in section 43C(1) permits HMRC to combat avoidance in a wide variety of cases and is a type of measure which Member States are expressly permitted to adopt by Article 11(2). HMRC say there is nothing in Article 11(2) to support HSBC's contention that it "aligns" with the concept of abuse of rights.

97. HMRC submit that HSBC's position is wrong because the concepts of "abuse" and "avoidance" are separate in EU law. The decision in *Halifax* did nothing to alter that position.

98. HMRC further argue that (1) the definition of tax avoidance in *Direct Cosmetics* is not properly confined to Article 27 or the facts of that case; (2) HSBC's interpretation would render Article 11(2) otiose and (3) HMRC's position is supported by the approach of the CJEU in *Sweden*.

Discussion

99. The first question raised by the preliminary issue is whether measures permitted under Article 11(2) are confined to situations constituting an abuse of rights as defined in *Halifax*.

100. In our judgment it is clear that they are not.

101. The starting point is the wording of Article 11(2). Where Member States exercise the option to introduce a grouping provision, they may adopt "*any measures needed to prevent tax evasion or avoidance*" through the use of the provision. There is nothing in that broad wording, and no authority has been suggested by HSBC, to justify it being, as HSBC put it, "aligned" with and restricted to the *Halifax* concept of abuse of rights. Aside from Article 11(2) the PVD contains numerous references to "evasion or avoidance", but also includes references to evasion alone[7] and to evasion, avoidance or abuse[8]. The choice of terminology should be respected.

[7] Articles 273 and 343.

[8] Articles 131 and 158.

102.Moreover, there is a clear distinction between avoidance—the word used in Article 11(2)—and abuse of rights. That distinction would hold true even if the CJEU had never decided *Direct Cosmetics*. In *Halifax* itself, the CJEU recognised the distinction, referring at [71] to the prevention of possible "tax evasion, avoidance and abuse". Ms Hall suggested that we should interpret this as a composite phrase referring to *Halifax* and not focus on the individual elements. We do not agree. As is shown by *Halifax*, the concept of abuse of rights is different to avoidance or evasion, and applies in significantly more limited circumstances. In *Gemeente Leusden and Holin Group BV cs v Staatssecretaris van Fiancien* (C-478/01 and C-702), the CJEU distinguishes and deals separately with tax avoidance and abuse at [78]-[79]. *Halifax* itself refers at [71] to *Gemeente*.

103.Ms Hall pointed out that Article 11(2) has its origin in Article 4(4) of the Sixth Directive, and was added shortly after the release of the decision in *Halifax*. If anything, we think that this is more consistent with the conclusion that Article 11(2) is not confined to abuse of rights, since the drafter would presumably have been aware of the recent discussion in *Halifax* of "evasion, avoidance and abuse".

104. The second question raised by the preliminary issue is whether measures permitted by Article 11(2) include measures intended to prevent tax avoidance as defined in *Direct Cosmetics*[9].

105. As we have stated, essentially this raises the question of whether it is permissible under Article 11(2) for Member States to introduce a measure intended to prevent the objective avoidance of VAT, even where there may be no actual intention on the part of the taxpayer to avoid VAT.

106. In support of their argument that the *Direct Cosmetics* concept of tax avoidance does not apply to Article 11(2), HSBC point out that (1) Article 27 is concerned with "certain types" of tax avoidance; (2) Article 27 contains no equivalent to the requirement in Article 11(2) that the tax avoidance must have arisen "through the use of [the] provision"; (3) Article 11 is not a derogating measure like Article 27 and (4) Article 27 states that any measures must not "except to a negligible extent, affect the amount of tax due at the final consumption stage".

107. These observations are correct, but none of them was relied on or described as material by the CJEU in its reasoning in *Direct Cosmetics*. Nor do we consider that any of those four points of difference between Articles 27 and 11 logically justifies restricting the CJEU's reasoning to Article 27. The CJEU's reasoning at [20]-[24] of its decision (set out above) was rooted in the distinction between evasion and avoidance, which applies equally in the context of Article 11. It referred at [22] to that distinction being "confirmed by" the historical background to Article 27, but does not say that it depends on that background. Indeed, at [23] the CJEU expressed its reasoning by reference to *the system of value-added tax* emphasising that that system

[9] The wording of the third issue refers to measures "limited" by such a concept, but it was common ground that it was intended to be interpreted as we have summarised it.

"is concerned principally with objective effects, whatever the intentions of the taxable person may be".

108. HSBC further argued that Articles 11(2) and the tax avoidance limb of 27 have "fundamentally different objectives". We do not agree. They both have as their objectives the prevention by specific measures of tax evasion and avoidance, albeit they have application in quite different situations.

109. We also take into account the CJEU's decision in *Sweden*. In that case, one of the Kingdom of Sweden's arguments to support restricting VAT grouping to the financial and insurance sector was that it was a measure permitted by Article 11(2). The CJEU's discussion of that issue, at [38]-[40] contains no mention of abuse of rights. Indeed, the CJEU's decision to uphold Sweden's generally applicable restriction cannot be reconciled with the case-by-case approach mandated by the second condition in *Halifax*.

110. HSBC also raised arguments, with which HMRC disagreed, that the decision of the VAT Tribunal in 2004 in *Xansa Barclaycard Partnership Ltd v Commissioners for HM Customs & Excise* [2004] UKVAT V18780 ("*Xansa*") regarding POR restrictions and tax avoidance was no longer good law. They contended that that was made plain by the CJEU's decision in *M-GmbH v Finanzamt fur Korperssceften Berlin* (C-868/19). That question is not within the terms of Issue 3. For that reason, it is not appropriate for us to decide those arguments.

111. Our conclusion, therefore, is that the measures which a Member State may adopt under the second paragraph of Article 11 of the PVD to prevent tax evasion or avoidance through the use of Article 11 are not limited to those needed to prevent tax evasion and avoidance caused by an abusive practice under *Halifax* principles, and extend to the concept of avoidance arising from *Direct Cosmetics*.

(4) Is section 84(4D) VATA engaged in relation to these appeals and, if so, what are the factors that the Tribunal must take into account in considering whether or not HMRC decided on an appropriate date?

Legislation and background

112.HMRC are entitled, under section 43C(3), to give notice terminating a body's treatment as a member of a VAT group in two circumstances: first, where it appears that the body "is not" eligible by virtue of section 43A to be treated as a member of the group and, second, where it appears that it is "no longer" so eligible. In either case, the notice must specify a date from which the termination takes effect. That date may be earlier than the date on which the notice is given but, if so, it cannot be *earlier* than either (a) "the first date on which, in the opinion of the Commissioners, the body was not eligible to be treated as a member of the group" or (b) "the date on which, in the opinion of the Commissioners, the body ceased to be eligible to be treated as a member of the group."

113. Section 84(4D) provides as follows:

(4D) Where—

(a) an appeal is brought against the giving of a notice under section 43C(3), and

(b) the grounds of appeal relate wholly or partly to the date specified in the notice,

the tribunal shall not allow the appeal in respect of the date unless it considers that HMRC could not reasonably have been satisfied that it was appropriate.

114.The notices given by HMRC to HSBC in this case reflect HMRC's conclusion that the GSCs are not, and never have been, eligible to be treated as a member of the VAT group. The date specified in the notices is 1 October 2013. Although the Appellants joined the relevant VAT groups at various times between 2001 and 2007, the notices do not specify a date earlier than 1 October 2013 because HMRC considered that no practical purpose would be served in identifying any earlier date, since an assessment arising out of a termination before that date would have been time-barred.

115.The preliminary issue relates only to HMRC's primary decision, to terminate the GSCs as members of the VAT group with effect from 1 October 2013. It gives rise to two questions, which we consider in turn.

Is section 84(4D) engaged in relation to these appeals?

116.This is a mixed question of fact and law, requiring consideration of HSBC's grounds of appeal as well as the relevant law.

117.HSBC argue that their grounds of appeal engage section 84(4D) in two respects.

(a) First ground of appeal

118.HSBC first rely on paragraphs 27 to 32 of its Grounds of Appeal. In these grounds, HSBC contend that HMRC has not explained why 1 October 2013 is the specified date, but that it appears (as in fact HMRC acknowledge) to have been chosen on the basis that any assessments arising out of any termination *before* that date would have been time-barred. HSBC contend that HMRC cannot reasonably have been satisfied that it was appropriate to specify a date by reference to limitation periods with regard to raising assessments. They submit that the only potentially relevant factors in reaching a decision to terminate group membership under section 43C(3) are those relating to eligibility for group membership. They also contend that HMRC are obliged to form an opinion on the first date on which HSBC was not eligible to be treated as a member of the VAT group, and that the Tribunal needs to know the date upon which HMRC formed that opinion in order to exercise its supervisory jurisdiction.

119.This is therefore an objection that HMRC should have specified an *earlier* date for termination than 1 October 2013.

120. In our judgment, while this ground of appeal superficially relates to the date specified in the notice, it does not fall within section 84(4D). The only requirement laid down in section 43C(4) as to the date to be specified in the notice, where that date is earlier than the date of the notice, is that it cannot be *earlier* than the first date on which (in the opinion of HMRC) the body was either not eligible or ceased to be eligible to be treated as a member of the VAT group. There is nothing in section 43C(4) which precludes HMRC identifying a date which, though earlier than the date of the notice, is or might be *later* than the first date on which the body was not eligible to be treated as a member of the VAT group. Accordingly, we do not consider that an appeal based on the ground that the date specified in the notice was too late is an appeal contemplated by or within section 84(4D). Properly analysed, we consider that that is precisely the nature of the ground identified at paragraphs 27 to 32 of HSBC's grounds of appeal.

121.Because we have determined that this is not a justiciable ground of appeal, we do not need to decide whether HMRC's ability validly to assess any VAT is a relevant factor which might legitimately be considered by HMRC in specifying a termination date under section 43C(4). However, had we had needed to reach a decision, we would have determined that there is no reason to exclude this factor from being a relevant consideration.

(b) Second ground of appeal

122.HSBC also rely on paragraphs 34 to 42 of their grounds of appeal. Those grounds contend that under section 43B(5), HMRC had 90 days within which to refuse the Appellants' applications to join the relevant VAT groups. HMRC's failure to do so means that it must have approved the GSCs' application for entry into a VAT group, having been satisfied that they were established or had a fixed establishment in the UK and that they met the other requirements for grouping. In the absence of evasion or abuse, HSBC say that HMRC could thereafter not terminate membership on the basis that the branches were no longer fixed establishments of their head offices. Accordingly, it is contended, under section 84(4D), HMRC could not reasonably have been satisfied that it was appropriate to terminate VAT group membership for reasons which, by 1 October 2013, had ceased to be legitimate grounds for termination.

123.If the second ground of appeal on this issue had related solely to an argument as to the effect of the expiry of the 90-day period in section 42B(5), we would have been dubious that section 84(4D) was properly engaged. That is because such a ground would in substance relate not to "the date specified in the notice" but rather to whether a termination notice could be served *at all* after the 90-day period, whatever date it might specify.

124.However, it is HSBC's case that in 2014 HMRC changed its policy as to the criteria for eligibility in relation to group membership, and in their grounds of appeal HSBC accept that if (contrary to their primary case) that change of policy was compatible with Article 11, then it was or might reasonably have been open to HMRC to decide to terminate the GSCs' membership prospectively, from the date of the new policy, but it was impermissible to terminate it retrospectively.

125.In our judgment, a ground of appeal which relates to the 2014 policy change alleged by HSBC and argues that an effective date earlier than that change is not permissible is one which does relate to the date specified in the notice, within section 84(4D).

126.In determining this preliminary issue, we express no view on the merits of any of HSBC's grounds of appeal on this issue. That is entirely a matter for the FTT. The only question for determination by us is whether this second ground of appeal as framed engages section 84(4D). For the reasons set out above, we consider that it does.

Factors to be taken into account by the FTT

127.The second part of the Section 84(4D) issue is the identification of the factors that the Tribunal "must take into account" in considering whether HMRC decided on an appropriate date. As clarified in the course of the hearing, what is meant by this is the identification of the nature of the task to be undertaken by the Tribunal if section 84(4D) is engaged, not the identification of each and every matter of fact that the Tribunal should take into account in the circumstances of this case in undertaking that task.

128.There was in fact much common ground between the parties on this question.

129.The starting point is that section 84(4D) provides that the Tribunal shall not allow an appeal against HMRC's decision "…unless it considers that HMRC could not reasonably have been satisfied that it was appropriate." HSBC contend that this requires the FTT to have regard to whether HMRC: (1) acted in a way in which no reasonable Commissioners could have acted, whether in breach of a legitimate expectation on the part of the taxpayer or otherwise; (2) took into account irrelevant factors; (3) disregarded a factor to which they should have given weight or (4) erred on a point of law in choosing the date. HMRC broadly agreed with this analysis, but added an important proviso. This was that the test focuses exclusively on the reasonableness of the decision reached, as opposed to the process by which it was reached. Accordingly, even if HMRC had erred in one of the four ways identified by HSBC, the FTT should not allow an appeal if HMRC could nevertheless have reasonably specified the date which was in fact contained in the notice on some other basis.

130.We agree with HSBC's description of the task before the Tribunal, and agree with the proviso added by HMRC: the question is whether HMRC "could" reasonably have decided upon the date specified in the notice, not whether it had reasonably done so in the given case.

131.Beyond that, we do not think it is appropriate to direct that any particular fact or circumstance is to be excluded from consideration, or to be given no weight. The FTT should be free to have regard to all the circumstances it considers are relevant in concluding whether HMRC could reasonably have been satisfied that it was appropriate to specify the date contained in the notice. HMRC accepted, and we agree,

that in carrying out that exercise the FTT could consider if relevant any legitimate expectation (in a public law sense) which could be established by the taxpayer.

132.Accordingly, we conclude that section 84(4D) VATA is engaged in relation to these appeals in respect of, and only in respect of, HSBC's ground of appeal that HMRC's primary decision notice could not reasonably have specified a date before the 2014 policy changes alleged by HSBC, and that the nature of the task to be undertaken by the Tribunal is as described at paragraphs [129]-[131] above.

Postscript

133.In the course of finalising this decision, we received a letter from KPMG referring us to two recent opinions of Advocate-General Medina in *Finanzamt Kiel v Norddeutsche Gesellschaft für Diakonie mbH* (C-141/20) and *Finanzamt T v S* (C-269/20). KPMG submitted that some of the legal principles addressed in the opinions were relevant to some of the principles raised by the preliminary issues. We are grateful to KPMG for drawing these to our attention but, having read the opinions, we are satisfied that there is nothing in them (noting in particular that neither of them is concerned with the meaning of "establishment" in Article 11) which adds anything of substance to the authorities already cited to us. Accordingly, we did not consider it necessary to delay publication of this decision in order to receive further submissions from the parties in light of the opinions.

Signed on Original

MR JUSTICE ZACAROLI

JUDGE THOMAS SCOTT

RELEASE DATE: 15 February 2022

ANNEX

AGREED STATEMENT OF FACTS AND ISSUES

(1) HSBC Electronic Data Processing (India) Private Ltd 1st Appellant
(2) HSBC Electronic Data Processing (Lanka) Private Ltd 2nd Appellant
(3) HSBC Electronic Data Processing (Malaysia) Ltd 3rd Appellant
(4) HSBC Electronic Data Processing (Philippines) Inc 4th Appellant
(5) HSBC Electronic Data Processing (Guangdong) Ltd 5th Appellant
(6) HSBC Bank plc 6th Appellant

FACTS

The following facts are agreed between the parties.

Background

1) The 1st, 2nd, 3rd, 4th and 5th Appellants ("the GSCs") and the 6th Appellant are all part of the HSBC Corporate Group ("the Corporate Group"). The Corporate Group is headquartered in the United Kingdom but operates across the world and in multiple jurisdictions. It serves more than 38 million customers through four global businesses: Retail Banking and Wealth Management; Commercial Banking; Global Banking and Markets; and Global Private Banking. The Corporate Group's international network covers 66 countries and territories in Europe, Asia, the Middle East, Africa, North America and Latin America.

2) In the early 2000s, the 6th Appellant began an extensive programme of re-locating the provision of various functions and processes from the United Kingdom to off-shore, lower cost jurisdictions.

3) The GSCs were established as part of the programme of relocation. The GSCs provide services to and for the benefit of entities within the Corporate Group. The GSCs mainly complete routine tasks in relation to 'Back Office' processes, such as payment processing and call centre functions.

4) There are seven Global Services Companies, including the GSCs. All seven of the Global Services Companies are based in offshore, lower cost jurisdictions.

5) Prior to HMRC's decisions of 22 December 2017, the GSCs were part of the HSBC VAT group ("the VAT Group"). These decisions removed the GSCs from the VAT Group with effect from 1 October 2013 or, alternatively, with effect from 1 January 2018.

6) The remaining two Global Services Companies are not directly relevant to the present appeals.

7) Consistent with the overall objectives of the programme of relocation, the aim of setting up the GSCs (as well as the other two Global Services Companies) was to optimise costs.

8) The GSCs have registered branches in the UK ("the Branches" or "the UK Branches") with Companies House. The UK Branches were established between 2001 and 2007 and were registered with Companies House under Part 34 of the Companies Act 2006 and the Overseas Companies Regulations 2009[10].

Legal Framework

9) From 2005, HSBC Global Services Ltd ("HGSL")[11] has acted as a contracting hub for all services provided by the GSCs. HGSL contracts for services with the 6th Appellant and then subcontracts this work to the GSCs. The relationship is managed through framework Intra Group Service Agreements ("IGSAs") and Performance Level Agreements ("PLAs").

Branch Structure

10) The UK Branches are resourced mainly by staff on long-term secondments ("the secondees"). As of December 2017, there were 16 staff seconded to the UK Branches, but not all of these members of staff were full-time. The secondments take place on a rolling 24-month basis.

11) Some of the secondees work full-time and are seconded on a full-time basis to the GSCs; others are seconded on a full-time basis to the GSCs but work part-time; and others work full- or part-time but are seconded to the GSCs on a part-time basis.

12) Typically, the secondees are not assigned to any particular GSC/Branch and may work for any of the Branches. The Branches were established and operated by reference to the particular offshored process (e.g. cards, mortgages, loans and credit, operations and banking services, etc.). Accordingly, the expertise of the secondees may be relevant to one or more offshored processes. Expertise is therefore not duplicated but is shared across the Branches.

13) All the secondees report directly or indirectly to Kate Seaton, who is the Head of the UK Branches.

Functions Performed by the secondees

14) The work of the secondees focuses on particular business services, for example mortgages or insurance products.

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[10] The use of the terms "Branches" and "UK Branches" in this Agreed Statement of Facts and Issues is without prejudice to HMRC's contention that the GSCs have not since 1 October 2013 (at least) had fixed establishments in the UK.

[11] HGSL was previously known as HSBC Global Resourcing (UK) Limited

15) Secondee roles also include the collation of data and management information for the governance process, taking minutes and general administrative support. For some of the secondees, this is the only work they undertake for the GSCs, although this work supports the work done by the other secondees.

16) It is agreed that at least some of the functions or activities performed by the secondees are also performed by other (i.e. non-Branch) staff in the UK, or by the same staff when not performing their Branch roles.

Human Resources

17) Secondees complete timesheets to allocate their time to each GSC for billing purposes.

Technical Resources

18) The secondees are situated in various locations around the UK and occupy space within buildings owned or leased by the Corporate Group. Consistent with the allocation of space and technical resources throughout the Corporate Group, the secondees have desks to sit at through HSBC's "hot desking" facility; computers and telephony to use; and access to all the equipment that is necessary for them to carry out their roles.

ISSUES

The parties agree that the following issues, which summarise grounds 1 – 5 of the Appellants' grounds of appeal, fall to be determined by the Tribunal:

1) Are the GSCs (or any of them) "established" or do they have a "fixed establishment" in the United Kingdom within the meaning of those expressions in section 43A of the VAT Act 1994?

2) Are S43C(1) and (2) VATA 1994 ultra vires?

3) Were HMRC entitled to remove the GSCs from the VAT Group on the grounds that this was necessary for the protection of the revenue?