Neutral Citation: [2024] UKFTT 00785 (TC)

Case Number: TC09275

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2018/06467

VAT – Refusal by Respondents to admit First Appellant as member of VAT group of which Second Appellant is representative member – Whether First Appellant had a fixed establishment in the UK – Whether, even if eligible to be treated as a member of the VAT group, its application could be refused for 'protection of the revenue' – Appeal dismissed

Heard on: 8 – 17 May 2024
Judgment date: 29 August 2024

Before

TRIBUNAL JUDGE JOHN BROOKS
TRIBUNAL MEMBER CATHERINE FARQUHARSON

Between

(1) BARCLAYS SERVICE CORPORATION
(2) BARCLAYS EXECUTION SERVICES LIMITED

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Andrew Hitchmough KC and Zizhen Yang instructed by Slaughter and May

For the Respondents: Hui Ling McCarthy KC, Michael Ripley and Edward Waldegrave instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The First and Second Appellants, Barclays Services Corporation ("BSC") and Barclays Execution Services Limited ("BESL") (together the "Appellants"), appeal against the decision of the Respondents, HM Revenue and Customs ("HMRC"), to reject an application by BESL, acting as the representative member of a VAT group (the "VAT Group"), for BSC to join the VAT Group ("the Application").

2. The Application was rejected by HMRC on two grounds:

   (1) BSC was not eligible to be treated as a member of the VAT Group because, for the purpose of s 43A(1) of the Value Added Tax Act 1994 ("VATA"), it was not established, nor did it have a fixed establishment, in the UK; or

   (2) Alternatively, if BSC did have a fixed establishment in the UK, it was nevertheless necessary to refuse the Application for the protection of the revenue, within the meaning of s 43B(5)(c) VATA 1994.

3. Andrew Hitchmough KC and Zizhen Yang appeared for the Appellants. HMRC was represented by Hui Ling McCarthy KC, Michael Ripley and Edward Waldegrave. Although greatly assisted by their submissions, both written and oral, we have not found it necessary to make specific reference in our decision to all of the submissions or materials to which we were referred, but we have taken all of them into account.

EVIDENCE AND FACTS

EVIDENCE

4. In addition to three bundles comprising 170, 2,804 and 2,009 pages respectively, four supplementary bundles of 935, 3,834, 4,726 and 149 pages respectively, we heard oral evidence from four witnesses. Eleni Hadjikakou and Nik Nikolov for the Appellants and Liz Hillman and Debra Picksley for HMRC.

5. Eleni Hadjikakou is the head of the BSC UK Branch. Although essentially a helpful witness whose carefully considered answers sought to assist the Tribunal, Ms Hadjikakou became somewhat reticent when cross-examined about the creation and purpose of the BSC UK Branch. Despite having attended Barclays Committee for Transactions with Tax Risk ("CTTR") on 25 April 2017 in which the proposal to establish a UK branch of BSC and VAT grouping application were discussed and having also discussed the potential VAT benefit of the UK branch becoming a member of the VAT Group during staff recruitment interviews, Ms Hadjikakou declined to comment when asked about the significance of VAT to the formation of the BSC UK branch saying either that she had not been involved in the "discussions" and "conversations" or that she was not a member of the Barclays Tax Team.

6. Nik Nikolov is the current Head of the Barclays Operational Continuity in Resolution ("OCIR") Centre of Excellence and head of BX[1] management office, BX Governance. This includes the BX service management team within Barclays, as well as the OCIR internal outsourcing and appointed representative centres of excellence. On 1 May 2024 he was appointed head of BX COO strategy governance and shared services. He was a straightforward and helpful witness.

7. Elizabeth Hillman, at the date of the hearing was a HMRC "tax professional manager". However, she had previously, from July 2017, been the senior VAT tax specialist within

[1] BX is a Barclays single service company that is independent of both the Ring Fenced Bank and the non-Ring Fenced Bank which operated as a third Business Unit alongside Barclays Bank UK Plc and its subsidiaries and Barclays International

HMRC's team working on the tax affairs of the VAT Group. She was the HMRC officer that rejected the Application. While she generally sought to assist the Tribunal, Ms Hillman, when pressed during cross-examination was frequently unable to recall matters, particularly those that appeared to criticise HMRC.

8. Debra Picksley, who before her retirement in July 2022, was a Lead Project Manager for HMRC's Indirect Tax, Avoidance and Partial Exemption specialist team. She also provided technical consultancy regarding complex VAT issues to support the enquiries that HMRC's Large Business team were undertaking into new applications for overseas subsidiaries to join VAT groups. However, when cross-examined, although generally trying to assist, Ms Picksley also sought to advance HMRC's case and was somewhat reluctant to give answers which appeared to be contrary to it.

Facts

9. The parties produced the following Statement of Agreed Facts:

The Appellants

(1) BESL is a private limited company incorporated in England and Wales and registered with Companies House. Between February 2017 and May 2019, BESL was registered with its previous name 'Barclays Services Limited'.

(2) BESL is a wholly owned direct subsidiary of Barclays PLC. Barclays PLC is a public limited company listed on the main market of the London Stock Exchange and the ultimate parent company of the global Barclays corporate group (the "Barclays Corporate Group").

(3) BESL is registered for VAT in the UK under a group registration number (the "VAT Group"). BESL is the representative member of the VAT Group.

(4) BSC, is a private corporation with limited liability that is registered in the United States of America (the "US") in the State of Delaware. BSC was incorporated in the US in 1993. It operates primarily in the State of New York and, more recently, in the State of New Jersey. Aside from a branch in the UK (discussed below), BSC has no presence outside the US.

(5) BSC is an indirect subsidiary of Barclays Bank PLC, which itself is a wholly owned direct subsidiary of Barclays PLC. As such, BESL and BSC are both under the common indirect ownership of Barclays PLC.

(6) BSC makes supplies of services to other members of the Barclays Corporate Group, including to BESL and other members of the VAT Group.

The UK branch of BSC

(7) BSC's UK branch (the "UK Branch") is registered with Companies House as a UK establishment of BSC. The Companies House website states that the date of registration is 26 July 2017.

(8) On 1 December 2017, the Appellants submitted the Application to HMRC for BSC to be treated as a member of the VAT Group in accordance with s 43B(2) of VATA.

(9) HMRC's decision to refuse the Application is the subject of this appeal.

(10) The following are party to a contract of employment with the UK Branch:

(a) Eleni Hadjikakou. Her contract was signed on 8 January 2018 and describes her position as 'Head of BSC UK, Director (or equivalent), Group Centre or such

other role as the Company reasonably decides from time to time' with a start date 'no later than 1 December 2017'.

(b) Michael Curran. His contract was signed on 9 January 2018 and describes his position as 'UK Service Delivery Manager, Assistant Vice President (or equivalent), Group Centre or such other role as the Company reasonably decides from time to time' with a start date of 1 December 2017.

(c) Nicola McEnaney. Her contract was signed on 8 January 2018 and describes her position as 'UK Service Delivery Manager, Assistant Vice President (or equivalent), Group Centre or such other role as the Company reasonably decides from time to time' with a start date of 1 December 2017.

(d) Nicholas Leason. His contract was signed on 8 January 2018 and describes his position as 'Service Delivery Manager, Vice President (or equivalent), Group Centre or such other role as the Company decides from time to time' with a start date of 8 January 2018.

(11) Prior to commencing employment with the UK Branch, each of Ms Hadjikakou, Mr Leason, Ms McEnaney and Mr Curran held other roles within the Barclays organisation in the UK.

(12) Mr Leason, Mr Curran and Ms McEnaney each report to Ms Hadjikakou.

(13) From December 2017, Ms Hadjikakou reported to Peter McCabe who was the Head of the UK Branch of Barclays Technology Centre India Private Limited ("BTCI"), a Barclays Group company that is incorporated and resident in India.

(14) The contracts of employment described above state the 'Initial Place of Work' of each employee to be Radbroke Hall, Knutsford, Cheshire.

(15) The cost for use of these premises is recharged through the Barclays ETA portal from Corporate Real Estate to the UK Branch. During 2018, this was at the rate of £2,155 per calendar month.

Activities of the UK Branch

(16) The parties agree that the UK Branch is involved in the monitoring and updating of intragroup agreements between BSC and the individual legal entities to which BSC provides services. However the Respondents require the Appellants to prove when it began undertaking these activities, and over what period it has done so. The Appellants' position is also that these activities are among other things which the UK Branch is involved in. The Respondents' position is that the Appellants are required to specify and prove any such "other things" relied upon.

Application for BSC to join the VAT Group

(17) On 1 December 2017, the Appellants submitted the Application for BSC to be treated as a member of the VAT Group.

(18) The Application was made on the basis that:

(a) BESL and BSC are both members of the Barclays corporate group headed by Barclays PLC; and

(b) BSC has a fixed establishment in the UK, namely the UK Branch.

(19) On 2 March 2018, HMRC issued notice to the Appellants (the "Appealed Decision") that the Application was refused on the following grounds:

(a) that in HMRC's view BSC was not eligible to be treated as a member of the VAT Group in accordance with s 43A(1) VATA because it is neither established nor has a fixed establishment in the UK; and

(b) alternatively, that if BSC does have a fixed establishment in the UK, it was nevertheless necessary to refuse the Application for the protection of the revenue, within the meaning of s 43B(5)(c) of VATA.

(20) On 25 May 2018, the Appellants requested a review of the Appealed Decision by an HMRC officer not previously involved in the case in accordance with s 83B VATA.

(21) On 5 September 2018, HMRC notified the Appellants that following the review process the Appealed Decision was upheld for the reasons set out in the original notice dated 2 March 2018.

(22) On 1 October 2018, the Appellants appealed to the Tribunal against the Appealed Decision.

Approach to Evidence and Further Findings of Fact

10. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2020] 1 CLC 428, Leggatt J (as he then was) observed:

> "15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
>
> 16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
>
> 17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb'' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).
>
> 18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with

new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

…

22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

11. However, in *Kogan v Martin & Ors* [2019] EWCA Civ 1645 Floyd LJ, giving the judgment of the Court of Appeal, said:

> "We start by recalling that the judge read Leggatt J's statements in *Gestmin v Credit Suisse* and *Blue v Ashley* as an "admonition" against placing any reliance at all on the recollections of witnesses. We consider that to have been a serious error in the present case for a number of reasons. First, as has very recently been noted by HHJ Gore QC in *CBX v North West Anglia NHS*

> *Trust* [2019] 7 WLUK 57, *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay *The Judge as Juror: The Judicial Determination of Factual Issues* (from The Business of Judging, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon *all* of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence."

12. Adopting such an approach, we make the following additional findings of fact to expand on those contained in the Statement of Agreed Facts and, hopefully, to provide a better understanding of the background and circumstances of the case.

Further Findings of Fact

Background

13. Mr Nikolov joined Barclays on a permanent basis in 2015 as design lead for a project, the Service Group Programme, which was part of a wider Structural Reform Programme ("SRP"). The Service Group Programme involved creating and establishing a single service company model for Barclays which is known as "BX". It was completed in September 2017 following which Mr Nikolov worked on the Barclays OCIR Programme, another programme within the Barclays SRP. His role focussed on how the requirements of the Prudential Regulation Authority ("PRA") OCIR policy were to be applied across Barclays.

14. Mr Nikolov confirmed that the regulated entities within the Barclays Corporate Group are Barclays Bank Plc (the non-ringfenced bank), Barclays UK Plc (the ringfenced bank) and Barclays Capital Securities Limited. The service providers, such as BSC, are non-regulated entities.

15. Although there were some obligations under the PRA rules in force before 1 January 2019, that date was the official "go live" date of the operational continuity and resolution and ringfencing rules which was referred to as "Day One". However, Barclays had set up its ringfenced bank from April 2018, prior to the regulatory deadline in order to test the arrangements. Mr Nikolov explained that the guidance and rules are published in advance of the "go live" date, usually 24 and 36 months before, to enable firms to prepare and implement the rules.

Outsourcing

16. Rules and guidance for regulated entities when outsourcing operational functions to other group companies (internal outsourcing) or third party service providers are maintained by both the PRA and the Financial Conduct Authority (the "FCA").

17. The PRA guidelines and rules on Outsourcing, Ring-fencing and Operational Continuity require services to be provided to regulated entities on arm's length terms and for the regulated entities to establish governance procedures for ensuring effective oversight and accountability for the outsourced services. The general body of guidelines and rules on outsourcing require that a regulated firm outsourcing critical or important operational functions remains responsible for discharging its own regulatory obligations and maintains effective oversight of the outsourced services.

18. Specific requirements on the recipients of the outsourced services include:

(1) That the respective rights and obligations of the service recipient and the service provider are set out clearly in a written agreement.

(2) That the service recipient has established methods and procedures for assessing the standard of performance by the service provider and for reviewing the services on an ongoing basis.

(3) That the service recipient properly supervises the carrying out of any outsourced function and is able to take appropriate action if it appears that the service provider may not be carrying out the functions effectively.

19. Across the Barclays Corporate Group, which includes a number of legal entities whose sole business is to provide services to other legal entities (the "Service Entities") in the Barclays Corporate Group, these requirements are met through, inter alia, the use of standardised service agreements known as "Intragroup Agreements" or "IGAs" to document all internal outsourcing relationships; a system of regular 'Service Reviews' carried out by the service recipients; and the provision of regular management information ("MI") on service performance by the service providers to the service recipients, to facilitate the Service Reviews and effective supervision by the service recipients.

20. The IGAs are standard form service agreements that are put in place whenever a Service Entity provides services to another legal entity in the Barclays Corporate Group. The IGAs comprise three sections which taken together form a legally binding agreement between the Service Entity and the recipient.

21. The first section, the IGA Framework Principles, which are drafted and maintained by Barclays commercial legal team (there is no involvement by the UK Branch), are a standard set of arm's length terms and conditions that apply whenever a Service Entity provides services to another legal entity in the Barclays Corporate Group. Clause 4 sets out provisions for "Service" with those for "resources" in clause 4.7, the material parts of which provides:

> "**Provision of Resources**
>
> 4.7.1 The Service Provider undertakes to maintain, or cause to be maintained and provided, adequate resources (including appropriately skilled personnel, access to premises and facilities, equipment, consumables, infrastructure, third party contracts and licenses) to ensure:
>
> (a) that the Services are undertaken in a timely, workmanlike manner to the standards of care required pursuant to Applicable Law, and the terms of this IGA;
>
> (b) the Service Recipient(s) and each Service Beneficiary is/are able to receive the benefit of the Services; and
>
> (c) all enquiries concerning the Services are dealt with properly and without delay.
>
> 4.7.2 …
>
> 4.7.3 Where Services are being provided to support entities in another jurisdiction, the Service Provider will also ensure that, where necessary, there are sufficient permanent resources present in that jurisdiction to facilitate the efficient delivery of the Services.
>
> …"

22. The second section, Local Conditions, contains specific local conditions or jurisdictional requirements that require variation to, or derogation from, the IGA Framework Principles. Ms Hadjikakou confirmed that the UK Branch played no role in drafting Local Conditions.

23. The third section of an IGA, the Service Order, lists the services that the Service Entity is providing to the service recipient using unique Service ID references. BX maintains a Service Catalogue listing 136 different services that the Service Entities currently provide. Each service listed in the Service Catalogue has a unique Service ID and in most cases is described in detail in a separate document known as a Service Appendix. Whenever an IGA is entered into between a Service Entity and a recipient, the IGA includes a Service Order which lists the services that are being supplied under the IGA and incorporates the relevant Service Appendices into the contract.

24. Ms Hadjikakou agreed that once "fully up and running", there would be a standard IGA with some local conditions to which the relevant services supplied under it are essentially plugged in. She explained that:

> "[y]ou would need to identify which services were being consumed by that legal entity in terms of – when we book cost and FTE [full time employees], is there a team in the US delivering that service, which components of that service is being delivered specifically by the US, and identify/provide evidence to support your delivery to, in this instance, Ireland, say, for example.
>
> It's not as simple as just then adding it to the IGA. You need to interlock it and agree it with the legal entity recipient."

25. Ms Hadjikakou confirmed that she had used the term "interlock" to mean securing the agreement of both relevant legal entities, the parties to the agreement. She explained that the recipient entity would not want to receive a cost for something for which it had not received a service. Ms Hadjikakou also agreed that any work undertaken by the UK Branch was "parasitic" on the services provided by BSC, ie if BSC did not provide services to another particular entity in the Barclays Corporate Group there would not be, or any need for, an IGA between them.

26. Each month the Service Entities issue MI packs to each of their service recipients. The MI packs include a self-evaluation by the Service Entity of service delivery against service level agreements set out in the Service Appendices, as well as other information on service costs and service controls where applicable. The service recipients then each host regular Service Review meetings with representatives of the Service Entities from which they receive services to discuss the MI packs and any issues with service delivery that the packs have highlighted. The purpose of the MI packs is to give accurate and up to date information to the service recipients on service delivery and performance. The Service Review meetings give the service recipients an opportunity to review performance on a regular basis and in doing so to maintain effective oversight and accountability for the functions that they have outsourced to the Service Entities.

Ringfencing

27. As a response to the 2008 financial crisis the UK passed new legislation and supporting regulations on ringfencing banks under which large UK financial institutions such as Barclays were required to separate or 'ringfence' their retail and consumer banking activities from their wholesale and investment banking activities keeping the two legally, operationally and financially separate from one another.

28. With effect from April 2018, Barclays divided its banking operations into two legally separate Business Units, "Barclays UK" or "BUK" and "Barclays International" or "BI".

29. BUK comprises Barclays Bank UK Plc and its subsidiaries. It is the ringfenced bank ("RFB"), created in response to the ring-fencing rules, and undertakes retail and consumer banking activities. BI, which includes Barclays Bank US LLC that is also referred to as the "US Intermediate Holding Company" or "US IHC", carries on corporate, international and investment banking activities.

30. In May 2015, the PRA published a Policy Statement setting its expectations with respect to the arrangements that ringfenced bodies might make to receive services from other entities within the same corporate group or from third parties outside of their group. In relation to services provided by other group entities (ie internal outsourcing) the Policy Statement provided that a ringfenced body may receive services and facilities from other group entities only where those entities are either 'group services entities' or 'ringfenced affiliates' (which is defined as other entities in the ring-fenced sub-group). Such a requirement is also contained in the PRA Rulebook on Ringfenced Bodies. This explains that:

> "where a ringfenced body receives services and accesses facilities that it requires on a regular basis from an entity in its group, it may do so, whether directly or indirectly, only where that entity is a 'permitted supplier.'"

31. A "Permitted Supplier" in relation to a ring-fenced body is either:

(1) any entity within the same corporate group as the ring-fenced body whose only business is to provide services or facilities; or

(2) another entity in the ring-fenced sub-group.

Accordingly, a Permitted Supplier with respect to the Barclays RFB would include any legal entity within the Barclays Corporate Group whose only business is to provide services or facilities or any legal entity within the RFB (ie the sub-group that comprises of Barclays Bank UK Plc and its subsidiaries).

32. The PRA Rulebook on Ringfenced Bodies also requires that all transactions between a ringfenced body and a member of its group that is not a 'ringfenced affiliate' must be on arm's length terms. There is also a requirement for a ringfenced body to establish, implement and maintain effective policies for identifying, recording and monitoring all transactions entered into between the ringfenced body and group companies that are not ringfenced affiliates.

33. The IGAs are used to document the provision of services by the Service Entities to other Barclays Corporate Group legal entities and are entered into on arm's length terms. This is monitored through the MI packs and Service Review meetings.

OCIR

34. The PRA launched its OCIR initiative in 2014 with its Discussion Paper 1/14 *Ensuring operational continuity in resolution*. Mr Nikolov explained that "Resolution" is a Bank of England process designed to manage an orderly failure of financial institutions. When a financial institution goes into Resolution, it must continue to fulfil certain obligations in order to meet its regulatory and customer requirements. The OCIR rules require financial institutions to have continuity plans in place to ensure that the regulated entities can continue to receive the critical services that they need to meet their regulatory and customer obligations in the event of financial stress, Resolution and post resolution restructuring. If a regulated entity loses the ability to access certain services following financial failure, it could

lead to a disorderly failure and potentially impact the stability of the UK financial markets as a whole.

35. In July 2016, the PRA issued Supervisory Statement SS9/16 Ensuring Operational Continuity in Resolution (pages 39 to 52 of NMN1) (the "OCIR Supervisory Statement") which included provisions on how regulated firms, such as BUK and BI, should organise and access critical services. Section 2 of the OCIR Supervisory Statement headed "Operational arrangements for critical services", provides that a regulated firm can organise critical services by outsourcing such services to an entity within its group or to an external party (a non-group provider), operate a business unit within the firm itself that provides critical services to one or more of its business units or firms within the group or use a combination of both of these.

36. Barclays response was to restructure service provision within the Barclays Corporate Group so that the majority of non-US Service Entities were consolidated as subsidiaries and branches of BESL. BESL was itself transferred to become another wholly owned direct subsidiary of Barclays Plc. Following these structural changes, BESL, its branches, its subsidiaries and the branches of its subsidiaries sat outside of both the RFB and the non-RFB. This created a single global shared services management construct that was independent of both the RFB and the non-RFB and which operated as a third Business Unit alongside BUK and BI, using the abbreviated name "BX".

37. Having decided to adopt a service company model that was independent of both the RFB and the non-RFB and having considered whether to establish a single service company or three separate service companies, Barclays established a single service company model referred to as "BX" which is based upon a single Service Entity, namely BESL and its branches and subsidiaries. As a result of the BX service company model, the concept of outsourcing and the applicable regulatory framework took on greater significance across the Barclays Corporate Group. Although some services continue to be sourced from within the RFB, the large majority of services consumed by both the RFB and the non-RFB are now provided by either BX or by third party suppliers.

38. The structural changes described above took effect from April 2018, after the High Court approved the Barclays 'Ring-Fencing Transfer Scheme' on 9 March 2018.

Genesis of UK Branch

39. The earliest document before the Tribunal in relation to the creation of the UK Branch was an email dated 2 December 2015 from Ross Barnes, a London based member of Barclays tax team to his colleagues, also in the tax team, based in New York. This email, as with all emails to which we refer in decision are, unless otherwise stated, internal Barclays emails.

40. In his email to his tax team colleagues Mr Barnes wrote:

> "I'm hoping you can help me with the consequences of establishing a UK presence of a US service company, or at least point me in the right direction.
>
> Under the structural reform umbrella, there is a growing focus on the service companies within the group and ensuring their operational continuity, as well as economic efficiency. As a part of this, it is envisaged that there may become a need for there to be dedicated personnel based in the UK managing the service delivery model, service flows, IGAs (and so forth) for each of the group's main service entities.
>
> BSC could be included in this bucket, and may strategically be required to have service delivery managers (and similar personnel/functionality) to be based in London. Would this create a UK branch/permanent establishment of BSC?"

41. Further progress on developing the proposal to create the UK Branch is apparent from the slides attached to an email of 2 March 2016 from Matthew Phillips, a Barclays Vice President for indirect taxes, to members of the tax team. Although these slides were described as "just a starter" for "setting up" the Branch it was hoped that "the main content" was there.

42. The first two of those slides explained that BSC was a service company in the US which was responsible for providing certain services such as HR and operations. It continued by setting out the following bullet points:

> "• Consideration is being given to setting up a UK branch of BSC.
>
> • The main purpose of the branch is to ensure BSC provides its services as efficiently as possible to the UK businesses.
>
> • The branch will enable this through building the relationships with senior figures in BSC and the UK business partners to ensure they receive the correct provision of services.
>
> • This means the branch needs to have a sufficient number of people in the UK in order to ensure it achieves this aim.
>
> • It is also important that the people in the UK are of the right level of seniority to provide the value needed.
>
> • The UK branch employees need to have sufficient technical resource to be able to adequately complete their jobs.
>
> • Where the above conditions are met the branch should be able to join the UK VAT group which will bring significant VAT efficiencies."

43. The second slide, under the heading "The Charter" set out the primary responsibilities of the Branch. These were:

> "• Build relationships with BU COOs and the relevant service providers in BSC.
>
> • Gather and aggregate the demand.
>
> • Provide a management layer in the UK who can ensure the UK demands are met.
>
> • Share the information regarding demand with the relevant stakeholders.
>
> • Facilitate to remove any capacity or infrastructure bottlenecks.
>
> • Manage the UK employment taxes, payroll and other administrative tasks in relation to relevant staff.
>
> • Provide status and MI to the key stakeholders."

44. In another of the slides, under the heading "Minimum branch substance" it is stated that:

> "In order for the UK branch to form part of the UK VAT group there needs to be sufficient human and technical resource in the UK."

45. That slide continued with a reference to the "substance test" and the various "factors" which need to be fulfilled to meet that test.

46. On 14 March 2016 Mr Barnes (Tax – London) sent an email to a Mr Mishik (Tax – NYC), a Ms Metcalfe (Tax – London) and Mr Phillips (Tax – London). It was noted in that email that:

> "We had a discussion a few months ago about the possibility of establishing a UK branch of BSC; since then the plans to implement this have been analysed and developed here (including a discussion with MH), and the

> VAT team are looking to push towards sign-off and implementation (subject to the necessary approvals). It is estimated the benefit will be c. £5-10m per annum of reverse charge VAT."

47. Another email, also dated 14 March 2016, was sent by Mr Barnes (Tax – London) to his New York based Finance colleagues and copied to his tax team colleagues. The email reminded them that they has previously spoken about "some UK VAT planning" that was still being developed (which is not related to the present appeal). However, the email continued by referring to a "separate piece of VAT planning" that was also being considered which involved:

> "… establishing a UK branch/permanent establishment of Barclays Services Corporation; there would be some functionality (for example, possibly senior service delivery managers/coordinators) based in the UK, acting on behalf of BSC. This will bring services supplied from BSC to UK trading entities such as BBPLC [ie Barclays Bank PLC] within the UK VAT group, and mitigate reverse charge VAT of circa £5-10m per annum."

48. On 18 March 2016, Chiu Ming Man, a Managing Director and Head of VAT in the Barclays tax team, sent an email to David Dunlop (Barclays Tax Barclaycard) reporting a conversation with Jai Westwood, the CEO of BSC. The email stated that Mr Westwood was "supportive" and would help "us" (ie the Barclays tax team) get the proposal for the UK Branch "onto the board for a vote".

49. A subsequent email from Mr Man to Mr Westwood, sent on 20 April 2016, referred to being able to "potentially mitigate the VAT through a UK Branch". It continued stating that Mr Man thought that:

> "… it might be helpful to have an initial session with you (I recall you mentioned you were the AE for this entity) to get you sufficiently sighted on the planning opportunity and also to formally seek your input on how we move this forward (the sooner we can implement the greater the P&L saving)."

50. Several matters were discussed under the heading "Some notes re NY rep office" in an email sent by Mr Westwood to Michael Egan (Compliance – NYK) and Alan Kaplan (Legal NYK) on 29 March 2016. Included was the following in relation to the UK Branch:

> "I spoke to Chiu Ming Man (the firm's VAT expert) and he mentioned that there is some commercial rationale to look at setting up a UK branch (not a regulated branch) of Barclays Services Corporation given the interaction between service companies and countries. This branch would then be added to the UK VAT group. Not only would this eliminate the emergence of the £3.6m VAT for Card, it would also have an approx additional £10m VAT saving on recharges BSC makes out of US to UK which are currently VAT incurring."

51. A Barclays slide presentation "Barclays services Corporation – UK Branch", dated 1 June 2016, explained that the UK staff of the UK Branch would be client relationship directors/service delivery managers who would form a point of contact for internal stakeholders needing to raise specific requests, concerns or complaints regarding the services provided. A slide with the heading "Benefits" of the UK Branch", stated:

> "There are numerous benefits to BSC having a presence in the UK of service delivery managers:
>
> ✓ Assure best practice of services provided to the UK
>
> ✓ Accurately prioritise and size demand

✓ Assess risks and track their mitigation and contingencies more efficiently

✓ Act as a key point of contact for the issues arising in the UK

✓ Provide regular updates and assurances to BSC senior management to ensure customer satisfaction

✓ Create anticipated VAT efficiencies in excess of £10m per annum"

52. On 21 June 2016, Mr Phillips (Group Tax – London) sent two emails (which were copied to his tax colleagues) to Simon Harris of Ernst & Young. The first email set out the background to the proposal for the UK Branch and the second explaining the work required from Ernst & Young. This was to provide:

> "… a tax opinion covering the tax implications of forming this branch and comments on our proposed implementation thereof. We will provide you with the background to this branch including the rationale for the branch and the proposed implementation (number of people, how they will be employed, type of work, recharge mechanism, etc). Whilst we want the report to cover all the different tax implications we need to consider we specifically want it to cover the following in detail:
>
> - An opinion on whether the proposed branch and implementation has the sufficient human and technical resource needed in order to join the UK VAT group. This will mean practical advice on ways in which we could improve our position, what HMRC are currently looking at from this perspective and any other factors we should bear in mind.
> - Given HMRC's recent actions we would also like to cover the point on protection of the revenue. This should include any recent changes to the application of this measure from HMRC and if they were to use it more widely when and on what basis we can push back on this application.
> - Any other tax issues which we should be aware of, or need to consider.
>
> As I mentioned on the call one of the reasons for this paper is to provide support for our internal tax risk principles review. This involves an independent committee assessing the level of risk associated with the branch to determine whether to proceed. This context may help you frame the work better."

53. There was a meeting of Barclays Tax Risk Assessment Panel on 5 July 2016. The purpose of the meeting was to review the proposal to establish the UK Branch. It was noted that although the technical position and commercial context of the proposal was considered to be "robust", a challenge to it by HMRC was likely and, "in a worst case scenario", it might lead to litigation. Accordingly, the proposal was also to be considered by the Tax Management Oversight Committee.

54. The minutes of the meeting record that the context of the proposal was explained by Ms Metcalfe (Tax – London) who told the meeting that:

> "The Proposal had been discussed at length with the CEO of BSC in the US who is fully supportive. Given that the proposal is wholly aligned with the service group model and service delivery would be more efficient/effective with people on the ground in the UK, the CEO would recommend proceeding even in the absence of any VAT benefit (estimated to be £10m per annum)."

This was confirmed by Ms Hadjikakou whose evidence was that she understood from Mr Westwood that the UK Branch would continue to exist "whatever the outcome" of this case.

55. The BSC Board which met on 27 September 2016 was provided, by Mr Westwood, with an "update on the potential UK Branch of the service company". This was supported by a presentation which identified the benefits of the proposed UK Branch, these were that it was:

> "… to work closely with key stakeholders [to]:
>
> ✓ Assure best practice of services provided to the UK
>
> ✓ Accurately prioritise and size demand
>
> ✓ Assess risks and track their mitigation and contingencies more efficiently
>
> ✓ Provide accurate and compelling project/program propositions to the UK
>
> ✓ Act as a key point of contact for the issues arising in the UK
>
> ✓ Provide face-to-face contact in the UK where necessary in order to better understand the UK business' requests and expedite the resolution of issues
>
> ✓ Work closely with the UK business partners to predict and overcome potential bottlenecks
>
> ✓ Provide regular updates and assurances to BSC senior management to ensure customer satisfaction
>
> ✓ Initiate knowledge transfer programs in order to maximise efficiencies
>
> ✓ Create VAT efficiencies of up to £10m*
>
> * This figure is based on a VAT charge of approximately £20-25m, which at the average IB recovery rate leaves an irrecoverable VAT cost of £10m"

56. Another slide in the presentation, headed "Branch requirements", states:

> "In order for the UK branch to achieve its aims and to form part of the UK VAT group there needs to be a sufficient level of human and technical resources in the UK required for its operation."

57. On 25 April 2017 there was a meeting of the CTTR to discuss the proposal to create the UK Branch. In attendance were various individuals including Mr Man (Tax) and five of his tax colleagues as well as Mr McCabe and Ms Hadjikakou who had been invited by Mr McCabe, her line manager, to attend the meeting as she was in London at the time.

58. However, prior to that meeting she had not seen a document headed "BSC UK Proposal - CTTR Memo". That memorandum had been circulated in advance of the meeting. It identified the "proposer" of the UK Branch as "Barclays Tax", and included a "target" date for implementation of 31 July 2017. In a section headed "Transaction Outline" the memorandum stated:

> "*Summary*
>
> This paper sets out a proposal to employ service managers of Barclays Services Corporation's ("BSC") in the UK ("BSC UK"). The purpose of BSC UK will be to manage the delivery of services provided by BSC to

entities in the Barclays group outside of the US and to manage supplies into BSC from Barclays entities outside of the US. The benefit of this proposal will be to improve the efficiency of service delivery between BSC and both the entities to whom it provides services and the entities from whom it receives services.

BSC UK will manage the provision of services from and to BSC in the US, in respect of the relevant recipients and providers of services located outside of the US and to ensure that the quality of services is consistently maintained.

This arrangement will allow a more efficient delivery of services from and to BSC and is aligned with the structure of service provision elsewhere in the group (as explained in more detail below) and the Service Management Framework. Following the stand up of Barclays Services Limited ("BSerL") in September 2017, it is expected that BSC UK will liaise regularly with the local Service Managers in the trading entities as envisaged by the Service Management Framework.

BSC UK will constitute a fixed establishment for UK VAT purposes and as such will be eligible for addition to Barclays' UK VAT group (the "UK VAT group"). As a result of the addition of BSC UK to the UK VAT group, supplies made by BSC to other members of the UK VAT group will be disregarded for the purposes of calculating the UK VAT group's liability in respect of VAT. It is expected that this will lead to a saving of c. £15m-20m of otherwise irrecoverable VAT per annum for the Barclays group.

It is expected that the cost of setting up BSC UK will be c. £30k and that the ongoing operating costs will be c. £400k per annum.

…"

59. The CTTR memorandum continued, stating under the heading "Rationale":

"The operating model to be implemented as part of the Structural Reform Programme includes service delivery managers employed by each trading entity whose role is to manage the delivery of services from those trading entities to their ultimate service recipients. In respect of BSC, locating Service Managers in the UK ensures that the Service Managers will be in the same time zone and location as some of BSC's principal service recipients and service providers, whilst also allowing Service Managers covering Europe and most of Asia Pacific to be available at times at which those markets are open."

When cross-examined, Ms Hadjikakou accepted that this paragraph reflected the creation of the UK Branch as set out in the Application (see below).

60. The appendices to the CTTR memorandum included the following paragraphs:

"**1. Transaction Description**

Proposal – establishment of BSC UK

1.1 …

1.2 The operational profile of BSC UK will be as follows:

1.2.1. BSC UK will directly employ 4 full time employees, comprising 3 Service Managers and a Head of BSC UK.

1.2.2. The Head of BSC UK will have signatory powers for BSC and will report directly into a member of the BSC Board.

1.2.3. The Service Managers will be based in Radbroke Hall, Knutsford where BSC UK will have dedicated office space, desk space and IT facilities. (This is also where the UK branches of the Indian Services companies are located.)

1.2.4. BSC UK will be responsible for managing the delivery of BSC's services to non-US recipients and the delivery of services to BSC from non-US service providers. BSC UK will recharge its costs, which will consist of staff, dedicated office space, desks and IT expenses, plus an appropriate margin consistent with the arm's length pricing model agreed with external advisors, to BSC's ultimate service recipients and providers directly.

1.2.5. Following the implementation of Barclays' UK ring-fencing obligations, it is expected that BSC will continue to provide services to Barclays International. However it is uncertain whether BSC will continue to provide services to the Ring Fenced Bank ("RFB"). If and to the extent that any services are to be provided to RFB, the relevant infrastructure and personnel may be migrated to a service entity other than BSC (most likely within the BSerL group).

…

2.2. UK Corporation Tax

2.2.1. Under s 19, CTA 2009, a non-UK resident company trading in the UK through a permanent establishment ("PE") is subject to corporation tax on the profits that are attributable to that PE.

2.2.2. The definition of a PE is contained in s1141 CTA 2010. A non-UK resident company has a PE in the UK if it has a fixed place of business in the UK through which the business of the company is wholly or partly carried on.[5]

61. The footnote to paragraph 2.2.2. explained that "A non-UK resident company will not have a PE in the UK if the fixed place of business that is maintained to carry on the activities of the company is of preparatory or auxiliary character. "Preparatory or auxiliary character" is non-exhaustively defined in s1143 and should not apply to the activities of BSC UK."

62. Subsequent CTTR appendices included the following paragraphs:

3 Accounting Analysis

This analysis has been discussed and agreed with the Technical Accounting Group.

…

3.12 BSC UK provides support services under service agreements to affiliates and it is compensated, as applicable, for such services through intercompany service fees and expense reimbursement agreements. The income associated with such agreements for services performed by BSC UK are accounted for on an accrual basis and reflected as income from affiliates. BSC UK is expected to recharge services to UK entities that obtain services on a "cost plus" basis. Consequently BSC UK will recognise income on the basis of the amount recharged from the UK entities it services.

4. Barclays Tax Principles

a) Does the transaction or tax planning support genuine commercial activity?

Yes

Barclays Services Corporation ("BSC") is a significant service company providing high volumes and values of services into the UK. From a resolution perspective the establishment of BSC UK would support operational continuity by providing clear oversight and communication lines between the US service company and the non-US operations that it supports and receives support from whilst helping to solve time-zone issues that would otherwise impact the availability of staff in the various geographic regions. BSC UK personnel will have a complete understanding of the services provided to the service recipients and by the service providers and the ability to facilitate the resolution of any issues that may arise during a stress, resolution or post-resolution circumstance.

Given the importance of structural reform there is a requirement for the Barclays group operating model to be as efficient as possible. Therefore, the role of BSC UK should also be able to ensure a more efficient and higher quality service is provided from BSC specifically to Barclays UK. This will be achieved through UK staff monitoring the provision of services from BSC in the US to UK entities in the Barclays group as well as from non-US entities into BSC. This will allow better aggregation and prioritisation of demand and a better customer service in terms of handling disputes and issues.

This is [in] line with our understanding of the service delivery model anticipated for significant service companies as part of the Structural Reform Program.

…

e) Is the transaction or planning consistent with, and can it be seen to be consistent with, our purpose and values?

Yes

The decision to set up BSC UK has sound commercial purpose and on this basis adding it to the VAT group would ensure that we are not financially disadvantaged as a consequence of basing a service company outside of the UK.

The placement of BSC outside the UK is driven by regulatory instructions. If instead, BSC was a UK company and all other factors remaining the same (e.g. services would still be provided to the same UK entities), it would be eligible to join the UK VAT group.

Therefore, taking advantage of existing legislative provisions as well as accepted practice to add BSC UK to a VAT group creates tax efficiencies and reduces cost, thus helping to maximise shareholder value.

…

6. Barclays Lens Evaluation

An assessment of BSC UK's establishment through the perspective of the Barclays Lens is included below:

6.1. How are we making a profit (directly or indirectly)?

6.1.1. BSC UK is being formed in a straightforward manner, consistent with the group approach to other foreign-incorporated service companies. The direct profit impact is a VAT saving to service recipients, expected to be c. £15m-20m per annum. The indirect profit impact is improved operational efficiency delivery to recipients.

…"

63. The minutes of the 25 April 2017 CTTR meeting, recorded, under the heading "Discussion", that the background to the set-up of the UK Branch, which was referred to as the "Transaction", was explained and steps for this were outlined.

64. It continued, noting:

> "It was highlighted that the aim of the Transaction was to improve the quality of services, both received by BSC and provided from BSC, through the set-up of BSC UK.
>
> The background explanation included a brief overview of the current VAT treatment of the services which BSC provides to UK recipients, and the consequences of establishing BSC UK.
>
> It was noted that the proposal was consistent with the service delivery model which has been adopted by Barclays Shared Services (BSS) and Barclays Technology Centre India (BTCI) for a number of years."

65. One of the "key points" noted during the discussion was the question asked by Matthew Cross (Compliance) as to whether the UK Branch would undertake any regulated activities. He was told that this was "not expected" and that the relevant Service Appendices detailing BSC UK's service catalogue would be made available to Compliance for review when finalised. The proposal was unanimously approved by the CTTR.

66. Following the CTTR meeting Mr McCabe, assisted by Ms Hadjikakou, appears to have taken the lead in progressing the proposal for the creation of the UK Branch.

67. On 23 May 2017 Mr McCabe sent an email to Velizar Tarashev (BI Finance – London) with the subject line "VAT opportunity in BI – grateful for your support/agreement?" This email stated:

> "You will recall that I mentioned we are supporting the creation of a US (sic) Branch of BSC …: the structure [ie the UK Branch] is forecast to provide an accretive P&L Benefit of £6.5m this year, and perhaps £15m a year, annually.
>
> …
>
> It is the same point for BTCI and BSS; the structure obviates the need to account for c£40m of reverse charge VAT but it costs c£1.1m to run the Branches."

68. It is clear from an email from Mr Westwood to Mr Carl Senior (Markets – London) and copied to Mr McCabe on 7 June 2017 that he, Mr Westwood "would be fine" given Mr McCabe's "overall supervision" if the manager of the UK Branch had:

> "… a dotted line into me as CEO of BSC if that helped."

69. On 11 July 2017 Mr McCabe sent an email to Kristie Wong (Finance – New York) in which he explained that he had been "asked to help" with the creation of the UK Branch and that he thought that she was "aware" of that proposal and the "VAT benefits it potentially offers". The email continued, stating that to progress the proposal it was necessary to hire "four UK based resources [employees]" to be "co-located with our existing team, in Radbroke". The email concluded with Mr McCabe asking Ms Wong "who he was best to speak to get approval, both to hire within BSC and consequential costs."

70. An email exchange took place on 19 July 2017. This was in relation to the UK branches of BTCI and Barclays Shared Services ("BSS" – a group service company based in India

providing "functional services", eg HR, finance and legal compliance). In that email exchange Ms Hadjikakou explained to Mani Kohli (Group Centre) that:

> "Manual billing is required to evidence the direct billing of [Corporate Real Estate Services] costs to the UK branch for UK VAT grouping requirements."

The email chain also included an email from Mr McCabe to Chetan Balu (Finance) in which Mr McCabe observed that "direct billing" of the premises was needed as it was a "key part of the substance requirements for the UK Branches of BSS and BTCI. In that email he informed Mr Balu that, "we will need the same for BSC when [it is] operationalised" and asked if this could be "agreed and progressed ASAP?"

71. The BSC Board met on 26 July 2017 to review and approve the creation of the UK Branch. The materials provided to the Board for the purposes of this meeting included the following summary:

> "**Proposal**
>
> • BSC will set up a UK establishment that will manage BSC's customer and supplier relationships outside of the US. The aim of BSC UK is to improve services provided and received by BSC and it will operate a similar model to the model currently in place in respect of the UK establishments of Barclays Shared Services (BSS) and Barclays Technology Centres India (BTCI).
>
> • BSC UK will comprise 3 service delivery managers and a Head of BSC UK (at Director level). An individual in Chennai will be dedicated to providing BSC UK with Finance support. BSC UK will therefore involve 5 FTEs in total. BSC UK will pay for IT facilities necessary for its day-to-day operations and desk space locally in the UK.
>
> It is anticipated that the running costs will be c. £500k per annum.
>
> **UK Tax Analysis**
>
> As a result of having a UK establishment, BSC may be added [to] Barclays' UK VAT group. Accordingly, supplies made between BSC and other members of the group will be disregarded for VAT purposes. Accordingly, UK service recipients (e.g. BBPLC and BSerL) will no longer be subject to a reverse charge for VAT purposes. It is expected that this will lead to a cost saving for the Group of £15m-£20m.
>
> **Approvals forums**
>
> The proposal has been signed off by the relevant functions (including Tax, TAG, Reg Policy, Reg Relations, Risk, Compliance, Legal) and has been through the following formal approvals forums:
>
> • Tax Risk Assessment Panel
>
> • Committee for Transactions with Tax Risk
>
> • Tax Management Oversight Committee
>
> • Legal Entity Review Committee
>
> **Request for Approval**
>
> • Establishment of BSC UK
>
> • Registration of BSC UK with Companies House and HMRC
>
> • Application to HMRC for addition of BSC to the UK VAT group
>
> • Appointment of Head of BSC UK to the Board of BSC

• Authority to approve the Head of BSC UK to be delegated to 1 Director

• Opening of a GBP bank account for BSC UK"

72. Although the Statement of Agreed Facts records that the Companies House website states that the date of registration of the UK Branch at Companies House was 26 July 2017, the Companies House issued Certificate of Registration has a registration date of 2 August 2017.

73. A "Change Note", dated 27 June 2017 with a "Change Effective Date" of 31 July 2017, recorded a change to an IGA, dated 31 December 2015, between BSC, as the service provider, and Barclays Bank PLC, as service recipient. The "Reason for Change" stated on the Note was:

> "Barclays Services Corporation UK ("BSC UK") will be set-up to manage the delivery of services provided by its Head Office, Barclays Services Corporation to the Service Recipient, Barclays Bank PLC. Correspondingly, this proposed change will capture the role of BSC UK in the provision of services."

74. The "Overview of Services" in the first schedule to the Change Note explained that:

> "The Service Provider through its representative in the UK (Barclays Services Corporation UK) manages the provision of services to the Service Recipient:
>
> - Demand Planning – Regular sizing of activities and assessment of Service Recipient requirements
> - Stakeholder Management – Relationship development with end users
> - Service Monitoring – Review of ongoing service delivery, issue escalation and resolution"

75. Ms Hadjikakou who was not in "that service management governance role at the time" was unable to explain why the Change Request had been made at a time before Companies House had issued a registration certificate for the UK Branch.

76. On 1 August 2017 Mr McCabe sent an email to Alastair Blackwell (ServCo Management – New York). Mr Blackwell was described by Ms Hadjikakou, as a senior managing director "within Barclays service company" who did not work for BSC.

77. The purpose of that email was to seek Mr Blackwell's approval in relation to the hiring of five full time employees and associated costs for which Mr McCabe was "struggling to get approval". This was despite the proposal for the creation of UK Branch having "widespread support". The email explained that the proposal to create the UK Branch would "allow us to leverage the same VAT grouping structures" as in BSS and BTCI to "deliver a tax benefit." Both BSS and BTCI had UK branches.

78. On 2 August 2017 Mr McCabe sent and email to Matthew Press (HR Barclays – London with the subject heading, "BSC UK Branch – approval to recruit". This explained that:

> "The UK resources (one D, 1 VP & 2 AVPs) will be based in Radbroke, …; they will be employed on a BSC UK Branch contract (this is essential, to make the VAT construct work) and will have reporting lines in the UK and to the Board of BSC in the US?"

79. An email was sent, on 5 September 2017, by Lucy Dorr (Barclays – New York), who was the "service owner" for BI Shared Services, to Nick Doddy (of BESL) and others. Mr

Doddy was the lead for "customer experience" who, although based in the UK would as Ms Hadjikakou explained, have had teams "across the globe". That email stated that the UK Branch:

> "Would comprise 4-5 people [for a] tax benefit of 15mm GBP back to BI [Barclays International]. This is not a requirement for SRP [the Structural Reform Programme] but rather a commercial decision that will also prepare a blueprint for BBI."

80. On 21 September 2017, Ralph Orciuoli (Barclays – New York) sent an email to Ms Dorr which was copied to Sylvia Veita (Barclaycard US) and Mr Doddy in relation to the creation of the UK Branch to let her know he had spoken to Jai Westwood:

> "… and we are on the same page. He is supportive of the [5] heads reporting to either/or Sylvia & Nick. He just needs some visibility as CEO of BSC – which he is flex. i.e. can be in the form of submitting papers, etc. just something so he and BSC board is aware of flow and issues.
>
> I am [to] have a call with the tax folks at 11:30 to discuss our the (sic) cost centers are setup and flow, and any other questions.
>
> Will keep you posted."

81. Having spoken to the tax team, Mr Orciuoli sent Ms Dorr an email later on 21 September 2017. In it he noted that a "cost center" was required to charge the heads "asap", with an estimated annual cost of £500,000. The email noted that "the tax team" were committed to providing "monthly reports of the on-going tax benefits so to always have evidence to support the 5 people". He also identified:

> "… two benefits to the firm:
>
> - a £15mm p.a. accrual [which] will start as soon as we can get people funded.
> - A 1 time £21mm tax benefit will be realized this year if we can establish this effort in time (ie need to demonstrate operationalization this year)."

82. On 12 October 2017 an email was sent by Fiona Nichols (Personal & Corporate Banking HR) to various individuals including Mr McCabe and Ms Hadjikakou regarding the UK Branch. This stated that it had been agreed that the UK Branch would "reside under Nick Doddy", who was, as we have already noted, employed by BESL. That email also repeated the annual £15 million accrual and "one off" tax benefits of establishing the UK Branch. This prompted an email response from Mr McCabe, 13 minutes after he had received the email from Ms Nichols, in which he wrote:

> "… please can I ask that we try not to refer to tax benefits in these mails? Apologies but this is a tax request and I am trying to ensure we meet their requirements as best we can?"

83. As it transpired, the costs of the UK Branch were initially attributed to a costs centre associated with BESL and were recharged to the UK Branch in 2018 by way of a "one off adjustment". However, notwithstanding the best efforts of Ms Hadjikakou, it was not possible to allocate the 2017 costs to the UK Branch as is apparent from an email sent by Ms Nicols to Ms Hadjikakou on 26 January 2018 which stated:

> "The Change/Transformation are working through the SAP build and we are just waiting for Legal to confirm which legal entity this needs to be set up in SAP against.

> They have flagged that it is probably unlikely that payroll will be able to backdate costs against the new cost center, back to December. From an HMRC perspective, does this have any impact that we need to be aware of?
>
> With regards to timescales for Nick [Doddy] I am happy to speak to him if this is causing an issue."

84. On 16 December 2017, having made the Application and received HMRC's letter seeking further information (see below), in an email to Frederick Pett (Barclays – London), concerning the invoicing of the UK Branch Corporate Real Estate Services ("CRES"), Ms Hadjikakou requested an update. The email continued:

> "I urgently require confirmation that BSC UK Branch and BTIC Branch will receive monthly invoices from December for all CRES charges?
>
> Both UK branches are being reviewed by HMRC and these invoices are imperative to demonstrating their substance.
>
> Grateful if you can confirm asap".

85. In evidence, Ms Hadjikakou confirmed that she had used HMRC's letter requesting further information in relation to the Application as an "impetus" to get Mr Pett to deliver the invoices and that she had been chasing him "for months on end" since the tine when she had been working in the UK branch of BTCI towards the establishment of the UK Branch.

Employees

86. As noted in the Statement of Agreed Facts, Ms Hadjikakou, Michael Curran, Nicola McEnaney and Nicholas Leason, all of whom are party to a contract of employment with the UK Branch, had all held other roles within the Barclays organisation before commencing employment with the UK Branch.

87. Ms Hadjikakou had, prior to her appointment as manager of the UK Branch, been employed as a UK branch manager by BTCI based in Radbroke Hall in Cheshire. Mr McCabe was the head of the UK branch of BTCI and Ms Hadjikakou was his deputy. She explained that "Manager" was a term used for a grade at the bank and that she was not the only manager of BTCI UK. Also, that her role at BTCI UK focused specifically on strategy and planning.

88. When she joined BTCI UK in April 2017, Ms Hadjikakou was aware from Mr McCabe of a project to establish the UK Branch. Although she had not been with BTCI UK that long, on 20 October 2017 Ms Hadjikakou decided to apply for the position with the UK Branch having seen an advertisement on the Barclays 'Internal Job Board', a section of the Barclays intranet site, inviting applications for the role of head of the new UK Branch. She attended an interview and was subsequently offered and accepted the position as Head of the UK Branch in early November 2017, a role she continues to hold.

89. Although Ms Hadjikakou signed her contract of employment with the UK Branch on 8 January 2018 it had a start date of "no later" than 1 December 2017. As at that date she was line-managed in the UK by Mr McCabe who was responsible, for example, for her appraisals and day to day supervision. She explained that it was a fairly common practice across the Barclays organisation to have more than one reporting line, particularly for employees who are based in one jurisdiction but have responsibilities aligned to individuals in other jurisdictions. As Head of the UK Branch she also reported to Mr Westwood, providing him with regular updates on the performance and activities of the UK Branch at BSC Board meetings.

90. Ms Hadjikakou continued to carry out work for BTCI during December 2017 and during January and February 2018. In evidence, she explained that she was responsible for

merging the UK branches of BTCI and BSS which took up the "vast majority" of her time. Although the BTCI /BSS merger was completed on 22 December 2017, there was some subsequent email correspondence, eg an email on 8 December 2017 was sent from "Hadjikakou, Elini: BTCI UK Branch" in relation to the "Merger of BSS & BTCI Branches – Employee Transfers".

91. Michael Curran, a Service Delivery Manager is an Assistant Vice President ("AVP") on the internal Barclays grading scale. Prior to joining the UK Branch, Mr Curran was a UK Branch Business Relationship Manager. Under the terms of his contract of employment with the UK Branch, which he signed on 9 January 2018, Mr Curran's contractual start date was 1 December 2017. However, he continued to work in his previous role until 11 December 2017 as is clear from an email sent to him by Ms Hadjikakou on 4 December under the subject heading "Hi":

> "Hi Mike,
>
> Hope you're well and having an easy last week in your old role.
>
> Looking forward to you starting next week and to seeing you on Thursday at the Christmas Party.
>
> Just wanted to let you know that you've been booked on a site induction on Tuesday 12th December at 8.45am. Hope that's ok?
>
> Can you email me your staff number so that I can arrange a permanent pass for you too."

92. Nicola McEnaney is also a Service Delivery Manager and AVP. Prior to joining the UK Branch, she worked in the Structural Reform Project migration team. Her contract of employment with the UK Branch, which was signed on 8 January 2018, gave a start date of 1 December 2017. Her first day of work for the UK Branch was 4 December 2017.

93. Nicholas Leason is a Service Delivery Manager and a Vice President on the internal Barclays grading scale. Mr Leason began working for the UK Branch on 8 January 2018. Prior to joining the UK Branch, Mr Leason had been a service manager working in 'Run the Bank Technology', primarily focussed on delivering services to Barclays Contact Centres and the Community Banking Branch Network.

94. By the end of October 2017 it had become apparent, as illustrated by an email dated 31 October 2017 from Sarah Brown (HR Services) to Mr McCabe, regarding the employment of Mr Curran, that the UK Branch employees would only be able to commence their employment with the UK Branch either on 1 December 2017 or 1 January 2018.

95. The email explained that the appointment would be:

> "… a technical transfer. A technical transfer is when a colleague changes their Legal Employing Entity, which Michael [Curran] will do. Lisa confirmed the new Legal Employing Entity should be Barclays Services Ltd and not BTCI, so this won't affect his pension. A technical transfer can only be effective from the 1st of the month, largely for tax reasons. The HMRC see a change of Legal Employing Entity like a change in employers, so if the start date were mid month it would look like he had 2 jobs for the same month and he would be heavily taxed. So our start date has to either be 1st Dec or 1st Jan. To achieve the 1st Dec we must have the salary all approved and the details in Taleo fully approved by payroll cut off for Oct, which is Thursday 9th Nov. So we have a little over a week. I wanted to make you aware as I think you are already having start date conversations with Michael's current line manager. This obviously won't give them the full 4 weeks notice so they would have to be in agreement also."

96. In his email in reply, also of 31 October 2017, Mr McCabe said that he was "not sure" he understood:

> "… the point on moving employing entities …? Am not aware it has impacted others as we move into the Branch. That said, there is a financial imperative for the Group to have people in role as soon as possible and so if we can get this done by December 1st, that would be great?

97. Although Ms Hadjikakou could not confirm the "financial imperative" to which Mr McCabe referred, we have little doubt that this was a reference to the "one time" £21 million 'tax benefit' expected to arise if the UK Branch could be made operational before the end of 2017 (see above). With this "financial imperative" in mind, Mr McCabe and Ms Hadjikakou were presented with a choice by their HR colleagues. This was for staff either being employed from 1 December 2017 by BESL or from 1 January 2018 by BSC.

98. An email from Ms Brown to Mr McCabe and Ms Hadjikakou on 7 November 2017, under the Subject "Legal Entity Issue", stated:

> "I guess it depends if getting them started, albeit slightly incorrectly, is more important or if it's more important that everything is right first time. If the later then the start dates would need to be 1st Jan 2018."

Within a minute, Mr McCabe replied:

> "December 1st is key – we need them in place (and the Director position) to ensure that we can benefit from a material transaction planned pre year-end."

99. There was, therefore, as Ms Hadjikakou confirmed in evidence, a conscious decision that she, Mr Curran and Ms McEnany should be employed by BESL, the "wrong" entity, rather than the UK Branch. It was also agreed by Mr McCabe and Ms Hadjikakou, that although Mr Curran would be formally employed by BESL from 1 December 2017 there would be a "phased handover" from his previous role and, as such, Mr Curran was not available for the UK Branch on 1 December 2017.

Post 1 December 2017

100. In the morning of 1 December 2017 Ms Hadjikakou sent an email to Vali Odedra (Barclays Investment Bank) to support the proposed salary for Mr Leason on joining the UK Branch. Also that day, Ms Hadjikakou sent an email to Ms Nichols asking how she could make changes in the organisational structure so that Ms McEnaney, Mr Curran and the UK Bank VP roles reported to her. Another email was sent by Ms Hadjikakou to Ms Nichols on 1 December 2017 inviting Ms Nichols (and others who were copied into the email) to a "BSC UK Catch Up" Webex call on 6 December 2017.

101. On 4 December 2017, her first day working for the UK Branch, Ms McEnaney received an email from Ms Hadjikakou with the subject heading "BI Head of Business Services Playbook Summary DRAFT". Attached to that email was the "BI HoBS [Heads of Business Services] Playbook". The framework document, which was not in place on "the first day" (ie 1 December 2017), was prepared to detail the purpose of the UK Branch.

102. In evidence, when asked to give a "sense" of the document, Ms Hadjikakou said that:

> "… the BI service office is representative of the BI legal entity recipients. Our role was very specific around representing Barclays Services Corporation as a provider, but we liaise very closely with the BI service office. They were established some months – I'm not sure of the exact dates – prior to us. They will have been involved in phase 1 and developed a playbook of – that detailed their responsibilities, the escalation points, the responsibilities of their head of business services. So should a legal entity

> recipient have an issue with a particular service, with a particular SLA [Service Level Agreement] that they – is not being resolved in a timely manner, it clearly details that escalation route."

103. In her email of 7 December 2017, responding to Ms Hadjikakou's 4 December 2017 email, Ms McEnaney wrote:

> "I've been through the slides and thinking about the BSC framework you mentioned ... just one question, which may be a little stupid, I'm not entirely sure where we actually fit in the document? So I'm not too sure where to pull our objectives from."

104. Ms Hadjikakou explained that as Ms McEnaney did not have any experience of internal outsourcing standards of OCIR, she had shared the framework document with her with the intention of holding a "workshop" when Mr Curran "was in play" a week later. Her plan was that they would go through the documents together and draw out their findings to enable them to "clearly define" the purpose and scope of the UK Branch, and also where value could be added to the internal process. As Ms Hadjikakou explained, during December 2017 they were "still kind of figuring things out" and that the role of the UK Branch was evolving.

105. When it was suggested to her that all the UK Branch had been really doing in December 2017 was to support the Application, Ms Hadjikakou disagreed saying:

> "… we were starting off in terms of developing this service management functionality. The HMRC piece was one element. Once we'd answered those [ie HMRC's] questions, we were then very much focused on: we need to build this framework. We need to start understanding what costs are consumed by BSC, which services they are aligned to, how many FTE [ie Full Time Employees] sit in the US with those services, and who do they deliver services to. That was very much the focus of – of the Branch"

106. Also, on 4 December 2017, Ms Hadjikakou sent an email to Nicola McAlinden, the head of BESL's service office who was responsible for the BX IGAs and the BESL IGAs that had already "gone live" and had access to the "whole catalogue of IGAs that were operated by Barclays. The email, which was copied to Alexandra Kipping (ServCo Management Office) who reported to Ms McAlinden, notified Ms McAlinden that she, Ms Hadjikakou, had "recently" taken the role as head of the UK Branch and wanted to "link in" with Ms McAlinden regarding the UK Branch's IGAs. She asked to be included in any communications relating to the UK Branch and "share with us" the IGAs already in place.

107. Ms McAlinden replied to let Ms Hadjikakou know that there had been a call on 4 December 2017 with "interested parties" and that, although she had not been included in that call, she would be included "on the actions and subsequent meetings." In subsequent emails Ms Hadjikakou sought further details from Ms McAlinden of those who had been working on the BSC IGAs. As Ms Hadjikakou put it in cross-examination:

> "I was asking somebody [Ms McAlinden] who led phase 1 of this initiative who her engagement points were in relation to Barclays Services Corporation. She was the one person that could give me the names of many people."

108. In her email to Mr Westwood of 11 December 2017, Ms Hadjikakou wrote:

> "**BSC UK Branch - update for the week starting December 4th**
>
> Wanted to give you an update on the progress made in the UK Branch last week,
>
> Achievements/progress over the last week.

- BSC UK Branch application filed with HMRC on the 1st December – as yet no response received from HMRC. I will let you know as soon as they do.
- BSC UK Branch Team – very pleased to welcome Nikki McEnaney & Michael Curran to the team. Nikki joins us from the Barclays.net migration team where she worked as a Performance Manager and Mike was a Business Manager at a central Manchester Barclays branch. Looking forward to working with them both as we build out the UK Branch.
- Recruitment – we have now filled the fourth and final position in the UK Branch team. A formal offer was made to Nick Leason last week which he has since accepted, Nick is currently a Service Delivery manager in BUK and he will hopefully join the UK Branch team in the 1st week of Jan.
- ServCo Management Office Engagement – I have linked in with Nicola McAlinden and team on the BSC IGAs. A list of IGAs has been shared and a review meeting scheduled for w/c 11th December. I will continue to support and work with the UK ServCo team to agree a way of presenting service reviews to ServCo management and ensure the UK Branch is involved in the service management reviews.
- Employment contract amendments – continued work with HR/on-boarding teams to amend the contracts for all UK Branch employees such that the employing entity is identified as a UK establishment of Barclays Services Corporation. All team members have been recruited on ServCo contracts, As the proposed amendment is a change in legal entity, it impacts T&C's and further complicates the process. Confirmation of next steps is expected from the on-boarding team w/c 11th December.
- Continued work with Financial Control to ensure they are set up with necessary systems. i.e. Baclays.net access to support BSC UK Branch.

Focus for this week (w/c 11th December)

- Introductory meeting with Sylvia Veitia to introduce myself/team and understand how the UK Branch can add value to her/team's objectives.
- Draft BSC UK Branch framework-working with the team to outline the objectives of the UK Branch. I hope to share a first draft with you in our meeting on the 22nd December.
- Engagement with our FBPs and finance cost management to ensure all financials are managed and transferred to the correct cost centre on a monthly basis and build a regular monthly financial report in relation to BSC UK branch.
- Follow up with ServCo Management Office on service management review meetings & IGA review; this will remain a focus for the coming weeks as we build to the formal service meetings.
- Work with HR & Tax team to re-issue employment contracts for BSC UK Branch team under the correct employing entity. The team have been made aware of pending contract amendments requited to demonstrate "substance" of the UK Branch

Risks and issues

> • HMRC review; remains a risk until approval of BSC's UK branch application is received from HRMC.
>
> Please do not hesitate to contact me if you have any questions or require any further information.
>
> If you're happy with this approach I'll aim to provide you with a similar update each week to keep you up to speed on progress?"

109. Clearly Mr Westwood was happy for Ms Hadjikakou to provide weekly email updates as, on 19 December 2017, she provided him with an email update for "the week starting on December 11th" 2017. In it she told him that HMRC had requested further information regarding the Application (see below) and work to provide a response to it by 11 January 2018 would be "a focus for me and the team over the next few weeks" and that it would be a "priority" that week "to gather [the] information requested by HMRC".

110. The only matter noted under "Risks and Issues" was that there remained a risk "until approval" of the Application "is received" from HMRC. The email also referred to progress having been made in drafting the "framework" document and that Mr Leason had signed his contract of employment. Ms Hadjikakou also stated in the email that she would:

> "… continue to support and work with the UK ServCo team, Eugene Gorfin and Kevin Kammer to ensure the UK Branch is captured in the IGAs and is involved in the service management reviews."

111. When asked if Ms McAlinden was "basically in charge" of the service review process, Ms Hadjikakou said that Ms McAlinden "had access to the golden source of information" and that, as at December 2017, the responsibility for maintaining IGAs "sat with" Ms McAlinden. She also explained that the entire service management governance framework "was evolving" and had been since 2017 and that it was not "firmly established" from "day one". She continued:

> "I think it's fair to say we were all still kind of figuring things out and trying to determine the appropriate procedures to put in place to meet internal outsourcing standards."

112. In her 4 January 2018 email to Mr Westwood, with an update on the UK Branch for the week commencing 2 January 2018, Ms Hadjikakou set out the "achievements/progress over the last week". These included:

> "• Data continues to be collated for HMRC in response to the UK Branch's application to join the UK VAT Group. We're making good progress, and are on track to provide all requested information by HMRC's deadline of the 15th January."
>
> • Employment contract amendments – progress has been made in updating the team's employment contracts. Revised copies are expected by the end of this week and I have set up consultation meetings with the team on Monday to take them through the minor amendments. Subject to their authorisation we will be in a position to share with HMRC and demonstrate that the team is directly employed by BSC UK Branch."

113. Also, with regard to the Draft framework document, she reported in that email that she had held meetings with Ms Kipping and Mr Gorfin:

> "… to start to piece together the information available relating to BSC's IGAs from a service recipient and service provided perspective. They were good meetings and both were keen for us to help support the process.

> Understand that there is a working group and workshops in the process of being set up to prepare a draft of BSC's IGAs as required by the FCA & PRA in its capacity as a "permitted supplier" ServCo. Both have recommended the team and I are added to these meetings. Plan is to data gather in Jan with a view to have a draft IGA prepared for Feb. I will keep you updated on progress."

114. Again the only item under "Risks and issues" was the HMRC review which remained "a risk until approval of BSC's UK branch application is received from HRMC."

115. As noted above, 8 January 2018 was Mr Leason's first day of employment with the UK Branch. On that day he sent an email to Ms McAlinden stating:

> "Not sure if you can help but I've recently joined BSC UK and I'm looking to get access to sections within the Service Portal site. IGAs, Service Reviews, etc. do you know who owns those and how myself and team can get access?"

116. The "Service Portal", as Ms Hadjikakou explained, provides access to Barclays IGAs. It includes all the service appendices, links to the intranet site for the UK Branch, BX and BI. "Every piece of information regarding internal outsourcing standards is documented, or at least linked within that service portal access" which also includes management information. There is a section within the portal where managers will rate their entity's service level agreements ("SLAs"). The UK Branch, which did not have access to it on 8 January 2018 when Mr Leason sent his email, downloads information from the Service Portal on the 14th of each month and identifies any gaps in the responses and, if necessary, follows this up with the Service Providers.

117. On 11 January 2018, in her weekly email to Mr Westwood with an update for the week commencing 8 January 2018, Ms Hadjikakou informed Mr Westwood that the achievements/progress for that week had been the completion of the draft response to HMRC. This had been issued to him, Chris Levy and Richard Crane for review and that:

> "The letter has been amended following your [Mr Westwood's] feedback. Richard Crane reviewed today and was comfortable. He particularly liked the framework however requested we remove the work [sic] "draft" and add "version as at 8 Jan 2018" in the footer to give additional weight to the document. The letter will also reference that the framework will be presented at the next BSC Board meeting. Final amendments will be made and the response submitted to HMRC on Monday 15th January."

118. In evidence, Ms Hadjikakou confirmed that the "framework" that Mr Crane particularly liked was the framework document, we have described above, that Ms Hadjikakou had been working on to detail the purpose of the UK Branch. However, still referring to it as the "Draft BSC UK framework" in her 11 January 2018 email to Mr Westwood, Ms Hadjikakou stated:

> "… updates continue to be made to the framework to include cost flows & IGAs, following our discussion on the 22nd December. This will be work in progress over the next few weeks however hope to be in a position to share a second draft with you by our next 1-2-1."

119. Ms Hadjikakou attached the "latest version" of the UK Branch framework to her next weekly email to Mr Westwood which was sent on 18 January 2018. In it she referred to workshops being scheduled "next week" to progress the IGAs between BSC and UK entities. She also stated that she was working:

> "… with the UK ServCo team to ensure the UK Branch continues to play an active role in supporting the BSC IGA process and service management reviews."

120. As in previous emails, the only item under "Risks and issues" was HMRC's review of the Application pending its approval.

121. The 18 January 2018 email also recorded, under "achievements/progress over the last week", that there had been a response to HMRC's request for further information on 15 January 2018; that Ms Hadjikakou had continued to work with HR to create the UK Branch company code in the HR portal; and that a "change request" had been submitted for the changes to be processed in February (2018) which would align employees to the dedicated UK Branch company code and ring-fence all direct costs, although timescales for completion had not been provided. In addition, the email referred to Ms Hadjikakou having continued to work with Financial Control to ensure they were set up with the necessary systems "ie Barclays.net access" to support the UK Branch. Ms Hadjikakou explained that Barclays.net was essentially online banking for Barclays entities. The only risk or issue identified in the email was the approval of the Application by HMRC.

122. Work continued on the framework document until April 2018 because, as Ms Hadjikakou explained, things "were changing continuously". She said that there had been "numerous drafts" of the document to detail "our purpose". The document, which was closely modelled on a similar document which set out the role for the GSC UK Branch (GSC being the combined BTCI and BSS), something Ms Hadjikakou confirmed in evidence, explaining that she had "leveraged" the GSC document to adapt for the UK Branch.

123. On 6 February 2018 there was a meeting of the Board of BSC in New York which Ms Hadjikakou attended remotely via conference telephone. The minutes of the meeting recorded that she:

> "… reviewed the team members and their respective roles. She advised that there is good communication between her team and Mr Westwood with monthly catch-up meetings and weekly email updates. There was discussion on the payment and how fees are charged for the UK Office services. Mr Westwood advised that all services outside of the US for internal affiliates were performed through the UK Office. Mr Westwood explained the VAT tax benefit that is received by having the UK Branch Office of BSC. Mr Westwood explained that BSC has applied to the UK VAT office to receive the same VAT treatment as Barclays Bank PLC (VAT Grouping); he noted the benefits of the UK Branch primarily include strategy, service and business management and that the VAT treatment is more in keeping with the approach taken both by other Barclays' Branches and indeed across the industry."

124. Although Ms Hadjikakou in evidence referred to "a number of strategic initiatives" undertaken by the UK Branch, in essence this related to its work on updating IGAs.

Application and HMRC's response

125. The Application to add the UK Branch to the VAT Group was made on 1 December 2017 on form VAT 50, which was signed by Robin Prince as the authorised signature on behalf of the VAT Group, and form VAT 51, signed by Mr Prince and also Ms Hadjikakou as an authorised signatory of BSC, the applicant company.

126. The Application was sent to HMRC under a covering letter, signed by Chiu Ming Man in his capacity as "Managing Director, Head of VAT". The letter stated:

> "To whom it may concern,

Please find enclosed forms VAT 50 and VAT 51 (the Application) concerning the addition of Barclays Services Corporation (BSC) to Barclays' VAT group (VAT Registration Number …) (the VAT Group).

BSC is incorporated in Delaware, USA and is eligible to join the VAT Group under s 43A, VATA 1994 by virtue of:

a) being controlled by the same entity as the other members of the VAT Group (Barclays PLC); and

b) having a fixed establishment in the UK.

BSC's UK operation is located at Barclays' site in Radbroke Hall in Knutsford, Cheshire and is registered with Companies House as a UK establishment of BSC under [registration number] (registered on 2 August 2017).

Background

In response to the banking crisis, measures were introduced requiring large UK banks to ring-fence UK retail operations and to establish measures that ensure the continued provision of critical shared services in the event of a resolution. These measures directly affect the way in which UK banks are organised and how they organise the services and facilities they require in order to provide critical economic functions to the wider economy. They aim to ensure that critical services provided to ringfenced banks can continue to be provided even where a member of the group enters into resolution. In addition, they support the objectives of the UK bank recovery and resolution regime, in that they seek to ensure that banks can continue to provide critical economic functions to the real economy in all circumstances (often referred to as 'operational continuity').

In response to the above, Barclays' [sic] has had a renewed focus on all intra-group service delivery, with an emphasis on implementing robust, arm's-length operating models to ensure the efficient and independent operation of all service delivery companies. A core component of this has been the implementation of a service management framework that involves each service company in the group appointing service managers who will be responsible for ensuring that the relevant service standards and service levels contractually agreed between the service company and the service recipient are maintained.

For its material trading locations, Barclays has determined that the most appropriate location for service managers is either in the jurisdiction where the service recipient is located, or otherwise in a jurisdiction which is geographically close and time-zone friendly. This model provides significant operational benefits and has already proved successful in respect of the UK branches of Barclays' Indian service companies.

BSC

BSC is the principal group service company in the United States, which provides services to entities within the Barclays group. BSC provides infrastructure services (e.g. operations, technology, HR and strategy and delivery services) to BBPLC and Barclays Services Limited [ie BESL] in the UK as well as to other Barclays entities globally (principally in Singapore, Japan, Hong Kong and the rest of Europe). Conversely, BSC [is] also the recipient of group services from jurisdictions outside of the US (including in particular the UK, Singapore, India and Hong Kong).

BSC's UK operation

> Consistent with the group's approach to service delivery, BSC has established an operation in the UK from which to manage and monitor the provision of services to its non-US service recipients (in particular the UK, Singapore and Japan). BSC's UK operation also monitors and manages BSC's relationships with the intra-group suppliers of services to BSC originating from outside of the US (in particular the UK, Singapore and Hong Kong).
>
> This arrangement allows a more efficient delivery of services to and from BSC, whilst ensuring that all delivery standards and agreements are met. The UK operation acts as first point-of-contact where issues arise and ensures that such issues are resolved. It also supports the group service company operating model and, in line with that model, costs of the UK operation are recharged to the trading entities that are the ultimate recipients of its services.
>
> The UK has been chosen as the most suitable location for those BSC service managers dealing with non-US services as:
>
> > a) the UK is the most significant non-US buyer of services from BSC and, accordingly, the service managers of the UK branch are expected to liaise regularly with the local buyers of BSC's services in the UK; and
> >
> > b) it will allow the service managers covering Asia-Pacific to be available when those markets are open.
>
> The UK operation of BSC comprises 4 full time, permanent members of staff: 1 director (a very senior corporate grade within Barclays that grants the individual the authority to bind BSC in making and receiving supplies); and a team of 3 service managers that report into the head of the UK operation. The director heads the UK based team and is directly accountable to the CEO of BSC. The service managers are responsible for collating and reporting the information necessary to measure the quality of service provision against the quantitative metrics and KPIs stipulated in the relevant service level agreements between BSC and the trading entities and as mandated under the operational continuity in resolution requirements."

127. At the time the Application was received, on 4 December 2017, in addition to a Barclays VAT Case Team, HMRC had established a small project team (the "Offshoring Project Team") which was engaged with several taxpayers, including Barclays, on the inclusion of overseas entities within UK VAT groups. The project team had been established because HMRC had identified a potential area of risk around VAT grouping of overseas entities.

128. The Application was shared with the Offshoring Project Team to ensure a consistent approach. Mrs Hillman, who then had been working with HMRC's Barclays VAT Case Team for five months, was allocated by the Head of the Offshoring Project Team to lead the case with the technical and input from the members of the Offshoring Project Team including Mrs Picksley.

129. Although she knew that HMRC had 90 days in to assess the Application (see s 43B VATA, below), Mrs Hillman, as she accepted, was not particularly familiar with applications in the context of a branch of an overseas company. She therefore referred to HMRC's guidance and discussed with and obtained input from the Offshoring Project Team to ensure she understood the criteria for the Application and met and applied this criteria correctly. Mrs Picksley confirmed that her discussions with Mrs Hillman were over the telephone. However, neither Mrs Hillman nor Mrs Picksley kept notes of their "general discussions" or telephone conversations. Although Mrs Picksley thought that there was "no requirement" to keep notes,

HMRC's VAT Manual (VGROUPS06400) states that when a HMRC officer is considering using HMRC's powers to refuse an application for VAT grouping for the protection of the revenue, he or she "must":

> "… keep good notes of the entire process. You should keep written records of all the factors that you took into consideration when making the decision and details of your reasons for exercising your powers. These notes should be sufficiently full and legible to be capable of production at a Tribunal hearing. Failure to be able to produce an audit trail for the decision may lead to the refusal being unsustainable."

130. Having been provided with examples of questions, based on other applications, that had been put together by the Offshoring Project Team, Mrs Hillman prepared a letter seeking further information on the Application. Before this letter was issued she sent a draft, by email dated 14 December 2017, to Mrs Picksley asking for any comments or recommendations which would be "gratefully received". Mrs Picksley replied by email on 15 December 2017. Although she said that the letter was "looking good", she still attached an annotated version of it to her email with her comments.

131. Mrs Hillman, having taken account of those comments, wrote to Barclays PLC on 15 December 2017. The letter acknowledged the Application had been received by HMRC on 4 December 2017 and that the appropriate forms had been received with the Application. The letter also explained that, as the Application was for a new member to be included into the VAT Group, HMRC had to ensure it met the eligibility criteria set out in s 43A VATA before the Application could be granted. To that end further information was required. The letter concluded:

> "To enable us to consider as much relevant information as is possible within statutory time limits, I would be grateful if you would provide your responses to all of the points covered in this letter no later than 15th January 2018. I recognise that this is a tight deadline to respond given the Christmas & New Year break but HMRC only have 90 days from 4 December to accept or refuse the application to join the Group and would appreciate it if you could supply the information as soon as possible."

132. Mrs Hillman accepted, when asked, that she had not questioned the timing of the Application in her letter, despite relying on this in her evidence as one of her reasons for refusing the Application. Although she sought to explain this by saying it was "implicit" in the specific questions asked in the letter, she was unable to identify which question before accepting that there was:

> "… no specific question within my letter that covered that one point, no."

133. She also accepted that no further questions had been asked in relation to whether there was a commercial reason for establishing the UK Branch and that she had not raised any issues relating to regulatory compliance, the time zone convenience of being in the UK, how the establishment of the UK Branch could improve the efficiency of the service delivery or whether there was any evidence to identify or support any non-VAT commercial savings. Neither had she asked about the group service operating model and whether the UK Branch would have been created without any perceived VAT saving. Although she agreed that the last of these issues was important, Mrs Hillman could not recall why she had not asked about it or any of the other matters.

134. Barclays responded to Mrs Hillman's letter on 15 January 2018. In addition to answering the specific questions she had raised, a body of information, contained in 33 attachments which included copies of employment contracts, Role Profiles, a detailed

seating/floor plan of the office at Radbroke Hall, a copy of the IGA and Change Notes which incorporated references to BSC and the CTTR memorandum was also provided.

135. On 25 January 2018 Mrs Picksley sent an email to Mrs Hillman in which she noted that the 15 January 2018 deadline for Barclays to respond to HMRC's 15 December 2017 letter had passed. She asked Mrs Hillman if there had been any response from Barclays observing that:

> "We need to be mindful that the 90 day deadline will fast approach and the time scale to consider the information/draft a TAR /obtain Policy approval and issue decision letter will be very tight."

136. Mrs Hillman responded later on 25 January 2018 to tell Mrs Picksley that there had been a response on the deadline date "with a lot of data" and that she had been working through it together with David Graham (of the Offshoring Project Team). She agreed to provide the information to Mrs Picksley. However, on 7 February 2018 Mrs Picksley, who had only seen the 15 January 2017 letter from Barclays and not the additional information provided with it, sent an email to Mr Graham regarding amendments she had made to the draft Technical Advice Request ("TAR") "primarily around the protection of the Revenue section."

137. Mr Graham and Mrs Picksley provided Mrs Hillman with examples of previous TARs to assist her preparation of the TAR required to obtain the approval of HMRC's Policy team. In the TAR Mrs Hillman set out the facts, alongside the arguments of Barclays and her reasons for considering that the Application should be refused. This draft TAR was reviewed by Mr Graham and countersigned by Mrs Picksley, who had still not had sight of the additional information provided by Barclays with the 15 January 2017 letter.

138. Mrs Hillman received a response from Policy on 23 February 2018. This agreed with her view that:

> "HMRC should refuse the application as it appears the newly created UK branch is not a fixed establishment for VAT grouping purposes and also refuse the application because, in our view it is necessary for the protection of the revenue. The two decisions can be made at the same time and should go in a single letter providing the reasons for both decisions."

139. HMRC's letter refusing the Application and setting out the reasons for this decision was issued by Mrs Hillman by letter dated 2 March 2018. The letter explained HMRC had concluded that the UK Branch did not have a 'fixed establishment' in the UK and therefore did not meet the eligibility criteria set out in s 43A VATA. The letter concluded:

> "Objectively, on the information provided to us, we consider that the UK branch of BSC was set up in order to remove substantial supplies provided from outside the UK from a charge to UK VAT. In our view, this amounts to a revenue loss beyond the normal operation of VAT grouping. Despite the claims made by you regarding the commercial reasons behind the UK branch structure, the evidence that has been produced to HMRC does not point to a real commercial function for BSC UK, and that the benefits of any such function are insignificant compared with the VAT benefits of sheltering supplies from the main overseas establishment.
>
> This is supported by reference to the direct profit impact statement made under paragraph 6.1.1. of the BSC UK Proposal – CTTR memo which provides that the direct profit impact is a VAT saving to service recipients of c £15m - £20m per annum.

> There appears to be little or no administrative burden on the business that arises from our refusal to allow the UK branch of BCS [sic] to VAT group. You have already stated, within the final paragraph of your letter dated 15th January 2018, that there would be no additional costs or burdens, other than the VAT cost. If the branch continues without VAT grouping, the administration costs and accounting for VAT on supplies it incurred would be negligible compared with the VAT revenue at stake. There would not appear to be any need for the UK branch to register for VAT.
>
> In consequence we consider that, in this case, the requirements for exercising HMRC's protection of the revenue powers are met."

LEGISLATIVE FRAMEWORK

European Legislation

140. Article 11 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (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."

141. Prior to the enactment of the PVD, VAT grouping was provided for by Article 4(4) of European Council Directive 77/388/EEC (the "Sixth Directive").

UK Legislation

142. Article 11 is implemented in the UK by provisions in VATA relating to VAT groups. Sections 43, 43A and 43B VATA provide for VAT grouping, eligibility and applications to HMRC to be treated as members of a VAT group. At the time the Application was made for BSC to be treated as a member of the VAT Group, these sections provided relevantly as follows:

> **43.— Groups of companies.**
>
> (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
>
> […]
>
> (2A) A supply made by a member of a group ('the supplier') to another member of the group ('the UK member') shall not be disregarded under subsection (1)(a) above if—
>
> (a) it would (if there were no group) be a supply of services to which section 7A(2)(a) applies made to a person belonging in the United Kingdom;
>
> (b) those services are not within any of the descriptions specified in Schedule 9;
>
> (c) the supplier has been supplied (whether or not by a person belonging in the United Kingdom) with any services which do not fall within any of

the descriptions specified in Schedule 9 and section 7A(2)(a) applied to the supply;

(d) the supplier belonged outside the United Kingdom when it was supplied with the services mentioned in paragraph (c) above; and

(e) the services so mentioned have been used by the supplier for making the supply to the UK member.

[…]

43A.— Groups: eligibility.

(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.

[…]

43B.— Groups: applications.

(1) This section applies where an application is made to the Commissioners for two or more bodies corporate, which are eligible by virtue of section 43A, to be treated as members of a group.

(2) This section also applies where two or more bodies corporate are treated as members of a group and an application is made to the Commissioners—

(a) for another body corporate, which is eligible by virtue of section 43A to be treated as a member of the group, to be treated as a member of the group,

[…]

(3) An application with respect to any bodies corporate—

(a) must be made by one of them or by the person controlling them, and

(b) in the case of an application for the bodies to be treated as a group, must appoint one of them as the representative member.

(4) Where this section applies in relation to an application it shall, subject to subsection (6) below, be taken to be granted with effect from—

(a) the day on which the application is received by the Commissioners, or

(b) such earlier or later time as the Commissioners may allow.

(5) The Commissioners may refuse an application, within the period of 90 days starting with the day on which it was received by them, if it appears to them—

(a) in the case of an application such as is mentioned in subsection (1) above, that the bodies corporate are not eligible by virtue of section 43A to be treated as members of a group,

(b) in the case of an application such as is mentioned in subsection (2)(a) above, that the body corporate is not eligible by virtue of section 43A to be treated as a member of the group, or

(c) in any case, that refusal of the application is necessary for the protection of the revenue.

(6) If the Commissioners refuse an application it shall be taken never to have been granted.

143. Sections 83(1)(k) and 84(4A) VATA provide for appeals to the Tribunal in this case. At the material time, they provided, relevantly, as follows:

83.— Appeals.

(1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters—

[…]

(k) the refusal of an application such as is mentioned in section 43B(1) or (2);

84.— Further provisions relating to appeals.

(1) References in this section to an appeal are references to an appeal under section 83.

[…]

(4A) Where an appeal is brought against the refusal of an application such as is mentioned in section 43B(1) or (2) on the grounds stated in section 43B(5)(c)—

(a) the tribunal shall not allow the appeal unless it considers that HMRC could not reasonably have been satisfied that there were grounds for refusing the application,

(b) the refusal shall have effect pending the determination of the appeal, and

(c) if the appeal is allowed, the refusal shall be deemed not to have occurred.

[…]

ISSUES

144. The parties agree, as set out in their 'Amended Agreed List of Issues', that the following issues arise:

(1) Does the UK Branch of BSC constitute a 'fixed establishment in the UK' for the purpose of s 43A VATA (the "Fixed Establishment" Issue).

(2) Does the wording of VATA contain a territorial limitation such that a UK VAT group does not include establishments outside the UK. If so, how would this apply to the facts of BSC's case? (the "Danske Bank Issue").

(3) If BSC does have a fixed establishment in the UK for the purpose of s 43A VATA and there is no territorial limitation, is it the case that HMRC could not reasonably have been satisfied that, in accordance with section 43B(5)(c) of VATA, it was necessary for the protection of the revenue to refuse the Appellants' application for BSC to be treated as a member of the VAT group (the "Protection of the Revenue" Issue).

Fixed Establishment Issue

145. It is common ground that BSC and the members of the VAT Group are under common control. It is also agreed that BSC, a US company, is not established in the UK. However, the parties part company as to whether the UK Branch is a "fixed establishment" of BSC in the UK.

146. In *HSBC Electronic Data Processing (Guangdong) Ltd v HMRC* [2022] STC 367 ("*HSBC*") the Upper Tribunal (Zacaroli J, as he then was, and Judge Thomas Scott) considered, inter alia at [5], the first preliminary issue in that case, namely how:

> "… is the concept of two or more bodies corporate being 'established' or having a 'fixed establishment' in s 43A of VATA, which it is common ground purports to implement the words 'any persons established in the territory of that Member State' in art 11 of the PVD, to be interpreted."

147. HMRC's case on fixed establishment in the present case was in essence identical to that it had advanced in *HSBC*. This, Ms McCarthy said, was "accurately summarised" by the Upper Tribunal in *HSBC* at [15(3)] and [15(4)], as follows:

> "15. …
>
> (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 his business' and 'a fixed establishment' which appear in art 43 of the PVD (concerned with the place of supply), and that jurisprudence should inform the interpretation of 'established' and 'a fixed establishment' in s 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."

148. The Upper Tribunal considered and rejected arguments advanced by HSBC, including, at [37], in relation to a fixed establishment having to make or receive supplies as being contrary to the decision of the Court of Justice of the European Union ("CJEU") in *European Commission v Ireland* (Case C-85/11) [2013] STC 2336 ("*Ireland*") in which it was held that a VAT group could include non-taxable persons. It also rejected, at [49], HSBC's argument that registration of a branch at Companies House pursuant to the Companies Act 2006 and the Overseas Companies Regulations 2009 was sufficient to satisfy the 'established in' and 'fixed establishment' requirement in s 43A VATA, on the basis that, "Parliament's intention in enacting s 43A was to reference the concepts of 'established in' and 'fixed establishment' in the place of supply rules".

149. The Upper Tribunal continued, concluding:

> "50. … that in interpreting in s 43A [VATA] the concept of bodies corporate being established or having a fixed establishment in the UK, and in art 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-Altstadt* (Case C-168/84) [1985] ECR 2251,

> [1985] 3 CMLR 667, at para 18, *ARO Lease* at para 15 and *Titanium* at paras 41–43.
>
> 51. That is not to say that those concepts, as understood in the place of supply rules, are simply 'imported' into s 43A and art 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 Sàrl v Bundeszentralamt für Steuern* (Case C-73/06) EU:C:2007:397, [2008] STC 1113, [2007] ECR I-5655, which concerned the eligibility to be reimbursed VAT in a Member State where the claimant was not registered.
>
> 52. HMRC consider that arts 10 and 11 of Council Implementing Regulation 282/2011/EU (the 'Implementing Regulation') contain an accurate and succinct description of the meaning of those terms in art 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 art 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 s 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."

150. Ms McCarthy contends that what the Upper Tribunal meant by "the precise meaning" of the terms, 'established and 'fixed establishment', being "highly fact sensitive" was that the question of whether the meaning of those terms were satisfied in any particular case, by applying the place of supply principles, would be highly fact sensitive. She sought to rely on the decisions of the Upper Tribunal and the Court of Appeal refusing HSBC's applications for permission to appeal against the Upper Tribunal's decision in *HSBC*. However, it is clear from [6.1] of the Supreme Court's *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001, which is applicable to all courts and tribunals (other than criminal courts) that judgments on applications for permission to appeal:

> "… may not in future be cited before any court unless it clearly indicates that it purports to establish a new principle or to extend the present law. In respect of judgments delivered after the date of this direction, that indication must take the form of an express statement to that effect."

151. Mr Hitchmough contends that although it is clear from the Upper Tribunal's decision in *HSBC* that the concept of fixed establishment in the context of place of supply should

"inform", and therefore should be taken into account, it cannot simply be imported and applied. Neither, he says, can the definition in the Implementing Regulation (relating to the place of supply) which the Upper Tribunal regarded as a "helpful starting point". He submits that it is also clear from *HSBC* that regard should also be had to the case law outside the place of supply principles which is also relevant.

152. To answer the question as to how far the place of supply principles are applicable in the context of VAT grouping, Mr Hitchmough contends that as the place of supply rules and the VAT grouping legislation serve different purposes and have a different focus it is necessary, given the observations by the Upper Tribunal in *HSBC*, for the place of supply principles to be adapted accordingly.

153. Relying on CJEU decisions including *Welmory sp z oo v Dyrektor Izby Skarbowej w Gdańsku* (Case C-605/12) [2015] STC 515 ("*Welmory*"), *ARO Lease BV v Inspecteur der Belastingdienst Grote Ondernemingen, Amsterdam* (Case C-190/95) [1997] STC 1272 and *Ireland*, Mr Hitchmough contends that although the same concept, fixed establishment, is used both in the grouping and in the place of supply rules, it is serving a very different purpose in each. For the purpose of place of supply he says that it is a concept that operates by way of derogation and has been construed quite restrictively.

154. However, Mr Hitchmough contends that this is not the case when the concept of fixed establishment is used in a grouping context. This is because s 43A VATA is not operating as some form of derogation. As such, Mr Hitchmough contends, it would be wrong to apply the same restrictive approach that has been applied in the context of place of supply where the very aim of the place of supply rules is looking to fix the place of a particular supply and therefore requires there to be a need for a supply.

155. By contrast, he contends, in the context of grouping the reference to making supplies cannot be determinative and that therefore the only question for the Tribunal is whether a person is established in a Member State characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources. He says that the reference to the need for "human and technical resources" goes to the question of whether there is an establishment in the UK and the reference to "sufficient degree of permanence" goes to the question of whether any establishment that might exist was fixed. As such, he submits, nothing more is required provided the human and technical resources in the UK make a meaningful commercial contribution to the business of the non-UK company.

156. Assuming that Mr Hitchmough is correct and, like the Upper Tribunal in *HSBC* at [53], leaving the precise meaning of the terms 'established' and 'fixed establishment' to be determined in a subsequent case, for the UK Branch to be a fixed establishment it must therefore have had on 1 December 2017, the date of the Application (which the parties agree is the relevant date that the eligibility requirements for grouping falls to be assessed), sufficient human and technical resources in the UK to make a meaningful commercial contribution to the non-UK company, ie BSC.

157. It is therefore necessary for us to consider what human and technical resources were available to the UK Branch as at 1 December 2017 and, as is clear from the Opinion of Advocate General Kokott in *Welmory* at [46], come to a conclusion on the facts. In doing so, as is clear from *Dong Yang Electronics sp z oo v Dyrektor Izby Administracji Skarbowej we Wrocławiu* (Case C-547/18 [2020] STC 2012 at [31] – [32], we should consider substance rather than legal form.

158. As such, as Advocate General Kokott pointed out, at [48], in *Welmory* it is not necessary for the taxable person, which in the present case is the UK Branch, to have at its

disposal "human resources" it employs or technical resources it owns. As she explained, at [51]:

> "… This is because, even if a fixed establishment does not necessarily require its own human and technical resources, the taxable person must nevertheless—based on the requirement for a sufficient degree of permanence in relation to the establishment—have comparable control over the human and technical resources. Therefore employment and lease contracts are required in particular in relation to the human and technical resources which put the latter at the taxable person's disposal as if they were his own and which therefore also cannot be terminated at short notice."

159. In *Hastings Insurance Services Limited v HMRC* [2018] UKFTT 27 (TC), having referred, at [507] to this passage of Advocate General Kokott's Opinion, the Tribunal (Judge Harriet Morgan and Mr Collard), at [511], considered it "clear" that a requirement for some element of control of the relevant resources is an essential element of the fixed establishment test. The Tribunal continued:

> "… Moreover, we do not consider that in framing the test in this way, as requiring control comparable to that of an owner, the Advocate General can be said, as HRMC [sic] argued, to be setting an unduly high hurdle compared with the other authorities. In *RAL* and *ARO Lease* it was envisaged that the relevant resources had to be under the "direct dependence" of or actually to be employed by the relevant entity."

160. Ms McCarthy contends that, on the evidence, as at 1 December 2017 the UK Branch had no human and no technical resources available to it and therefore, as there was no activity, the UK Branch could not, as a matter of fact, have been a fixed establishment of BSC. Alternatively, she contends that the human and technical resources and activity that was present on 1 December 2017 was so minimal that on any view it cannot count as sufficient for the purposes of the factual exercise set by the Upper Tribunal in *HSBC*.

161. In contrast, Mr Hitchmough, who accepts that the UK Branch was in its infancy and not fully operational on 1 December 2017, submits that, on the evidence, the activity of the UK Branch had commenced "in any relevant sense" no later than 1 December 2017. He says that Ms Hadjikakou had started working formally for BSC from her dedicated desk at Radbroke Hall on 1 December 2017, a combination of human and technical resources, where she continued putting in place the systems and processes required to enable BSC to meet its contractual commitments under the IGAs. Additionally, he submits that on 1 December 2017 the other UK Branch employees had entered into contracts of employment and office space had been secured for them at Radbroke Hall.

162. Although Ms Hadjikakou's, Mr Curran's and Ms McEnany's contracts of employment with the UK Branch which were signed on 8 (Ms Hadjikakou and Ms McEnany) and 9 January 2018 (Mr Curran) and had a start date of 1 December 2017 (the contract of employment for Mr Leason, the other employee of the UK Branch, had a start date of 8 January 2018), as at 1 December 2017 neither Mr Curran nor Ms McEnany had started to work for the UK Branch. Ms McEnany's first day of work was 4 December 2017 and Mr Curran's 12 December 2017.

163. This leaves Ms Hadjikakou who, on 1 December 2017, sent several emails to colleagues relating to the UK Branch. However, she continued to undertake work for BTCI during December 2017 which, she said, took up the "vast majority" of her time. Additionally, as at 1 December 2017, she reported to her line manager, Mr McCabe of BTCI. It was Mr McCabe, rather than anyone at BSC, that was responsible for her day to day supervision. Additionally, Ms Hadjikakou had to email Ms McAlinden on 4 December 2017 to ask if she

could "link in" with Ms McAlinden regarding the UK Branches IGAs only to be informed that there had been a call on that day with "interested parties" which had not included Ms Hadjikakou.

164. As such, having regard to all the circumstances, we are unable to find that there is the required "comparable level" of control, to which the Advocate General referred in *Welmory*, by the UK Branch as her employer.

165. Similarly, even though we accept Mr Hitchmough's submission that Ms Hadjikakou would not have been denied access to Radbroke Hall, her desk, computer and telephone, there was no evidence of the UK Branch having "comparable control" to an owner of such assets as at 1 December 2017. There was also no evidence before us of any formal arrangement by which the UK Branch was permitted to occupy the space allocated to it at Radbroke Hall. For example, there was no evidence of any employment or lease contracts which, as the Advocate General observed in *Welmory* at [51], "are required in particular in relation to the human and technical resources which put the latter at the taxable person's disposal as if they were his own and which therefore also cannot be terminated at short notice."

166. In the absence of such comparable control over the human and technical control resources by the UK Branch, it must follow that it does not, as a matter of fact, satisfy the criteria necessary to be a fixed establishment of BSC.

167. In reaching this conclusion we reject Mr Hitchmough's comparison with a branch in its infancy and an intending trader relying on *Finanzamt Goslar v Breitsohl* (C-400/98) [2001] STC 355. This is because the activities undertaken in relation to the UK Branch were, at most, preparatory or auxiliary and, as such, insufficient for the UK Branch, as at 1 December 2017, to even reach its infancy as a fixed establishment (see *Planzer Luxembourg Sàrl v Bundeszentralamt für Steuern* [2008] STC 1113 at [56]).

168. Having concluded that, because of the lack of human and technical resources available to it on 1 December 2017, the UK Branch could not have been a fixed establishment of BSC on that date, we have declined Mr Hitchmough's invitation to give an indication as to when we consider the UK Branch did have sufficient resources. While we accept that such an indication might possibly have been of assistance in any future application, the evidence before us and submissions made were in relation to the 1 December 2017 date and, in the circumstances, anything we might have said in this regard, even if we had the jurisdiction to do so, would in any event have little, if any, assistance.

169. As this conclusion is sufficient to dispose of the appeal it is not strictly necessary for us to address the remaining issues. However, as these issues were fully argued, and in case of any further appeal, we have considered them, albeit not as comprehensively as might have been the case had we come to a different conclusion in relation to the Fixed Establishment issue.

Danske Bank Issue

170. This issue concerns the construction of s 43A VATA and whether it allows the entire eligible non-UK body corporate into a VAT group, the "whole establishment construction", or only that part of the non-UK corporate body established in the UK. Although it is common ground that the whole establishment construction is correct, HMRC, playing "devil's advocate" contend that this has been brought into question by the decision of the CJEU in *Danske Bank A/S, Danmark, Sverige Filial v Skatteverket* (Case C-812/19) [2021] STC 68 ("*Danske Bank*").

171. In *Danske Bank* the issue before the CJEU was whether Article 11 of the PVD must be interpreted as meaning that, for VAT purposes, the principal establishment of a company, situated in a Member State and forming part of a VAT group, and the branch of that company, established in another Member State, must be regarded as separate taxable persons where that principal establishment provides that branch with services and imputes the costs thereof to the branch (see *Danske Bank* at [17]). The Court concluded that:

> "28. … Danske Bank's principal establishment is part of the Danish VAT group at issue. As a result of the fact that it belongs to that VAT group, it must be held, for VAT purposes, that it is that group which supplies the services at issue in the main proceedings.
>
> 29. Furthermore, having regard to the territorial limits resulting from the first paragraph of art 11 of the VAT Directive, the Swedish branch of Danske Bank cannot be regarded as forming part of the Danish VAT group in question.
>
> 30. Accordingly, for VAT purposes, the Danish VAT group to which Danske Bank's principal establishment belongs, on the one hand, and the Swedish branch of that company, on the other, cannot be regarded as forming together a single taxable person."

172. Such a conclusion raises the issue of whether a conforming construction of s 43A VATA to impose the territorial limitation described by the CJEU in *Danske Bank* is possible. If not, the non-conforming legislation must be applied.

173. The principles of conforming construction were "authoritatively" set out in *Vodafone 2 v HMRC* [2010] Ch 77 (see *Swift (trading as A Swift Move) v Robertson* [2014] 1 WLR 3438) in which Sir Andrew Morritt C observed, at [38], that the "broad and far-reaching nature of the obligation" to apply a conforming construction was constrained and "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."

174. It is common ground that the UK has always applied a whole establishment construction of s 43A VATA. In our view any change from a whole establishment to an establishment only construction would give rise to important practical repercussions. That this would be the case is clear from the HM Treasury document of 20 August 2020, *VAT Grouping – Establishment, Eligibility and Registration Call for Evidence*, which was issued to gather the views of businesses that utilise VAT grouping provisions and others particularly in relation as to whether 'establishment only' provisions were to be adopted by the UK.

175. Even if we were equipped to do so, it would not be possible, or proper, for us to evaluate the practical repercussions of what in effect would be a new regime that would be fundamentally different from that currently in place as understood by HMRC and HM Treasury. It therefore follows that because of its broad and far-reaching effect, together with the inevitable practical repercussions that would arise, it is not possible for us to give a conforming construction to s 43A VATA.

Protection of the Revenue Issue

176. As noted above, HMRC may refuse an application for a company to be treated as a member of an existing VAT group under s 43B(5)(c) VATA if that refusal is "necessary for the protection of the revenue." However, the Tribunal cannot allow an appeal unless it considers that HMRC "could not reasonably have been satisfied that there were grounds for refusing the application" (see s 84(4A) VATA).

177. In *HSBC* the Upper Tribunal considered the factors to be taken into account by the Tribunal when considering s 84(4D) VATA (drafted in almost identical terms to s 84(4A)

VATA) which requires the Tribunal to dismiss an appeal "unless it considers that HMRC could not reasonably have been satisfied" that it was appropriate to give notice to a company to terminate its treatment as a member of a group (under s 43C VATA). HSBC had contended that the Tribunal was required 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.

178. The Upper Tribunal noted, at [129], that "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."

179. At [130] of *HSBC* the Upper Tribunal agreed with both HSBC's description of the task before the Tribunal and with HMRC's proviso and stated that the question for the Tribunal 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. It continued, at [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."

180. It is common ground that, in the light of *HSBC*, the question for us is whether HMRC could reasonably have decided to refuse the Application, not whether they had reasonably done so in this case. As such, even if we were to find that HMRC had actually been unreasonable in a *Wednesbury* sense in this case, it would not be determinative as HMRC are entitled, and have in fact defended the decision in this case, to refuse the Application on the basis that it was necessary to do so for the protection of the revenue, not on the four factors identified in *HSBC* but on the basis that they could reasonably have come to such a decision.

181. The legal test to be applied is derived from the second limb of Article 11 PVD. This allows Member States to adopt "any measures needed to prevent tax evasion or avoidance" through the use of Article 11.

182. It is agreed that it follows from the decision of the CJEU in *Direct Cosmetics Ltd and Laughtons Photographs Ltd v Customs and Excise Commissioners* [1988] STC 540 at [24] that counter-avoidance measures can be applied "even where the taxable person carries on business, not with any intention of obtaining a tax advantage, but for commercial reasons" if the Member State considers the decrease in taxable amount unjustified.

183. There is also agreement that the aim of the grouping legislation is administrative simplification. However, the parties part company on what constitutes the relevant simplification. Barclays contend that it is a business facilitation measure allowing a business

choice over its corporate structuring, enabling complex multinationals to group and be taxed in the same way as a single company organised in divisions whereas HMRC contend that it is to remove complexity in relation to VAT accounting.

184. In *Customs and Excise Commissioners v Thorn Materials Supply Ltd and Thorn Resources Ltd* [1998] STC 725 ("*Thorn*") Lord Nolan said, at 733, the provisions:

> "… are not designed to confer exemption or relief from tax. They are designed to simplify and facilitate the collection of tax by treating the representative member as if it were carrying on all the businesses of the other members as well as its own, and dealing on behalf of them all with non-members."

185. This passage from *Thorn* was referred to by Buxton LJ in *Customs and Excise Commissioners v Barclays Bank plc* [2001] STC 1558 ("*Barclays*") at [23] in relation to the intention of VAT grouping being "to simplify and facilitate the collection of the tax, rather than introducing any fundamental change in liability to the tax itself."

186. In *Lloyds Banking Group plc and others v HMRC* [2019] STC 1134 ("*Lloyds*") Rose LJ (as she then was) discussed the domestic case law on VAT grouping and referred to the general principles derived from *Thorn* (at [28]) and *Barclays* (at [29]). At [116] she identified the objectives of the grouping provisions and creation of "the representative member who is deemed to carry on the businesses of the group members", as simplifying administration and combating abuse. Ms McCarthy contends that this supports HMRC's argument that the relevant simplification is in terms of the fact of fewer transactions resulting in simpler VAT accounting.

187. Having referred to *Ireland* at [16] in *Lloyds*, Rose LJ went on to observe, at [18], that:

> "The Court's reasoning in *Commission v Ireland* followed closely that of Advocate General Jääskinen's Opinion in the case. He noted, para 36, that the conclusion that a single taxable person might include any legally independent persons provided that they were closely bound to one another was 'in conformity with the principle of legal certainty, which is particularly important in taxation matters, where not only taxable persons and tax authorities but also the member states need to rely on the clear and precise wording of the relevant European Union law'. The Advocate General described the effect of the formation of a VAT group in the broader context of the VAT regime. He said that '[t]he forming of a VAT group results in the creation of a single taxable person for VAT purposes which is in all aspects comparable to a taxable person consisting of only one entity' (para 40). The VAT regime works best, he said, when the imposition of the tax does 'not affect either competition or the decisions economic operators make when organising their activities, such as legal form or organisational structure' (para 41). He went on: (footnotes omitted)
>
> > '42. The establishment of a VAT group initiates the tax liability of the VAT group, and terminates the separate tax liability of those of its members who were taxable persons for VAT purposes before joining the group. The VAT treatment of the group's transactions, both to and from entities outside the group, is comparable to VAT treatment of a single taxable person operating individually. Transactions between the individual members of the group, and which remain therefore within the group, are considered as having been carried out by the group for itself. Consequently, a VAT group's internal transactions do not exist for VAT purposes.'

188. Mr Hitchmough contends that this, together with the application of those principles by Rose LJ at [120] of her judgment in *Lloyds*, supports his argument that administrative simplification is not confined to VAT accounting or record keeping but extends to the way in which undertakings organise themselves.

189. We agree with Mr Hitchmough and find support for such a conclusion not only in *Lloyds* and *Ireland* but also from the Opinion of Advocate General Kokott in *SC Adient Ltd & Co KG v Agenția Națională de Administrare Fiscală* (C-533/22) of 1 February 2024 at [33]; the Opinion of the Advocate General Rantos in *Finanzamt T v S* (C-184/23) of 16 May 2024 at [80] – [87]; and the explanation by the Exchequer Secretary to the Treasury, Philip Oppenheim MP, that VAT grouping was "originally introduced to provide administrative advantages, giving businesses an alternative to organising themselves on a divisional basis" with the same VAT consequences (see Hansard HC Deb 23 January 1997 vol 288).

190. There was agreement that the VAT and Duties Tribunal in *National Westminster Bank plc* (VAT Decision 15514) and *Xansa Barclaycard Partnership Ltd v Commissioners of Customs and Excise* (2004) VAT Decision 18780 had adopted the correct approach in an appeal against the exercise of the "protection of the revenue" powers. The protection in question being "against any loss of revenue which is not de minimis whether or not it follows from the normal operation of grouping" (see *National Westminster* at [72]) for which there must be "something present other than a completely "straightforward" application of the [grouping] rules before the Commissioners can act to protect the revenue" (see *Xansa Barclaycard* at [44]).

191. This requires the Tribunal to consider the phrase "necessary for the protection of the revenue" as a "totality and involves a balancing exercise in which the Commissioners must weigh the effect on the Appellant of refusal of grouping against the loss of revenue likely to result from grouping" (see *National Westminster* at [74]). It is therefore necessary to consider whether, in this case, there is any loss to the revenue that goes beyond the normal consequences of grouping.

192. Having concluded that the normal aims and consequences of VAT grouping is to provide a freedom to structure a business in a way that best meets its commercial needs while ensuring it is taxed in the same way as a single company organised on a divisional basis, it follows that had we found on the facts that, as at 1 December 2017, the UK Branch had the necessary human and technical resources to be a fixed establishment of BSC, the VAT savings on its admission to the VAT Group would be those that fell within the normal consequences of VAT grouping.

193. Accordingly, it would not have been possible for HMRC to reasonably have been satisfied that there were grounds for refusing the Application for the protection of the revenue.

DECISION

194. For the reasons above, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

JOHN BROOKS
TRIBUNAL JUDGE

Release date: 29th AUGUST 2024