Neutral Citation Number: [2010] EWHC 1061 (Ch)

IN THE UPPER TRIBUNAL
ON APPEAL FROM THE FIRST-TIER TRIBUNAL (TAX CHAMBER)
(APPEAL REFERENCE FTC/14/2009)

Sitting at the Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11th May 2010

Before :

MR JUSTICE MANN

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Between :

DAWSONGROUP Plc	**Appellant**
- and -	
HMRC	**Respondent**

- -
- -

Felicity Cullen (instructed by **Richard Yates LLP(Hons) FCA CTA AHT, Chartered Accountant and Chartered Tax Adviser**) for the Appellant
Daniel Margolin (instructed by **The Solicitor and General Counsel for HM Revenue and Customs**) for the Respondent

Hearing dates: 25th and 26th March 2010

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MANN

Mr Justice Mann :

Introduction

1. This is an Appeal from a determination of Judge Colin Bishopp, sitting in the First Tier Tribunal (Tax Chamber), dated 9th June 2009. The question before him was whether or not certain expenditure incurred by the Appellant ("Dawsongroup") was deductible in computing its profits for the purposes of corporation tax in relation to the accounting year to 31st December 2000. The amount in question was just over £433,000.00. Dawsongroup claimed that that sum was deductible because it was an "investment company" for the purposes of section 30 of the Income and Corporation Taxes Act 1988, and that the sums in question were "disbursed as expenses of management" for the purposes of section 75(1) of the same Act. In order to succeed, Dawsongroup had to succeed on both those issues. The judge held that on the facts Dawsongroup was not an investment company, and also held that even if he had determined otherwise on the first issue, the expenses in question were not expenses of management within section 75. There had been other issues in the hearing below, but they had fallen away by the time of the decision. Dawsongroup appeals on the footing that the judge below was wrong on both counts. The representation before me was the same as it had been below – Mrs Felicity Cullen QC appeared for the taxpayer, and Mr Daniel Margolin appeared for HMRC.

Background

2. Dawsongroup is the holding company of a group of companies which carries on the business of renting trucks, trailers, buses, coaches and some specialist equipment. It has its origins in a haulage business which had begun in 1935. By 1988 it had adopted a group structure and in that year it became a public company and roughly 25% of its shares were floated on the London Stock Exchange. The remaining shares were held by Mr Peter Dawson, his family and trustees for his family.

3. In paragraph 2 of the decision the judge dealt with the background to a decision to take the company private again, reached in 2000. While the share price had originally risen after the flotation, it then declined and fluctuated around the flotation price. The directors thought that poor share performance was attributable to illiquidity because Mr Peter Dawson and his family owned 75% of the issued shares and that outside shareholders were interested in short term profits rather than allowing money to stay in the group for long term gain. A low share price impacted adversely on the reputation and standing of the company in the eyes of outsiders such as bankers and customers. There was an additional financial burden imposed as a result of Dawsongroup being listed, arising out of more stringent compliance requirements including the need for one, and later two, independent directors.

4. By 2000, those controlling and running Dawsongroup had come to the conclusion that it would be better if the company were no longer a listed company, and it was decided that Mr Peter Dawson and his family should make an offer to buy out the external shareholders. The offer was made, the shares were bought and the company became a private one once more. The idea of removing the company's public status was investigated and ultimately supported by the board of Dawsongroup, and money was spent in considering and implementing the offer. The £433,000.00 deduction, which is the subject of these proceedings, is the cost to the company of that exercise. That sum is a proper deduction if Dawsongroup is an investment company and if that money ranks as an expense of management. Hence the issues arising below and on this appeal.

5. I shall have to consider the activities of Dawsongroup and its subsidiaries in more detail below, but in order to understand the narrative and criticism of the decision it is necessary to have an outline understanding at this stage. Dawsongroup was a holding company in the sense that it owned the shares of the other companies in the group. Some of the shareholdings were indirect – that is to say, Dawsongroup's directly owned subsidiaries themselves owned the shareholding in other companies. The group's trading activities were carried out by various of those subsidiaries. From time to time the board of Dawsongroup considered the acquisition of other companies to add to the group. Usually these ideas were rejected, but on occasions companies were purchased. Ultimately the activities of the trading subsidiaries were controlled by Dawsongroup's board, but day to day trading decisions were taken by the subsidiaries in question. Dividends were paid up into Dawsongroup, and Dawsongroup itself distributed its own profits. To that extent the structure was a typical group structure.

6. However, there was one additional feature of its activities. As well as conducting those activities Dawsongroup itself conducted trading activities. Those activities were the provision of services to the rest of the companies in the group. These included centralised treasury functions (Dawsongroup did the borrowing required by the group, and on-lent to the subsidiaries), company secretarial services, IT services, some legal services and other services which were more conveniently and economically acquired centrally and distributed into the group. These services were significant and an arm's length charge was made to the subsidiaries for them. It was common ground that this amounted to a trading activity, and did not amount to "making investments" for the purposes of section 130.

Legislative Provisions

7. Section 130 of the 1988 Act defines "investment company":

> "In this Part of this Act 'investment company' means any company whose business consists wholly or mainly in the making of investments and the principal part of whose income is derived therefrom… "

8. As the judge accepted, and as the parties agreed, there are two distinct parts of the definition. The first relates to the nature of the business ("whose business consists wholly or mainly in the making of investments"), and the second relates to the proportion of the income of the company which comes from that business. It is common ground on the facts of this case that the second part of this test is fulfilled. The dispute turns on the first part.

9. Section 75(1) of the 1988 Act deals with the nature of the expenses which are at issue in this case:

> "In computing for the purposes of corporation tax the total profits for any accounting period of an investment company resident in the United Kingdom there shall be deducted any sums disbursed as expenses of management (including commissions) for that period, except any such expenses as are deductible in computing profits apart from this Section."

The decision appealed from

10. The judge below started his decision by setting out some background. In paragraph 2 he set out the background to the decision to take the company private. He said:

> "Unfortunately, the flotation was not a success. Although the price of the shares increased significantly for a time, it later subsided and remained at or about the flotation price. The Directors' belief was that the poor share value performance was a consequence of two principal clauses: the fact that the majority shareholder, Peter Dawson, and his family owned almost three-quarters of the shares, making the market in them illiquid; and the fact that outside investors were more concerned about short-term profits than long-term growth which was the goal of the 'family' shareholders, a factor which made the strategic management of the Group difficult. Another material consideration was the additional financial burden imposed on the company by reason of its being listed, including the cost of more stringent compliance requirements, one of which was the obligation that its Board should include initially one and later two independent Directors."

11. He then goes on to place the disputed expenditure in the context of the implementation of that decision.

12. From paragraph 6, he goes on to consider the first question, namely the "investment company" question. He correctly identifies the fact that the question is one of fact. At paragraph 9 he referred to a statement of agreed facts (which has been before me as well), supplemented by the oral evidence of the then Finance Director, Mr Clive Gear. In paragraph 10 he sets out the structure of the group and Dawsongroup's position in that structure and describes some of the activities. He then moves on to consider some of the authorities to which he was referred. In the course of this discussion he is said by Mrs Cullen to have committed various errors of exposition which she says demonstrate his misperception of the proper test to be applied.

13. The meat of his decision came in paragraph 25:

> "25. I agree with Mr Margolin that the critical tests are those adumbrated by Lightman J in the final sentence of the extract from his judgment in *Cook v Medway Housing Society*, which I have set out above, and by Teevan J in *Monteagle Estate*. Though I accept that it is possible to be simultaneously a trading company and an investment company, I have reached the clear conclusion that Dawsongroup is a trading company which carries out its business by means of subsidiaries which it controls, that it holds the shares in its subsidiaries as a necessary incidental to its chosen means of carrying on that

> activity, and that the holding of the shares is not an end in itself, a business activity in its own right. I reached the same answer by applying Mrs Cullen's 'elephant test': an investment company, in my judgment, is one which deals in or merely holds, assets such as shares, land or bonds in order to profit, by dividends, rents, or interest from its investments but not, as here, as the means by which it is able to control the assets. Standing back from the matter, it seems to me that Dawsongroup is in reality engaged in trade. I conclude, therefore, that it is not an investment company within the meaning of Section 130, and on that ground alone the appeal must accordingly fail."

14. That meant that the second question (the 'expenses' question) did not technically arise, but he went on to consider it. He made short reference to authorities in paragraph 29 and reached his conclusion in paragraph 31:

> "31. In my judgment, Mr Margolin is right. There must, I think, be a connection, or identifiable relationship, between the expenditure and the investment business of which it is, supposedly, an expense. Here, the expenditure had nothing to do with investment (or trading for that matter). I do not doubt that the regulatory burden was significant, that it impeded the Board's freedom to make strategic decisions and that it adversely affected the Group's growth and profitability. The question, however, is not whether the expenditure was reasonably incurred, or whether the company (ultimately the shareholders) derived a benefit from what was done in return for the expenditure, but whether it is an expense of management, that is the conduct of the (investment) business. The business undertaken by Dawsongroup, whether correctly viewed as trade or investment, was wholly unaffected by what was done – it was, and always would have been, carried on in exactly the same way; no investment decisions (such as the acquisition of a new subsidiary) depended on it; and Dawsongroup's relationship with its subsidiaries, which represent its only investments, was, and was intended to be, unchanged. Indeed, as Mr Gear's evidence makes clear, it was the Board's perception of the effect of its listed status on the Group's trading activities (that is, the need to earn short-term profits at the expense of growth) and on the value, or perhaps more accurately the price, of its shares which led to the incurring of the expenditure. At best it could be said to have made it possible for Dawsongroup to exploit its subsidiaries better in the future, but it could not be said to be expenditure incurred in the course of managing investments."

15. He therefore held that the requirement of Section 75 was not fulfilled by the expenses in question, and Dawsongroup failed for that reason as well.

The proper approach to the law and facts on the investment company question

16. There was common ground on the law which applies to this point, and the manner in which it ought to be applied to the facts. The following were common ground (and I find them to be correctly agreed):

    i) A company can be an investment company within the meaning of the section at the same time as it carries on a trade. The latter activity does not exclude the possibility of its being the former.

    ii) Where a company carries on both activities, whether or not it is to be regarded as an investment company involves a consideration, *inter alia*, of whether one is ancillary to the other.

    iii) In *Cook v Medway Housing Society* [1997] STC 646 at 656 Lightman J expressed the relevant question, in a mixed activity company, as being as follows:

> "In determining what is the business of a company for the purposes of s 130, it is necessary to have regard to the quality, purpose and nature of the company and its activities, and this includes the full circumstances in which the relevant assets are acquired and retained, including the objects clause in the memorandum of association of the taxpayer … It is relevant to have regard to the actual activities carried on by the taxpayer at the relevant date, but if these are viewed without regard to the taxpayer's past history or future plans they may give only a partial and incomplete picture. The critical question is whether the holding of assets to produce a profitable return is merely incidental to the carrying on of some other business, or is the very business carried on by the taxpayer."

    iv) Part of the test to be applied was also set out by Teevan J in the Irish case of *Casey v The Monteagle Estate Co Ltd* [1962] IR 106 at p 138:

> "What has to be looked to is the nature of the operations or functions of the company. The search is not for a company making investments but for a company whose main business is the making of investments."

The criticisms of the decision on the investment company point

17. Dawsongroup's criticism of the decision falls under two main heads. First, it is said that the judge below demonstrated that he applied the wrong test, and second, if that is wrong, then nonetheless the decision was one which no reasonable tribunal could reach on the evidence that it heard. The first of those is said to be demonstrated both in the decision paragraph itself (paragraph 25) and in the reasoning which led up to it, which Mrs Cullen said fed through into paragraph 25 and demonstrated both why it was that the judge fell into error in that paragraph and the error itself.

18. Mrs Cullen said that paragraph 25 (which contains the core decision of the judge) itself betrayed that the judge applied the wrong test. Although it starts by indicating an intention to apply the relevant authorities, it makes a number of errors thereafter. It purports to deploy the concept of a "trading company", when in fact that expression has no meaning in this context – there is no such thing for these purposes. Furthermore, the judge's second sentence contains a fundamental error in that it fails to distinguish between Dawsongroup's activities as a holding company and the operating trades carried on by its subsidiaries. The judge therefore uses an inadmissible concept. He then mis-states Mrs Cullen's "elephant test". That test, as partially recorded in paragraph 18 of the decision, was along the familiar lines that one cannot necessarily precisely define a given entity, but one knows one when one sees one. Having suggested that he was going to apply such a test, however, the judge then attempted a definition. The definition contains errors – a company which "deals in" shares is a company which is carrying on a trade. In the last two sentences he seems to be saying that because Dawsongroup is engaged in trade, it is therefore not an investment company, contrary to his previous apparent acceptance that a company could be an investment company even if it still had a trade.

19. Mrs Cullen said that the errors in this paragraph flow from earlier errors in the judgment.

    i) At an earlier stage the judge had referred to a "trading company", which was not a meaningful concept in this context, as already pointed out.

    ii) In paragraph 11 he demonstrated that he had misunderstood the argument of HMRC. The judge described HMRC's position as being:

    > "that the Appellant's principal activity, determinative of its status, is the *control of* and provision of services to its subsidiaries, which is to be regarded as a trading activity rather than a function of investment." (my emphasis)

    This was not HMRC's position (as Mr Margolin actually accepted before me). HMRC's stated position was that the provision of services was the principal activity. In adopting the stance that he did, the judge put into the core activity something which the Revenue did not claim to be there, and which was not there.

    iii) At one stage in the proceedings the Revenue took the point that the holding of the shares in its subsidiaries and exercising control over the acquisition of and activities of subsidiaries did not amount to a relevant activity at all – it was neither trading nor investment. However, it abandoned that point, and the logical consequence of that was that that side of the Dawsongroup's activities must be taken to be investment activities for the purposes of the section. The judgment did not reflect that. Before me Mr Margolin accepted that that was the logical effect of the Revenue's shifted stance. Mrs Cullen complained that the judge went on to apply various authorities, previously relevant to the abandoned "no business" point, as authorities on the meaning of "investment" and "investment company", thereby taking irrelevant considerations into account.

iv) The judge demonstrated other errors of logic and perception. Thus in paragraph 23 he said:

> "Although, as the *Korean Syndicate* case showed, a holding company could be regarded as carrying on a business, here the holding of the subsidiaries' shares was no more than an adjunct to Dawsongroup's principal activity of controlling a trading group."

Mrs Cullen pointed out that to describe the holding of shares as being an adjunct to the activity of controlling a trading group was to put things the wrong way round. The activity of controlling was an adjunct of holding a controlling interest in the first place – the former flowed from the latter, not the other way round. She also said that the activity of a holding company controlling its trading subsidiaries was a classic example of managing an investment, and thus of investment company activity.

The determination of the investment company point

20. I can deal shortly with some of Mrs Cullen's criticisms.

21. In my view the decision below should not be criticised on the footing that the judge used the irrelevant concept of "trading company". I think that when he used that expression he was using it as a shorthand for "a company which carries on a trade". It may be that the use of the phrase would lead to misunderstanding, but it was no worse than that. The first time he used the phrase was in paragraph 11 of his decision. In paragraph 10 he had described the holding company nature of Dawsongroup, and then the services-providing activities. He then said:

> "Against that background the parties agree that Dawsongroup is a trading company. Its own case is that it is, nevertheless and in addition, an investment company since its principal activity is the holding of assets, that is the shares of its subsidiaries. The respondents do not deny that it is possible for a company to be both engaged in trade and an investment company; their position is that the appellant's principal activity, determinative of its status, is the control of and provision of services to its subsidiaries, which is to be regarded as a trading activity rather than a function of investment."

The first sentence does not, in terms, reflect the agreement between the parties, since neither had said that Dawsongroup was a "trading company". They both said it was a company that traded. I do not think it likely that the judge misunderstood that. His real understanding is set out in the third sentence, reciting the position of the Revenue, which records the position of a company being "engaged in trade". That is what he meant by a trading company, and that is what he meant when he used the same phrase in paragraph 25.

22. Similarly, I reject Mrs Cullen's complaint that the judge applied authorities for the purpose other than that for which they were deployed. Looking at the judge's references to those authorities, he seems to have recognised what they were really

authority for, and on balance seems to have derived more support from them for Dawsongroup's case than for the Revenue's case anyway. At the end of the day they do not seem to have played a real part in his final reasoning; if they did, then it would tend to have supported Dawsongroup's case than the Revenue's.

23. Mrs Cullen's other criticisms are more pertinent, because they go to the point that seems to underlie the judge's reasoning in paragraph 25. The paragraph starts by identifying the test (or the source of the test) and does so correctly. The question is, in essence, what is the main activity – and is it investment activity or is it not? In this case the question is whether the main activity is investment activity or whether it is trading activity.

24. If one is going to ask those questions then one must identify the scope of the two activities correctly. In my view the judge, having set out the correct test, then mis-identified the activities to which he applied it, or perhaps mischaracterised the activities carried on by the company. The parties were at one as to what the trading activities were – they were the provision of services by Dawsongroup to the rest of the group. When the judge says, in paragraph 25, that Dawsongroup was a trading company "which carries out its business by means of the subsidiaries which it controls", he seems to be describing something else. The business of providing services cannot be said to be carried out "by means of" the subsidiaries. The services are provided for the benefit of the subsidiaries. I think that this paragraph betrays that the judge thought that the trading activities of the holding company involved, or included, its control over its trading subsidiaries, or its control over those subsidiaries. He mischaracterises the holding company attributes of Dawsongroup, or some of them, as being trading activities. This is incorrect, and it was not (and is not) the Revenue's case either. That the judge made this mistake is made clearer in the extract from paragraph 23 of his judgment, set out above. He thought that the Revenue was contending that the principal activity was "controlling a trading group". Mr Margolin accepted that that was wrong. To reflect the Revenue's position accurately the judge ought to have said "the principal activity of <u>providing services to</u> a trading group". The judge's formulation is more than a mere inelegancy of expression, or a failure to reflect a party's submissions. I think it supports the proposition, and helps to demonstrate, that the judge analysed the situation so as to separate the feature of merely holding shares from the exercise of the control which that holding enables the holder to do, and that he put the latter on the side of trade in this case. That was not and is not the Revenue's case, and in my view it is not correct. There are two sorts of activities in the case – (a) the trade (the provision of services) and (b) the holding of shares and the arrangement of the affairs of the group which that holding enables, including the disposal and acquisition of companies, the general control of the subsidiaries to ensure the maintenance of their value, and the gathering in of income in the form of dividends from those subsidiaries. That is not a complete catalogue of the activities associated with the holding of shares, but it will do for present purposes. Those activities do not fall on the trading side of the line. They fall on the other side. The Revenue accepts that they are investment activities for the purposes of the question I have to decide, save that it says that any decisions taken at the holding company level about the actual trading activities of subsidiaries (for example, whether a subsidiary should enter into a particular contract) were not investment-type activities. The judge seems to have treated them as trading, and therefore not investment. That, in my view, is wrong.

25. The remainder of paragraph 25 does not demonstrate that the judge escaped from this apparent error. His formulation of the "elephant test" can be divided into two parts. The first describes what he thinks an investment company does. If one leaves out the question of "dealing", which might make the company a trader in shares, it is a reasonable formulation, though perhaps not complete. It is a development of what Lightman J said in *Cook*. However, what he contrasts it with is not a sensible comparator. As a matter of English it is not clear what the "means" is intended to refer back to, but that is not the point. The judge seems to be contrasting the mere holding of investments and the receipt of dividends, on the one hand, with using some more active (less quiescent) control of the assets on the other. That is not a relevant distinction for these purposes. It cannot sensibly be the case (and it is not the Revenue's stance) that a quiescent holding company is an investment company but one which uses its shareholding to control its companies (if that is what the judge meant by assets) is not. A responsible investor pays attention to, and adjusts, his investment from time to time. That adjustment will use "control" over the subsidiaries. That control does not disqualify the activities from being properly characterised as investment activities for the purposes of the section. Of course, the nature of the acts may cross the line away from investment, but the important point is that the deployment of control, by itself, does not necessarily do so. The judge seems to have thought otherwise, and he erred in doing so.

26. The remaining parts of paragraph 25 do not retrieve the situation. The "standing back" exercise is an entirely proper one, but only if one views the situation from the correct standpoint and applies the correct tests. The judge did not do so. His decision is thereby undermined.

27. The position boils down to this. The Revenue's stance, as Mr Margolin said at an early stage of this hearing, and from which it did not resile, is that if Dawsongroup had not carried on its admitted trading activities (the provision of services), its remaining activities would have amounted wholly or mainly to the making of investments for the purposes of the section. However, this company had trading activities, and those activities were the main activities of the company, or at least were significant enough to prevent the investment activities from being the sole or main activities. That was in my view the correct contrast. It was not one which the judge below drew or relied on. He therefore erred and his decision is flawed.

28. That means that the position has to be reconsidered. Mrs Cullen's position is that the evidence all pointed one way, and that was that trading was ancillary to what was properly described as the making of investments. Mr Margolin submitted that if I considered that matters had not been properly assessed then I should remit for further consideration. I have found that the judge applied the wrong test. That, in a sense, means that an incorrect assessment was carried out. However, in the circumstances of this case I do not think it is necessary to remit the matter. There is an extensive statement of agreed facts, which covers much if not most of the relevant evidential ground on this point. There is some further evidence of Mr Gear. His credibility was not in issue, and I have a witness statement and two notes of his cross-examination (there was no transcript). No-one suggested that those notes were inadequate for the purpose of an assessment of the evidence. So, although the judge below did not make many findings of fact on this issue on which I can rely, I can read the evidence for

myself and form my own conclusion on the point. The relevant facts are those appearing in the following paragraphs.

29. I have already indicated the general structure of the group. While Dawsongroup once carried on some external trading, since 1988 all that trading has been carried on by directly or indirectly held subsidiaries of Dawsongroup. The only trade carried on by Dawsongroup is the provision of services to other group members as described above, some of which are described above. The complete list given in evidence by Mr Gear was as follows:

- Financial, banking and treasury services – the subsidiaries were not allowed overdrafts and borrowed working capital from Dawsongroup. Surplus funds were deposited with Dawsongroup. Commercial rates of interest were paid by and to Dawsongroup.
- IT services
- Legal services.
- Financing of hire fleet assets.
- Management services – contract negotiation with customers and suppliers, hire fleet management, knowledge and selection of hire fleet products, knowledge of asset disposal markets and techniques, use of treasury management tools to reduce net borrowing costs, credit assessment and management of customer debt, identification of new rental products, company secretarial services.

30. The income from these activities was significant. In 1999 and 2000 the income was over £2.25m, excluding interest, though without bringing interest into the calculation the activities were overall loss-making. The dividends received in the years 1995 to 2000 varied between £2.35m and £43m, but the latter is seriously out of line. The main point about dividends is that they were very significant. This mainly goes to the second half of the "investment company" test, and it is accepted that Dawsongroup passes that test, but it is not wholly irrelevant to the comparative exercise that has to be performed.

31. Of more significance is the profit from trading. Documents before the judge show internal profits on the management activities. It shows significant profit from the "Computer Department", very significant profits on "Finance (interest)", small profits on "credit control" and legal, and very significant losses on "Management". Taking 1999 as an example, the Finance profit figure was £287,683, computer profits were £145,010, Management losses were £368,7564, credit control profit was £2,977 and Legal profits were £5,283. The figures for other years fluctuate quite widely, but the overall thrust is the same. The Management loss figure is significant. A company whose main business was the provision of services would not willingly sustain year on year losses of that order on that sort of business. I appreciate that the question in this case is not whether the trading activity was the main business; it is whether the investment business was the principal business. However, since the Revenue's case was that the trading was the main business to which the investment activities are ancillary, the inferences to be drawn from these figures are very relevant.

32. In his cross-examination Mr Gear confirmed the benefits to the subsidiaries (and therefore ultimately to Dawsongroup) of providing the services centrally. It avoided their having to go outside the group for expertise and costs were kept down. So far as Dawsongroup is concerned, it provided services to maintain control, particularly over the group finance. He saw the value of Dawsongroup as being the main board creating value via the dividends and increases in net asset values of the subsidiaries.

33. The judge recorded (paragraphs 12 and 13) that notes of previous discussions between the directors and officers of the Revenue showed the directors putting forward the view that Dawsongroup was a trading company, stressing that employees spend little time on managing the investments. The correct categorisation of the company for the purposes of section 130 is ultimately a legal question to which the directors' perceptions are irrelevant. In any event, the significance of their views depends on why they are being asked the question. The evidence revealed that Mr Gear did not understand at the time that a company could be an investment company which also traded. He thought that it had to be one or the other. In calling it a "trading company" he was using a description without immediate legal significance. All that undermines the significance of the directors' views even if those views might otherwise have been relevant.

34. The accounts were prepared on the footing that it was a trading company (or rather, not on the footing that it was an investment company). Mr Gear agreed that most investment-related decisions were taken at board level, and that the investment-related (as opposed to trading-related) activities of the employees were what he described as "ad hoc" tasks such as due diligence inquiries on corporate acquisitions. The judge went on to record that most acquisition opportunities were quickly dismissed and even the board spent relatively little time on "what might properly be called investment decisions". It is not clear what he treated as falling within that description. He seems to be recording the fact that if one looked at the time spent by the employees and directors of Dawsongroup, one would find that more time, and perhaps most of their time, was spent on the trading side of its activities. I take this into account.

35. There was little evidence of how the present situation came about, though in my view that would have been of some relevance. The only historical material is contained in a note of a meeting between Dawsongroup's representatives and HMRC on 1st December 2003. It is not clear from that history whether the holding company came first, with the service provision following into it later, or whether the holding company structure plus service provision came at the same time. The former might have suggested a primacy for the investment aspects, but it is not clear that that was the case, though the note is perhaps a little more consistent with that state of affairs than the latter. What is apparent, however, is that the services were taken over in more than one phase spread over a period of time. In the end, however, there is little here that assists in the decision that I have to make.

36. That, in summary, is the available evidence, and I turn back to the legal test which has to be applied. I remind myself that an investment company is a "company whose business consists wholly or mainly in the making of investments". Dawsongroup's business is plainly not "wholly" the making of investments, so the question is whether or not it consists "mainly" in that activity. In deciding that question the proposition of Teevan J in *Casey*, while obviously correct, is not particularly helpful. The critical question formulated by Lightman J in the last sentence of *Cook* is much more useful:

> "The critical question is whether the holding of assets to produce a profitable return is merely incidental to the carrying on of some other business, or is the very business carried on by the taxpayer."

37. Nonetheless, it seems to me that it is not quite exhaustive of all the possibilities. It suggests two – that the investment activities are incidental to some other activity, or that it is itself the sole (or perhaps main) business. There is a third possibility – that a company carries on an investment business and another business (say, a trading activity) and neither of them can be described as main (or as incidental the one to the other). In this third case, the company would not be an investment company. I shall consider all three possibilities.

38. First, I can and do reject the possibility that the trading activity is the main business to which the investment activity is ancillary. This was HMRC's case as expressed to me by Mr Margolin. In my view that simply fails to describe Dawsongroup's *raison d'être* and the overall picture of its functions. While the evidence shows that the most of the services were to be charged on a costs plus basis I do not think that the evidence shows that it would be right to treat the making of the profit that this would be capable of giving rise to as being the main reason for this company's business existence. Mr Margolin accepted that the Revenue's case was as stated "notwithstanding the figures". That "notwithstanding" is significant – it implicitly acknowledges that the figures would suggest otherwise. I think that they do suggest otherwise. I do not consider that this company was set up, or thereafter operated, so as to have the provision of services to the other members of the group as its main business. That is certainly not the impression that the evidence gives.

39. That leaves a choice between the other two possibilities – investment business as the main business with the trading as ancillary, or neither form of business ancillary to the other. Deciding between them is a matter of forming an overall impression, and while the evidence lacks some of the clarity that I think it might have had, I think that the overall picture is of a company which is primarily a holding company and which also happens to provide services to the rest of the group. In other words its main activity is being a holding company with a degree of real control over the rest of the group. Mr Gear said in cross-examination that Dawsongroup could have been just a holding company without providing the services, but then the group would not have got the benefits of the central provision of services. This gives the flavour of a company whose main function is that of a holding company and which, for the benefit of the group, also provided the services, and that makes the latter ancillary to the former, or at least it makes them very much subsidiary to the former. Most of the activities of the company which do not fall under the head of chargeable services fall within what can be treated as the making of investments. The Revenue accepts that a holding company which does no more will usually be an investment company. A responsible holding company will take steps to make sure that its investments (its shares in its subsidiaries) are producing proper returns and maintaining their value. That means that the board will be concerned about certain aspects of the management of the group below. A great deal of the activities of the board members of Dawsongroup (so far as they were described in this case) involved such supervision. That is probably what the judge below meant when he described the principal activity of Dawsongroup as being "controlling a trading group" in paragraph 23 of his decision. Most of those

controls fall to be characterised as holding investments for these purposes, as the Revenue conceded. I think that that was the main activity.

40. I therefore conclude that Dawsongroup is an investment company for the purposes of section 130.

The "expenses of management" point

41. The judge did not deal with this in a particularly detailed way. Paragraph 2 of his decision (referred to above) contains the only recitation of fact which is relevant to the point. Thereafter he devoted only 3 paragraphs to his reasoning for his decision on the point, which is that (assuming that he was wrong on the first point) the expenses in question were not expenses of management for the purposes of section 75. Paragraph 29 sets out some of the arguments of the taxpayer, recording that Mrs Cullen submitted that the expression "expenses of management" had a wide meaning and that the expenditure was incurred in order to free the company of the regulatory burden which listing imposed, so that it was "correspondingly" a management expense of the investment business. In paragraph 30 he records the submission of the Revenue, which he ultimately accepted in paragraph 31, which I set out again in the interests of clarity and which contains his conclusion:

> "30. The flaw in the taxpayer's argument, [Mr Margolin] said, was that the expenditure in respect of which relief was sought was not incurred, to adopt a phrase used in *Holdings v* IRC at [40], in the course of the investment business (assuming Dawsongroup had any such business) or in the management of anything, even Dawsongroup's trading business.
>
> 31. In my judgment, Mr Margolin is right. There must, I think, be a connection, or identifiable relationship, between the expenditure and the investment business of which it is, supposedly, an expense. Here, the expenditure had nothing to do with investment (or trading for that matter). I do not doubt that the regulatory burden was significant, that it impeded the Board's freedom to make strategic decisions and that it adversely affected the Group's growth and profitability. The question, however, is not whether the expenditure was reasonably incurred, or whether the company (ultimately the shareholders) derived a benefit from what was done in return for the expenditure, but whether it is an expense of management, that is the conduct of the (investment) business. The business undertaken by Dawsongroup, whether correctly viewed as trade or investment, was wholly unaffected by what was done – it was, and always would have been, carried on in exactly the same way; no investment decisions (such as the acquisition of a new subsidiary) depended on it; and Dawsongroup's relationship with its subsidiaries, which represent its only investments, was, and was intended to be, unchanged. Indeed, as Mr Gear's evidence makes clear, it was the Board's perception of the effect of its listed status on the Group's trading activities (that is, the need to earn short-term profits at the expense of growth) and on the value, or perhaps more accurately the price, of its shares which led to the incurring of the expenditure. At best it could be said to have made it possible for Dawsongroup to exploit its subsidiaries better in the future, but it could not be said to be expenditure incurred in the course of managing investments."

The taxpayer's criticism of the decision and the Revenue's stance

42. Mrs Cullen said that she had a two pronged attack on this. The first was that the judge applied the wrong test in paragraph 31. What he should have been assessing is whether the expenses were expenses of managing the business, which meant the investment business. What the judge referred to in that sentence was managing investments, which was different, and therefore part of an erroneous test. If she failed on that, then she said that the judge reached a conclusion which he could not reasonably reach on the evidence, and therefore erred in law – see *Edwards v Bairstow* (1955) 36 TC 207 at 229 per Lord Radcliffe.

43. Mr Margolin, for the Revenue, accepted that the last sentence of paragraph 31 did not pose or apply the right test. However, he said that the judge below had applied the correct test earlier in the paragraph, when he said:

> "The question is … whether it is an expense of management, that is the conduct of the investment business."

That being the case there was no error in the judge's decision-making. The evidence justified the judge's finding and pointed away from the expenditure falling within the "expenses of management" category.

The correct test

44. There is no statutory definition of the term. It has been considered in the authorities in contexts which are not directly comparable to the present one, though there is some guidance to be had from those authorities.

45. In *Sun Life Assurance Society v Davidson* [1958] AC 184 the question arose in relation to brokerage and stamp duties paid on particular transactions. Those expenses are not similar to those in issue in the present case. Nonetheless there is some assistance to be gained from what was said in that case. Thus Viscount Simonds said (at page 196):

> "It is, in fact, very clear that an expression like "expenses of management" is insusceptible of precise definition and that there must be a borderline or twilight area in which a conclusion one way or the other could easily be reached. That does not mean that there is not on either side of it an area of sunshine and of darkness."

He regarded it as a mistake to view:

> "'management' as equivalent to running the company's business in a wide and almost colloquial sense" (p 201).

46. Lords Morton, Somervell and Reid all said the expression should be given a wide or fairly wide construction. Lord Reid also said:

> "I do not think that it is possible to define precisely what is meant by "expenses of management." It has not been argued that these words have any technical or special meaning in this

> context. They are ordinary words of the English language, and, like most such words, their application in a particular case can only be determined on a broad view of all relevant matters. I cannot accept the argument for the appellants that every sum spent by the company is an expense of management unless it can be brought within certain limited classes of expenditure which are admittedly not expenses of management, such as payments to policy holders and the purchase price of investments acquired by the company. It is not enough to show negatively that a particular sum does not fall into any other class; it must be shown positively that it ought to be regarded as an expense of management." (page 205)

The last sentence is particularly important.

47. In *Camas plc v Atkinson* (2004) 76 TC 641 an investment company paid fees to advisers in connection with a possible takeover or merger with another company (which in the event did not happen). All the expenditure (apart from some printing costs) concerned advice given to the board about the possible bid. The question arose as to whether those expenses were expenses of management. It was held that they were. The facts of the case were apparently such that there was a choice between two alternatives. The Revenue accepted that if the expenses were not part of the purchase costs, then they were expenses of management – see paragraph 29. The debate therefore focused on whether they were part of the purchase costs rather than the qualities necessary to qualify as an expense of management. Again, the facts do not help much.

48. There are no other authorities which materially assist.

49. Thus the relevant principles in considering the point:

    i) The expression "expenses of management" is to be treated as an ordinary English expression, which is incapable of detailed definition.

    ii) It is that expression, and that concept, which needs to be considered. The question is whether the expenditure falls within that category, and not whether it fails to fall within some other and thereby qualifies by default (as it were).

    iii) The expression is a wide or fairly wide one (the difference probably makes no practical difference).

    iv) There is a distinction between the expenses of management and the general expenses of the business. An expense can fall within the latter category and not be within the former. The emphasis must be on "management".

50. I would also add this. If one asks "management of what", it must be management of the business of the company, which has to be investment business or mainly investment business. This point acquires some significance in considering the nature and purpose of the expenditure in this case.

Did the judge apply the correct test?

51. With those points in mind I turn to consider whether the judge applied the right test. His formulation is set out in paragraph 31 of the decision, to which I have referred above. It is common ground that his last sentence does not apply the right test. Managing investments is not, for these purposes, the same as management for the purposes of the section. So there is some basis for saying that he applied the wrong test. However, as indicated above, the Revenue says that the judge in fact posed the correct test earlier on in the paragraph. If it were plain enough that he had posed the right test, and that the last sentence is a mistake in exposition, then the mistake could be acknowledged for what it apparently is (on this footing).

52. In order to assess this it is necessary to look back in more detail at the judge's reasoning. In paragraph 29 the judge set out the taxpayer's case to the effect that it accepted the statutory expression meant managing the business rather than the investments themselves. That of itself makes it less likely that the judge meant what he seemed to say in the last sentence of paragraph 31 – that sentence as it stands would not reflect anyone's case at the hearing before him. The rest of that paragraph summarises various of the authorities which were said to demonstrate that the expression had a wide meaning and that the expenditure was actually incurred to free the business of its regulatory burden and the financial consequences of that burden, which made it an expense of management. Then he turned to Mr Margolin's argument. His argument, as recorded, was that the expenditure was not really connected with the investment business at all; or to put it another way, it was not carried out "in the management of anything". That contrasts it with the facts of the authorities, in which the expenditure was connected with the business, and with the management of something, even if that something was not the investment business itself.

53. It is this argument which the judge accepts. He finds (rightly, in my view) that the expenditure has to be connected in some way with the investment business before any question can arise of its being an expense of management of that business (he does not articulate it in that way, but that is what he seems to be saying). Having found that, he finds it did not have the necessary connection because it had nothing to do with investment, or trading. In those findings he is seeking to demonstrate the gap between what the expenditure was made for on the one hand and the activity which it was sought to connect it to on the other (the investment business). His use of the word "investment" was probably a shorthand for "investment business". He finds that there was no connection, and for good measure expressed the view that it had nothing to do with trading either. So far his reasoning is permissible. If the expenditure has nothing at all to do with the investment business, it cannot be an expense of management of that business. He then makes some observations on the facts, to which I will return, and discards some irrelevant tests (correctly) and seems to pose the right test. Then he makes some more apparent findings of fact about the extent to which Dawsongroup's business was affected, and makes some assertions about Mr Gear's evidence. He does not at this point, and in terms, say that the expenditure fails the test that he has just posed, but that is because he has just answered the question in accepting Mr Margolin's case, which involves it failing the test. The first half of his last sentence is a summary of how he saw the facts, and lines up with the rest of the paragraph. When put against that background, the second half of that sentence (which

is the part on which Mrs Cullen bases this part of her case) is a non sequitur. I do not believe it betokens a sudden change of tack connoting that the judge is now applying a new and different test to that which he has been applying and considering hitherto. I think that it is a mistake in expression, and no more.

54. Accordingly, this part of the taxpayer's case fails. The judge did not make the error relied on. The preceding parts of paragraph 31 make it clear enough that the judge was apparently applying the right test, and finding that the expenditure did not fall within it.

Are there other bases for the appeal?

55. That is not an end of its case, however, because the taxpayer also complains that the judge reached a conclusion that he was not entitled to reach on the evidence. Mrs Cullen's case was that the purpose of the expenditure plainly bought it within the concept of management expenses. In this context its purpose was said to be the removal of the regulatory burden, removal of impediments to the board's freedom to make strategic decisions and improve growth and profitability, and the bringing about of a situation which enabled the company to achieve more growth by the retention of funds which would otherwise have been paid out in dividends. That last factor is probably a facet of the second. She said that expenditure which helped to improve or maintain the trading potential of the company and further trading to its advantage would be deductible in computing the profits of a trade (see *Heather v PE Consulting* (1972) 48 TC 293), and similar expenses would in principle, be deductible as an expense of management if they were intended to have the same effect (and were not connected with the acquisition or disposal of a particular investment). If one looked at all the evidence in this case, the reason for the expenditure fell within those purposes because it was the unchallenged evidence of Mr Gear that de-listing was pursued in part to avoid the expenses associated with listing and to retain moneys in the group (rather than distribute them in dividends) to the benefit of the trading of the group and the value of the investments. That was a purpose which made the expenditure an expense of management both in ordinary terms and within the statute. It mattered not that there might have been other purposes which would not, by themselves, have made the expenditure an expense of management, because there was no "wholly and exclusively" requirement in relation to this expenditure – if part of the purpose was an "expense of management" purpose, then it did not matter that part was not. The judge below did not acknowledge this, or give sufficient weight to the evidence about this, and that vitiates his decision. The only proper decision was that this expenditure was an expense of management.

56. The Revenue's primary case seems to be that the evidence showed that the real reason for the de-listing, and therefore for the expenditure of the relevant sums, was to restructure the share capital, with a view to improving the share price. The documents, and in particular the documents prepared in connection with the offer, all demonstrated that, and no contemporaneous document supported any assertion that the purpose (or indeed any part of it) was for the purposes of managing the investment business. In particular, no document suggested that the board considered that removal of the regulatory burdens (costs and otherwise) was a significant factor in the board's consideration of the merits of de-listing and the buy-out offer. The judge must be taken to have rejected the suggestion that relief from the financial or other burdens of maintaining the listing was part of the thinking behind the de-listing operation. Mr

Margolin supported that finding and said the judge was right to make the other findings that he made. That being the case, the judge was right to find that the expenses were not expenses of management. They were nothing to do with management.

The judge's findings and their significance

57. The judge's final findings in relation to the board's reasoning appear in the penultimate sentence of paragraph 31. His finding seems to be that the board's thinking, which is also set out in paragraph 2, was as there referred to, save that in paragraph 31 he does not there include a reference to the removal of the regulatory burden, and he concludes that the purpose of the expenditure was not such as to make it a management expense. The way in which he fails to deal with the removal of the regulatory burden is a little odd, because he identifies it is a "material consideration" in paragraph 2, and actually refers to the regulatory burden (and accepts it existed) in paragraph 31. So it is prima facie odd that he seems to leave it out of what he seems to conclude the "board's perception" as being in the crucial sentence at the end of paragraph 31. He seems to treat it as irrelevant, and to treat the other reasons for the expenditure as being insufficient to allow the expenditure to qualify as expenses of management.

58. His treatment of this point is important in the light of the way in which Mrs Cullen puts her appeal, because she says that saving the costs and burden of regulation is plainly an expense of management, and Mr Margolin does not dispute that, if taken by itself and in isolation, it would indeed be capable of being so treated. It seems to me that he is right in that acceptance – the cost of the regulatory burden is itself capable of being an expense of management, so an expense intended to reduce that expense is equally capable falling under that head. That being the case, part of Mrs Cullen's case on this part of the appeal is that the judge did not properly deal with this. She says there is no "wholly and exclusively" test in relation to the deductibility of these expenses, so even if only part of the motivation was the saving of regulatory costs (and other burdens) that is enough.

59. It is therefore necessary to consider the question of the part played in the board's thought processes by the possibility of relief from the regulatory burden.

60. There was evidence to support a finding that that was a factor in the minds of the directors. In paragraph 17 of his witness statement (taken as his evidence in chief) Mr Gear listed 4 items which he described as "problems arising from [the company's] listed status". The fourth of them was:

> "the compliance and corporate governance regime had started to become onerous and expensive".

He expanded on that in later paragraphs and put the cost at an annual expenditure figure of £173,000, the result of having to perform the compliance obligations of a listed company, and that was without taking into account the time and cost of dealing with "investor relations". When he came to list the benefit to the company's "trade", which the directors felt would benefit from the removal of the constraints posed by its listed status, the cost saving was listed as the first of them, followed by better control of dividend payments (to retain cash in the company for lending to subsidiaries and

for its own purposes), enabling the company's executive directors to spend more time providing management expertise to the company and its subsidiaries and the creation of "shareholder value through long term profit growth rather than the short term growth demanded by the City".

61. Mr Gear was extensively cross-examined on the reasons for the de-listing. It was pointed out to him, and he accepted, that none of the contemporaneous documents relied on costs and regulatory savings as being a reason for de-listing. The emphasis in those documents was on improving the share price, the illiquidity of the market in the shares and the depressive effect of listing on the share price. These documents included the offer document issued by Mr Dawson's vehicle company, a report by KPMG (accountants) and a recommendation by independent directors. These chime with part of Mr Gear's evidence to the effect that what dictated the process was the desire of Mr Dawson to be rid of the minority shareholders. Nonetheless, Mr Gear plainly resisted the suggestion that freeing the group from the impediments of listing had nothing to do with the decision-making process.

62. It is not plain what the judge actually found about all this. It is plain enough from paragraphs 2 and 3 that the judge acknowledged that the costs of being a listed company were in the minds of the board. However, what part he thought it played in the decision-making process is less clear. He acknowledges in paragraph 31 that "the regulatory burden" was significant, and that must connote some cross-reference back to paragraph 2. However, when he goes on to refer to impeding the boards' freedom to make strategic decisions and the effect on growth and profitability he must be talking about something else. The costs of compliance were not said to affect those. What affected those were the existence of outside shareholders with their own requirements for dividends rather than retaining income, with the effect that that had on decisions as to the future shape of the group. So these findings are a little confused. The penultimate sentence of paragraph 31 purports to record Mr Gear's evidence without referring to the compliance costs. If that is intended to be an accurate reflection of Mr Gear's evidence then it is not accurate because his evidence recorded that attention was paid to that factor. If it is supposed to be rejection of Mr Gear's evidence about that factor then it is inconsistent with earlier parts of his judgment and if he was rejecting Mr Gear's evidence on the point he ought to have made that clear – *Barclays Mercantile Business Finance Ltd v Mawson* [2003] STC 66 at para 32. If it is intended to be a conclusion about the real motivation behind the decision to de-list, relegating the costs point to some subsidiary status then it does not make that clear either.

63. Thus the judge's findings are not clear. Coupled with that is the fact that the judge seems to be wrong, on the evidence, when he finds that the business undertaken by Dawsongroup was wholly unaffected by what was done. Mr Gear gave clear evidence as to at least two major decisions (one to open up a subsidiary in Poland, and another to go into a new rental area) which he says would have been most unlikely to have been taken in the absence of de-listing. That evidence was not challenged by the Revenue in Mr Gear's cross-examination.

64. The result of this is that the judge's reasons for arriving at his overall decision are not readily ascertainable below the level of generalised findings, and some of the findings are ones that should not have been made. In those circumstances the matter should be revisited.

65. Once again, the first thing that should be considered in this context is whether the matter should be revisited by me, reviewing the evidence and considering its effect, or whether it should be remitted to the judge to make further findings. Having considered the nature of the inquiry and the availability of the evidence, I consider that the right course is for me to consider the matter without further findings of fact from the judge below if I can do so. I have the documents, Mr Gear's witness statement and an adequate note of his cross-examination. I do not consider that further cross-examination would be appropriate anyway, and without it the judge would have virtually all the same material that I have, albeit with the added benefit of his recollected experience of the hearing (if he has one).

66. I therefore turn to the facts. The outline of Mr Gear's evidence appears above. His witness statement listed market sentiment towards small companies, the fact that the company was operating in a traditional and mature industry, the illiquidity in the company's shares and the increasingly onerous and expensive governance and compliance regimes as being the four problems flowing from the listed status. The first three of these fed into market sentiment and share valuation (depressing the latter) which in turn made a bad impression on bankers and financiers, suppliers, employees and customers. He elaborated a little on the effect of having to pay dividends (which was expected by the market) as opposed to re-investing more of the profit. And he elaborated on the cost of the governance and compliance aspects.

67. His cross-examination contains an emphasis which is significant. He was taken to a circular letter from Mr Dawson which sets out reasons for the offer being made to the minority shareholders. He accepted that this letter sets out the principal reasons for de-listing. Those reasons were lack of market support for small companies, lack of liquidity in the shares and the need to increase share price (the letter referred to the "relatively low valuation" of the shares). He accepted that all the documents relating to the de-listing relied on similar reasons, and did not mention the cost saving and other matters now relied on by Dawsongroup as making the relevant expenses "expenses of management", but he said (in substance) that that was because the stated reasons were those that would interest the minority shareholders. When asked why the company was de-listed, Mr Gear is recorded as saying that there was no other way of getting a "fair share price". He accepted that the exercise was for improving shareholder value, but declined to accept that the benefits to "trade" were incidental. By this last reference I assume he meant the cost saving and the benefits relied on by Dawsongroup in these proceedings.

68. In my view the overall picture that emerges from his evidence is that the principal motivation behind the de-listing, and behind the board's support for the de-listing, was concern for share price or share valuation, and the perceptions of third parties of the position of Dawsongroup in the market, followed by the belief that taking the 25% of shares out of the market would enable the group to retain more of its profits. The saving of cost and governance activities that would follow from a de-listing was also perceived as a benefit, but it was an additional benefit that flowed from a process that was principally justified on another basis.

69. This puts it a long way down the scale. Looking at the evidence as a whole it seems to me that the correct characterisation is that reflected above – it was in no way an objective, but it was more in the nature of a desirable effect of something that was being done for other reasons. The real objectives of the de-listing, from the

company's point of view, were those summarised in the penultimate sentence of paragraph 31 of the judgment. Saving the costs of compliance was not in any real sense a reason for the de-listing, which explains why it did not figure in any of the contemporaneous written material. They all focussed on the real reasons. Accordingly, its significance was not sufficient to make the associated expenditure and expense of management if it would not otherwise have qualified. It was not even one among several reasons; it was, as I have said, an additional benefit of something desired, or justified, on another basis.

70. Accordingly that factor does not assist the taxpayer. However, Mrs Cullen also maintained that the other, central (my characterisation, not hers), reasons for the de-listing and the expenditure still made it an expense of management, and the judge was wrong to conclude otherwise. The retention of funds within the company, used to improve and grow the business, qualified the expenditure as an expense of management.

71. The judge decided that point against the taxpayer. That is the essence of the findings that can be gleaned from paragraph 31. I have come to the same conclusion. The expenditure was intended to improve the business in a broad sense. It did so by making sure that there were more assets within the business, and by giving the directors more freedom in making business decisions. Those decisions did not relate to the management of the investment business. They related to the management of the investments. The extra retained money would remain in the subsidiaries and make them more valuable, or would be applied in their growth, and again make them more valuable. Or they could be retained by the holding company and applied elsewhere to improve the investments. These characterisations demonstrate that the expenditure was not in order to manage the business; it was to improve the investments, or even (in substance, if not literally) to acquire more investments. So far as it was designed to remove an undervaluation of the holding company's shares, again that does not seem to me to have anything to do with the management of the business.

72. Accordingly I have arrived at the same decision as the judge below, albeit for other reasons.

Conclusion

73. I therefore dismiss this appeal. The parties have agreed that in the absence of some obvious complicating factor, the costs of this appeal should follow the event. I therefore order the taxpayer to pay the Revenue's costs of this appeal. Both sides were agreed that I should not deal with the costs below.

Release date: 11 May 2010