**[2018] UKUT 0010 (TCC)**

**Appeal number: UT/2016/0131**

***INCOME TAX – whether appellants were "managed service companies" – s.61B(2) Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") – whether a managed service company provider was "involved" with the appellants – whether the provider "benefits financially" from the provision of services – the meaning of "influences or controls"***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

**(1) CHRISTIANUYI LIMITED**
**(2) FANNING SOCIAL CARE LIMITED**
**(3) HADDASSAH LIMITED**
**(4) DR. JACEK TRZASKI LIMITED**
**(5) JONNY TOOZE PHYSIOTHERAPY SERVICES LIMITED**

**Appellants**

**- and -**

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

**Respondents**

**TRIBUNAL: The Honourable Mr. Justice Marcus Smith**
**Judge Timothy Herrington**

**Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 27, 28 and 29 November 2017**

**Giles Goodfellow, Q.C. and Ben Elliott, instructed by Mazars LLP, accountants, for the Appellants**
**Akash Nawbatt, Q.C. and Kate Balmer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

## A. INTRODUCTION

**1.** Section 61B(1) of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") defines a "managed service company" in the following terms:

> "(1) A company is a "managed service company" if-
>
> (a) its business consists wholly or mainly of providing (directly or indirectly) the services of an individual to other persons,
>
> (b) payments are made (directly or indirectly) to the individual (or associates of the individual) of an amount equal to the greater part or all of the consideration for the provision of the services,
>
> (c) the way in which those payments are made would result in the individual (or associates) receiving payments of an amount (net of tax and national insurance) exceeding that which would be received (net of tax and national insurance) if every payment in respect of the services were employment income of the individual, and
>
> (d) a person who carries on a business of promoting or facilitating the use of companies to provide the services of individuals ("an MSC provider") is involved with the company.

**2.** For the last of these conditions – contained in section 61B(1)(d) – to be met, two requirements have to be satisfied:

**(1)** First, a person must be "involved with the company". The notion of involvement is defined in section 61B(2) of ITEPA, which provides:

> "(2) An MSC provider is "involved with the company" if the MSC provider or an associate of the MSC provider-
>
> (a) benefits financially on an ongoing basis from the provision of the services of the individual,
>
> (b) influences or controls the provision of those services,
>
> (c) influences or controls the way in which payments to the individual (or associates of the individual) are made,
>
> (d) influences or controls the company's finances or any of its activities, or
>
> (e) gives or promotes an undertaking to make good any tax loss.

(3) A person does not fall within subsection (1)(d) merely by virtue of providing legal or accountancy services in a professional capacity.

(4) A person does not fall within subsection (1)(d) merely be virtue of carrying on a business consisting only of placing individuals with persons who wish to obtain their services (including by contracting with companies which provide their services).

(5) Subsection (4) does not apply if the person or an associate of the person-

(a) does anything within subsection (2)(c) or (e), or

(b) does anything within subsection (2)(d) other than influencing the company's finances or activities by doing anything within subsection (2)(b)."

**(2)** Secondly, that person must be an "MSC provider", as that term is defined in section 61B(1)(d), set out in paragraph 1 above.

**3.** The consequence of a company being a "managed service company" is that liability to income tax and national insurance contributions ("NICs") will arise on the part of the managed service company in respect of payments that have been received by the relevant individual whose services were provided by the managed service company.

**4.** By a decision released on 21 April 2016 (the "Decision"), the First-tier Tribunal (Tax Chamber) ("FTT") upheld various determinations to income tax under regulation 80 of the Income Tax (PAYE) Regulations 2003 and various notices of decision as to liability to national insurance contributions under section 8 of the Social Security Contributions (Transfer of Functions, etc) Act 1999. There was one determination and one notice of decision in the case of each of the five Appellants. The determinations and notices of decision were made for the tax years 2007-2008 to 2009-2010.

**5.** The determinations and notices of decision were made on the basis that the Appellants were managed service companies within the meaning of section 61B of ITEPA. As to this:

**(1)** It was common ground before the FTT,[1] and was common ground before us, that the Appellants are all companies satisfying the requirements of sections 61B(1)(a), (b) and (c).

[1] Decision at [12].

**(2)** According to the Respondent, the Commissioners for Her Majesty's Revenue and Customs ("HMRC"), each of the Appellants also satisfied the requirements of section 61B(d), in that a person who carried on a business of promoting or facilitating the use of companies to provide the services of individuals (that is, an "MSC provider") was "involved" with each of the Appellants. That company, in all cases, was a company called Costelloe Business Services Limited ("CBS").

**(3)** Before the FTT, the Appellants conceded that CBS was an "MSC provider" for the purposes of section 61B(1)(d).[2]

**(4)** In dispute before the FTT was whether CBS was "involved with" the Appellants for the purposes of section 61B(1)(d). By its Decision, the FTT found that CBS satisfied sections 61B(2)(a), (c) and (d). Accordingly, the FTT found that CBS was "involved with" the Appellants by virtue of these provisions.

## B. THE GROUNDS OF APPEAL

**6.** The Appellants seek to appeal the Decision on ten grounds. Permission to appeal has been granted for Grounds 1 to 9. The Upper Tribunal deferred consideration of whether permission to appeal should be granted in relation to Ground 10 until the substantive hearing of the appeal. We deal with the question of permission to appeal in relation to Ground 10 in paragraphs 56 to 63 below.

**7.** The Appellants' grounds of appeal may be summarised as follows:

**(1)** *Ground 1*. Did the FTT err in law in holding that Parliamentary and governmental materials could not be used to identify the mischief at which the legislation was aimed or as an aid to statutory construction?

**(2)** *Grounds 2 to 9*. Did the FTT err in law in holding that sections 61B(2)(a), (c) and (d) of ITEPA, or any of them, were satisfied in this case?

**(3)** *Ground 10*. Should the Appellants be granted permission to resile from their admission before the FTT that CBS was an MSC provider within the meaning of section 61B(1)(d)? If so, was CBS an MSC provider within the meaning of section 61B(1)(d)?

**8.** We describe more fully the various grounds of appeal in the course of this decision.

---

[2] Decision at [12].

## C. STRUCTURE OF THIS DECISION

**9.** The FTT's Decision is a careful and detailed one, making numerous findings of fact upon which the FTT's determination as to the applicability of section 61B is based.

**10.** Appeals from the FTT to the Upper Tribunal are on points of law only: see section 11(1) of the Tribunals, Courts and Enforcement Act 2007. Since the question of whether CBS is an MSC provider involved with the Appellants turns on the application of section 61B to the specific facts concerning the Appellants, it is necessary to set out the relevant facts, as found by the FTT, in this decision. This we do in Section D.

**11.** Section E considers the extent to which these findings of fact are susceptible of being challenged on the basis that the FTT erred in law. Section E also considers the extent to which we should make findings of fact going beyond the findings made by the FTT in its Decision. Although, in the main, both the Appellants and HMRC were content to base their submissions on the findings of the FTT as stated in the Decision, both sought to establish as facts matters that were not found by the FTT; and the Appellants also contended that some of the factual findings of the FTT were wrong and that in making those findings, the FTT had erred in law.[3]

**12.** Section F considers the first ground of appeal, namely whether the FTT erred in law in its approach to Parliamentary and governmental materials as an aid to the construction of a statute. Section G then considers, in light of our determination of the first ground of appeal, the relevant background material in this case.

**13.** Section H deals with Ground 10. By Ground 10, the Appellants contend that CBS was not a "MSC provider" within the meaning of section 61B(1)(d) of ITEPA. Logically, this question precedes the question in issue under Grounds 2 to 9 (which concern whether CBS was "involved with" the Appellants under sections 61B(1)(d) and (2)), and so it sensible to consider Ground 10 (including whether permission to appeal should be given) before Grounds 2 to 9.

**14.** Section I considers the various grounds (articulated in Grounds 2 to 9) on which the Appellants contended that the FTT's construction of section 61B(2) of ITEPA was wrong in law.

**15.** Finally, Section J sets out how we dispose of the appeal.

---

[3] See, for example, paragraph 34 of the Appellants' written submissions.

## D. FINDINGS OF FACT IN THE DECISION OF THE FTT

**16.** The FTT made the following findings of fact, which we consider to be material:

**(1)** **The Appellants.** The Appellants were as follows:

**(a)** Dr. Osamwonyi is a forensic medical examiner and the sole shareholder and director of the First Appellant, Christianuyi Limited. Between 1994 and 2003, he worked directly for the NHS as an employee. In 2003 he was employed by a medical agency ("Medteam"), who dealt with his pay arrangements and taxes. In around 2007, Medteam's accountant advised Dr. Osamwonyi that the agency would only engage his services if he operated through a limited company, and provided him with a list of organisations that could assist him in this regard. Having tried a company called "Simply Contracting Limited", who set up a limited company for him, Medteam advised Dr. Osamwonyi to move to CBS, which Dr. Osamwonyi did.[4] It was CBS that established Christianuyi Limited for Dr. Osamwonyi.[5]

**(b)** Ms. Fanning was, at all material times, a social worker. She was originally employed by Calderdale Metropolitan Council, but then ceased to be a direct employee and provided her services through a composite company arrangement. (The nature of composite companies is considered in paragraph 41(1) below.) At some time in late 2006/early 2007, Ms. Fanning began providing her services through a composite company operated by an associate company of CBS. She moved to CBS on 28 March 2007, and CBS established the Second Appellant, Fanning Social Care Limited, on her behalf.[6]

**(c)** Ms. Ayodele was the sole shareholder and director of the Third Appellant, Haddassah Limited. Ms. Ayodele was a social worker, who had previously provided her services through a number of intermediary companies. On 8 November 2007, Ms. Ayodele moved to CBS and CBS established Haddassah Limited on her behalf.[7]

---

[4] Decision at [193]-[194].

[5] Decision at [74] and [195].

[6] Decision at [199]-[201].

[7] Decision at [204]-[206].

**(d)** Dr. Trzaski is a qualified doctor and Polish national. Between October 2007 and February 2008, he was an employee of a company ("4 Ways Healthcare"). In around 2008, he approached a recruitment agency to find new employment and was given a choice to be paid through the ordinary payroll or through a limited company. Dr. Trzaski chose to be paid through a limited company, and he was referred to CBS. CBS established the Fourth Appellant, Dr. Jacek Trzaski Limited, on his behalf.[8]

**(e)** Mr. Tooze is a physiotherapist. Before October 2001, he had worked as an employee. From October 2001 until 4 March 2007, he provided his services through composite companies run by "Freeland Professional Services". In March 2007, this company ceased to operate, and – for a brief period until August 2007 – Mr. Tooze worked as an employee for the Ministry of Defence. Mr. Tooze then approached a recruitment agency, "Piers Meadow Recruitment", which informed him that he had to provide his services through a limited company. To that end, the agency provided Mr. Tooze with a list of organisations that could assist him in this regard, and Mr. Tooze ended up dealing with CBS. CBS established the Fifth Appellant, Jonny Tooze Physiotherapy Services Limited, on his behalf.[9] Mr. Tooze was the sole shareholder and director of the Fifth Appellant.[10]

We refer, in this decision, collectively to the "Appellants" and individually to each Appellant as the "First Appellant", etc. We refer to the individuals on whose behalf the Appellants were established as the "owner" or "owners" of the relevant Appellant or Appellants.

**(2)** **CBS.** CBS was one of a group of companies referred to in the Decision as the "i4 group", which term we adopt.[11] There was considerable overlap between the personnel, functions and organisation of CBS and other companies within the i4 group.[12] CBS employed no more than nine members of staff, one of whom (a Mr. Mian) was a junior accountant with two years' post-qualification experience. Mr. Mian was the only accountant

[8] Decision at [174] and [176].

[9] Decision at [181]-[182].

[10] Decision at [7] and [10].

[11] Decision at [22]-[23].

[12] Decision at [23].

employed by CBS.[13] With the advent of the legislation which introduced (amongst other things) section 61B into ITEPA, the i4 group began to offer, through CBS, a personal service company product described as the "Gold Business Service" or "GBS".[14]

**(3)** **Advising customers of the Gold Business Service.** On 26 February 2007, the i4 group wrote to all of its existing customers. This letter:

**(a)** Informed the customers of the new legislation and indicated that the i4 group was withdrawing its existing composite company product. The letter stated that the new legislation (referred to in paragraph 15(2) above) would make the use of this type of structure unattractive.

**(b)** Offered customers a choice between moving to a personal service company (i.e. the GBS product) or what was described as an "umbrella company".[15]

**(c)** Made clear that any company established pursuant to the GBS product would be independently owned and controlled by the customer, and that the GBS product would allow the customer to have his or her own company and outsource "the complex administration and accounting function to us".[16]

**(d)** Described the umbrella company option as "a service where full tax and national insurance is deducted from earnings, with allowable business expenses offset against your taxable income".[17] By contrast, with the GBS option, "it is important to remember that your net income is likely to be very similar to that from your current composite company".[18]

**(e)** Made clear that the GBS product would be offered through CBS.[19]

A second letter was sent to customers on 21 March 2007, repeating the offer of the GBS product or the use of an umbrella company".[20]

---

[13] Decision at [49]-[50].

[14] The name of the product appears initially to have been "Gold Personal Service" (Decision at [43]), but nothing turns on this change of name.

[15] Decision at [39].

[16] Decision at [40].

[17] Decision at [40].

[18] Decision at [41].

[19] Decision at [42].

[20] Decision at [43].

The FTT found that these letters were written in a manner intended to persuade customers to accept the personal service company option.[21]

**(4)** **The GBS product.** The GBS product was a standardised product, offered to customers on standard-form documents.[22] CBS did not meet individual customers and any contact was by letter, email or over the telephone. Any initial contact over the telephone was with a salesperson. CBS did not discuss with individual customers whether the GBS product was suitable for them and no bespoke advice was given to customers using the GBS product.[23]

As to the nature of the GBS product:

**(a)** The services provided by CBS were listed in "Appendix A" to the letter of engagement that was sent to customers, setting out the terms on which CBS was appointed. There were various versions of the letter of engagement,[24] but this description of the services being provided by CBS was the same in all of them. Appendix A read:

"A. BUSINESS SERVICES

We will provide the following as requested:

a) A registered office in England and Wales

b) A Company Secretary

c) Company email account

d) Mail forwarding facilities

B. ACCOUNTING SERVICES

As your appointed agent we will:

a) Raise sales invoices on instruction

b) Reconcile receipts by outstanding invoices

---

[21] Decision at [40] and [43].

[22] Decision at [51]. This was a conclusion reached by the FTT on the basis of the evidence before it. Unlike the other statements set out in paragraph 16 of this decision, we consider this to be a conclusion based on the evidence, rather than a finding of fact in its own right. It is, therefore, a finding that is open to review by us. Having considered all of the findings made by the FTT, we are satisfied that the FTT's conclusion on this point was entirely right.

[23] Decision at [52].

[24] Decision at [67].

c) Maintain detailed company accounts as required by Companies Act

d) Prepare the annual accounts for approval by you

C. PAYROLL SERVICES

a) Calculation of gross salary and statutory deductions (PAYE, NIC)

b) Calculation of reimbursed expenses and other earnings and deductions as required

c) A printed or emailed Pay Advice for each pay period for your approval

d) A printed or emailed Company Account Summary showing the summarised income and expenses for each pay period and year-to-date

e) Liaise with HMRC regarding registration, tax code changes and other matters as they arise

The following statutory returns will be submitted and paid on your behalf:

a) PAYE and NI Contributions

b) P35 Employers Annual Return

c) P14 End of Year Summary

d) P60 Employee End of Year Summary/certificate

e) P11D

f) P45 Employee Leaving Certificate

D. VAT RETURNS

At the time of this letter you are not VAT registered. If registration becomes necessary we will endeavour to assist you in the process. If you are VAT registered we will file the VAT returns and submit the appropriate payment.

E. ANNUAL ACCOUNTS

As your appointed agent we will:

a) Submit the annual accounts to the Registrar of Companies

b) Complete and submit the company’s annual return

c) Complete and submit any other forms required by law to be filed at Companies House, provided you keep us fully informed of any relevant changes [and] events which are required to be notified to Companies House, within one week of the change or event

d) Maintain statutory books

e) Compute the Corporation Tax due

f) Prepare the company tax return (CT600)

g) Submit the tax return to you for approval prior to submission to HM Inspector of Taxes."

**(b)** The letter of engagement also referred to the following services:[25]

"**Factoring services**

You appoint Costelloe Factoring Services Ltd (CFSL) as your invoice factoring agent. CFSL will be assigned the benefit of your account and will collect the amounts payable from your debtors. Upon receipt, the amounts will be paid directly into your company bank account, less any monies advanced on account. The fees for this service are included in your fees as outlined above.

…

**Statutory payments**

We will calculate your PAYE, National Insurance contributions, Corporation Tax and VAT (if applicable) liabilities and you agree for these to be collected via direct debit from your company bank account and paid to the relevant authority on the due dates."

**(c)** In terms of how these services were paid for, CBS initially charged 5% plus VAT per invoice transaction.[26] The charge was, thus, a proportion of the sums received by the customer for the services provided by it. From around July 2007, that changed:[27] instead of a 5% rate, CBS would charge a fixed amount of £35 plus VAT "as and when work is done".[28] In or around December 2007, an annual fee was offered, which was apportioned either weekly or monthly.[29] It is not clear

[25] Decision at [65].

[26] Decision at [65] and [119].

[27] Although it appears that for existing customers, it was introduced at different times over the summer or late autumn of 2007: Decision at [120].

[28] Decision at [120].

[29] Decision at [68], [70] and [121].

whether this, third, basis for charging was an alternative to the second or in substitution for it.[30] As regards this third fee structure, the FTT found:[31]

> "121. …CBS continued to invoice clients as and when work was done. Thus, fees were deducted from a client's…account only when the client was paid. If the client was not paid, for example if the client was on holiday or sick, no charge was made. These "missing" payments were not pursued by CBS and were not charged on the next occasion that CBS ran a payroll in respect of that client.
>
> …
>
> 124. …The fee appeared to be linked to the production of a payslip and the production of a payslip was driven by the company receiving income in a given period which, in turn, was linked to the services provided by the director. Where a client received two payments from the agency in one week it would be subject to two CBS's fees even though CBS produced one payslip. In other words, even though CBS had to run one payroll and one payslip, it still charged two fees…[32]"

**(5)** **The manner in which the GBS product was provided: establishment of a company.** CBS bought large quantities of off-the-shelf companies in anticipation of hundreds of customers wanting to use the GBS product. Between 16 January 2007 and 21 March 2007 approximately 349 companies were incorporated by CBS to be used as personal service companies by customers.[33] In total, CBS incorporated approximately 1,400 new companies, of which approximately 1,000 were used by CBS to provide personal service companies to customers.[34] In their registration form – by way of which customers indicated how they wanted the GBS service provided to them[35] – customers were given an option allowing them to choose to have a company set up by CBS or using their existing limited company.[36] Most opted for a company set up by CBS,

---

[30] The Decision at [121] is not entirely clear on the point: however, we do not consider that anything turns on it. According to the Appellants, the third fee structure replaced the second: Appellants' written submissions at paragraph 28.

[31] Decision at [121].

[32] See also, Decision at [291].

[33] Decision at [72].

[34] Decision at [74].

[35] Decision at [53]*ff*.

[36] Decision at [73].

including all of the owners of the Appellants: only around 39 customers used pre-existing personal service companies.[37]

As regards the companies set up by CBS:

**(a)** Most of these companies used CBS's address as the address of their registered office.[38]

**(b)** Almost all customers used CBS as the company secretary.[39]

**(6)** **Manner in which the GBS product was provided: "payroll requirements".** "Payroll requirements" refers to the manner in which CBS's customers were to be paid out of the companies established on their behalf:

**(a)** The registration form obliged the customer to select (by way of options on the form) payment frequency ("weekly/monthly") and amount. Initially, as regards amount, there were two options: *(i)* "minimum wage"; and *(ii)* "specified amount £…". Later versions of the registration form offered three choices: *(i)* "minimum wage"; *(ii)* "most tax efficient (ensure you have our advice on this)"; *(iii)* "fixed amount of £…".[40] CBS did not provide advice as regards these choices.[41]

**(b)** As at August 2009, 99% of customers were on the minimum wage model.[42] In cases where a choice was not expressly made, it would appear that the minimum wage model (which would generally result in the least tax being paid) was selected for the customer, as was the case with Dr. Trzaski.[43]

**(c)** Any sums over-and-above the minimum wage received by the company established on behalf of the customer (the "surplus") could, in theory, be dealt with in a variety of ways. The surplus could, for example, be retained, advanced by way of loan or distributed as a dividend.

**(d)** In practice, distribution of the surplus by way of dividend seems to have been the only option contemplated by CBS.

---

[37] Decision at [74].

[38] Decision at [75].

[39] Decision at [76].

[40] Decision at [62]-[63].

[41] Decision at [134].

[42] Decision at [143].

[43] Decision at [142].

The FTT found that although dividends were distributed, there was no evidence from any of the Appellants to show that they had determined that the surplus should be distributed as a dividend.[44] There were no company resolutions approving the payment of dividends, and no meetings at which the payment of dividends was considered.[45] However, the amount of dividends payable were recorded in the payslips produced by CBS,[46] the dividend vouchers produced by CBS at the end of each tax year and in the company's annual (unaudited) accounts.[47]

**(7)** **Manner in which the GBS product was provided: bank accounts and payments.** The registration form involved the customer asking CBS to supply a CredEcard Instapay bank account (the "CredEcard account") for the personal service company's use.[48] CredEcard accounts were operated by a company called "CredEcard" acting as a bank.[49] As to this:

**(a)** Customers were encouraged to pay CBS's fees out of their CredEcard account. Payment by other means – for example, by way of debit or credit card – would attract a 5% surcharge.[50] All customers were offered a CredEcard account.[51] The account enabled each customer to access funds in the account either "on-line" or through a debit card.[52]

**(b)** Almost all of the GBS customers operated a CredEcard account established by CBS: only 11 customers – and none of the owners – out of over 1,000 used their own bank account.[53]

**(c)** If the customer opted to pay out of the CredEcard account, they authorised CBS to collect its fees from that account.

---

[44] Decision at [309].

[45] Decision at [145] and [147].

[46] Decision at [147].

[47] Decision at [152]-[154].

[48] Decision at [56].

[49] Decision at [33]. CredEcard was, apparently, backed by the Newcastle Building Society.

[50] Decision at [57].

[51] Decision at [77].

[52] There is no clear statement to this effect in the Decision, but it was common ground before us that the accounts could be accessed in this way.

[53] Decision at [80].

Initially, this constituted an authorisation by the customer to CBS but without a debit mandate being completed and produced to CredEcard itself.[54] Subsequently, a debit mandate form was enclosed for completion, which was produced to CredEcard.[55]

**(d)** Customers with a CredEcard account were also given a choice as to how to pay their taxes: either by themselves or by way of CBS. In the latter case, the following form of authority was entered into:

> "Please collect my statutory taxes via Direct Debit and hold them in my tax reserve account until they become due, at which time I authorise you to pay them to the relevant authority on my behalf. I understand that the funds will be held in a client account which is interest-bearing, and I will receive regular statements of the funds being held on my behalf.
>
> Note: This option is only available for CredEcard instapay account holders."[56]

**(e)** Although CBS did take money for the payment of statutory taxes from customers' CredEcard accounts, these monies were held in one of CBS's three bank accounts and not in a client account. CBS did not account to its customers for the interest it received.[57]

**(f)** The advantage of using a CredEcard account was, according to CBS, the speed with which it could be opened for the customer.[58] There were advantages for CBS also. Because the income of the customers was paid, initially, to CBS's "factoring arm" and from that entity to the CredEcard accounts,[59] CBS was able to appreciate what monies came in and when, and deduct its own fees promptly without

---

[54] Decision at [57].

[55] Decision at [58].

[56] Decision at [59]. There appears to be an inconsistency between the choice described here and the obligation to authorise payment of taxes out of the account stated in the letter of engagement: see paragraph 16(4)(b) above. We proceed on the basis that there was a choice as to how taxes were to be paid.

[57] Decision at [60].

[58] Decision at [78].

[59] Decision at [81]. These invoicing services appear to have been provided to substantially all of the purchasers of the GBS product: Decision at [138]-[140].

incurring recovery costs. It could also ensure that statutory taxes were paid more easily.[60]

**(g)** The means by way of which CBS accessed the customers' CredEcard accounts varied. Obviously, there was, as between each customer and CBS, an authority permitting the deductions of fees and taxes. That authority appears to have been sufficient to enable CBS to make deductions or withdrawals from the CredEcard account, even without a mandate or instruction to the CredEcard from the customer.[61] After around September 2007, debit mandates were put in place, and CredEcard operated pursuant to instructions from the customer.[62]

**(8)** **Customer access to funds in the CredEcard accounts.** As has been described, customers were invited to specify what was to paid as wages to the payroll. The vast majority of customers were recorded as receiving the minimum wage.[63] Of course, the customers withdrew more than the minimum wage from their CredEcard accounts. As has been noted, customers did not specify the amount of dividends they were to be paid from their CredEcard accounts. They simply withdrew the monies from their CredEcard accounts, after payment of a minimum wage salary.[64]

**(9)** **Awareness of the Appellants and, inferentially, CBS's other customers.** The FTT made various findings regarding the general awareness of the Appellants in relation to the GBS product. Thus:

**(a)** Most seemed unaware of the technicalities regarding a registered office and the fact that they could choose the address for this. "Indeed, Dr. Trzaski was unaware that he had a registered office or that he needed one".[65]

**(b)** "There was no evidence of any guidance given by CBS to clients about the options available in respect of appointing a

---

[60] These are not necessarily factual findings of the FTT. They are contentions of the Appellants regarding the operation of the CredEcard account which we accept as the practical advantages of the GBS product: see Appellants' written submissions at paragraph 72.

[61] Decision at [85]-[98]. This was done without CBS having the access codes of the customer for "on-line" banking. It was an entirely independent means of transacting on the account. This is obviously a somewhat unusual arrangement, and the CredEcard accounts appear to have been somewhat unusual beasts. However, nothing turns on this for the purposes of this Decision.

[62] Decision at [87] and [99]-[117] and paragraph 16(7)(c) above.

[63] See paragraph 16(6)(b) above.

[64] Decision at [144].

[65] Decision at [75].

company secretary. Dr. Trzaski was unaware that he had needed a company secretary or, indeed, that he had one."[66]

**(c)** Substantial amounts of statutory tax were deducted from the customers' CredEcard accounts. These monies – prior to being paid to the relevant tax authority at the appropriate time – were held in a CBS bank account and earned interest.[67] This was unknown to the customers of CBS. The Decision at [133] states:

> "Mr. Stevenson [indirectly beneficially interested in CBS and giving evidence for the Appellants] confirmed that the clients did not know that CBS was earning interest on the amounts deducted by CBS in respect of taxes. Dr. Trzaski stated that he did not know what CBS did with the money deducted from his company's CredEcard account in respect of taxes. He did not know that the sums would be deposited in CBS's bank account earning interest for up to 19 months, Dr. Osamwonyi likewise confirmed that he did not know what CBS did with the taxes they deducted and did not know when CBS paid the tax to HMRC. Mr. Tooze also did not know when his taxes were due to be paid. We find, therefore, that CBS's clients were unaware that the money deducted by CBS in respect of taxes was held in a bank account in CBS's name and that they were unaware that there was a delay between the taxes being so deducted and then being paid to HMRC."

**(d)** Customers did not, on the whole, understand the difference between minimum wage payments and dividends. The distinction was drawn in the paperwork produced by CBS, without consultation with the customers.[68]

## E. CHALLENGE TO THE FTT'S FINDINGS

**17.** For the most part, the parties were content to rest their cases on the findings of fact made by the FTT. However, in some instances, the parties:

**(1)** Invited us to find facts that had not been found by the FTT. Thus, for instance, HMRC invited us to find that there was a limit – of some £4,999 – on the amount of credit that could be held in a CredEcard account.

**(2)** Invited us to overrule the FTT on specific findings, because it was contended that such a finding had no evidence to support it and/or was inconsistent with the evidence before the FTT. Thus:

---

[66] Decision at [76].

[67] See paragraph 16(7)(e) above.

[68] Decision at [147]-[154].

**(a)** The Appellants contended that the FTT's conclusion as to how CBS was paid (set out at paragraph 16(4)(c) above) was susceptible of challenge "on the basis that there was no evidence to support that finding and that the finding is inconsistent with the evidence before it".[69]

**(b)** The Appellants contended that the FTT's conclusion that the owners of the First Appellant (Dr. Osamwonyi), the Second Appellant (Ms. Fanning) and the Fourth Appellant (Dr. Trzaski) had not indicated to CBS that they wanted to be paid the minimum wage was an unsustainable conclusion.[70]

**18.** Whilst it is open to us to supplement the findings of fact made by the FTT, we consider that we should be slow to avail ourselves of that opportunity where, as here, the FTT has made comprehensive and detailed findings. We have not found it necessary, in this case, to seek out and find facts that were not found by the FTT.

**19.** As we have stated, by virtue of section 11(1) of the Tribunals, Courts and Enforcement Act 2007, appeals from the FTT to the Upper Tribunal are on points of law only. A finding of fact will be in law erroneous and susceptible of challenge as a point of law where the requirements of *Edwards v. Bairstow* [1956] 1 AC 14 at 29 (*per* Viscount Simonds) are met:

> "For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained. It is for this reason that I thought it right to set out the whole of the facts as they were found by the commissioners in this case. For, having set them out and having read and re-read them with every desire to support the determination if it can reasonably be supported, I find myself quite unable to do so. The primary facts, as they are sometimes called, do not, in my opinion, justify the inference or conclusion which the commissioners have drawn: not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is therefore a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand."

**20.** The cases where it was contended that the FTT's findings were based upon no evidence or upon a view of the facts which could not reasonably be entertained are set out at paragraph 17(2) above. In each case, we do not consider – having been referred to and looked at the underlying material – that the FTT's factual conclusions can properly be challenged.

---

[69] See paragraph 34 of the Appellants' written submissions.

[70] See paragraph 66 of the Appellants' written submissions.

In both cases, the FTT findings of primary fact were based on sufficient evidence to enable the FTT to reach that finding.

## F. GROUND 1: THE FTT ERRED IN LAW IN HOLDING THAT PARLIAMENTARY AND GOVERNMENT MATERIALS COULD NOT BE USED TO IDENTIFY THE MISCHIEF AT WHICH THE RELEVANT LEGISLATION IS AIMED OR AS AN AID TO STATUTORY CONSTRUCTION

### (1) Introduction

**21.** The Appellants put forward two propositions:

**(1)** First, that it is always permissible for the courts to consider official reports, white papers and ministerial statements in order to identify the "mischief" that the legislation seeks to correct.

**(2)** Secondly, that Parliamentary material may be used as an aid to construction where legislation is ambiguous or obscure or the literal meaning of which leads to an absurdity.[71]

**22.** We consider these contentions below.

**23.** The FTT said this at [283] of the Decision:[72]

> "…Mr. Way [counsel for the Appellants before the FTT] made frequent references to Hansard in order to establish the mischief at which section 61B ITEPA was aimed. We do not consider this to be a permissible use of Hansard. The decision of the House of Lords in *Pepper (Inspector of Taxes) v. Hart*…governs the appropriate use by a court or tribunal of Hansard. Resort to statements of a sponsoring minister can only be relied upon where the statutory language is ambiguous. Attempting to use Hansard in order to establish the objective of the legislation is the use of an impermissible extrinsic aid to statutory construction."

**24.** It was contended by the Appellants that this misstated the law and that the FTT's erroneous statement in relation to the use of Parliamentary materials had caused it to fail, when construing the statutory provisions in ITEPA, to have regard to relevant material.

### (2) The law

**25.** The approach to construction of primary legislation that a court must take is fully set out in *Craies on Legislation*, from which we derive the following propositions:[73]

---

[71] See paragraph 24 of the Appellants' written submissions.

[72] Decision at [283].

**(1)** The cardinal rule for the construction of legislation is that it should be construed according to the intention expressed in the language used. The function of the court is to interpret legislation according to the intent of them that made it, and that intent is to be deduced from the language used.[74]

**(2)** When seeking to construe an Act of Parliament, the courts in practice take both a literal and a purposive approach, to the extent that such a distinction is a helpful one. As Craies notes:[75]

> "…the argument between literal and purposive interpretation may never have had much substance except as a purely academic exercise, and it is now probably wholly futile. Recent developments…combine both to produce and reflect a situation in which it is now beyond doubt that the courts will go to any sensible length to discern and give effect to the underlying policy intention of legislation, and that in construing a statute they will use all kinds of material available to them as tools to discover that intention."

In *Pepper (Inspector of Taxes) v. Hart* [1993] 1 AC 593 at 617, Lord Griffiths stated:

> "The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look a much extraneous material that bears upon the background against which the legislation was enacted."

**(3)** When construing an Act of Parliament, the court will, of course, draw as necessary upon the presumptions and principles of construction that have evolved over time,[76] the Interpretation Act 1978[77] and other interpretation provisions,[78] the Human Rights Act 1998,[79] and the other parts of the Act apart from the text actually being construed.[80] We were not addressed on these aspects of the process of construction, but it is of course necessary to bear in mind

---

[73] Goldberg, *Craies on Legislation*, 11th ed. (2017) (hereafter "*Craies*").

[74] *Craies* at [17.1.1]: and see Ch. 17 generally.

[75] At [18.3.3]. On the "literal" and "purposive" approaches, see Ch. 18 generally.

[76] *Craies* at Ch. 19 (rebuttable presumptions of construction) and Ch. 20 (other canons and principles of construction)

[77] *Craies* at Ch. 22 (the Interpretation Act 1978)

[78] *Craies* at Ch. 23 (other general interpretation provisions) and Ch. 24 (other specific interpretation provisions).

[79] *Craies* at Ch. 25 (section 3 of the Human Rights Act 1998).

[80] *Craies* at Ch. 26 (use of parts of legislation other than text for construction)

that the use of extraneous materials is but one element of the construction process.

**(4)** With the exception of Parliamentary material[81] – which is subject to the special rule in *Pepper (Inspector of Taxes) v. Hart* – the courts are "increasingly prepared to look at any material that is likely to be genuinely helpful in illuminating the context within which legislation is to be construed".[82] However, two cautionary notes must be sounded:

**(a)** First, background material must not be allowed to take precedence over the clear meaning of the words used. The cardinal rule that legislation should be construed according to the intention expressed in the language used must not be lost sight of. In *Milton v. DPP* [2007] EWHC 532 (Admin), Smith LJ stated at [24]:

> "In my view, this case well illustrates the danger of referring to background material such as a White Paper as an aid to construction in circumstances in which that ought not to be done. When construing a statute, the court should first examine the words themselves. If the meaning is clear, there is no need to delve into the policy background. If the court is uncertain as to the meaning, it may well be helpful to consider background material in order to discover the "mischief" at which the change in the law was aimed. However, this case illustrates the dangers of so doing. It is clear to me that the district judge was led into error by his reference to the White Paper."

**(b)** Secondly, a certain degree of care needs to be employed in ascertaining what material is helpful when construing an Act of Parliament. In contractual cases, the factual matrix refers to material facts reasonably available to the parties to the contract. That would be an inapposite criterion for identifying material helpful in construing an Act of Parliament, which binds all. Clearly, the only material that ought to be used when construing an Act is that material reasonably available to the public in general. In *British Telecommunications plc v. Office of Communications (Partial Private Circuits)* [2012] CAT 5,[83] the Competition Appeal Tribunal noted:

> "201. Public law instruments like statutes…are – like contracts – to be construed in the context of the factual matrix in which they

[81] i.e. records of the proceedings of Parliament, as recorded in Hansard.

[82] *Craies* at [27.1.1.2]. On the use of extraneous material, see Ch. 27 generally.

[83] Affirmed on appeal: [2012] EWCA Civ 1051.

are set (*Black-Clawson International Limited v. Papierwerke Waldorf Aschaffenburg AG* [1975] AC 591 at 646). What comprises the relevant matrix of fact in any given case depends upon the nature of the instrument being construed. As was noted by Lord Hoffmann in *Attorney-General of Belize v. Belize Telecom Limited* [2009] 2 All ER 1127 at [16], the law "permits reference to all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed".

202. Whereas in the case of a contract, the relevant factual matrix will extend to what was reasonably available to the contracting parties, in the case of a public law instrument, which…is promulgated to the world at large, the relevant factual matrix will only extend to the material reasonably available to the public at large (and so will typically be narrower than the relevant factual matrix in a contractual context)."

**(5)** Parliamentary material is not treated in the same way as other extrinsic material:

**(a)** Until the decision in *Pepper (Inspector of Taxes) v. Hart*, "it was generally accepted that statements of underlying policy intention on the part of the government could not be used by the courts for the purpose of construing legislation. The words enacted by Parliament were to be taken and interpreted at face value, to discover what Parliament in fact enacted not what it would probably have wanted to enact had it thought about the point at issue more carefully."[84]

**(b)** The effect of the decision of the House of Lords *Pepper (Inspector of Taxes) v. Hart* is clearly stated in the speech of Lord Browne-Wilkinson [1993] 1 AC 593 at 640:

"I therefore reach the conclusion, subject to any question of Parliamentary privilege, that the exclusionary rule should be relaxed so as to permit reference to Parliamentary materials where: (a) the legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear."

**(c)** It is clear, therefore, that the circumstances in which Parliamentary material may be deployed as an aid to construction are rather narrower than those which pertain in relation to other forms of extraneous material. It is also clear that the courts have been astute to resist reference to

[84] *Craies* at [28.1.1].

Parliamentary material where the *Pepper (Inspector of Taxes) v. Hart* criteria have not been met.[85]

### (3) Conclusion

**26.** As a counsel of perfection, [283] of the Decision should (quoted in paragraph 23 above), in addition to referring to "ambiguity", have mentioned the two other justifications for referring to Parliamentary materials, namely "obscurity" and "absurdity". Apart from that minor criticism, we do not consider that [283] of the Decision misstates the law in any way. The paragraph is expressly limited to Parliamentary material, and its statement of the rule in *Pepper (Inspector of Taxes) v. Hart* is essentially correct. Had the paragraph purported to state the position in relation to extrinsic material other than Parliamentary material, it clearly would have been wrong. But it does not.

**27.** We were referred to various Parliamentary materials during the course of argument, namely extracts from a debate in the House of Commons on 30 April 2007 and a record of proceedings before the House of Commons Public Bill Committee on 15 May 2007.

**28.** We consider that, generally speaking, if reliance is to be placed on Parliamentary materials, it is incumbent on the party seeking to adduce such material to identify precisely:

**(1)** The ambiguity, obscurity or absurdity in the Act in question; and

**(2)** The Parliamentary material that specifically deals with the provision that is said to be ambiguous, obscure or absurd and resolves the difficulty in construction.

**29.** In this case, apart from one alleged ambiguity (which we consider in paragraphs 65 to 68 below, and reject as untenable), the Appellants never indicated which parts of ITEPA were ambiguous or obscure (absurdity was expressly disavowed). Nor did the Appellants identify those specific parts of the Parliamentary material adduced before us that they contended would assist in relation to any ambiguity or obscurity.

**30.** We have looked at the Parliamentary materials *de bene esse* and were addressed on them in general terms at some length. We have derived no assistance from them. In any event, we do not consider them admissible under the rule in *Pepper (Inspector of Taxes) v. Hart*, and we consider the decision of the FTT to be unimpeachable in this regard.

**31.** The appeal in relation to Ground 1 is, therefore, dismissed.

---

[85] See, for instance, *Re. P. (a child)(adoption proceedings)* [2007] EWCA Civ 616 at [29]-[30]; *R. (Haw) v. Secretary of State for the Home Department* [2005] EWHC 2061 (Admin) at [39], [68] and [86].

## G. THE RELEVANT BACKGROUND MATERIAL

### (1) The material

**32.** Apart from the Parliamentary materials, we were shown:

**(1)** A consultation paper published by HM Treasury and HMRC dated December 2006 entitled "Tackling Managed Service Companies" (the "2006 Paper").

**(2)** A paper published by HM Treasury and HMRC dated March 2007 entitled "Tackling Managed Service Companies: summary of consultation responses" (the "2007 Paper").

**(3)** A printout from HMRC's "news" page on its website dated April 2008 (the "2008 News").

**(4)** Two sets of answers produced by HMRC to frequently asked questions in relation to *(i)* agents and *(ii)* employment agencies and businesses (respectively "FAQ 1" and "FAQ 2").

**33.** We found these materials to provide a helpful background to the statutory provisions that are the subject of this appeal. We summarise the content of that material in Section G(2) below.

**34.** However, we have to say that the manner in which both the Appellants and HMRC sought to deploy this material left a great deal to be desired. At times, it seemed to us, from the parties' contentions, that it was these materials that we were being asked to construe, rather than the provisions of ITEPA itself.

**35.** At other times, these materials were deployed less to elucidate or provide background to the provisions of ITEPA, and more for forensic point scoring. Thus, an example of a typical MSC provider's advertisement used in the 2006 Paper ("We will also carry out all the administration and payroll, so that you can enjoy all the benefits of being an employee and a shareholder of your own limited company, without the hassle"), which was very similar to CBS's own advertising, was deployed in support of the contention that section 61B of ITEPA applied in this case. Whilst no doubt excellent prejudice, this point shed no light on the provisions we had to construe. We found such forensic point-taking unhelpful.

### (2) The background material relating to the ITEPA provisions

**36.** The following paragraphs are based on the background material presented to us by the parties.

*(i) The background as stated in the 2006 Paper*

**37.** It is a principle underlying UK tax legislation that the tax treatment of income is determined by its nature. Thus, income which is properly employment income should be taxed as such.

**38.** The 2006 Paper made the following points:

**(1)** A worker might very well choose to go into business on his own account, selling his labour services to an end client. He might choose to do so as a self-employed worker or he might set up a company through which his labour services are provided. Such a company was often referred to as a "personal service company".

**(2)** The worker would be a (and generally the) shareholder of the personal service company, and usually would be a director. While personal service companies might supply the worker's services direct to the end client, in practice they more often found work through an agency. The end client paid the agency, which deducted its fee, and then paid the personal services company for the services of the worker. The worker might draw a salary from the personal services company but, as a shareholder, was also able to receive dividends. The most tax efficient way of being paid was to take the minimum wage as salary, and draw the rest as dividends.

**(3)** A personal services company could be used by someone who was, in all other respects, an employee, as a means of paying less tax. Consistent with the principle articulated in paragraph 37 above, the Government sought to ensure that, even if an individual was working through a company, but where the underlying nature of the contract is one of employment, tax and NICs were paid at employed levels.

**(4)** At the time of the 2006 Paper, this was done by the "Intermediaries legislation" – also known as "IR35". The Intermediaries legislation refers to income tax and NICs rules that govern the treatment of services provided through an intermediary. The rules are contained in various provisions, including Part 2 of Chapter 8 of ITEPA. The aim of the legislation is to eliminate the avoidance of income tax and NICs through the use of intermediaries, such as service companies or partnerships, in circumstances where an individual worker would otherwise:

**(a)** For income tax purposes, be regarded as an employee of the client; and

**(b)** For NICs purposes, be regarded as employed in employed earner's employment by the client.

**(5)** The legislation ensures that, if the relationship between the worker and the client would have been one of employment had it not been for an intermediary (such as a personal services company), the worker pays broadly income tax and NICs on a basis which is fair in relation to what an employee of the client would pay.

**(6)** Of course, not all personal service companies fall within the Intermediaries legislation. It is only where the relationship between the worker and the client would have been one of employment but for the interposition of the personal services company that this is the case.

**(7)** The 2006 Paper referred to managed service company providers as persons in the business of providing generic company structures to workers, which they then administered on behalf of those workers. Prior to the legislation that is the subject matter of this decision, intermediary companies were sold by such providers in one of two forms:

**(a)** "Composites" or "composite companies". In a composite company, several otherwise unrelated workers were made worker-shareholders of a company – the composite company. The size of the composite company was restricted to ensure that profits did not exceed the threshold for the small companies' rate of corporation tax. Each worker would usually hold a different class of share in the company. This enabled the composite company to pay different rates of dividend to each worker.

**(b)** A "managed" personal service company. In contrast to a composite company, there would only be one worker per company. The personal service company would be set up by the managed service company provider for the worker, and administered by the provider on the worker's behalf.

Such entities can be called "managed service companies".

**(8)** In the case of managed service companies, the worker was almost invariably not in business on his own account and the underlying nature of the contracts in which he was involved was one of employment.

**(9)** Of course, the Intermediaries legislation should have ensured that employed levels of tax and NICs were paid, but HMRC's compliance activity suggested that, in the vast majority of these cases, the legislation was not complied with, meaning that the principle of equivalence described in paragraph 37 above was not being respected.

**(10)** In addition to the loss to tax, the government identified other issues arising out of the services offered by managed service company providers, notably:

**(a)** The risk of unauthorised deductions by the managed service company provider or other irregularities arising because of the worker's lack of control.

**(b)** The risk of depressing the market rate for work in sectors where managed service companies were prevalent.

**(c)** The fact that the managed service company provider benefited financially by taking a significant proportion of the benefit of the contrived tax arrangement as a fee. This fee was usually fixed at a particular sum each week or a percentage of the payments resulting from the worker's labours. The amount was generally £800 to £1,800 over a year for each worker. This was significantly more than the fees that an accountant might typically charge a small business for the preparation of accounts, corporation tax computations and filing, and routine meetings and inquiries (usually around £400 to £700 a year).

**(d)** Managed service company providers also profited from the interest accruing on the amounts deducted from incoming payments against the company's corporation tax liability. The tax was generally withheld by the managed service company provider as soon as the worker was paid – but it might be up to two years before the corporation tax needed to be paid to HMRC.

**(11)** The Intermediaries legislation had proved to be ineffective in respect of the services provided by managed service company providers. In particular:

**(a)** The contract-by-contract approach required by the legislation was very resource intensive. A detailed consideration of the nature of the underlying contract governing each assignment was appropriate in the case of personal service companies which had a variety of engagements, some of which might be contracts of employment while others might be self-employment.

**(b)** In the case of entities established by managed service company providers, where the worker was almost invariably not in business on his own account, and the underlying relationship with the end client was one of employment, the contract-by-contract approach was less appropriate. In view

of the growth of these schemes, it was difficult in practice to counter them on a sufficiently wide scale.

**(c)** Furthermore, the legislation necessarily operated retrospectively, even where those using the schemes complied with it. The tax liability was established at the end of the tax year and was not due for payment until some months later. Where there was non-compliance, HMRC had to establish liability after the event and this, combined with the transient nature of many workers under such schemes made it very difficult to enforce payment of income tax and NICs.

**(d)** Even where the managed service company was still operating and the liability had been established, managed service company providers had in the past simply closed down their existing operations and started up new managed service companies. Because managed service companies had no assets, the debt could not be enforced against the company and the tax and NICs due could not be collected.

*(ii) The proposals in the 2006 Paper*

**39.** The 2006 Paper therefore proposed removing managed service companies from the scope of the Intermediaries legislation (although other personal service companies would remain subject to it). Instead, employed levels of tax and NICs would be applied to income received by workers in respect of services provided through managed service companies by way of a different (that is, a new) regime, focussing specifically on managed service companies.[86]

**40.** Clearly, the definition of a "managed service company" would be crucial to such a new approach. Chapter 3 of the 2006 Paper, and the draft legislation set out in Annex B to the 2006 Paper, sought to define managed service companies by reference to their distinguishing features.[87] The 2006 Paper stated:

"3.1 Chapter 2 described the usual structures of Managed Service Company (MSC) schemes and the way they operate. Features described include:

- in Composite Companies tens of otherwise unrelated workers hold different classes of shares in the same company;
- in Managed Personal Service Companies (MPSCs) the scheme provider is the common link between many otherwise unrelated companies of this type;

[86] See paragraphs 2.45 and 2.46 of the 2006 Paper.

[87] See paragraph 3.7 of the 2006 Paper.

- the worker in an MSC is generally not a director of the company, although he is a shareholder (an individual in business on his own account through a company would almost invariably be a director of the company); and

- the MSC usually does not move with the worker as it would if it were really his business.

3.2 But defining MSCs in these functional terms is unlikely to prove robust against attempts to restructure to avoid being caught by the new provisions. The focus is therefore on those characteristics which are core to the MSC business model and which distinguish these structures. It is important to note that some of these individual features may well be present to a greater or lesser degree in other structures; it is the presence of these characteristics in combination that is key to identifying MSC schemes.

3.3 As discussed in Chapter 2, MSCs provide the services of individual workers to end clients, often through a contractual chain involving employment agencies. To this extent, they share some of the characteristics of Personal Service Companies (PSCs). But the presence and role of the MSC scheme provider is a distinguishing characteristic of the MSC. The MSC scheme provider markets MSC structures and makes them available to workers and also has an ongoing role in the administration and management of the company.

3.4 MSC scheme providers play a central role in the structure of MSCs by:

- setting up the companies and allocating individual workers to them;

- often providing, usually via a nominee company, a company director and a company secretary for the MSC; and

- often providing corporate directors for hundreds or even thousands of MSCs."

**41.** The 2006 Paper proposed to approach the legislative definition of managed service companies in two stages:

**(1)** The first stage was to describe a managed service company as one which provided the services of workers and which did so through a "managed service company scheme".

**(2)** The second stage was to define a "managed service company scheme".

**42.** It will thus readily be appreciated that the approach taken in the 2006 Paper was, in terms of definition, rather different to the approach ultimately adopted in section 61B ITEPA. This, as has been seen, involved defining a managed service company:

**(1)** By reference to the three criteria set out in section 61B(1)(a) to (c); and

**(2)** By reference to the involvement of an MSC provider (section 61B(1)(d)).

In short, the approach ultimately adopted in ITEPA abandoned the notion of a "managed service company scheme", and focussed instead on the concept of an "MSC provider".

**43.** The stated aim of the 2006 Paper was to exclude personal service companies from the new, anticipated, provisions.[88] However, the 2006 Paper made very clear that if and to the extent that a personal service company used a managed service company as a corporate vehicle, it would be caught by the anticipated provisions, and that it would be incumbent on the owner of the personal service company to ensure that it took steps to avoid being so caught:

"D.29 While workers in MSCs are almost invariably not in business on their own account, there may be a limited number of workers who are in business for themselves and using MSCs as a corporate vehicle. These workers would face the on-off compliance cost of moving into Personal Service Companies (PSCs) to avoid paying employed levels of tax and NICs. However, they should not generally face increased costs as the ongoing administrative costs of employing an accountant are lower than the typical fees paid to a scheme provider…

D.30 Although the Government's aim is to target clearly the scope of the measure on MSC schemes some PSCs might face the modest one-off compliance cost of assessing the new measures in order to conclude that they do not apply."

**44.** The 2006 Paper emphasised the need to be robust against anti-avoidance measures: paragraph 3.16 notes:[89]

"…it is important that the legislation should be robust against attempts to circumvent it by re-structuring or devising new arrangements purporting to be outside its scope…"

**45.** In terms of the charge to tax, it was envisaged that "where a worker providing their services through an MSC receives payment for those services, the MSC is treated as making a payment of employment income to the worker. The MSC will be obliged to operate PAYE and pay NICs in the usual way".[90] The 2006 Paper envisaged an ability in HMRC to transfer such liabilities the "appropriate" third parties, such as the MSC provider and persons associated with it.[91] In the event, such provisions were enacted into ITEPA.

---

[88] See paragraphs 3.12, D.29 and D.30.

[89] See also paragraph 3.2 of the 2006 Paper.

[90] See paragraph 4.4 of the 2006 Paper.

[91] See paragraphs 4.12*ff* of the 2006 Paper.

*(iii) The 2007 Paper*

**46.** The 2007 Paper described the outcome of the consultation process launched by the 2006 Paper. Various concerns were identified as a result of this process, including in particular the need to "strengthen the definition of a Managed Service Company (MSC) to give greater clarity and certainty".[92]

**47.** Paragraph 3.15 of the 2007 Paper noted one suggestion to make the definition more robust, namely that "the definition should focus on the MSC scheme provider itself". The 2007 Paper went on to state:

> "4.5 …The new legislation will define an MSC scheme provider by reference to their business, which is facilitating the provision of the services of individuals through companies.
>
> 4.6 The definition both describes the nature of an MSC scheme provider's business and sets out what that provision means in practice. The legislation reflects a number of characteristics the Government believes are unique to MSC scheme providers. If a person who is in the business of providing companies to individuals displays those characteristics he is determined to be an MSC provider.
>
> 4.7 Where a provider is an MSC scheme provider within the definition, the legislation will apply to all service companies being made available through that business. The legislation will also ensure that MSC scheme providers cannot circumvent the legislation by splitting the constituent elements of their business between various parties in an attempt to claim that no one party is caught by the definition.
>
> 4.8 By focussing on the business of an MSC scheme provider in this way, the definition will not catch those who provide services to a service company in the course of a different type of business, such as the provision of accountancy services. Nor, for the same reason, will it include employment agencies because their business is not that of being an MSC scheme provider.
>
> 4.9 This definition will be more effective than the current draft because it focuses on the role of the MSC scheme provider as the distinguishing characteristic of the MSC and will enable HMRC to focus on the small number of MSC scheme providers rather than looking at each service company separately."

*(iv) Other materials*

**48.** In the event, neither party placed particular reliance on the 2008 News or FAQ2.

**49.** FAQ1 provided:

---

[92] See paragraph 1.2 of the 2007 Paper.

"Are company secretaries, company formation agents etc, MSC providers?

A. No. Persons who promote or facilitate companies generally do not fulfil the criterion of section 61B(1)(d).

If an adviser is not covered by the exemption at section 61B(3), are they automatically an MSC provider?

A. No. Simply because a person is not exempt by virtue of section 61B(3) does not mean that they are an MSC provider involved with a client company. For that to happen a person must fulfil wholly the criterion of section 61B(1)(d) which links directly to section 61B(2)."

### (3) Conclusions in relation to this material

**50.** As we have noted, both the Appellants and HMRC placed significant reliance on this material as an aid to construing the provisions of ITEPA that were before us.

**51.** We found this material helpful in terms of setting the context in which section 61B of ITEPA came to be enacted. Essentially, the Intermediaries legislation had been found to be wanting and a new regime, focussed specifically on managed service companies, was required and proposed.

**52.** As regards this new regime:

**(1)** It was to operate in parallel with, but in priority to, the Intermediaries legislation. This is how the legislation in ITEPA was in fact enacted.[93]

**(2)** It was a key concern to ensure that the new regime could not be evaded.

**(3)** The manner in which the managed service companies, to which the regime would apply, would be identified, changed significantly between the initial proposals contained in the 2006 Paper, which were consulted upon, and those which were enacted in ITEPA. We entirely accept that the purpose of the new regime – to single out "managed service companies" and subject them to the new regime – remained the same between the 2006 Paper and the enactment of the new provisions into ITEPA. But the fact is that manner in which managed service companies were to be differentiated or identified changed.

**(4)** We do not consider that it is possible to derive much from the background material that assists us in construing the definitional provisions contained in section 61B of ITEPA. Indeed, we consider

[93] See paragraph 23 of HMRC's written submissions.

that Parliament will have borne in mind, quite carefully, the risks of avoidance, and that it is principally the terms of section 61B itself – rather than the background material – that will assist in the construction process. That, of course, is entirely in accordance with the cardinal rule described in paragraph 25(1) above.

**53.** Our conclusion is that the background material in this case – which we have carefully considered, and on which the parties spent so much time in their oral submissions – is of less, rather than more, help when considering the specific questions of construction that arise in these appeals.

## H. GROUND 10: CBS WAS NOT AN "MSC PROVIDER" WITHIN THE MEANING OF SECTION 61(1)(d)

### (1) Introduction

**54.** Before the FTT, the Appellants conceded that CBS was an MSC provider for the purposes of section 61B(1)(d).[94] Thus, the substance of Ground 10 was not before the FTT and the FTT proceeded on the basis that CBS was an MSC provider within the meaning of section 61B(1)(d).

**55.** The Appellants now seek to re-open that question before us. Before considering the substance of the point that is Ground 10, we must consider whether Ground 10 should be permitted as a ground of appeal. As we have noted (paragraph 6 above), the question of whether permission should be granted was left to us.

### (2) Permission to appeal

*(i) Two questions*

**56.** Two questions arise:

**(1)** First, given that the question of whether CBS was an MSC provider for the purposes of section 61B(1)(d) was expressly conceded by the Appellants and so not determined by the FTT, was there actually a "point of law arising from" the Decision within the meaning of section 11 of the Tribunals, Courts and Enforcement Act 2007? In other words, is there in fact jurisdiction for us to entertain Ground 10 at all?

**(2)** Secondly, assuming we do have jurisdiction to entertain Ground 10, should the Appellants be permitted to withdraw their concession as recorded in the Decision? It seems to us that if the Appellants are permitted to withdraw their concession, then permission to appeal in

[94] Decision at [12].

relation to Ground 10 must be granted, so that the point can be heard and determined.

*(ii) Jurisdiction*

**57.** We hold that there is jurisdiction to hear and determine, on appeal, what is, in effect, a fresh point of law. We reach this conclusion for the following reasons:

**(1)** Generally speaking, an appeal lies against a judgment or order, not against the reasons given by the judge for his or her judgment or order: *Lake v. Lake* [1955] P 336; *Cie Noga d'Importation et d'Exportation SA v. Australia and New Zealand Banking Group Ltd* [2002] EWCA Civ 1142 at [27], [51] and [52]; *Price v. The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 0164 (TCC) at [31] to [33].

**(2)** That principle applies to tribunals, including to the FTT: *Harrod v. Ministry of Defence* [1981] ICR 8; *Price v. The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 0164 (TCC) at [34].

**(3)** The consequence of this principle is that whilst a (successful) party cannot appeal if the decision below is in his or her favour, that party can (as a respondent to an appeal) seek to uphold the decision below on different grounds to those relied on by the lower court or tribunal without needing permission to do so: *Price v. The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 0164 (TCC) at [34] to [35].

**(4)** On the other hand, the unsuccessful party can (and can only) appeal the decision: the basis upon which that decision is reached is not under attack. It follows that the challenge to the decision can be on different grounds to those relied upon by the lower court or tribunal in justifying its decision.

**(5)** It is, therefore, important to identify with precision what the decision in the lower court or tribunal actually is. In the case of the FTT, the FTT does not draw up a formal order in the same way as a court. The rules provide that the FTT must, after making a decision which finally disposes of all issues in the proceedings, provide to each party a decision notice which states the FTT's decision. That decision notice must – unless the parties agree it is unnecessary – include either a summary of the findings of fact and reasons for the decision or be accompanied by full written findings of fact and reasons for the decision: *Price v. The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 0164 (TCC) at [39].

**(6)** In the present case, the latter course was followed. The entire document is entitled "Decision", but the bulk of this contains the FTT's findings of fact and reasons for its decision. The FTT's actual decision is contained in [325] of the Decision, which simply states that "[f]or the reasons given above, we dismiss all five appeals". The "decision" of the FTT for the purposes of an appeal was that the determinations by HMRC that the Appellants were liable to income tax and the notices that they were liable to make NICs were well-founded. Naturally, that decision was based upon the conclusion that the Appellants fell within Chapter 9 of ITEPA, but that is not the decision of the FTT, merely part of the process by way of which the FTT arrived at its decision.

**(7)** It therefore follows that it is perfectly possible to contend that the FTT's Decision was wrong in law because CBS was not an MSC provider within the meaning of section 61(1)(d).

*(iii) Permission to appeal*

**58.** That leaves, then, the question of whether the Appellants should be permitted to appeal on the basis of Ground 10. As we have noted, this turns on the question of whether the Appellants should be permitted to withdraw the concession made by them before the FTT.

**59.** The Court of Appeal has emphasised that the discretion to allow a concession to be withdrawn on an appeal should only be exercised in exceptional circumstances and for compelling reasons.[95]

**60.** The general principles that should be borne in mind, when exercising this discretion, were articulated by Mann J in *BT Pension Scheme Trustees Ltd v. Secretary of State for Business, Innovation and Skills* [2011] EWHC (Ch) at [44], which we adopt. They are as follows:

**(1)** The resiling party has the burden of establishing that the previously foregone point should be raised.

**(2)** It will be hard to raise a point which has been expressly conceded.

**(3)** If taking the point would risk causing prejudice to the other party, in the sense that it might have been deprived of the opportunity of dealing with the case differently in the court below, then it is unlikely that resiling will be allowed. The greater the risk, the less likely it is that it will be allowed.

**(4)** The burden is a low threshold of risk for these purposes.

---

[95] See, for example, *Leicestershire County Council v. UNISON* [2006] IRLR 810 at 15-21.

**(5)** The burden of establishing no risk is on the party who wishes to withdraw the concession, and the other party should have the benefit of any doubt in this area.

**61.** We heard argument on Ground 10 *de bene esse* because the point underlying Ground 10 is closely linked to Grounds 2 to 9 and because the timetable for the hearing of the appeal was not disrupted by the hearing of Ground 10. We are, therefore, in a very good position to apply the principles articulated by Mann J.

**62.** There are three factors pointing towards permitting Ground 10 to be advanced on appeal:

**(1)** First, there is the absence of prejudice to HMRC.

**(a)** Mr. Goodfellow, Q.C., for the Appellants, contended that Ground 10 was a pure point of law capable of being considered and determined on the basis of the factual findings made by the FTT. Certainly, Mr. Goodfellow's submissions were so confined.

**(b)** We have considered further whether, in order to deal with Ground 10, the FTT would have had to make further findings of fact. If so, then plainly this would be an indicator against permitting the Appellants to withdraw their concession. Mr. Goodfellow contended that this issue did not arise, and we agree. It is possible to determine Ground 10 on the facts as found by the FTT.

**(c)** Mr. Nawbatt, Q.C., for HMRC, did not seek to contend that HMRC would wish to rely upon or advance factual assertions additional to the FTT's findings. He was content to argue the point on the FTT's factual findings.

On this basis, there is clearly no prejudice to HMRC in the concession being withdrawn.

**(2)** Secondly, we are conscious that this is the first case considering the construction of section 61B ITEPA. There is an advantage in considering all those aspects of these provisions that the parties wish to advance, as guidance for future cases.

**(3)** Thirdly, and relatedly, HMRC urged us to hear Ground 10. Although initially opposing permission in relation to Ground 10, HMRC came to the view that it was better to have the point determined.

We can see no countervailing reason why the Appellants should not be permitted, in this case, to resile from their concession.

**63.** Accordingly, we give permission to the Appellants to resile from their concession and we give permission for Ground 10 to be advanced as a ground of appeal.

## (3) The substance of Ground 10

### *(i) The relevant provision*

**64.** Section 61B(1)(d) provides that:

> "A company is a "managed service company" if –
>
> …
>
> (d) a person who carries on a business of promoting or facilitating the use of companies to provide the services of individuals ("an MSC provider") is involved with the company."

### *(ii) The Appellants' contentions*

**65.** The Appellants contended that the wording of section 61B(1)(d) was "ambiguous".[96] It was contended that the definition of an MSC provider as "a person who carries on a business of promoting or facilitating the use of companies to provide the services of individuals" could either mean:

> **(1)** That, in order to be an MSC provider, a company must promote or facilitate the use of companies, which are then used to provide the services of individuals; or
>
> **(2)** That, in order to be an MSC provider, a company must promote or facilitate the services provided by the companies it has promoted or facilitated.

**66.** The Appellants contended for the second alternative. Paragraph 93 of the Appellants' written submissions state:

> "The Appellants' submission is that, having regard to the wording and purpose of the legislation, a party only "carries on a business of promoting or facilitating the use of companies to provide the services of individuals" where that person is promoting and/or facilitating the provision of the individual's services through the company. That condition is not satisfied where:
>
> (1) The putative MSC provider does not control, manage or direct the PSC's business activities;
>
> (2) The putative MSC provider merely facilitates, encourages or advises the establishment of a company, knowing that the individual will go on to use the company to provide services; and/or

[96] See paragraph 94 of the Appellants' written submissions.

(3) Following the establishment of the PSC, the putative MSC provider's only substantial role is to undertake administrative and accounting functions and they are not involved with the company's business activities."

**67.** As we have noted, it was suggested by the Appellants that this provision was ambiguous. We disagree. We consider that the meaning of section 61B(1)(d) is entirely plain on the face of its wording:

**(1)** There is no requirement for the putative MSC provider to promote or facilitate the provision of the individual's services. Section 61B(1)(d) requires that the putative MSC provider promote or facilitate the use of a company that provides the services of individuals.

**(2)** In other words, whilst the promotion or facilitation of the provision an individual's services would almost certainly satisfy the section 61B(1)(d) test, this is not a necessary condition. What is necessary is the promotion or facilitation of the use of the company.

**(3)** This conclusion is reinforced by the terms of section 61B(2)(b), which provides that an MSC provider is "involved with the company" if the MSC provider or an associate of the MSC provider "influences or controls the provision of" the services provided by the company. Clearly, if the Appellant's contention was right, this provision would be entirely redundant, because it would always be satisfied by virtue of the fact that the putative MSC provider had met the "MSC provider" test. On this basis, of course, the entirety of section 61B(2) becomes redundant, because the tests laid down in sections 61B(2)(a) to (e) are disjunctive.

**(4)** Section 61B(1)(d) sets out a perfectly straightforward, two-stage, test for determining whether a company is or is not an MSC provider:

**(a)** First, does the putative MSC provider promote or facilitate the use of a company?

**(b)** Secondly, if so, does that company provide the services of individuals?

**68.** Applying this test, it is plain that CBS falls within the statutory definition of an "MSC provider". The appeal in relation to Ground 10 is, therefore, dismissed.

## I. GROUNDS 2 TO 9

### (1) Introduction

**69.** Grounds 2 to 9 all relate to the question of whether sections 61B(2)(a), (c) or (d) were satisfied in this case. More specifically:

**(1)** Grounds 2, 3 and 4 relate to section 61B(2)(a).

**(2)** Grounds 5 and 6 relate to section 61B(2)(c).

**(3)** Grounds 7, 8 and 9 relate to section 61B(2)(d).

**70.** It is convenient to consider the Grounds relating to each sub-sub-section together. We do so in the next sections of this decision.

### (2) Section 61B(2)(a) and Grounds 2, 3 and 4

*(i) The relevant provision*

**71.** Section 61B(2)(a) provides that:

> "An MSC provider is "involved with the company" if the MSC provider or an associate of the MSC provider –
>
> (a) benefits financially on an ongoing basis from the provision of the services of the individual…"

*(ii) Grounds 2 and 3*

**72.** In Grounds 2 and 3, the Appellants contended that the FTT had erred in law in holding that the fixed fees paid to CBS by the Appellants for the services provided by CBS meant that CBS was "benefitting financially on an ongoing basis from the provision of the services of the individual" within the meaning of section 61B(2)(a) of ITEPA.

**73.** CBS's charges are described in paragraph 16(4)(c) above. Over time, CBS had three charging structures: the first was a 5% fee per invoice transaction, and was thus directly proportionate to the sums received by the companies set up by CBS. The second and third charging structures were not proportionate rates. The second structure involved a fixed amount of £35 "as and when work is done", whilst the third involved an annual rate apportioned either weekly or monthly.

**74.** It was conceded by the Appellants that the first charging structure fell within section 61B(2)(a) and no appeal was made in respect of this finding by the FTT. However, the Appellants contended that the FTT had erred in holding that the second and third charging structures meant that CBS was

"benefitting financially on an ongoing basis from the provision of the services of the individual" within the meaning of section 61B(2)(a).[97]

**75.** The Appellants contended that whereas there was a sufficient causal link between the provision of services of the individual and the financial benefit to CBS in the case of the first charging structure (because that involved CBS taking a percentage) so that section 61B(2)(a) was met in that case, that was not the case as regards the second and third charging structures.

**76.** The Appellants' written submissions state:

"30. The Tribunal held that the words "benefits financially on an ongoing basis" should be given their ordinary meaning and construed purposively. However, the Tribunal made no attempt to explain the purposive approach that it had applied in construing that provision. In addition, the Tribunal's interpretation only covered the first half of the requirement in section 61B(2)(a). Critically, the Tribunal failed to give appropriate consideration to what it means to benefit financially "from the provision of the services of the individual".

31. Notwithstanding that the FTT did not expressly consider the full scope of this provision, it clearly applied a very broad or loose approach to this condition. At paragraph 291, the FTT considered that the provision was met in relation to the fee structure whereby a fixed fee was paid each time a payment was made to the PSC:

"We consider that in each case CBS benefited financially on an ongoing basis from the services provided by the individual…The fixed fee per transaction basis of charging was also clearly related to the services provided by the individual. The fee was only charged when a payment was received by the personal service company. Moreover, the fee related to the number of payments received by the client (from the agency) rather than the number of times the payroll had to be run or a payslip produced. Thus, if the client received two payments in one week from the agency, CBS ran one payroll and produced one payslip, but charged two fees. Thus, the fees relates to the number of payments received (which was a factor of the amount of work done by the client) rather than the number of times it had run a payroll or produced a payslip. This, in our view, is a sufficiently close link to establish that CBS benefited "from" the services provided by the individual."

32. This analysis demonstrates that the Tribunal applied a very broad meaning to the wording of section 62B(2)(a) and a commensurately loose causal link between the receipt of benefit by CBS and the provision of services by the individual. If all that is required is that a person only received fees when the individual is working and so has need of the supplier's services, then all manner of suppliers of goods and services would potentially fall foul of this provision since their receive payments based on the PSC's consumption of their goods/services, which is likely to arise only when the PSC is conducting its

[97] Ground 2 related to the second charging structure and Ground 3 related to the third charging structure.

business activities. In particular all payroll service providers would fall within this provision since their fees are determined by the number of payments and so the time taken to process payments received from the employer.

The Tribunal's logic is fundamentally flawed. The reason that CBS earns a fee is because they are providing a service to the PSC (in relation to each payment received by it) and the amount it receives is linked to the amount or value of the service provided and not to the extent, nature or value of the work done by the individual. The fact that CBS receives a fee when the individual works is a natural consequence of the fact that CBS receives fees only when it provides services to the PSC, and it is the individual's work which generates the payments to the PSCs which creates the need for CBS's services, and it is for performing those services and the number of times which CBS performs them that determines the amount CBS gets paid and not the amount or value of the services provided by the individual."

**77.** We consider that both the second and third fee structures fall within the scope of section 61B(2)(a) and that Grounds 2 and 3 must both be dismissed. We reach this conclusion for the following reasons:

**(1)** Section 61B(2)(a) must, obviously, be seen in its context. The question of whether the conditions of this sub-sub-section have been met will only arise if:

**(a)** The company to whom the MSC provider is providing services meets the requirements of sections 61B(1)(a) to (c). In effect, the company must be a personal services company.

**(b)** The services are provided to that company by an MSC provider within the meaning of section 61B(1)(d).

Unless these requirements are met, the question of "involvement" simply does not arise.

**(2)** Given these pre-conditions, it is, in our view, not surprising that section 61B(2)(a) is broadly framed. In our judgment, and subject to the limiting words "on an ongoing basis" – which we consider further below – section 61B(2)(a) is sufficiently widely framed so as to include any financial benefit to the MSC provider (or an associate of the MSC provider) arising out of the provision of the services of an individual by a company meeting the requirements of section 61B(1)(a), (b) and (c).

**(3)** We reject the contention that section 61B(2)(a) contains any requirement of proportionality or correlation between the amounts earned as a result of the provision of the services of the individual and the extent of the financial benefit to the MSC provider. Section 61B(2)(a) contains no such requirement on its face, and we see no reason to imply such a requirement. That, we consider, would be an open invitation to precisely the sort of evasion that Parliament

would have been astute to avoid. Indeed, on the Appellant's case, all that would be required to ensure that CBS was not "involved" with the Appellants was a relatively minor change in the way in which CBS charged for its services.

**(4)** It follows that, to the extent that the FTT considered (in [291] of the Decision) that it was necessary to find some sort of correlation between CBS's charges and the payments to the Appellants, we consider that the FTT was seeking to establish a requirement not actually present in section 61B(2)(a).

**(5)** We turn to the limiting words "on an ongoing basis". These words, as it seems to us, are intended to exclude from the scope of section 61B(2)(a) "one-off" financial benefits.

**(6)** We note the contention advanced by the Appellants that a wide construction of section 61B(2)(a) would embrace the services of – for instance – payroll service providers. Viewing section 61B(2)(a) in isolation that is no doubt correct. However, we say nothing, in this decision, as to the application of section 61B to payroll service providers. It is clear that whilst CBS did provide payroll services, it provided many other services in addition. It seems to us that the question of whether a payroll service provider *simpliciter* falls within the scope of section 61B of ITEPA is not a question before us, and not one that it would be helpful for us to address. We would only observe that, in order to discern the precise limits of the legislation in relation to payroll service providers *simplicter*, it might well be necessary to re-visit the Parliamentary materials in light of different contentions in relation to the scope of section 61B of ITEPA. As it is, it remains an open question – on which we say nothing – as to whether a company providing solely payroll services to a company meeting the requirements of section 61B(1)(a) to (c) would fall to be considered a "MSC provider" within section 61B.

*(iii) Ground 4*

**78.** In Ground 4, the Appellants contended that the FTT erred in finding that the interest CBS earned in respect of sums that it deducted from the receipts of its customers in respect of tax in the period between the deduction of those sums and the payment of those sums to the tax authorities constituted a "financial benefit" within the meaning of section 61B(2)(a).

**79.** The findings in relation to the manner in which CBS earned this interest are set out at paragraphs 16(7)(d) and (e) above. Applying the construction of section 61B(2)(a) that we have stated in paragraph 77 above, we have no hesitation in concluding that the interest received by

CBS was a "financial benefit…from the provision of the services of the individual".

**80.** The Appellants contended that the financial benefit to CBS was too indirect and dependent upon too many other factors to satisfy the requirements of section 61B(2)(a). The Appellants' written submissions stated:

"45. The entitlement to and the amount of the benefit obtained by CBS is a number of stages removed from benefiting from the services provided by the individual (and the payments received) because the interest earned is determined by a number of more influential variables which are independent of the services being provided by the PSC:

a) The manner in which the individual receives payments – the amount held on deposit represented the PSC's tax liability. Since different tax treatments apply to dividends and wages with consequentially different tax liabilities being incurred by the PSC, the amount held on deposit earning interest was dependent on the manner in which the individual chose to receive payments from their PSC…;

b) The rate of tax – for the same reason, the amount held on deposit earning interest was dependent on the rate of tax at the time;

c) The allowable expenses incurred by the PSC – the amount of expenses incurred would reduce the amount of tax to be deducted;

d) The rate of interest and the interval of time between the payment of sums into the deposit account and their application in settlement of the company's liability – This is determined by a number of further factors including the bank with which funds a held (which varied), the amount held on deposit, the type of account held, and the prevailing interest rates.

46. The above variables determined CBS's income from this course but had no relationship with the services provided by the individual…".

**81.** For the reasons we give in paragraph 77(3) above, we do not consider that section 61B(2)(a) requires any form of correlation or relationship between the amounts earned by the individual and the extent of the financial benefit received by the MSC provider. As long as there is a causal link between the two, the fact that one may fluctuate whilst the other does not is nothing to the point – it is a wholly irrelevant factor. In this case, it is absolutely clear that the tax deductions were made out of the gross receipts by the customer, and it was from these deductions that CBS derived its financial benefit.

**82.** The appeal in relation to Ground 4 is, therefore, dismissed.

**83.** There is, however, one further point that we should briefly address for the sake of completeness. As we have noted (see paragraph 16(7)(d)above), CBS undertook to account to its customer for the interest on any

deductions, and CBS did not do so. It is, therefore, entirely questionable as to whether CBS was entitled to act as it did: it is entirely possible that CBS's customers could require CBS to account for the benefit it received in this way.

**84.** We do not propose to resolve the question of whether CBS acted improperly and – if it did – what its customers' remedies might be. We would only observe that, in our judgment, the phrase "benefits financially" is sufficiently wide to embrace financial benefits obtained improperly or unlawfully and which the MSC provider might have to account for to another. Accordingly, whether or not the interest was a legitimately obtained financial benefit by CBS is irrelevant to the outcome of the appeal in relation to Ground 4.

### (3) Section 61B(2)(c) and Grounds 5 and 6

*(i) The relevant provision*

**85.** Section 61B(2)(c) provides that:

> "An MSC provider is "involved with the company" if the MSC provider or an associate of the MSC provider –
>
> …
>
> (c) influences or controls the way in which payments to the individual (or associates to the individual) are made…"

*(ii) Grounds 5 and 6*

**86.** These grounds of appeal relate to the manner in which dividends were paid to the Appellants. As has been described in paragraphs 16(6) above, CBS asked its customers to select their payroll requirements. Essentially, a customer could choose how much would be received as a wage and that determined how much the customer received by way of dividend.

**87.** As at August 2009, 99% of customers were on the minimum wage model and all of the owners of the Appellants received the minimum wage. However, it was only in relation to <u>two</u> of the Appellants (the Third Appellant (Ms. Ayodele) and the Fifth Appellant (Mr. Tooze)) that the FTT considered that the evidence justified a finding that the Appellants had <u>chosen</u> the minimum wage as their payroll requirement. As regards the First Appellant (Dr. Osamwonyi), the Second Appellant (Ms. Fanning) and the Fourth Appellant (Dr. Trzaski), the FTT concluded that:

**(1)** There was, in the case of Dr. Trzaski, positive evidence that he did not select the payment of the minimum wage, but nonetheless was paid the minimum wage model.[98]

**(2)** In the cases of Dr. Osamwonyi and Ms. Fanning, there was not sufficient evidence to justify a finding that there had been any election by them regarding their payroll requirements. The FTT found (at [306] of the Decision):

> "…As regards Dr. Osamwonyi and Ms. Fanning, no Registration Forms were produced in evidence. We therefore do not know as regards [these Appellants] whether their directors authorised the payment of salaries in respect of the minimum wage on the Registration Form. Dr. Osamwonyi's evidence, however, was that he left it to CBS to determine how he was paid."

**88.** The FTT concluded that:

**(1)** Ms. Ayodele and Mr. Tooze had elected to be paid the minimum wage and that CBS did not control the amounts determined to be paid by way of remuneration.[99] However, the FTT did not consider that any of the Appellants had applied their mind to the manner in which the surplus profits (i.e. the monies received by the Appellants over-and-above the payments in respect of the minimum wage) should be dealt with, and that it was CBS that determined that the surplus profits of a client personal service company would be distributed by way of dividend. For this reason, the FTT concluded that CBS influenced or controlled the way in which payments to these individuals were made.[100]

**(2)** As regards Dr. Osamwonyi and Ms. Fanning, the FTT reached the same conclusion, but also found at [308] of the Decision:

> "As regards [the First Appellant] and [the Second Appellant] there was no evidence before us concerning the instructions, if any, given to CBS by Dr. Osamwonyi and Ms. Fanning respectively concerning the level of their salary payments. Indeed, as we have said, Dr. Osamwonyi's evidence was that he simply left how he would be paid to CBS. Therefore, in the case of [the First Appellant] we find that CBS controlled and influenced the way that payments were made to Dr. Osamwonyi. As regards [the Second Appellant], the burden of proof is on the appellant to show that CBS did not control or influence the way that payments were made to Ms. Fanning. [The Second Appellant] has simply failed to do this. Accordingly, we conclude that [the Second Appellant] has failed to show that section 61B(2)(c) did not apply."

---

[98] Decision at [305].

[99] Decision at [307].

[100] Decision at [313].

**(3)** As regards Dr. Trzaski, the FTT reached the same conclusion as in the case of Ms. Ayodele and Mr. Tooze, but also found that "CBS determined the level of Dr. Trzaski's salary and therefore…controlled the way in which payments were made to him for the purposes of section 61B(2)(c)".[101]

**89.** The Appellants contended that the FTT erred in holding that section 61B(2)(c) was satisfied by virtue of the payment of dividends to the shareholders (Ground 5), i.e. the conclusion described in paragraph 88(1) above.

**90.** They also contended that the conclusions reached in relation to Dr. Trzaski (paragraph 88(3) above), Dr. Osamwonyi and Ms. Fanning (paragraph 88(2) above) were wrong (Ground 6). Part of this appeal contended that this conclusion was wrong on *Edwards v. Bairstow* grounds.[102] For the reasons given in paragraph 20 above, we reject this contention. We do not consider that it can be suggested that these were conclusions that the FTT was not entitled to reach on the evidence before it.

**91.** We consider that CBS influenced or controlled the way in which payments were made to the owners of the Appellants and that Grounds 5 and 6 must be dismissed for the following reasons:

**(1)** "Control" and "influence" are ordinary English words. We consider that "control" refers to a power of direction, and will exist where the MSC provider is – either explicitly or implicitly – given a power to do (or refrain from doing) something in relation to the affairs of its customer.

**(2)** We agree with the FTT that "control can be shared and need not be exclusive".[103]

**(3)** "Influence" exists where the MSC provider has an effect upon the manner in which the customer conducts its affairs.

**(4)** These are the dictionary definitions of "control" and "influence". They are, in essence, the same as those used by the FTT (see the Decision at [301] ("control") and [302] ("influence")).

**(5)** In the present instance, we are concerned to ascertain whether CBS controlled or influenced the way in which payments were made to the owners. We consider that this is a question that must be approached in the round: it is necessary to consider the manner in

[101] Decision at [305].

[102] See the Appellants' written submissions at paragraph 66(1) and see paragraphs 19-20 above.

[103] Decision at [301].

which all of the payments came to be made to the customers. As we have noted, these payments were in form of the minimum wage plus dividends.

**(6)** We consider that the essence of the product offered by CBS (as found by the FTT: see paragraph 16 above) was intended to, and did, influence the manner in which CBS's customers were paid. The whole point of the corporate structure offered by CBS was to enable its customers to draw a salary at the minimum wage and then to draw the surplus as a dividend, instead of simply receiving a salary where the incidence of taxation would be higher. CBS's customers were not – as the FTT found – especially troubled as to the process by way of which this lower incidence of taxation would be achieved: they were attracted by the fact of a lower incidence of income tax and NICs.

**(7)** Fundamentally, we do not consider this to have been a question of control: CBS's customers chose to subscribe to the GBS product. However, CBS undoubtedly influenced the way in which payments to the owners were made. We consider it beyond doubt that CBS caused the owners to draw by way of wage and dividend what would otherwise have been drawn by way of wage alone. In this way, CBS influenced the way in which payments to the owners were made.

**(8)** In subsidiary respects, CBS did have control:

**(a)** Whilst it may well be the case that most customers elected to receive a minimum wage, as the FTT has found, where an election was not made, CBS effectively determined that the minimum wage would be paid. We agree with the finding of the FTT that this amounted to control – particularly given that control can be shared. Accordingly, we agree with the findings made by the FTT in relation to the First Appellant (Dr. Osamwonyi), the Second Appellant (Ms. Fanning) and the Fourth Appellant (Dr. Trzaski).

**(b)** A regards the payment of dividends, we find that CBS exercised control in respect of all of the dividends received by the owners. CBS determined that the surplus should be paid as dividends and carried out the necessary administrative steps to obtain this outcome. We stress that there was nothing improper in any of this. We have no doubt that – in very broad-brush terms – CBS's customers approved of and authorised CBS's actions on their behalf. However, particularly in the case of dividends, we find that as part of the process the corporate owners ceded control over the way in which payments were made to CBS.

**(c)** The Appellants placed great stress on the fact that where an individual is the sole director and sole shareholder of a company (as all the owners were in the case of the Appellants), their assent to the distribution of dividends could be informally given, and would not necessarily require a resolution in general meeting or any other formal form of assent.[104] We do not necessarily dissent from this, and certainly we do not find that dividends were distributed without the essential consent of the owners. But that is nothing to the point: the fact is that the customers of CBS – including the owners – had bought into the GBS product and were prepared to allow CBS to do the necessary to bring home the tax benefits that CBS suggested might be achievable. That, in our judgment, amounts to control.

**92.** Accordingly, we dismiss Grounds 5 and 6.

## (4) Section 61B(2)(d) and Grounds 7, 8 and 9

### *(i) The relevant provision*

**93.** Section 61B(2)(d) provides that:

> "An MSC provider is "involved with the company" if the MSC provider or an associate of the MSC provider –
>
> …
>
> (d) influences or controls the company's finances or any of its activities…"

### *(ii) Grounds 7, 8 and 9*

**94.** The FTT found that CBS had influenced or controlled the Appellants' finances and/or any of its activities in three respects:

**(1)** First, in persuading its customers to use the CredEcard accounts offered by it, in particular by incentivising the use of the CredEcard account through the surcharge.[105] The Appellants appeal against this finding by way of Ground 7.

**(2)** Secondly, in deducting monies from the Appellants' accounts in respect of future tax obligations every time a payroll was processed. At [318] of the Decision, the FTT held:

> "…we consider that CBS influenced the manner in which the appellant companies paid their taxes. CBS would receive an email notification when

[104] See *Re Duomatic Ltd* [1969] 2 Ch 365 at 373 (*per* Buckley J).

[105] Decision at [316] to [317].

a payment was made into one of its client's CredEcard accounts. The amount of taxes would then be deducted by CBS every time a payroll was processed. The result was that the appellants paid away amounts in respect of taxes well before the statutory due dates for payment to HMRC. In our view, the acceleration of the appellants' tax payments constituted CBS influencing their finances."

The FTT further considered that CBS's failure to account for the interest it earned demonstrated that it controlled its customer's money, in effect because it (CBS) was acting in breach of fiduciary duty.[106]

The Appellants appeal against this finding by way of Ground 8.

**(3)** The FTT found that CBS influenced or controlled the Appellants' finances and/or any of its activities in withdrawing from the CredEcard accounts monies (in respect of both CBS's fees and taxes due) without a mandate addressed to the bank.[107] The FTT concluded that CBS's ability to withdraw money from accounts of which it was not the owner amounted to control over the Appellants' finances and/or any of its activities:

"322. …we have concluded that, after the introduction of debit mandates from September 2007, CBS did not use its password and login details to log into (and thereby access) its clients' accounts but, rather, debited amounts via the Instapay system pursuant to the debit mandates. In our view, debiting amounts from the client company's CredEcard account pursuant to a debit mandate does not of itself constitute CBS controlling of influencing the client company's finances. The debit is made pursuant to an authority given by the client and control (either to revoke or continue that authority) remains with the client. For the same reason, we do not consider that, in this respect, CBS exercised influence over their clients' finances. Moreover, we do not consider that CBS shared control with the clients in these circumstances: control remained with the client.

323. The position was different, however, as regards the periods before the debit mandates were introduced in September 2007. As we have found…until the introduction of debit mandates, CredEcard permitted CBS to withdraw amounts in respect of fees and taxes from its clients' accounts without a mandate addressed to it. In our view, this constitutes control of the client company's finances by CBS for the purposes of section 61B(2)(d). CredEcard allowed CBS to withdraw money from its customers' accounts without receiving a mandate…"

**(4)** The Appellants appeal against this finding by way of Ground 9.

---

[106] Decision at [319] to [321].

[107] Decision at [116].

*(iii) Analysis*

**95.** In our judgment, each of Grounds 7, 8 and 9 must fail. Our reasons for reaching this conclusion are as follow:

**(1)** We have set out, in paragraph 91 above, our understanding of the meaning of the terms "influence" and "control".

**(2)** In the case of section 61B(2)(d), the influence or control is in relation to the company's finances or any of its activities. Section 61B(2)(d) is very broadly framed – particularly, in relation to the reference to "any…activities". It seems to us, however, that there must be some limits to the ambit of this provision and that the mere sale or offer of goods or services by a person alleged to be the MSC provider on arm's length and non-discriminatory terms cannot amount to influencing or controlling a company's finances or any of its activities. That would be to draw the net too widely.

**(3)** The Appellants contended that there were excellent commercial grounds for CBS to incentivise its customers to use CredEcard accounts. The advantages to CBS of this course are set out in paragraph 72 of the Appellants' written submissions and are summarised in paragraph 16(7)(f) above. We are quite prepared to accept that there were significant commercial advantages to CBS in incentivising its customers to use a CredEcard account. That, however, is precisely the point: by imposing a 5% surcharge on the use of other forms of payment, CBS was affecting the manner in which the customer chose to pay, and so was influencing (in this case) each of the Appellant's finances by causing them to set up CBS's favoured banking facility. The fact that CBS had perfectly sound commercial reasons for incentivising the Appellants in this way is nothing to the point.

**(4)** So far as the deduction of tax is concerned, we do not consider that the mere deduction – in advance – of taxes can amount to CBS influencing the Appellants' finances or any of its activities. This was simply a service that CBS offers, and that the owners chose to accept. To this extent we disagree with the analysis of the FTT. The fact is that this was a service explicitly offered by CBS to its customers, and which they accepted.

**(5)** However, the authority conferred on CBS involved CBS holding the monies in a particular way (i.e., in an interest-bearing client account) and accounting to the customer for interest. This CBS did not do. It seems to us that where an agent acts in a manner inconsistent with its stated obligations to its customer, that does amount to the controlling of the Appellants' finances or other of its

activities. To this extent we agree with the determination of the FTT.

**(6)** So far as the access to the CredEcard accounts is concerned, we entirely agree with the reasoning of the FTT. As it seems to us, where a customer mandated CBS to debit its account and notified the bank of this authority, then the bank was acting in accordance with the instruction of its client, and CBS was neither influencing nor controlling the behaviour of the customer. However, where the instruction to the bank does not exist, and the authority exists simply between Appellant and CBS, who itself directs the bank, matters are different.

**96.** The appeal in relation to Grounds 7, 8 and 9 is, therefore, dismissed.

## H. DISPOSITION

**97.** For the reasons given in this decision, we dismiss the Appellants' appeal on all Grounds.

**Mr. Justice Marcus Smith** **Judge Timothy Herrington**

**Upper Tribunal Judges**

**Release Date: 19 January 2018**