



Neutral Citation: [2026] UKUT 00211 (TCC)

Case Number: UT/2024/000138

**UPPER TRIBUNAL
(Tax and Chancery Chamber)**

The Royal Courts of Justice,
Rolls Building, London

VALUE ADDED TAX – VAT grouping – HMRC decision to refuse admission of First Appellant to VAT group – whether First Appellant had a fixed establishment in the UK at date of application for grouping – whether decision to refuse grouping on alternative ground of being necessary for the protection of the revenue was reasonable – whether a conforming construction of the UK VAT grouping rules to restrict their territorial ambit is possible

Heard on: 5, 6, 9 and 10 March 2026

Judgment date: 08 June 2026

Before

**MR JUSTICE RAJAH
JUDGE THOMAS SCOTT**

Between

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

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

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

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

DECISION

INTRODUCTION

1. The Second Appellant, Barclays Execution Services Ltd (“BESL”) is the representative member of a VAT group within the Barclays corporate group. On 1 December 2017, BESL applied to the Respondents (“HMRC”) for the First Appellant, Barclays Services Corporation (“BSC”), to join the VAT group (the “Application”). BSC is a Delaware corporation with limited liability which is also part of the Barclays corporate group and which operates primarily in the United States and has a branch in the UK.

2. HMRC rejected the Application on two alternative grounds:

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

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

3. BSC and BESL appealed against that rejection to the First-tier Tribunal (Tax Chamber) (the “FTT”). In its decision issued on 29 August 2024 (the “Decision”), the FTT dismissed the appeal.

4. The FTT held that BSC did not have a fixed establishment in the UK as at 1 December 2017. BSC and BESL appeal against that decision (the “Fixed Establishment Issue”).

5. The FTT also held that if BSC had had such a fixed establishment, HMRC could not reasonably have been satisfied that the Application should be refused as necessary for the protection of the revenue (“POR”). HMRC appeal against that decision (the “Protection of the Revenue Issue”).

6. The FTT was also asked by HMRC to determine whether the relevant statutory provisions in VATA could be construed so as to contain a territorial limitation, in conformity with the decision of the CJEU¹ in *Danske Bank A/S, Danmark, Sverige Filial v Skatteverket* (Case C-812/19) [2021] STC 68 (“*Danske Bank*”). The FTT decided that they could not. HMRC appeal against that decision (the “Danske Bank Issue”).

7. Mr Hitchmough KC and Ms Yang also appeared for the Appellants before the FTT, and Ms McCarthy KC, Mr Ripley and Mr Waldegrave also appeared for HMRC before the FTT. We are grateful for the written and oral submissions of all counsel, and for the contributions of the hard-working teams who supported them.

BACKGROUND: VAT GROUPING IN THE UK

8. It is helpful to set the scene for the issues in this appeal.

9. The starting point is Article 11 of Council Directive 2006/112/EC on the common system of VAT (the Principal VAT Directive or “PVD”). This provides as follows:

...each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.

¹ We use “CJEU” to refer to both the Court of Justice of the European Union and the earlier Court of Justice of the European Communities.

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

10. Three important points are readily apparent from Article 11. First, it gives Member States an option (“may regard”). Second, deciding how to implement that choice in domestic legislation is left to individual Member States, within the parameters of treating as a single taxable person only those persons with the necessary close links. Third, the reference to the ability of a Member State which adopts Article 11 also to adopt measures necessary to prevent evasion or avoidance indicates that this was a risk for which it was thought sensible to provide.

11. Member States have chosen a variety of ways in which to implement the Article. The UK chose to implement Article 11 by section 43 VATA, which we consider in detail below.

12. Most Member States which have introduced such provisions have restricted the single taxable person treatment to entities within the territory of that Member State, sometimes called an “establishment only” approach. However, the UK chose to extend the treatment to bodies corporate which, although not resident in the UK, have a fixed establishment in the UK, sometimes called a “whole establishment” or “whole entity” approach.

13. We discuss below the *purpose* of VAT grouping, but there is no doubt that as implemented in the UK, with its whole establishment approach, its *effect* can be to result in material VAT savings for businesses which set up a VAT group. That is particularly the case in sectors such as financial services which generate substantial supplies which are exempt from VAT. As HMRC explained in their skeleton argument:

Where a UK company receives supplies from a non-UK company the default position is that it is required to account for VAT in respect of the supplies in question. This is the effect of the “reverse charge” rules found in s8 VATA. If the UK company itself makes supplies which are in whole or in part exempt from VAT (which is likely if it is operating in the financial services sector) the VAT on the imported services would lead to a significant “sticking” VAT charge.²

14. HMRC’s view is that some groups in the financial services sector have adopted structures which seek to take advantage of the UK’s VAT grouping rules by establishing in the UK, and including within a VAT group, what HMRC describe as “minimal establishments”³ of a non-UK service company within the corporate group. The aim, or at least the effect, is that no reverse charge arises (subject to provisions discussed below) on supplies by the non-UK service company to UK companies within the VAT group.

15. The meaning in this context of “fixed establishment” and the scope of the POR provisions were the subject of discussion by the Upper Tribunal in *HSBC Electronic Data Processing (Guandong) Ltd v HMRC* [2021] UKUT 0058 (TCC) (“*HSBC*”), which we discuss further below.

16. It was against this backdrop that the FTT was asked to determine the three issues which arise again in this appeal.

THE PURPOSES OF VAT GROUPING

17. We heard extensive submissions from both parties regarding the purpose or purposes of VAT grouping. In their skeleton argument Mr Hitchmough and Ms Yang stated as follows⁴:

² HMRC skeleton argument paragraph 13.

³ The label is somewhat tendentious, and not endorsed by the Appellants.

⁴ Appellants’ skeleton argument paragraph 10.

An appreciation of the purpose of VAT grouping together with the approach to grouping adopted in the UK is fundamental to the determination of this appeal. Not only...does it effectively answer the conforming construction and protection of the revenue issues, it also informs the approach that should be adopted in defining the concept of fixed establishment in this context.

18. For our part, we agree with HMRC that this overstates the position. We will deal with the significance of the purposes of VAT grouping in relation to each issue separately, but will first set out our conclusions as to those purposes.

19. Looking first at the purposes of Article 11, the Upper Tribunal in *HSBC* said this, at [25]:

It is common ground that the twin objectives of Article 11 are (a) simplifying administration for VAT group members and the tax authorities and (b) helping to combat abuses such as splitting up one undertaking into several taxable persons: see *EC v Sweden* (C-480/10) (“*Sweden*”) at [37].

20. The referenced passage from *Sweden* refers to the following statement from the judgment of the CJEU in *European Commission v Ireland* (C-85/11) [2013] STC 2336 (“*Ireland*”) at [47]:

As regards...the objectives pursued by art 11 of the VAT Directive, it is apparent from the explanatory memorandum to the proposal which resulted in the adoption of the Sixth Directive (COM(73) 950) that, by adopting the second subparagraph of art 4(4) of the Sixth Directive, which was replaced by art 11 of the VAT Directive, the European Union legislature intended, either in the interests of simplifying administration or with a view to combating abuses such as, for example, the splitting-up of one undertaking among several taxable persons so that each might benefit from a special scheme, to ensure that member states would not be obliged to treat as taxable persons those whose ‘independence’ is purely a legal technicality.

21. This statement from *Ireland* was recently cited with approval by the Supreme Court in *Prudential Assurance Company Limited v HMRC* [2025] UKSC 34 (“*Prudential*”), at [24].

22. It is clear, then, that two of the central purposes of Article 11 are to simplify administration and to combat abuse. We understand the parties to agree up to that point.

23. Where the parties diverge is that the Appellants submit that “the administrative simplification promoted by VAT grouping is to provide businesses with flexibility in how they structure themselves, without giving rise to adverse (and unintended) VAT consequences, thereby promoting fiscal neutrality”⁵.

24. Thus, argue the Appellants, the purpose of “administrative simplification” in this context includes the promotion of organisational fiscal neutrality. At a granular level, they say that this purpose means that a corporate group’s decisions as to whether to operate via a legal entity or a branch should not produce materially different VAT consequences.

25. Mr Hitchmough relied on various statements in support of this proposition, including the following:

(1) In *Prudential*, Lady Rose and Lady Simler (with whom the other judges agreed) said, at [76]:

The purpose behind the VAT group provisions is...to promote organisational fiscal neutrality as between corporate groups comprising a number of legally separate entities and corporations divided into different branches within the same legal entity: see *Commission of the European Union v Ireland* [2013]

⁵ Appellants’ skeleton argument paragraph 13.

STC 2336 (referred to above) and *Finanzamt T v S* (Case C-184/23) EU:C:2024:599; [2024] STC 139 [“(Finanzamt T II”)] per Advocate General Rantos, paras 81—86.

(2) In *Ireland*, Advocate General Jaaskinen stated in his Opinion:

48. Where an economic operator is not entitled to deduct input VAT incurred in a purchase, it might be economically advantageous for it to produce the goods or services itself. For example, a bank that is not entitled to deduct VAT might benefit economically if it produces IT services needed for its banking activities internally rather than buying them from a third party. However, if the VAT grouping option is available, it may outsource its IT service provision to a subsidiary belonging to the group and still gain the same advantage.

49. Hence, VAT liability can and does have an impact on the structure and functioning of business activities. But VAT grouping allows the member states to diminish the influence of VAT on the way economic operators organise themselves...Thus, VAT grouping supports fiscal neutrality by enabling appropriate business structures without negative consequences in terms of VAT liability...

(3) In *Lloyds Banking Group plc v HMRC* [2019] EWCA Civ 486, Rose LJ (as she then was) stated, at [120]:

...it is a key feature of VAT grouping that where companies come together to form a group there are significant changes to the tax treatment of their supplies; it is not simply a matter of the single taxable person accounting for the same amount of VAT as would have been payable on the members' transactions had they remained independently taxable persons. As Advocate General Jääskinen said in *Commission v Ireland*, para 42, one important change is that a VAT group's internal transactions do not exist for VAT purposes. This can bring financial as well as administrative advantages where, for example a member of the group makes exempt supplies and can avoid incurring non-deductible input tax by obtaining inputs from a fellow group member.

26. For HMRC, Ms McCarthy emphasised that none of the cases cited concerned cross-border arrangements. She argued that the CJEU decisions and corresponding Opinions relied on by the Appellants cannot be read across to cross-border arrangements. Such arrangements raise different issues and, in any event, the CJEU decisions and Opinions cannot be taken as applying to cross-border arrangements since under EU law, only entities in the same Member State can form a VAT group (as confirmed in *Danske Bank*).

Discussion

27. A comprehensive review of the objectives of VAT grouping, and how those objectives have developed, was recently undertaken by Advocate General Rantos in his Opinion in *Finanzamt T II* (at [78]-[86]), who stated as follows:

78. In order to address the doubts expressed by the referring court, it is necessary to determine the rationale, that is to say, the justification, for VAT grouping, as provided for in the second subparagraph of art 4(4) of the Sixth Directive.

79. In that regard, it should be recalled that, as regards the objectives pursued by the second subparagraph of art 4(4) of the Sixth Directive, the Court has stated that it is apparent from the Commission proposal which resulted in the adoption of that directive (COM(73) 950 final) that the EU legislature, by adopting that provision, intended, either in the interests of simplifying administration or with a view to combating abuses such as the splitting-up of

one undertaking among several taxable persons so that each might benefit from a special scheme, to ensure that Member States would not be obliged to treat as taxable persons those whose ‘independence’ is purely a legal technicality.

80. The referring court expressly refers to that case-law of the Court, but focuses exclusively on the objectives of simplifying administration and combating abuses. However, as is clear from the preceding point, VAT grouping is primarily intended to ensure that Member States are not obliged to treat as taxable persons those whose ‘independence’ is purely a legal technicality. It is thus expressly an instrument which allows Member States to distinguish the issue of VAT liability from that of the legal organisation of undertakings.

81. In that regard, it should be noted that VAT liability can and does have an impact on the structure and functioning of economic operators. It may influence the organisational choices made by undertakings. Accordingly, an undertaking may choose either to in-source certain supplies of goods or services, using an internal operational unit of the undertaking itself, or to outsource them to an entity which is legally distinct but belongs to the group (for example, a production or services company). Accordingly, the question of whether an economic operator’s activities are in-sourced or outsourced (within the group) may depend not only on operational or economic considerations, but may also have to take account of consequences arising from VAT liability.

82. However, in principle, it should not be relevant to take into account for VAT purposes whether part of an undertaking’s activity is outsourced to a separate entity (potentially a separate taxpayer) forming part of the group or whether it is carried out by an internal operating unit of a larger undertaking. In fact, it is the activity and not the legal form that defines status as a taxable person for VAT purposes.

83. VAT grouping therefore allows the Member States to diminish the influence of VAT on the way economic operators organise themselves. Thus, VAT grouping supports ‘organisational’ fiscal neutrality by enabling appropriate business structures without negative consequences in terms of VAT liability. However, subject to the considerations set out in point 85 of this Opinion, that function presupposes that the group’s internal transactions are not taxable. It is only if the tax regime relating to VAT is the same where the supply is in-sourced or outsourced (within the group) that the ‘organisational’ fiscal neutrality referred to above can be guaranteed.

84. The observation that the objective of guaranteeing ‘organisational’ fiscal neutrality is the fundamental and original function of VAT grouping follows not only from the wording of the case-law of the Court cited in point 78 of this Opinion, but also from the origin of the provision which provides for it...

85. However, as noted by the referring court, the function of guaranteeing ‘organisational’ fiscal neutrality lost some of its importance when the possibility of deducting input VAT was introduced. Should such a possibility exist, the tax liability and the right to deduct input VAT offset one other, with the result that, where such deduction is possible, the VAT group scheme has no material scope and its justification lies fundamentally in administrative simplification of a procedural nature. In that regard, it should be noted that that administrative simplification also benefits the tax authorities as it enables them to avoid a number of checks.

86. The objective of guaranteeing the ‘organisational’ fiscal neutrality of that scheme nevertheless remains entirely valid for undertakings which do not have the right to deduct input VAT. For those undertakings, if the Member State in question has made use of the option of permitting the establishment of VAT groups – and provided that the internal transactions are not taxable – it is immaterial whether those undertakings supply the goods or services themselves or through a controlled undertaking. In both cases, those supplies of goods or services will not be burdened by VAT. It is therefore precisely for those undertakings that the rationale for guaranteeing ‘organisational’ fiscal neutrality remains valid. Accordingly, for those undertakings, VAT grouping not only has a procedural scope, as an administrative simplification, but also retains a material scope.

28. We respectfully agree with and adopt this summary. It makes clear that it is unduly narrow to describe the purposes of VAT grouping as being limited to the promotion of administrative simplicity and the prevention of abuse. Because Article 11 addresses substantive VAT liability as well as administration, it has a practical effect on the organisational choices faced by businesses. Therefore, we accept Mr Hitchmough’s submission that one of the objectives of VAT grouping is to promote organisational neutrality, particularly in relation to services which could either be supplied by a third party or from within a group.

29. However, we also see the force of Ms McCarthy’s point that there is no authority, in either CJEU or domestic case law, which establishes that the objective of organisational fiscal neutrality extends to supplies made to an entity in a Member State by an entity outside that Member State. We agree with Ms McCarthy that, as the law is now understood following *Danske Bank*, the territorial limitation applying to Article 11 means that logically the objective could not extend to such a situation.

30. The position is less straightforward when we turn to the purpose and objectives of the UK’s VAT grouping rules, as contrasted with Article 11. That is because the UK regime, as we have discussed (and discuss further in relation to the *Danske Bank* Issue), reflects a deliberate decision made by the UK to adopt a “whole establishment” approach to eligibility for grouping. So, where a company in a group is non-UK resident but is accepted by HMRC as having a fixed establishment in the UK, then, subject to certain restrictions, such fiscal neutrality as results from grouping extends to supplies made by the non-resident company to members of the group resident in the UK.

31. In our opinion, it follows from the design of the UK grouping rules that such cross-border fiscal neutrality can fairly be said to be one of the objectives of the UK rules. However, the extent and limitations of that objective, and whether any particular factual situation relating to a grouping application falls within the objective, remain unclear, particularly in the absence of any authority addressing organisational fiscal neutrality in a cross-border context.

32. We consider below how these objectives inform the issues in the appeal.

ISSUES IN THIS APPEAL

33. We must determine three issues, namely:

- (1) The Fixed Establishment Issue.
- (2) The Protection of the Revenue Issue.
- (3) The *Danske Bank* Issue.

34. It is logical to deal first with the *Danske Bank* Issue, because if we were to decide that a conforming interpretation of the UK VAT grouping rules in order to impose a territorial ambit

was possible, that would clearly have significant repercussions for the resolution of the other two issues⁶.

THE DANSKE BANK ISSUE

Background

35. As explained above, the UK VAT grouping rules have implemented Article 11 on a “whole establishment” or “whole entity” basis. This means that eligibility for grouping extends to a body corporate which is not resident in the UK but which has a fixed establishment in the UK.

36. In the context of this appeal, this means that if HMRC were to accept the application by BESL and BSC for BSC to join the VAT group of which BESL is the representative member, grouping would extend not only to transactions between VAT group members and the UK branch but also between VAT group members and BSC.

37. In *Danske Bank*, the CJEU indicated that there was a territorial limitation on Article 11. An issue before the CJEU was whether Article 11 must be interpreted as meaning that, for VAT purposes, the principal establishment of a company, situated in a Member State and forming part of a VAT group, and the branch of that company, established in another Member State, must be regarded as separate taxable persons where that principal establishment provides that branch with services and imputes the costs thereof to the branch. The Court concluded as follows, at [28]-[30]:

28 ... Danske Bank’s principal establishment is part of the Danish VAT group at issue. As a result of the fact that it belongs to that VAT group, it must be held, for VAT purposes, that it is that group which supplies the services at issue in the main proceedings.

29. Furthermore, having regard to the territorial limits resulting from the first paragraph of art 11 of the VAT Directive, the Swedish branch of Danske Bank cannot be regarded as forming part of the Danish VAT group in question.

30. Accordingly, for VAT purposes, the Danish VAT group to which Danske Bank’s principal establishment belongs, on the one hand, and the Swedish branch of that company, on the other, cannot be regarded as forming together a single taxable person.

38. It was common ground between the parties in this appeal, as before the FTT, that the effect of *Danske Bank* is to impose a territorial limitation on Article 11 such that the single taxable person treatment which can be permitted is restricted to entities within the territory of that Member State. We have proceeded on this basis.

39. The issue which HMRC ask us to determine in this appeal is whether it is possible to give section 43 VATA a construction conforming with Article 11, so as to impose this territorial limitation. HMRC say that such a conforming construction is possible, while the Appellants say that it is not.

HMRC’s position

40. Before we turn to that question, it is somewhat strange, to put it mildly, that HMRC should be taking this position. That is not only because section 43 as it stands clearly imposes no such territorial limitation, but also because the UK had previously set out its stall on the

⁶ We indicated to the parties during the hearing that if we were inclined to reach such a conclusion, it would be likely to be procedurally fair and appropriate to allow the parties to make further submissions in relation to the impact on the other issues, a proposition with which we understood the parties to agree.

international stage as having a relatively competitive VAT grouping regime partly because of its whole establishment approach.

41. Various Revenue and Customs Briefs in 2015 set out HMRC's position following *Skandia*, and confirmed the UK's whole establishment approach. In November 2025 HMRC published Revenue and Customs Brief 7 (2025), which again confirms that approach.

42. Against that background, we questioned Ms McCarthy on HMRC's motivations for taking the position which they have adopted in this appeal. The Appellants had also raised concerns for their part that it was inappropriate, and a waste of the Upper Tribunal's time, for HMRC to be raising this issue in light of HMRC's clear, stated public policy.

43. However, Mr Hitchmough and Ms Yang clarified that the Appellants were not taking the position that HMRC should be prevented from seeking the Tribunal's ruling on the question of conforming construction. Ultimately, it is for the parties to frame the issues in an appeal, and for the Tribunal to determine a question of statutory construction placed before it; the wider ramifications of any decision that a conforming interpretation is possible would be outside the remit of this appeal. Therefore, as requested by the parties, we set out below our decision on the issue of conforming construction.

Principles of conforming construction

44. The approach to be taken in applying a conforming interpretation was set out by Sir Andrew Morritt C in *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446 ("*Vodafone 2*"), at [37]-[38]. The relevant principles can be summarised as follows:

(1) The obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:

- (a) it is not constrained by conventional rules of construction;
- (b) it does not require ambiguity in the legislative language;
- (c) it is not an exercise in semantics or linguistics;
- (d) it permits departure from the strict and literal application of the words which the legislature has elected to use;
- (e) it permits the implication of words necessary to comply with Community law obligations; and
- (f) the precise form of the words to be implied does not matter.

(2) The only constraints on the broad and far-reaching nature of the interpretative obligation are that:

- (a) the meaning should go with the grain of the legislation and be compatible with the underlying thrust of the legislation being construed: an interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; and
- (b) the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to evaluate.

The FTT's decision on the issue

45. The FTT's decision on this issue was, as it acknowledged, *obiter*: [169]. Having referred to *Vodafone 2*, the FTT's conclusion was as follows:

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

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

Discussion

46. The approach to a conforming construction set out in the above passage from *Vodafone 2* has its origin in the decision of the CJEU in *Marleasing v Comercial Internacional de Alimentacion* (C-106/89) (“*Marleasing*”). It mandates a “highly muscular approach” to the construction of national legislation, in the words of Lord Sumption in *FII Group Test Claimants v RCC* [2012] UKSC 19 at [176]. The only limitations on the approach were summarised in *Vodafone 2* as follows:

38. Counsel for HMRC went on to point out, again without dissent from counsel for V2, that:

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

47. We were referred by the parties to a number of other decisions, in addition to those cited in *Vodafone 2*, which discuss the application of a conforming construction, including various decisions of the FTT and the decisions of the Upper Tribunal in *Trustees of the Panico Panayi Accumulation and Maintenance Settlements v HMRC* [2024] UKUT 00319 (TCC) and *Ampleaward Ltd v HMRC* [2020] UKUT 0170 (TCC). Having considered those authorities, we consider that they do not materially modify or add to the summary of principles in *Vodafone 2*, which we have adopted in making our decision. We note that in *Swift v Robertson* [2014]

UKSC 50, the Supreme Court described the relevant passages in *Vodafone 2* as “authoritatively” setting out the breadth and importance of the relevant principles (at [21])⁷.

48. Ms McCarthy referred us to the FTT decision in *Baillie Gifford & Co v HMRC* [2019] UKFTT 410 (TC). In that case, the FTT considered whether a conforming construction of section 43A VATA (as it then stood) could apply to extend the reference in section 43A to a “body corporate” to include a Scottish partnership⁸. The FTT decided that such a construction was permissible and did not go against the grain of section 43A. We do not consider that this decision sheds any particular light on the Danske Bank Issue, because it concerns a different question, and the FTT did not have to consider the whole establishment question.

49. The critical issue which arises in determining whether a conforming construction of section 43A is permissible so as to restrict VAT grouping by reference to the *Danske Bank* territorial limitation is whether such a construction would go against the grain of the relevant legislation.

50. Ms McCarthy submitted that it would not go against the grain, because neither section 43 nor section 43A *expressly* provides that non-UK establishments can be included in UK VAT groups. She relied in this context on the following statement in *IDT Card Services*, at [90] (emphasis added to original):

In determining whether the solution is one of interpretation or impermissible law-making, the relevant test remains whether the interpretation that would be required to make the statute in question Convention-compliant or in this case, EU law-compliant, would involve a departure from a fundamental feature of the legislation. As I see it, the latter cannot be the case where the effect of the interpretation would be to bring the statute into conformity with the objectives of the Sixth Directive **in the absence of clear statutory language to the effect that Parliament intended that there should not be such conformity.**

51. In our opinion, this language is, and is intended to be, simply a restatement of the “grain” or “cardinal feature” restriction. That becomes apparent when one considers it not in isolation but in the context in which it is made. It follows a detailed analysis of the decision in *Ghaidan*, which includes the following statements:

[87] ... Lord Rodger also...gave helpful guidance. He held that in deciding how to interpret the legislation the courts should not produce a meaning which departed substantially from a fundamental feature or cardinal principle of the legislation...

[88] ... However, s 3 permits only interpretation, not the rewriting of legislation which goes beyond mere interpretation...

[89] The critical point made by the House of Lords in the *Ghaidan* case can be found in the passage from the speech of Lord Nicholls which I have set out above. Lord Nicholls accepts that the effect of interpretation in accordance with s 3 of the 1998 Act may be to change the meaning of the legislation but, as he explains, the meaning adopted by the court must not conflict with a fundamental feature of the legislation. He adopts the words of Lord Rodger that the interpretation chosen by the court must 'go with the grain of the legislation'. Lord Nicholls, Lord Steyn and Lord Rodger all accepted that there would be occasions when the courts could not adopt an interpretation that

⁷ Ms McCarthy pointed out that the Supreme Court in *Swift v Robertson* did not cite the section of *Vodafone 2* at [38] which deals with what is described as constraint (b), but we agree with Ms Yang that that is most likely to be because it was not relevant on the facts.

⁸ The appeal in that case concerned a period prior to the amendments introduced by Finance Act 2019 to include certain partnerships within section 43A.

would make the legislation compatible with Convention rights because that would involve making policy choices which the court was not equipped to make (see paras 33-35 per Lord Nicholls, para 49 per a Lord Steyn and para 115 per Lord Rodger). It is also clear from the *Ghaidan* case that the interpretation of legislation under s 3 or the *Marleasing* principle may involve a substantial departure from the language used though it will not involve a departure from the fundamental or cardinal features of the legislation...

52. The restriction that a conforming/*Marleasing* construction cannot involve a departure from a fundamental feature or cardinal principle of the legislation is not dependent on identifying some express language which would prevent the construction. That would be an unwarranted gloss. Rather, the test requires identification of the features of the relevant legislation which are fundamental or cardinal (the “grain” of the legislation) in the context of any particular case.

53. In this case, we consider it to be clear that a fundamental feature of the UK’s VAT grouping rules is that they apply to the entire body corporate which is grouped. This follows inexorably from a straightforward construction of the language used, taking into account the purposes of Article 11 described above.

54. Section 43(1) states that “(1) Where under sections 43A to 43D **any bodies corporate** are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member” (emphasis added to original).

55. Section 43A states (emphasis added to original):

43A — Groups: eligibility

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

- (a) one of them controls each of the others,
- (b) one person (whether a body corporate or an individual) controls all of them, or
- (c) two or more individuals carrying on a business in partnership control all of them.

56. It is in our opinion clear from the emphasised wording that in the legislation in question eligibility is based on and defined by reference to each body corporate, or whole establishment. That is a fundamental or cardinal definitional element, to which the remaining requirements for common control, enacting the “close links” element of Article 11, are applied. It is two or more **bodies corporate** which are eligible under section 43A, and it is those **bodies corporate** which are treated as members by section 43. That is part of the grain or underlying thrust of the legislation.

57. While it is unnecessary to decide on precise draft wording in order to effect a conforming construction, HMRC submitted that a conforming construction of section 43A(1) could be achieved by construing it as including the additional words shown underlined below:

Two or more bodies corporate are eligible to be treated as members of a group if and to the extent that each is established or has a fixed establishment in the United Kingdom...

58. We consider that an amendment such as this, or substantially similar to this, would clearly go against the grain of the legislation and conflict with one of its fundamental features, as we have explained. Any amendment must be compatible with the underlying thrust of the

legislation and not conflict with a fundamental feature of the legislation. This amendment is not so compatible and is inconsistent with a fundamental feature. As such it would, in the language used in *Ghaidan*, “cross the boundary between interpretation and amendment”.

59. The second constraint on a conforming construction established by the authorities is that it cannot result in a court or tribunal having to reach decisions in relation to the conformed legislation which are in substance matters of policy and therefore outside the judicial remit. Ms Yang submitted that in this case such decisions would indeed fall to be made. She gave a number of examples, such as the modifications which might be required to the provisions of section 43(1) dealing with the joint and several liability of VAT group members. Ms McCarthy submitted that such changes would not involve the tribunal in impermissible policy decisions, but were simply consequential amendments which followed logically from a conforming construction.

60. Although we acknowledge the force of the concern raised on this front by Ms Yang, in view of our conclusion that a conforming construction would clearly go against the grain of the legislation, we do not need to decide whether it would also fall foul of this separate constraint.

61. While we have not relied on this in reaching our decision, section 43(2A), introduced by Finance Act 1997, reinforces our conclusion as to the grain of the grouping legislation. This provision has the effect of disapplying the disregard of intra-group supplies in section 43(1) where, broadly, the relevant services are bought in from a third-party supplier by a non-UK member of the VAT group (without VAT arising) for onward supplies to a UK member of the VAT group. In such a situation, section 43(2A) applies to treat the supply by the overseas group member as a taxable supply in the UK, on which the representative member of the group must account for VAT under the “reverse charge” provisions.

62. Section 43(2A) indicates a recognition by Parliament of the consequences which may arise from the inclusion of the whole establishment of an overseas member in the VAT group. Its very purpose is to address certain of those consequences.

Conclusion

63. In reaching its conclusion that a conforming construction of section 43A to impose a territorial limitation was not permissible, the FTT relied on the fact that such a construction would result in a fundamentally different regime, referring to “its broad and far-reaching effect, together with the inevitable practical repercussions that would arise” as issues which it was not appropriate for the FTT to determine.

64. While we agree with the FTT that a conforming construction would result in a fundamentally different regime, with significant practical repercussions, we do not consider that this would, of itself, be a valid reason for not applying a conforming construction to section 43A. In our view, the reason why a conforming construction would be impermissible is that it would clearly be contrary to the underlying thrust of the legislation and its fundamental features.

65. So, albeit for different reasons to those given by the FTT, we conclude that section 43A cannot be construed in conformity with Article 11 in order to impose a territorial restriction in line with *Danske Bank*.

66. The remaining issues in the appeal are determined in light of this conclusion.

67. Before turning to those issues, it is helpful at this stage to summarise the FTT’s findings of fact.

THE FTT'S FINDINGS OF FACT

68. We summarise below the FTT's decisions on those issues. It is important to keep in mind that the FTT's conclusions followed a thorough and extensive consideration of the evidence by the FTT, and resultant findings of fact, which formed the factual setting for the appeal against HMRC's refusal decision.

69. References below to paragraphs in the form [x] are, unless indicated otherwise, to paragraphs of the Decision.

70. In addition to extensive documentary evidence, the FTT heard oral evidence from a number of witnesses. These included Ms Eleni Hadjidakou, the head of BSC's UK branch. The FTT found that "although essentially a helpful witness...Ms Hadjidakou became somewhat reticent when cross-examined about the creation and purpose of the UK branch", and noted that she declined to comment on the significance of VAT to the formation of the branch: [5].

71. The FTT set out at [9] a Statement of Agreed Facts produced by the parties, as follows:

The Appellants

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

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

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

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

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

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

The UK branch of BSC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Activities of the UK Branch

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

Application for BSC to join the VAT Group

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

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

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

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

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

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

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

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

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

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

72. The FTT made extensive further findings of fact, at [13]-[139]. These included the following:

(1) From 2015, Barclays undertook a project titled the Service Group Programme as part of the wider Structural Reform Programme. This involved creating a single service company model for the group.

(2) The Prudential Regulation Authority (the "PRA") imposed requirements from 1 January 2019 on the ringfencing of banks, mandating the separation of retail and consumer banking from wholesale and investment banking activities. Barclays UK plc became the ringfenced bank and Barclays Bank plc became the non-ringfenced bank, with service providers such as BSC being non-regulated.

(3) The PRA and the Financial Conduct Authority impose various rules and guidance applicable to regulated entities when outsourcing operational functions to other group companies or third-party service providers. These require services to be provided to regulated entities on arm's length terms and for the regulated entities to establish governance procedures for ensuring effective oversight and accountability for the outsourced services. Within the Barclays group, an essential element of meeting these requirements was through standardised service agreements known as Intragroup Agreements ("IGAs"), supplemented by regular service reviews and the provision of management information to facilitate effective supervision.

(4) The PRA introduced provisions concerning "operational continuity in resolution", ("OCIR") to ensure continuity and order in financial institutions in situations of financial stress or failure. OCIR rules introduced in 2016 included provisions impacting the provision of certain critical services within the Barclays group. In response, Barclays decided to take a number of steps including the adoption of a service company model which was independent of both the ringfenced and non-ringfenced banks. A single service company was established, being BESL and its branches or subsidiaries (referred to as "BX").

(5) At [39]-[85], the FTT made findings as to the genesis of the UK branch. Potential VAT savings arising from the branch structure were identified at an early stage, and formed an important part of the planning and internal approval processes for the branch.

(6) As the proposal progressed, it was identified that in addition to the annual VAT savings, a "one-off" tax benefit of £21 million could be realised if the branch could be operational by the end of 2017: [81]-[82].

(7) The costs of the UK branch were initially attributed to a costs centre associated with BESL and were charged to the UK branch in 2018, but it was not possible to allocate the 2017 costs to the UK branch: [83].

(8) Detailed findings in relation to the employees of the UK branch are at [86]-[99]. We discuss these further below. These included the background to the decision which was taken that as at 1 December 2017 those individuals who were intended to work for the branch would be employed not by BSC/the branch, but by BESL.

(9) Findings as to relevant events in relation to the branch occurring after 1 December 2017 are at [100]-[124]. These included an email exchange between Ms Hadjikakou and Ms McAlinden, the head of BESL's service office, which was responsible for many of the IGAs, and findings in relation to the access which the branch had to information regarding the IGAs, including the Service Portal, which we discuss below.

(10) Findings regarding the application to add the branch to the VAT group, and HMRC's eventual refusal of that application, are at [125]-[139].

THE FIXED ESTABLISHMENT ISSUE

73. The FTT dismissed the Appellants' appeal against HMRC's decision that the UK branch of BSC did not constitute a "fixed establishment in the United Kingdom" for the purposes of section 43 VATA at the relevant date. It explicitly did so on the assumption that the correct test of whether there was a fixed establishment was that proposed by Mr Hitchmough: [156].

74. The FTT recognised that its decision on this issue was sufficient to dispose of the appeal: [169]. For the same reason, it is also the most significant ground in this appeal.

The FTT's decision

75. Following its extensive findings of fact, the FTT's decision on this issue was at [145]-[169].

76. The FTT began by discussing and setting out the statements on the meaning of "fixed establishment" in *HSBC*. One of the central issues dealt with in *HSBC* was the degree to which case law in relation to the meaning of a fixed establishment in the VAT rules regarding the place of supply could and should be read across to the context of VAT grouping. The FTT set out the arguments made by Mr Hitchmough, to the effect that it would be wrong to apply the restrictive approach taken in the place of supply context to VAT grouping. Those arguments led Mr Hitchmough to the following submission, at [155]:

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

77. Crucially, the FTT chose to carry out its analysis on the basis put forward by Mr Hitchmough. It stated as follows, at [156]:

Assuming that Mr Hitchmough is correct and, like the Upper Tribunal in *HSBC* at [53], leaving the precise meaning of the terms 'established' and 'fixed establishment' to be determined in a subsequent case, for the UK

Branch to be a fixed establishment it must therefore have had on 1 December 2017, the date of the Application (which the parties agree is the relevant date that the eligibility requirements for grouping falls to be assessed), sufficient human and technical resources in the UK to make a meaningful commercial contribution to the non-UK company, ie BSC.

78. Importantly, HMRC argued for a materially narrower approach to the existence of a fixed establishment.

79. Having summarised the arguments of the parties as to the application of this test to the facts, the FTT considered the resources available to the branch as at 1 December 2017 in terms of the human and technical resources available. In doing so, it accepted Mr Hitchmough's approach of considering whether the branch had either actual control or "comparable control" over such assets, meaning control comparable to that of an owner of the relevant asset.

80. The FTT concluded that the necessary control or comparable control did not exist in the branch as at 1 December 2017, stating "it must follow that it does not, as a matter of fact, satisfy the criteria necessary to be a fixed establishment of BSC": [166].

81. The FTT stated that in reaching this conclusion it rejected Mr Hitchmough's comparison between the position of the branch at that date and a branch in its infancy or an intending trader: [167].

Grounds of appeal

82. The FTT granted the Appellants permission to appeal against its decision on the following three grounds:

(1) The FTT erred in law in its understanding and application of the concept of "comparable control" when considering whether BSC had a fixed establishment in the UK. In particular:

(a) It is wrong to ask, as the FTT did, whether BSC had a "comparable level" of control over its own resources in the UK.

(b) As for the resources in the UK that were not owned by BSC, the FTT wrongly failed to recognise that, as BSC had immediate and constant access to such resources, it therefore had comparable control over them.

(2) In applying its flawed concept of "comparable control", the FTT made further errors of law by basing its conclusion, that BSC did not have a fixed establishment in the UK, on three findings of fact that (1) contradicted the true and only reasonable conclusion on the evidence, (2) resulted from erroneous inferences that it had made, and (3) took into account irrelevant factors. As such, the FTT should have found (but, in error, did not find) that BSC had a fixed establishment in the UK.

(3) The FTT erred in law in rejecting the comparison between the UK Branch on the Relevant Date and an intending trader.

83. We refer to these as Grounds 1, 2 and 3.

The approach adopted by the FTT

84. In relation to the meaning of fixed establishment in the VAT grouping rules, the FTT referred to the relevant passages in *HSBC* on this issue, and also to HMRC's formulation of the test. However, its entire reasoning and conclusions were then predicated on the assumed correctness of the formulation proposed by Mr Hitchmough.

85. As a consequence of this approach, the FTT declined to determine the correct meaning of fixed establishment in this context.

86. It is clear from [156] (set out above) that this approach was rooted in pragmatism. The decision in *HSBC* was, of course, binding on the FTT, but that decision had left the precise meaning of the term to be determined in a subsequent case by reference to the facts in that case. It was plain that HMRC's approach was more stringent and more difficult to satisfy than that of the Appellants. The FTT decided to determine the issue on the basis of Mr Hitchmough's approach because this avoided the need to decide whether, as a matter of law, a more stringent approach was required. If the Appellants failed to prove on the balance of probabilities that there was a fixed establishment in existence as 1 December 2017 on the basis of Mr Hitchmough's approach (as the FTT decided they did), then they would necessarily fail any more stringent test.

87. In this appeal, the FTT's approach presented us with a choice. We could in principle (1) determine whether the FTT erred in law in reaching its decision, assuming for this purpose, like the FTT, that the correct test was Mr Hitchmough's test, or (2) first determine what the correct test in law was, and then determine whether there was a fixed establishment on that basis, by reference to the facts found by the FTT.

88. Each approach has its advantages and disadvantages, but we decided to proceed initially on the basis of approach (1). Unlike the Tribunal in *HSBC*, we are not being asked to decide the meaning of fixed establishment as a preliminary issue. This Tribunal has before it an appeal against the decision of the FTT, and that decision was explicitly reached on a predicated basis. If we conclude that the FTT did not err in law in reaching its decision, on that basis, then that would be sufficient to dispose of Ground 1. If we conclude that the FTT did err in law in reaching its decision, on that basis, then we would necessarily need to go on to decide the correct test in law, and whether the Appellants did or did not satisfy that test.

Ground 1: Misapplication of the comparable control test

89. The FTT assumed the correctness of Mr Hitchmough's test, namely whether, as at 1 December 2017, the UK branch had actual or "comparable" control over sufficient human and technical resources in the UK to make a meaningful commercial contribution to the non-UK company (BSC).

90. The concept of a branch having "comparable" control over a resource refers to the approach described by Advocate General Kokott in *Welmory sp z oo v Dyrektor Izby Skarbowej w Gdansku* (Case C-605/12) ("*Welmory*"). In her Opinion she explained as follows:

48. First of all, for the assumption that there is a fixed establishment within a state it is not necessary for the taxable person to have at his disposal there human resources who are employed by him, or to have technical resources which he owns.

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

52. In other words, it should be emphasised that a taxable person cannot as such constitute a fixed establishment of a different taxable person. This does not, however, exclude the possibility of a taxable person having immediate and constant access to the human and technical resources of a different taxable person who, in a different respect, can at the same time be a service provider for the fixed establishment thereby constituted.

91. So, Advocate General Kokott’s approach entails establishing (1) the human and technical resources owned by the branch, and (2) the human and technical resources which it does not own but which are at the disposal of the branch as if they were owned by the branch, under arrangements which “cannot be terminated at short notice”. Both are taken into account in assessing whether the branch is a fixed establishment.

92. Ground 1 asserts that the FTT made two errors of law in applying this test. First, the FTT erred in concluding that the branch did not have a comparable level of control over Ms Hadjidakou, because she was a resource who was owned directly by BSC, and comparable control was therefore irrelevant. Second, in relation to the resources which were not owned by BSC, the FTT erred in concluding that comparable control over those assets did not exist, because that concept only requires that the branch have immediate and constant access to such resources, which it did.

Was Ms Hadjidakou employed by BSC on 1 December 2017?

93. In relation to the human resources of the branch as at 1 December 2017, the FTT’s conclusions were as follows, at [162]-[164]:

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

163. This leaves Ms Hadjidakou who, on 1 December 2017, sent several emails to colleagues relating to the UK Branch. However, she continued to undertake work for BTCI during December 2017 which, she said, took up the “vast majority” of her time. Additionally, as at 1 December 2017, she reported to her line manager, Mr McCabe of BTCI. It was Mr McCabe, rather than anyone at BSC, that was responsible for her day to day supervision. Additionally, Ms Hadjidakou had to email Ms McAlinden on 4 December 2017 to ask if she could “link in” with Ms McAlinden regarding the UK Branches IGAs only to be informed that there had been a call on that day with “interested parties” which had not included Ms Hadjidakou.

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

94. The FTT’s analysis of the position of Ms Hadjidakou at [163] clearly proceeds on the basis that she was not a direct employee of the branch at that date, as it considers various facts (which are themselves the subject of challenge under Ground 2) relevant to whether the branch had a comparable level of control over her, as that term is defined in *Welmorey*.

95. Mr Hitchmough submits that the FTT was wrong to take this approach, because Ms Hadjidakou was in fact an employee of BSC, and as such a resource directly owned by BSC. Mr Hitchmough said that the FTT found as a fact that she was an employee of the branch. That finding was correct, he said, because Ms Hadjidakou had formally ceased to be employed by BTCI (a Barclays group company incorporated and resident in India) on 1 December 2017, and had started working for BSC on that date.

96. We reject Mr Hitchmough’s arguments, for the reasons which follow.

97. First, the FTT did not find as a fact that Ms Hadjidakou was employed by the branch on 1 December 2017. Mr Hitchmough supported his assertion by stating that “in the Decision at [163] and [164], the FTT distinguishes Ms Hadjidakou from the other UK branch employees whose employment had started later than 1 December 2017, and it describes the UK Branch as Ms Hadjidakou’s “employer” on that date”⁹. The most that can be drawn from [163]-[164] is that Ms Hadjidakou performed some functions for the branch on 1 December 2017. There is nothing to indicate a finding that she was an employee of the branch. The reference to the UK branch “as her employer” at the end of [164] is simply describing the relevant legal test for comparable control, which was failed on the facts.

98. Second, Ms Hadjidakou was actually employed by BESL at 1 December 2017. The FTT made findings of fact in relation to the individuals who were to work for the branch at [86]-[99]. As set out at paragraph 72 above, as the proposal progressed, it was identified that in addition to the annual VAT savings, a “one-off” tax benefit of £21 million could be realised if the branch could be operational by the end of 2017: [81]-[82]. It also became apparent in late 2017 that if the branch was to be operational by 1 December 2017, it would not be practicable for those individuals to have employment contracts with BSC/the branch by that date. Instead, they would have to be employed initially by BESL. The FTT made the following findings in this respect, at [97]-[99], with “the financial imperative” referring to the potential one-off saving of £21 million:

97. ...With this “financial imperative” in mind, Mr McCabe and Ms Hadjidakou were presented with a choice by their HR colleagues. This was for staff either being employed from 1 December 2017 by BESL or from 1 January 2018 by BSC.

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

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

Within a minute, Mr McCabe replied:

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

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

99. Third, although the employment contract with BSC which Ms Hadjidakou signed on 8 January 2018 was stated to have a “start date” of 1 December 2017, that could not have retrospective effect in law to make her an employee of the BSC from that earlier date.

100. When we questioned Mr Hitchmough on this issue during his oral submissions, he argued that it was necessary to take a substantive rather than formalistic view of whether Ms Hadjidakou was an employee of the branch at 1 December 2017, and the fact that she had “started work” for the branch on that day showed that in substance she was its employee. We reject this argument. Whatever is meant by “in substance” in this context, ownership in the context of the human resources of a fixed establishment must refer to a legal relationship of

⁹ Appellants’ skeleton argument paragraph 70.

employer and employee, and on 1 December 2017 that relationship existed between Ms Hadjikakou and BESL, not BSC.

101. Therefore, the FTT did not err in law by considering whether the branch had comparable control over Ms Hadjikakou.

Did BSC have comparable control over the other resources it did not own on 1 December 2017?

102. The Appellants argue that in relation to the other resources which the branch did not own, the FTT erred in law in finding that the branch did not have comparable control over those resources.

103. As regards Ms Hadjikakou, this argument is the subject of Ground 2. The issue under Ground 1 relates to the other assets of the branch.

104. The FTT’s conclusion as to other assets was set out at [165]:

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

105. Mr Hitchmough said that the relevant test of comparable control required nothing more than that the branch had “immediate and constant access” to the asset in question. The FTT had failed to apply that test. The correct test was satisfied in view of the FTT’s finding at [165] that “Ms Hadjikakou would not have been denied access to Radbroke Hall, her desk, computer and telephone”. In addition, he argued, the FTT erred by relying on the absence of a written lease, because if such a lease had existed there would have been no need to consider comparable control in the first place. The FTT had also failed to apply an approach of considering substance rather than form.

106. As to the last of these criticisms, we find no indication in the Decision that the FTT did not consider the substance of the position. Indeed, the FTT correctly directed itself to the need to take this approach at [157]:

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

107. Far from being any error of law, the reference by the FTT to the absence of any “lease contract” in relation to the occupation by the branch of Radbroke Hall was a direct application of the guidance given by Advocate General Kokott in *Welmory*. She stated (at [51]) that “the taxable person must nevertheless...have comparable control over the human and technical resources. **Therefore employment and lease contracts are required in particular in relation to the human and technical resources which put the latter at the taxable person’s disposal as if they were his own and which therefore also cannot be terminated at short**

notice” (emphasis added to original). So, the Advocate General considered that, in the absence of direct employment or outright property title in relation to premises, other contractual arrangements would be required in order to give rise to comparable control. Those were absent on the facts found in this case.

108. We reject Mr Hitchmough’s submission that it followed from the FTT’s acceptance that “Ms Hadjidakou would not have been denied access to Radbroke Hall, her desk, computer and telephone” that the only conclusion reasonably available to the FTT was that the branch had comparable control over the premises, desk, computer and telephone. It is scarcely surprising that, as an employee of the Barclays group, Ms Hadjidakou would not, in practice, have been denied such access, particularly since she had been based in Radbroke Hall when employed by BTCL prior to working for the branch: [87]. We do not consider that this finding amounted to a finding that (in the language used by Advocate General Kokott) those resources were at the disposal of the branch as if it owned them, nor that any arrangement could not be terminated at short notice. Nor was there any evidence that such access as existed was based on any contractual arrangements, as referred to by the Advocate General. Finally, the FTT’s finding that access would not be denied was only one part of the evidence available to the FTT in reaching its evaluative conclusion.

109. Mr Hitchmough suggested that the Advocate General had stated that the test of comparable control was satisfied if a branch had “immediate and constant access” to a resource. This is based on her statement at [52] that “a taxable person cannot as such constitute a fixed establishment of a different taxable person. This does not, however, exclude the possibility of a taxable person having immediate and constant access to the human and technical resources of a different taxable person who, in a different respect, can at the same time be a service provider for the fixed establishment thereby constituted”. There is no indication that the Advocate General was in this passage replacing, and materially diluting, the more detailed formulation of comparable control set out in the preceding paragraph. Comparable control means control which is like ownership; access is a necessary element of that but cannot sensibly be said to be sufficient. It is necessary to keep in mind that *Welmory* was a place of supply case, in which one of the issues was whether one taxable person could constitute a fixed establishment of another taxable person for place of supply purposes. That is the question which is being dealt with at [52].

Conclusion

110. The appeal under Ground 1 is dismissed.

Ground 2: FTT’s decision in relation to Ms Hadjidakou vitiated by erroneous findings of fact

111. Ground 2 asserts that the FTT made three errors of law in its findings and inferences in relation to whether the branch had comparable control over Ms Hadjidakou. These were as follows:

- (1) The finding at [163] that, on 1 December 2017, Ms Hadjidakou had “continued to work for BTCL...which, she said, took up the ‘vast majority of her time’ ” (the “First Error”).
- (2) The reference at [163] to the fact that, on 1 December 2017, Ms Hadjidakou reported to Mr McCabe of BTCL “rather than anyone else at BSC”, wrongly inferring that Ms Hadjidakou was not working as an employee of BSC (the “Second Error”).
- (3) The reference at [163] to the call regarding the UK branches was an irrelevant factor (the “Third Error”).

112. Ground 2 is that if the FTT had not made these errors, it would inevitably have concluded that the branch had comparable control over Ms Hadjidakou on 1 December 2017.

Edwards v Bairstow challenges

113. Ground 2 comprises three challenges to findings of fact by the FTT. The jurisdiction of the Upper Tribunal is limited by statute to errors of law: section 11 Tribunals, Courts and Enforcement Act 2007. Findings of fact can give rise to an error of law only on the basis set out in *Edwards v Bairstow* [1956] AC 14. In that case, Viscount Simonds referred to making a finding without any evidence or upon a view of the facts which could not be reasonably entertained, and Lord Radcliffe described as errors of law cases where there was no evidence to support a finding, or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding. Lord Diplock has described this ground of challenge as “irrationality”¹⁰.

114. Any party seeking to make an *Edwards v Bairstow* challenge should adopt the approach authoritatively described by Evans LJ in *Georgiou (trading as Marios Chippery) v Customs & Excise Commissioners* [1996] STC 463, p. 476:

It is right, in my judgment, to strike two cautionary notes at this stage. There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. That is well seen in arbitration cases and in many others. It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be misused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.

It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal’s conclusion was against the weight of the evidence and was therefore wrong. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court.

115. The proper approach in this Tribunal is clearly set out in *HMRC v Marlborough DP Limited* [2024] UKUT 00098 (TCC) at [177]-[181].

116. Unfortunately, the Appellants did not comply with this approach, or initially identify the challenges as *Edwards v Bairstow* challenges. That has caused unnecessary time and effort on the part of both HMRC and this Tribunal.

The First Error

117. At [163], the FTT stated in relation to Ms Hadjidakou that “she continued to undertake work for BTCI during December 2017 which, she said, took up the “vast majority” of her time”. The Appellants say that on the basis of the relevant evidence this finding was not one

¹⁰ *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 410F-411A.

which the FTT was reasonably entitled to make. They argue that the relevant evidence is that given by Ms Hadjidakou in cross-examination, during which she stated that on 1 December 2017 there were “some discrete actions that needed to be closed out” as regards her work at BTCI, and that her involvement in BTCI work at that date was limited and involved “email correspondence facilitating the closure of outstanding actions”.

118. At [90], the FTT made the following findings of fact:

Ms Hadjidakou continued to carry out work for BTCI during December 2017 and during January and February 2018. In evidence, she explained that she was responsible for merging the UK branches of BTCI and BSS which took up the “vast majority” of her time. Although the BTCI /BSS merger was completed on 22 December 2017, there was some subsequent email correspondence, eg an email on 8 December 2017 was sent from “Hadjidakou, Elini: BTCI UK Branch” in relation to the “Merger of BSS & BTCI Branches – Employee Transfers”.

119. This argument is without merit. Even before one begins to consider other evidence available to the FTT, and the reservations expressed by the FTT as to Ms Hadjidakou’s evidence (at [5]), the argument falls at the very first hurdle, because the transcript of Ms Hadjidakou’s cross-examination includes the following exchange (emphasis added to original)¹¹:

Q. So between April 2017 and December 2017, can you give us a rough sense of what proportion of your time was spent working on the merger [for BTCI]?

A. **I think the vast majority of my time, certainly in the latter half of my time at BTCI UK branch, was spent on the merger.** It was the focus for the vast majority of individuals involved in the project.

120. Mr Hitchmough asserted that Ms Hadjidakou’s response related only to the period before she joined the BSC branch on 1 December 2017. That is plainly wrong. The question covers December 2017, and the use of the word “certainly” shows that the response was not so limited.

121. The FTT did not even go so far as to make a finding that on 1 December 2017 continuing work for BTCI did take up the vast majority of her time. It recorded that that is what she said, and that was plainly right.

122. The FTT clearly made no error in the respect alleged.

The Second Error

123. At [163], the FTT stated that “as at 1 December 2017, [Ms Hadjidakou] reported to her line manager, Mr McCabe of BTCI. It was Mr McCabe, rather than anyone at BSC, that was responsible for her day to day supervision”.

124. The Appellants say that the FTT erred by wrongly inferring that Ms Hadjidakou was not in fact working as an employee of BSC, and ignored the fact that she had two line managers, the other being Mr Westwood, the CEO of BSC. The evidence was that Mr Westwood was happy for her also to report to Mr McCabe. The FTT further failed to take into account that it was fairly common practice in the group to have more than one reporting line.

125. In view of our dismissal of Ground 1, the argument that Ms Hadjidakou was an employee of the branch at 1 December 2017 falls away. We therefore consider this ground by reference to the disputed inference in the context of comparable control.

126. At [89], the FTT made the following findings of fact:

¹¹ Day 1 transcript of FTT hearing, page 84 lines 1-6.

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

127. In his oral submissions, Mr Hitchmough took us to passages from the transcript of Ms Hadjikakou’s cross-examination before the FTT which, he said, showed that her evidence was that her overall supervision rested with Mr Westwood, and that Mr McCabe’s supervision of her was at the behest of or on behalf of BSC, through Mr Westwood. Further, he said, her evidence showed that she regarded Mr Westwood as her “indirect” line manager.

128. On examination, Ms Hadjikakou’s evidence was less clear-cut than this. For example, she stated that “...line management in terms of managing performance of the team and having somebody in location to refer to and offer guidance to the team, that would be Peter McCabe. In terms of the services delivered from BSC and relevance of what we were doing for [BSC], that would be kind of that dotted line into Jai Westwood”¹².

129. The passage to which the Appellants object in [163] is clearly correct, and amply justified by the evidence before the FTT. In her Witness Statement, Ms Hadjikakou explicitly stated (at paragraph 19) that “between December 2017 and September 2019 I was line-managed locally in the UK by Mr McCabe”. As the FTT stated, at 1 December 2017, it was Mr McCabe of BTCI who was Ms Hadjikakou’s line manager and responsible for her day-to-day supervision.

130. Mr Hitchmough’s real complaint is that the FTT should also have referred to and explained the position in relation to Mr Westwood. However, the FTT had already accurately done this, at [89]. They were under no obligation to repeat each and every piece of evidence in a paragraph summarising the principal reasons why the FTT did not accept that the branch had comparable control over Ms Hadjikakou.

131. Nor did the FTT, as Mr Hitchmough asserted, conclude that Ms Hadjikakou “reported to Mr McCabe rather than anyone at BSC”. The passage at [163] states that she reported to Mr McCabe, who was her line manager. That was factually correct. The reference to Mr McCabe “rather than anyone at BSC” is made only in relation to responsibility for her day-to-day supervision. Again, that was factually correct.

132. The FTT clearly made no error in the respect alleged.

The Third Error

133. At [163], the FTT stated that:

Additionally, Ms Hadjikakou had to email Ms McAlinden¹³ on 4 December 2017 to ask if she could “link in” with Ms McAlinden regarding the UK Branches IGAs only to be informed that there had been a call on that day with “interested parties” which had not included Ms Hadjikakou.

¹² Day 2 transcript of FTT hearing, page 17 line 21-page 18 line 2.

¹³ Ms McAlinden was “the head of BESL’s service office who was responsible for the BX IGAs and the BESL IGAs that had already “gone live” and had access to the whole catalogue of IGAs that were operated by Barclays”: [106].

134. The complaint here is not that the FTT was not entitled to make this finding, or that it drew an incorrect inference from it, but that it erred in law by taking into account an irrelevant factor.

135. The Appellants argue that this fact “is irrelevant to the question of whether BSC had human and technical resources available to it in the UK in any relevant sense”¹⁴. If anything, they say, it shows that BSC did have comparable control over Ms Hadjidakou, because the email was sent on behalf of BSC. Mr Hitchmough argued that, in any event, its relevance was not to whether comparable control existed, but only to the separate question of whether the resource in question was sufficient to make a meaningful contribution to the business of the branch.

136. We do not accept that the fact in question was irrelevant. The FTT explicitly carried out its evaluation on the basis of Mr Hitchmough’s formulation. This was that on 1 December 2017 the branch had “sufficient human and technical resources in the UK to make a meaningful commercial contribution to the non-UK company, ie BSC”: [156]. We see no justification for segregating this test into a decision regarding available resources and then a separate decision as to whether those resources were sufficient to make a meaningful contribution. Each element of this single test should be assessed in conjunction with the other: put another way, resources are only relevant if they go toward establishing the sufficiency to make a meaningful contribution.

137. So, the fact that the only employee over whom the branch might arguably have comparable control had no prior knowledge of, and had not been asked to participate in, a call regarding one of the primary areas of responsibility of the branch, namely the UK branch IGAs, was clearly relevant to the contribution which Ms Hadjidakou had been able to make some three days earlier, on 1 December 2017. The weight to be afforded to that fact was entirely a matter for the FTT, but in our view its relevance cannot be disputed.

138. The FTT clearly made no error in the respect alleged.

Materiality and Conclusion

139. In light of our conclusions on Ground 2, we do not need to consider whether, if any or all of the errors asserted by Ground 2 had been established, they would, in any event, have been material. An error of law is material if it might (not would) have affected the outcome: see Henderson LJ in *Degorce v HMRC* [2017] EWCA Civ 1427 at [95]. In this appeal, the Appellants would need to have established that any errors of law in the FTT’s findings regarding the comparable control of the branch over Ms Hadjidakou might have made a difference to the FTT’s conclusion that Mr Hitchmough’s test of a fixed establishment was not met at 1 December 2017. It would have been necessary as part of that exercise to consider whether such resources as the branch did have comparable control over were sufficient to make a meaningful commercial contribution to the business of BSC. It would also have been necessary to evaluate the weight to be afforded to the FTT’s separate findings of fact, including those regarding the lack of access in the branch at 1 December 2017 to the various IT systems and information within the group necessary for the branch to carry out its designated functions.

140. The appeal under Ground 2 is dismissed.

Ground 3: Intending trader analogy

141. At [167], having reached its conclusion that the branch did not amount to a fixed establishment on 1 December 2017, the FTT said this:

¹⁴ Appellants’ skeleton argument paragraph 92.

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

142. Ground 3 is that this was an error of law by the FTT. The Appellants say that the analogy between the branch and an intending trader is entirely apt, and that the decision in *Breitsohl* should be applied in this respect. They say that if an intending trader is eligible to join a VAT group, then surely a UK branch in a similar position should also be eligible. Further, argued Mr Hitchmough, the concept of a “meaningful commercial contribution” must be sufficiently broad to cover a nascent branch. He drew an analogy with a research and development activity carried out in a branch. He argued that the tasks undertaken in establishing the branch must make a meaningful commercial contribution to the business of the overseas company from the outset, and such contribution cannot be confined to the functions that the branch will ultimately perform. There was an intention to use the resources as at 1 December 2017 to perform a crucial monitoring and oversight function for BSC, for which a specific charge was to be made.

143. Mr Hitchmough said that the FTT was wrong to place reliance in this context on *Planzer*, because the passage relied on related only to ongoing activity of a business. Additionally, *Planzer* was a place of supply case, which could not be read across to the VAT grouping rules.

144. Finally, he said, on the evidence the activity of the branch at 1 December 2017 was not, in any event, merely preparatory or auxiliary.

Discussion

145. In view of our decisions to reject Grounds 1 and 2, this ground is academic.

146. That is because the definition of a fixed establishment proposed by Mr Hitchmough and adopted by the FTT requires that as at 1 December 2017 the branch owns/has comparable control over human and technical resources which are sufficient to make a meaningful contribution to the business of BSC. While we have rejected Mr Hitchmough’s attempt to split this into two separate tests, it nevertheless follows that if, as matter of fact, **no** resources are in the ownership or comparable control of the branch, then the issue of whether they are sufficient to make a meaningful contribution does not arise. That is the situation here. The FTT found that on 1 December 2017 the branch had no actual or comparable control over any employees or any technical resources. We have upheld that decision. The intending trader analogy, as Mr Hitchmough accepted, addresses whether the branch was making a meaningful contribution, and, in particular, whether the process of setting up and establishing the branch made a meaningful contribution from “day one”. Here, we have found that the FTT did not err in law in finding that the branch had no ownership of or comparable control over any resources at 1 December 2017, so the issue of meaningful contribution at that date does not arise.

147. However, since we heard argument on the issue, we will set out our views.

148. There is no authority for the proposition that it is sufficient to give rise to a fixed establishment for the purposes of VAT grouping that, at a particular date, steps are being taken to set up a branch which will, in due course and once it is operational, own the necessary resources to make a meaningful contribution to the business of the company setting up the fixed establishment.

149. The interpretation of the term fixed establishment in section 43A is dealt with by *HSBC*. In that case, the Upper Tribunal stated as follows, at [50]-[51]:

50. We therefore conclude that in interpreting in Section 43A the concept of bodies corporate being established or having a fixed establishment in the UK, and in Article 11 the concept of being established in a Member State, such interpretation is informed by the concepts of establishment and fixed establishment found largely in the place of supply rules. The CJEU case law on those terms as applicable in the context of place of supply is relevant, including *Berkholz v Finanzamt Hamburg-Mitte-Alstadt* (C168/84) at [18], *ARO Lease* at [15] and *Titanium* at [41]-[43].

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

150. Mr Hitchmough’s attempt to widen the meaning of fixed establishment in section 43A finds no support in this passage. On the contrary, *HSBC* lends support to the FTT’s reference to *Planzer* in regarding the activities at 1 December 2017 as insufficient because they were merely preparatory or auxiliary, in that it refers to the relevance of *Planzer* in determining the meaning of fixed establishment in section 43A.

151. In the absence of authority, Mr Hitchmough relies on an analogy with *Breitsohl*. In that case, the CJEU decided that an intending trader could register for and thereby recover VAT which it had incurred on the basis that it was entitled to be treated as a “taxable person”. He says that it would be illogical and an “odd result” if the position was different in relation to an “intending” fixed establishment.

152. We do not agree. The concepts of “taxable person” and “fixed establishment” are substantively different. In addition, an intending trader has a directly effective right under EU law to reclaim VAT, whereas there is no directly effective right to be admitted to a VAT group.

153. We did not find that a comparison with a nascent R&D facility shed any useful light on the issue.

154. In our opinion, the FTT was entitled to reach the conclusion which it did at [167].

155. The appeal under Ground 3 is dismissed.

Fixed establishment: the correct test in section 43A

156. The FTT chose to proceed on the assumption that Mr Hitchmough’s test of what fixed establishment means in section 43A is correct. Since we have dismissed the Appellants’ appeal, and since the Appellants would have failed any more rigorous test, we do not need to determine whether that test is correct in law. Nevertheless, we wish to offer some *obiter dicta*.

157. The meaning of fixed establishment in the VAT grouping provisions was discussed in *HSBC*. The most important passages are as follows (emphasis added to original):

49....**Parliament’s intention in enacting section 43A was to reference the concepts of “established in” and “fixed establishment” in the place of supply rules...** While not determinative, we agree with HMRC that it is also inconsistent with the legislative history of section 43A. In particular, the Explanatory Notes to the Finance Act 1999 (which introduced section 43A) explained that the new requirement that companies must be established or have a fixed establishment in the UK was intended to replace previous tests

which had their roots in company law with tests more consistent with VAT law. On notifying this change to the VAT Committee (in VAT Committee Working Paper no.279, at paragraph 3.5), the UK explained that **it was proposed to move from a test that stemmed from company law to tests of “established” or “fixed establishment” which already existed within VAT law.**

50. We therefore conclude that in interpreting in Section 43A the concept of bodies corporate being established or having a fixed establishment in the UK, and in Article 11 the concept of being established in a Member State, such interpretation is **informed by the concepts of establishment and fixed establishment found largely in the place of supply rules. The CJEU case law on those terms as applicable in the context of place of supply is relevant, including *Berkholz v Finanzamt Hamburg-Mitte-Alstadt* (C168/84) at [18], *ARO Lease* at [15] and *Titanium* at [41]-[43].**

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

...

53. **The definitions in the [Articles 10 and 11 of Council Implementing Regulation 282/2011 (the “Implementing Regulation”)] are not directly applicable to Article 11, as they apply in determining the place of supply. We agree, however, that they provide a helpful starting point, when read in the light of the CJEU case law, in interpreting “established” and “fixed establishment” in section 43A. We do not think it is appropriate to go further than this, in a decision dealing only with preliminary issues. The precise meaning of the terms “established” and “fixed establishment” in any given case is highly fact sensitive, and better determined in the context of all the relevant circumstances in any given case.**

158. It follows from the highlighted passages that Mr Hitchmough’s formulation is not correct. It sets too low a bar, because it effectively leaves out of account the guidance on the meaning of fixed establishment in the place of supply rules and in other decisions such as *Planzer*. As *HSBC* makes clear, Parliament’s intention in enacting section 43A was to reference the concept of fixed establishment in the place of supply rules, and CJEU case law in relation both to the place of supply rules and in other contexts is “relevant” to the meaning of the term in section 43A and “must be taken into account”.

159. In practice, this means that the factors identified as relevant, and the concepts applied, in the CJEU case law on the place of supply rules (and in cases such as *Planzer*) which consider whether a fixed establishment exists must be taken into account in the overall evaluation. They are not to be read across and applied wholesale, but nor are they to be ignored or treated as irrelevant.

160. Since our comments on this issue are *obiter* we do not regard it as appropriate to offer any further guidance than this.

THE PROTECTION OF THE REVENUE ISSUE

161. HMRC refused the application for BSC to join the group on the alternative basis that if BSC did have a fixed establishment in the UK, it was nevertheless necessary to refuse the

Application for the protection of the revenue, within the meaning of section 43B(5)(c) (the “POR provision”).

Legislation

162. Where an application is made for a body corporate to join a group, the POR provision provides as follows:

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

...

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

163. Where an appeal is made against a decision to refuse an application under the POR provision, section 84(4A) applies as follows:

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

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

164. In relation to a substantially similar provision¹⁵, it was held in *HSBC* that the effect of the word “could” in section 84(4A)(a) is as follows:

129. ...the test focuses exclusively on the reasonableness of the decision reached, as opposed to the process by which it was reached...

130... the question is whether HMRC “could” reasonably have decided upon [the matter in question], not whether it had reasonably done so in the given case.

165. The POR provision is derived from Article 11 of the PVD (set out at paragraph 9 above), the second paragraph of which states as follows:

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

The FTT’s decision

166. In view of the FTT’s decision on the Fixed Establishment Issue, the Protection of the Revenue Issue was academic, but the FTT did consider it and indicated what its decision would have been had it found that a fixed establishment did exist at 1 December 2017.

167. The FTT dealt with the issue at [176]-[193]. It began by considering the objectives of VAT grouping, reaching a conclusion which we discuss further below. It then set out what would have been its decision as follows:

190. There was agreement that the VAT and Duties Tribunal in *National Westminster Bank plc* (VAT Decision 15514) and *Xansa Barclaycard Partnership Ltd v Commissioners of Customs and Excise* (2004) VAT Decision 18780 had adopted the correct approach in an appeal against the exercise of the “protection of the revenue” powers. The protection in question being “against any loss of revenue which is not de minimis whether or not it

¹⁵ Section 84(4D).

follows from the normal operation of grouping” (see *National Westminster* at [72]) for which there must be “something present other than a completely “straightforward” application of the [grouping] rules before the Commissioners can act to protect the revenue” (see *Xansa Barclaycard* at [44]).

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

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

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

HMRC’s case

168. HMRC argued that the FTT made various errors of law, for the following reasons:

- (1) *HSBC* establishes that the second paragraph of Article 11 allows Member States to combat not only cases involving an abuse of VAT grouping, but also avoidance of the kind described by the CJEU in *Direct Cosmetics Limited v HMRC* (Cases C-138/86 and 139/86). This is, broadly, an outcome which objectively results in less tax being paid, even if tax avoidance was not intended.
- (2) The FTT erred in its view of the purpose of the VAT grouping rules.
- (3) The decisions in *National Westminster* and *Xansa* referred to by the FTT in fact support the reasonableness of HMRC’s decision in relation to POR on the facts in this case.
- (4) The admission of BSC to the VAT group would not have materially reduced administrative costs for the group, would actually have complicated its arrangements administratively and would have resulted in very substantial VAT savings. That combination goes beyond the “normal consequences” of VAT grouping and would have enabled avoidance in a *Direct Cosmetics* sense.

The Appellants’ case

169. Mr Hitchmough argued that the question of whether an arrangement or structure gives rise to “avoidance” in this context depends on the aims and objectives of the VAT grouping legislation: was the VAT reduction in a given case one which the legislation did or did not intend? In this case, the FTT got it right, because the inclusion of BSC in the VAT group would have promoted fiscal neutrality, by ensuring that the same amount of VAT was payable as would have been the case had BSC been a division of Barclays in the United States. This is an example of precisely the sort of administrative simplification at which VAT grouping is aimed.

Parliament cannot have intended that the POR power should be exercisable by HMRC where the ordinary consequences of VAT grouping are, in HMRC's view, too expensive.

Discussion

170. In view of our decision to dismiss the Appellants' appeal on the Fixed Establishment Issue, this issue is academic. Nevertheless, since we heard argument on it, we will give our view on the FTT's indicative decision.

171. The FTT's reasoning explicitly rested on its conclusion that "[one of the] normal aims and consequences of VAT grouping is to provide a freedom to structure a business in a way that best meets its commercial needs while ensuring it is taxed in the same way as a single company organised on a divisional basis". As we discuss at paragraphs 29 to 31 above, while we accept that this is one of the objectives of the UK VAT grouping rules, the extent and limitations of that objective, and the circumstances in which that neutrality is intended to arise by virtue of grouping, remain unclear. In considering whether to deny grouping under the POR provision, HMRC must reach a decision on the extent to which a particular grouping application gives rise to a risk of *Direct Cosmetics* avoidance or *Halifax* abuse, by reference to the objectives of the UK VAT grouping rules¹⁶. Their decision can and should take into account all relevant factors in relation to the particular application in question. An appeal to the tribunal against that decision can succeed if but only if HMRC could not reasonably have reached the decision to deny grouping under the POR provision.

172. On the facts in this appeal, we consider that there are two particular aspects of the arrangements which strongly indicate that HMRC could reasonably have reached the decision in question.

173. First, while the anticipated annual VAT savings were very considerable, as at 1 December 2017 the resources of the branch were, putting it at its highest, skeletal. The branch had no employees; it did not have comparable control over any employees; it did not own or have comparable control over any premises or physical office resources, and it had no access to the group IT systems which would enable it to undertake its intended activities in relation to IGAs and regular service reviews.

174. Second, in addition to the annual VAT savings which were anticipated to arise, the timing of the application for BSC to join the VAT group was driven by the opportunity to generate an additional "1 time £21mm tax benefit" ([81]) if the VAT grouping could be achieved before the end of 2017, described by Barclays as a "financial imperative": [97].

175. As we have explained, on an appeal against refusal of an application under the POR provision, the question for the Tribunal under the legislation is whether HMRC "could" reasonably have decided to refuse the application under the POR provision, not whether it had reasonably done so in the given case. In all the circumstances in this appeal, including the two aspects we have highlighted, we consider that HMRC could reasonably have reached that decision.

176. Therefore, in disagreement with the FTT, if it had been necessary for us to decide this issue, we would have reached a contrary conclusion to that reached by the FTT.

DISPOSITION

177. The Appellants' appeal on the Fixed Establishment Issue is dismissed. The FTT reached the correct conclusion on the Danske Bank Issue, but reached the wrong conclusion on the Protection of the Revenue Issue.

¹⁶ As we have decided above, it is not possible to apply a conforming construction of the UK rules so as to impose a territorial limitation.

**MR JUSTICE RAJAH
JUDGE THOMAS SCOTT**

Release date: 08 June 2026