Neutral Citation Number: [2024] EWCA Civ 1412

Case No: CA-2023-002584

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
Mr Justice Michael Green and Upper Tribunal Judge Swami Raghavan
[2023] UKUT 00257 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2024

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE WHIPPLE
and
SIR LAUNCELOT HENDERSON

- -

Between :

THE KING **on the application of** **(1) REFINITIV LIMITED** **(2) REFINITIV UK EASTERN EUROPE LIMITED** **(3) LIPPER LIMITED** **(4) THOMSON REUTERS CORPORATION**	**Claimants/ Appellants**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Defendants/ Respondents**

- -
- -

Jonathan Peacock KC, Sam Grodzinski KC and Laura Ruxandu (instructed by **Baker & McKenzie LLP**) for the **Appellants**
John Brinsmead-Stockham KC, Marika Lemos and Alice Defriend (instructed by **The General Counsel and Solicitor for HMRC**) for the **Respondents**

Hearing date: 15 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30 am on 15 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Launcelot Henderson :

Introduction and Background

1. The issue in these judicial review proceedings concerns the lawfulness in public law of charging notices to diverted profits tax ("DPT") issued by HMRC to three UK-resident companies in the Thomson Reuters group on 20 August 2021. The total amount charged was more than £167 million. The notices related to the accounting period of each of the three companies running from 1 January to 31 December 2018. The largest charge by far was that levied on Refinitiv Limited, which is the first claimant and the first appellant in this court, in the sum of £167,400,683.57. The amounts charged on the other two companies, which are the second and third claimants and appellants, were relatively insignificant: £51,137.31 in the case of Refinitiv UK Eastern Europe Limited, and £7,073.20 in the case of Lipper Limited. Unless it is necessary to distinguish between them, I will refer to the three companies together as "TR UK".

2. It is common ground that, in the circumstances of the present case, the lawfulness in public law of the charging notices turns on the question whether they were inconsistent with the terms of an advance pricing agreement ("APA") made between TR UK and HMRC in January 2013. An APA is a statutory contract made between HMRC and the applicant for the APA pursuant to provisions in Part 5 of the Taxation (International and Other Provisions) Act 2010 ("TIOPA"). One of the matters to which an APA may relate is the appropriate "transfer pricing" methodology to apply to intra-group transactions during a specified period. By virtue of section 220 of TIOPA, the Tax Acts have effect, in relation to any chargeable period to which an APA relates, as if questions relating to the relevant matters "are to be determined – (a) in accordance with the agreement, and (b) without reference to the provisions in accordance with which they would otherwise be determined".

3. The legislation about transfer pricing is contained in Part 4 of TIOPA. It applies for the purposes of both corporation tax and income tax: section 146. The basic transfer-pricing rule, as set out in Chapter 1 of Part 4, applies where an actual provision has been made or imposed as between any two affected persons by means of a transaction or series of transactions, the parties are associated with each other by reference to the "participation condition" in section 148, and (subject to an immaterial exception for oil transactions) there is a difference between the actual provision and the provision (defined as "the arm's length provision") "which would have been made as between independent enterprises": section 147(1). Where those conditions are satisfied, and where "the actual provision confers a potential advantage in relation to United Kingdom taxation on one of the affected persons" (section 147(2)(b)), then by virtue of section 147(3):

> "The profits and losses of the potentially advantaged person are to be calculated for tax purposes as if the arm's length provision had been made or imposed instead of the actual provision."

4. The commercial context in which TR UK became potentially liable to the transfer pricing regime spans the period from 2008 to 2018. During that period, TR UK

supplied services related to intellectual property ("IP") to another group company resident in Switzerland, Thomson Reuters Global Resources ("TRGR"), which held the group's main IP assets. Those services enhanced the value of the IP held by TRGR, which TRGR used to make profits which were taxed at much lower rates in Switzerland than the headline rates of UK corporation tax. HMRC's case, in short, was that TR UK did not receive the compensation for providing those services that they would have done if the services had been provided at arm's length, and that TR UK thereby received a potential advantage in relation to UK taxation because their profits subject to UK corporation tax were lower than they would have been under an arm's length relationship with TRGR. In broad terms, this remained the position until the IP was sold by TRGR in 2018 for a very substantial gain, as part of a disposal by the Thomson Reuters group of its "Financial & Risk" ("F&R") business unit to a new joint venture company, Refinitiv Holdings Limited. It was also part of HMRC's case that the services supplied by TR UK to TRGR throughout the period from 2008 to 2018 contributed (a) to the generation of annual profits by TRGR in future years (as well as in the year of supply) and (b) to the value of the IP sold in 2018, and thus to the capital profits made on the sale by TRGR in 2018.

5. As may well be imagined, the appropriate methodology to use to calculate the arm's length price of services for transfer pricing purposes is not always a straightforward matter. Various different methods may be employed, and negotiations between the taxpayer and HMRC may be complex and protracted before agreement is reached. In the present context, two basic methods are relevant, which are conveniently labelled the "cost-plus" method and the "profit-split" method. Other methods include a "cost-allocation" approach. As the labels suggest, the main feature of a "cost-plus" method is that a specified percentage mark-up is added to the costs of providing the relevant services during a specified period, while a "profit-split" method involves the application of a specified percentage year by year to revenues derived from distribution activities in respect of third party sales: see the decision of the Tax and Chancery Chamber of the Upper Tribunal in the present case (Michael Green J and Judge Swami Raghavan, [2023] UKUT 00257 (TCC), "the UT Decision") at [46] and [47].

6. The APA which TR UK and HMRC concluded in January 2013 covered the period 1 October 2008 to 31 December 2014. The element of retrospection was authorised by section 224 of TIOPA, which expressly provides that an APA "may contain provision relating to chargeable periods ending before the agreement is made", subject to a cut-off date in 1999 when the legislation first came into force in the Finance Act of that year. I will need to examine the provisions of the APA in detail later in this judgment. At this stage, it is enough to say that the purpose of the APA, as stated in its first recital, was to "establish an appropriate transfer pricing methodology" in satisfaction of TR UK's obligations under Part 4 of TIOPA, "in relation to achieving an arm's length allocation of income and expenses for cross-border transactions between [TR UK] and related parties". The transactions covered by the APA included the fees paid by TRGR to TR UK for eight specified categories of services, identified as "Software and New Product Development Services", "Content Development and Acquisition Services", "News and Editorial Services", "Data Hosting Services", "Markets Central and Support Services", "Advisory Services", "Corporate Services" and "Synergy and Integration Services", each of which was separately defined in clause 1.

7. Clause 5.3 then recorded the parties' agreement that a method known as the "Transactional Net Margin Method" ("TNMM") would be used to determine TR UK's compensation for Non-UK Distribution activities performed by TR UK on behalf of TRGR. In a similar way, clause 5.4 provided that the TNMM would also be used in relation to seven of the eight specified categories of services which I have mentioned, to determine TR UK's compensation for providing them to TRGR. In relation to each such category, a mark-up percentage of between 6% and 15% was agreed "for the period of the agreement". Strictly speaking, the TNMM was not a true cost-plus mark-up, because its effect was to yield a net profit rather than gross profit; but for convenience and simplicity the parties have throughout been content to describe it as a cost-plus method, as did the Upper Tribunal at [46], and I will do likewise.

8. The APA ran its course and terminated on 31 December 2014. The second recital to, and clause 9 of, the APA expressly contemplated that it might be renewed by written agreement between the parties, but this did not happen. As the Upper Tribunal found at [50], the claimants sought a new APA for subsequent accounting periods, but none was ultimately agreed, and their application was withdrawn on 13 September 2018.

9. The charge to DPT was first enacted in Part 3 of the Finance Act 2015 ("FA 2015)", its introduction having been announced in the Autumn Statement given by the Chancellor of the Exchequer on 3 December 2014. It was an entirely new tax, which had effect in relation to accounting periods beginning on or after 1 April 2015: see section 116(1). A helpful description of its purpose and basic mode of operation was given by Sales LJ in *R (Glencore Energy UK Ltd) v Revenue and Customs Commissioners* [2017] EWCA Civ 1716, [2017] 4 WLR 213, at [8]:

> "8. DPT is a tax introduced to counter the use of aggressive tax planning deployed by multinational corporate groups to divert profits which would otherwise have been subject to corporation tax in the UK away from the UK to low tax jurisdictions, thereby eroding the UK tax base. The tax becomes chargeable in relation to 'taxable diverted profits' arising to a company in a relevant accounting period (section 77) under certain conditions, in an amount calculated by comparing the UK tax payable in relation to the arrangements which result in the diversion of profits with the notional tax payable in the UK if they had not been diverted. The assessment of whether the relevant conditions exist and the elaboration of the counterfactual scenario to work out the notional tax payable (i.e. the tax which would have been payable had a 'relevant alternative provision' been in place between relevant parties: see section 82) can involve considerable complexity."

10. DPT is not itself corporation tax, but it is charged by reference to the same accounting periods as corporation tax: section 113(1). For the accounting periods in issue in this case it was charged at the flat rate of 25% of the amount of taxable diverted profits specified in the charging notice, which must be issued to the company by a designated officer of HMRC: section 79(1) and (2). Before a charging notice is given, the officer must first give the company a preliminary notice under section 93 explaining (among other things) the basis on which the proposed charge is calculated. There is then a process in which the company may make written representations on the limited grounds specified in section 94(3), which the officer must consider before deciding

whether to proceed to issue a charging notice: section 95(2). Where a charging notice is issued, the DPT is payable in full within 30 days and the payment of the tax "may not be postponed on any grounds", including if HMRC carry out a review of the charging notice under section 101 or if the taxpayer exercises its right of appeal against the notice to the First-tier Tribunal under section 102.

11. The factual basis for a charge to DPT to arise is set out in sections 80 to 85, which must be read with the introductory section 77(2) which states that:

> "Taxable diverted profits arise to a company in an accounting period only if one or more of sections 80, 81 and 86 applies or apply in relation to the company for that period."

We are concerned with section 80, which is headed "UK company: involvement of entities or transactions lacking economic substance". Section 80(1) reads as follows:

> "80 (1) This section applies in relation to a company ("C") for an accounting period if—
>
> (a) C is UK resident in that period,
>
> (b) provision has been made or imposed as between C and another person ("P") (whether or not P is UK resident) by means of a transaction or series of transactions ("the material provision"),
>
> (c) the participation condition is met in relation to C and P (see section 106),
>
> (d) the material provision results in an effective tax mismatch outcome, for the accounting period, as between C and P (see sections 107 and 108),
>
> (e) the effective tax mismatch outcome is not an excepted loan relationship outcome (see section 109),
>
> (f) the insufficient economic substance condition is met (see section 110), and
>
> (g) C and P are not both small or medium-sized enterprises for that period."

12. Without going into further detail, it is evident that there are some structural similarities between cases where section 80 applies and cases where the transfer pricing regime in Part 4 of TIOPA might also be applicable. This is no accident, and careful provision is made for the interaction between the two regimes, for example in section 84(2) which prevents the inclusion in the calculation of diverted profits of any amounts taken into account in the company's self-assessment to corporation tax under the transfer pricing regime before the end of the DPT review period. The concepts in section 80(1) of an "effective tax mismatch outcome" as a result of "the material provision" made or imposed as between C and P (or here, as between TR UK and TRGR) obviously resemble the concepts in the transfer pricing code of "the actual provision" made or imposed as between any two persons, where the actual provision "confers a potential advantage in relation to United Kingdom taxation on one of the affected persons". Moreover, the key transfer pricing criterion of the hypothetical arm's length provision which would have been made as between independent

enterprises has its counterpart in the concept of "the relevant alternative provision", or "RAP" for short, which is used in the calculation of taxable diverted profits under sections 82 and 85 of FA 2015.

13. The RAP is defined in section 82(5) as meaning:

> "the alternative provision which it is just and reasonable to assume would have been made or imposed as between the relevant company and one or more companies connected with that company, instead of the material provision, had tax (including non-UK tax) on income not been a relevant consideration for any person at any time."

Thus, in each context, there is a comparison between the actual or the material provision which is actually made in the real world on the one hand, and the alternative hypothetical provision which would have been made on the other hand, either if the parties were at arm's length (transfer pricing) or if tax had not been a relevant consideration (DPT).

14. As HMRC explained in their unchallenged written evidence to the Upper Tribunal, the differences between the arm's length principle for transfer pricing and the RAP for DPT purposes mean that in theory they may produce either the same or different outcomes on the facts of a given case, although in the majority of cases it is possible for the taxable diverted profits to be extinguished by a suitable transfer pricing adjustment: see the witness statement of Stefan Ellender, who was at the material time a Senior Transfer Pricing Specialist with HMRC and also had policy responsibilities for DPT, at paragraphs 12 to 17. Mr Ellender further explained (at paragraphs 4 to 5) that:

> "4. The administration of DPT by HMRC is different from that for corporation tax. Companies do not self-assess to DPT but instead a DPT charge is levied by HMRC through the issuance of a DPT notice following the prescribed statutory framework during which the company has the right to make representations to HMRC before any charge is levied. Should a DPT charging notice be issued to a company for an accounting period the company must pay that charge within 30 days at a higher rate than the normal corporation tax rate, currently and for the accounting periods relevant to this judicial review, the rate was 25%.
>
> 5. Following the issuance of a DPT charging notice a statutory review period commences, currently 15 months, during which the company and HMRC can work together to resolve the profit diversion. During the first 14 months of the review period the company has the ability to amend their return so as to bring their taxable diverted profits into the charge of corporation tax, thereby reducing or removing the charge to DPT. Should the 15 month review period end with a charge to DPT remaining the company has the right to appeal that charge to the tax tribunal within 30 days of the end of the review period."

15. Following the expiry of the APA, its non-renewal and the introduction of DPT, HMRC formed the view that in later accounting periods (i.e. from 1 January 2015

onwards) it was no longer appropriate to use a cost-plus methodology in relation to the IP-related services supplied by TR UK to TRGR, but a profit-split methodology should be used instead. Furthermore, HMRC considered that the circumstances of the case would justify the issue of DPT notices to TR UK. Accordingly, as the Upper Tribunal record at [52], over the period from 8 February 2018 to August 2021 HMRC issued DPT charging notices to TR UK for each of their annual accounting periods from 2015 to 2018. In the event, TR UK chose not to challenge the DPT notices for 2015, 2016 and 2017 by way of judicial review, although the amounts charged were substantial, ranging from about £24 million in 2015 to over £69 million in 2016 and over £56 million in 2017. We are therefore concerned only with the three DPT notices for the 2018 chargeable period.

16. In the charging notice issued to Refinitiv Ltd on 20 August 2021, the basis on which the charge is calculated was set out in paragraph 18. The RAP was identified in these terms:

> "The RAP, as defined in s82(5) FA 2015, is that if tax on income had not been a relevant consideration for any person at any time, it is just and reasonable to assume that legal ownership of the non-trademark IP rights would be centralised and arm's length pricing would be applied to all transactions, including those related to developing, enhancing, maintaining, protecting and exploiting [*DEMPE*] those assets.
>
> Under the RAP, [*Refinitiv*] would have additional income in the form of arm's length compensation paid to it by the legal owner of the non-trademark [*IP*] rights for the performance of DEMPE functions. This is because the evidence provided suggests the vast majority of the DEMPE functions with respect to the [*IP*] rights covered by the material provision are carried out in the UK and the US."

17. It can be seen, therefore, that this is a case where HMRC sought to identify the RAP by reference to an arm's length pricing criterion, which in principle might well overlap (or even coincide) with the outcome of a transfer pricing analysis where an arm's length approach would also have to be applied. The critical point for present purposes, however, is that HMRC now wished to apply the arm's length test by reference to a profit-share basis rather than a cost-plus basis of the same general type as had underpinned most of the relevant parts of the APA. HMRC's reasons for wishing to adopt this change of basis are encapsulated in an email sent by them to TR UK's solicitors on 22 June 2021, which was the day before HMRC issued preliminary DPT charging notices to TR UK on 23 June. The relevant passages in the email are quoted in the UT Decision at [56], and include the following:

> "TRUK, through its value-adding services, makes a significant contribution to the value of TRGR's intangibles and, therefore, it is appropriate that it is compensated by reference to a share of the returns earned by TRGR from the exploitation of the intangibles in two ways: first, by using the intangibles to sell products and services as part of its commercial operations; and second, by selling the intangibles as part of the disposal of the F&R business. Therefore, it is in line with the arm's length principle for TRUK to be rewarded by reference to a share of the profits generated by TRGR from both the use of intangibles to sell

> products and services to customers and the IP value crystallised on the sale of the F&R business in 2018."

18. Within a few days of the preliminary charging notices, TR UK set in motion the pre-action protocol which led to the present judicial review proceedings which were begun by a claim form issued on 16 November 2021. The claimants are the three TR UK companies and Thomson Reuters Corporation ("TRC"), which agreed to indemnify a purchaser of a business unit in Thomson Reuters in respect of certain tax liabilities which include those which are the subject of the claim. There is no dispute about the standing of TRC to join in bringing the claim. The relief sought is that the final charging notices issued in August 2021 should be quashed to the extent that they conflict with the APA; an order declaring the notices to be invalid for the reasons given in the supporting grounds of challenge; and repayment of the DPT which had already been paid pursuant to FA 2015 section 98.

19. The grounds of challenge, settled by leading counsel then representing the claimants (Julian Ghosh KC and Sam Grodzinski KC), argued that the inclusion in the final notices of amounts calculated pursuant to the RAP (outlined above) was "fundamentally inconsistent with the binding contractual provisions of the APA and with TIOPA … section 220". This basic point was then elaborated. It was contended that the power under section 95 of FA 2015 to determine whether to issue final charging notices "must be exercised in accordance with public law principles" and not so as to undermine the statutory regime for APAs in Part 5 of TIOPA. The notices were said to be "unfair, irrational and [*to*] constitute an abuse of HMRC powers, within the sense explained in the leading cases of *In re Preston* [1985] 1 AC 835 and *R v IRC, ex parte Unilever plc* [1996] STC 681". The grounds then sought to address HMRC's arguments as they were then understood, including a contention that the APA was irrelevant because the notices concerned the profits of TR UK in 2018, four years after the end of the APA period.

20. At an oral hearing on 16 June 2022, Foster J granted permission for the claim to proceed. In her short judgment, she said she was "just" satisfied that the claim passed the threshold of arguability, and she was content that it was "properly expressed as a public law abuse of power case". In due course, directions were given for the claim to be transferred to the Upper Tribunal, where it was heard on 17 and 18 July 2023. On 23 October 2023, the UT Decision was released, dismissing the claim.

21. The claimants now appeal to this court, with permission granted by the Upper Tribunal in a written decision dated 28 November 2023.

The statutory framework

(1) Corporation tax

22. As UK-resident companies, TR UK are subject to corporation tax on their profits. Corporation tax is charged on profits of companies for any financial year for which an Act so provides: section 2(1) of the Corporation Tax Act 2009 ("CTA 2009"). Profits are defined in subsection (2) as meaning income and chargeable gains, except in so far as the context otherwise requires. Thus, corporation tax, like income tax, is an annual tax which is imposed by Act of Parliament in every year. The "financial

year" runs from 1 April to 31 March in the following year; it is not the same as the familiar "tax year" for income tax, which runs from 6 April to the following 5 April.

23. Corporation tax for a financial year is charged on profits arising in the year: section 8(1) of CTA 2009. It is, however, calculated and chargeable, and assessments to corporation tax are made, by reference to accounting periods: section 8(2). If, as will usually be the case, a company's accounting period falls within more than one financial year, the amount of the chargeable profits arising in the accounting period must be apportioned between the relevant financial years: section 8(5).

24. Corporation tax which is assessed and charged for an accounting period of a company is assessed and charged on the full amount of the profits arising in that period, subject to any contrary provision in the Corporation Tax Acts: section 8(3) and (4).

25. The basic rules for computing the full amount of the profits arising in an accounting period are set out in Part 3 of CTA 2009.

Transfer pricing

26. As I have already explained, Part 4 of TIOPA deals with transfer pricing for the purposes of both corporation tax and income tax. The key section is section 147, subsections (1) to (5) of which provide:

> **"147 Tax calculations to be based on arm's length, not actual, provision**
>
> (1) For the purposes of this section "the basic pre-condition" is that—
>
> (a) provision ("the actual provision") has been made or imposed as between any two persons ("the affected persons") by means of a transaction or series of transactions,
>
> (b) the participation condition is met (see section 148),
>
> (c) the actual provision is not within subsection (7) (oil transactions), and
>
> (d) the actual provision differs from the provision ("the arm's length provision") which would have been made as between independent enterprises.
>
> (2) Subsection (3) applies if—
>
> (a) the basic pre-condition is met, and
>
> (b) the actual provision confers a potential advantage in relation to United Kingdom taxation on one of the affected persons.
>
> (3) The profits and losses of the potentially advantaged person are to be calculated for tax purposes as if the arm's length provision had been made or imposed instead of the actual provision.
>
> (4) Subsection (5) applies if—
>
> (a) the basic pre-condition is met, and

> (b) the actual provision confers a potential advantage in relation to United Kingdom taxation (whether or not the same advantage) on each of the affected persons.
>
> (5) The profits and losses of each of the affected persons are to be calculated for tax purposes as if the arm's length provision had been made or imposed instead of the actual provision."

27. The basic scheme of section 147 is then fleshed out in various respects, by section 148 (which defines the "participation condition") and by the provisions of Chapter 2, which run from section 149 to section 164. For example, section 155 explains what is meant by a "potential advantage" in relation to UK taxation, and section 164 requires Part 4 to be interpreted in accordance with the transfer pricing guidelines issued by the OECD (the Organisation for Economic Co-Operation and Development) so as best to secure consistency with them.

Advance Pricing Agreements

28. Part 5 of TIOPA contains the law relating to APAs. It consolidates provisions first enacted in the Finance Act 1999. Section 218 defines an APA as meaning:

> "…a written agreement that –
>
> (a) is made by the Commissioners with any person ("A") as a consequence of an application by A under section 223,
>
> (b) relates to one or more of the matters mentioned in subsection (2), and
>
> (c) declares that it is an agreement made for the purposes of this section."

29. The matters mentioned in subsection (2) include:

> "(e) the treatment for tax purposes of any provision made or imposed, whether before or after the date of the agreement, as between A and any associate (see section 219) of A's …"

It is common ground that this wording includes transfer pricing adjustments made under Part 4 in relation to the relevant transactions between TR UK and TRGR. The definition of "associate" in section 219 is materially similar to the "participation condition" for transfer pricing in section 148.

30. The effect of an APA is then stated in section 220, which is of central importance in the present case:

> **"220 Effect of agreement on party to it**
>
> (1) Subsection (2) applies if a chargeable period is one to which an advance pricing agreement relates.

> (2) The Tax Acts have effect in relation to the chargeable period as if, in the case of the person with whom the Commissioners made the agreement, questions relating to the matters mentioned in section 218(2) are to be determined—
>
> (a) in accordance with the agreement, and
>
> (b) without reference to the provisions in accordance with which they would otherwise be determined.
>
> (3) Subsection (2) is subject to—
>
> - subsections (4) and (5), and
> - section 221.
>
> (4) A question is to be determined as mentioned in subsection (2) only so far as the agreement provides for the question to be determined in that way.
>
> (5) In the case of so much of a question as—
>
> (a) relates to any matter mentioned in paragraph (e) or (f) of section 218(2), and
>
> (b) is not comprised in a question that relates to a matter within another paragraph of section 218(2),
>
> reference to a provision is capable of being excluded under subsection (2) by an advance pricing agreement only if the provision is in Part 4."

31. It is important to note that, by virtue of subsection (1), the effect set out in subsection (2) applies only if the relevant chargeable period (which for a company means the relevant accounting period: see sections 1118 and 1119 of the Corporation Tax Act 2010) is one "to which an [*APA*] relates". Thus, if the relevant accounting period of a corporate party to an APA is not one to which the APA "relates" within the meaning of subsection (1), the APA can have no effect in relation to that accounting period.

32. Since we are concerned with a matter mentioned in section 218(2)(e), it is also necessary to note the provisions of subsection (5), the effect of which is agreed to be that the provisions capable of being excluded under subsection (2) are confined to those contained in the transfer pricing code in Part 4.

33. Section 221 deals with the effect of revocation of an APA by HMRC or failure by a party to the agreement to comply with a significant provision or to meet a key condition. Nothing of that kind has been alleged in the present case, where the APA ran its course without mishap. In a similar vein, section 226 provides for the annulment of an APA for misrepresentation, which again has not been alleged against TR UK.

34. Section 223 states the circumstances in which an application for an APA may be made to HMRC by "A". By subsection (2), the application must be one "for the clarification by agreement of the effect in A's case of provisions by reference to which questions relating to any one or more of the matters mentioned in section 218(2) are to be, or might be, determined". In summary, the application must set out A's understanding of how the relevant provisions would apply in the absence of the

agreement, the respects in which A seeks clarification of those provisions, and how A proposes matters should be clarified consistently with A's understanding.

35. I have already drawn attention to section 224, which allows an APA to make retrospective provision for chargeable periods ending before the agreement is made but not before 27 July 1999.

(2) Diverted Profits Tax

36. I have already described the main features of the DPT legislation in Part 3 of FA 2015 which are relevant to the present case, including the charge to tax in section 80 and the key definition of the RAP in section 82(5). I also draw attention to some of the procedural safeguards for the taxpayer which are built into the legislation: the need for a charging notice under section 95 to be issued to the company by a designated HMRC officer, the mandatory requirement to give a preliminary notice under section 93, the opportunity for the company to make representations under section 94 in response to the preliminary notice, and the mandatory review procedure which applies during the review period of 12 months (increased in 2019 to 15 months) after issue of the charging notice and payment of the tax (see section 101). The company also has a right of appeal to the First-tier Tribunal, which may be exercised within 30 days after the end of the review period (see section 102). On an appeal under section 102, the First-tier Tribunal may confirm, amend or cancel the charging notice to which the appeal relates: section 102(5).

37. In the present case, TR UK have lodged appeals against the charging notices which they will pursue in the First-tier Tribunal on multiple grounds if their application for judicial review of the decision to issue the notices fails.

The provisions of the Advance Pricing Agreement ("APA") in more detail.

38. The APA was executed by the four parties to it in the Thomson Reuters group (defined collectively as "Thomson Reuters Markets UK") on 15 November 2012 and by HMRC on 24 January 2013. As I understand it, the four Thomson Reuters parties include the first three claimants, which I have called "TR UK", under the names which they then bore. It is not in dispute that the APA may be treated as an agreement made between TR UK and HMRC, and I will therefore proceed on that basis.

39. I have already referred to the two recitals which set out the background, and for convenience I will repeat them:

> "(A) Pursuant to Part 5 of TIOPA 2010, [*TR UK*] and HMRC (the "Parties") would like to enter into an Advance Pricing Agreement ("APA") to establish an appropriate transfer pricing methodology in satisfaction of [*TR UK's*] obligations under the provisions of Part 4 of TIOPA in relation to achieving an arm's length allocation of income and expenses for cross-border transactions between [*TR UK*] and related parties.
>
> (B) The APA has a 5 year term beginning with the accounting periods of [*TR UK*] commencing 1 January 2010 and terminating on 31

> December 2014, unless renewed by the written agreement of the Parties. Additionally, the APA covers a roll back period from 1 October 2008 to 31 December 2009."

40. Clause 1 contained a list of definitions, including "TRGR" which was defined as "a Swiss resident entity and Thomson Reuters company". Clause 2 described the "Covered Transactions" as transactions giving rise to, inter alia, "2.1.4 Fees for the following services paid by TRGR to [*TR UK*]", which were then listed under seven bullet points as recorded at [6] above.

41. Clause 3, headed "Legal Effect", said:

> "3.1 This agreement is made pursuant to and for the purposes of the provisions of Part 5 of TIOPA 2010 and binds the Parties, for the duration of the agreement, to determine the treatment of the Covered Transactions in accordance with the terms of this agreement.
>
> 3.2 HMRC will be bound by the terms and conditions of this agreement and will not impose during the currency of this agreement any transfer pricing adjustments to the Covered Transactions which might otherwise have been made pursuant to the application of the provisions of Part 4 of TIOPA 2010.
>
> 3.3 For the avoidance of doubt, nothing in this agreement shall, in relation to years covered by this agreement, prevent HMRC from raising a transfer pricing inquiry in respect of any transaction entered into by Thomas Reuters Markets UK which is not a Covered Transaction."

42. Clause 4 then set out various "Critical Assumptions", and clause 5 listed the transfer pricing methods which had been agreed for specified categories of transactions. These included in clause 5.4 the eight categories of services with which we are primarily concerned, and in each case except one it was agreed that the TNMM would be used to determine TR UK's compensation for providing the relevant services to TRGR, with a specified mark-up percentage of between 6% and 15%. For the last category, Synergy and Integration Services, the method specified was a cost allocation approach.

43. It is also worth observing that other methods were specified for some other transactions, including (in clause 5.1) a profit-split method to determine certain royalties which would be received by TR UK from TRGR.

44. Clause 7.2 on "Application of Tax Laws" provided that:

> "Notwithstanding anything in this agreement [*TR UK*] remains subject to all applicable UK taxation laws not directly affected by this agreement. [*TR UK*] is entitled to any benefits or relief otherwise available under all such laws."

45. Clauses 7.6 and 8 dealt with "Revocation and Modification" and "Compliance and Monitoring" respectively. Clause 9, headed "Duration of this agreement", reflected

Recital (B) and provided:

> "This agreement has a 5-year term beginning with the accounting period commencing 1 January 2010 and terminating on 31 December 2014, unless renewed by written agreement of the Parties. Additionally, the APA covers a roll back period from 1 October 2008 to 31 December 2009.
>
> HMRC confirm their willingness to consider in accordance with the law and practice prevailing at that time a renewal of this agreement for an additional period without prejudice to the rights of either party …"

46. Finally, clause 10, headed "Governing Law", provided that the agreement "shall be governed by and construed in all respects in accordance with the laws of England".

The decision of the Upper Tribunal

47. Having set the scene and briefly summarised the rival arguments, the Upper Tribunal began their discussion at [61] of the UT Decision. They observed that, given the many matters on which the parties were in agreement, resolution of the case turned on a narrow question: "Were the DPT notices inconsistent with the APA to the extent that they calculated the arm's length price of the services provided in 2008-14 on a profit-split basis in 2018 which was in addition to the previous calculation of the arm's length price for those services on a cost-plus basis in accordance with the APA?"

48. The Upper Tribunal then helpfully identified the main areas of common ground at [62] and [63]:

(a) TR UK accepted as a general proposition that (subject to a legitimate expectation case being made out on the particular facts of a given case), were it not for the APA, HMRC *would* be able to change their method of arm's length pricing from one accounting period to another;

(b) it is the inclusion of the cost-plus method in the APA which is central to TR UK's case that HMRC acted inconsistently, and therefore unlawfully in public law terms, whether that is put in terms of an error of law, an abuse of power, or irrationality;

(c) if such an inconsistency is established, then the judicial review claim succeeds;

(d) the issue of arm's length pricing underlies both the DPT charging notices and the APA, because the RAP for DPT purposes involves precisely the same task of ascertaining profits on an arm's length basis as the transfer pricing does; and

(e) HMRC accepted that the IP enhancement services provided by TR UK to TRGR in 2008-14 contributed to the profit realised by TRGR on the sale of the IP in 2018.

49. The Upper Tribunal continued:

> "64. The fundamental issue therefore is the scope of the APA. It clearly applies to the earlier accounting periods between 2008 and 2014, but the central dispute is as to whether the APA also relates to the 2018

> period. The claimants' case is that it does. That is because they say that services provided during 2008-2014 and which were taxed on the basis of the arm's length pricing in the APA are sought to be taxed again on a different basis through the calculation of the profits for that 2018 period.
>
> 65. That dispute engages foremost a question of statutory interpretation of the Part 5 TIOPA provisions on APAs, in particular the meaning of the words in s220 TIOPA: "chargeable period…to which an advance pricing agreement relates". As applied to the facts of this case the question becomes: Is the 2018 accounting period a chargeable period to which the APA "relates" for the purposes of s220?"

50. The Upper Tribunal proceeded to consider that central question of statutory construction at [66] to [77]. They recorded HMRC's submission that a chargeable period to which an APA "relates" must be one which falls within the specified term of the APA, whereas Mr Ghosh KC argued for TR UK that the statutory wording requires only that there be a connection between the APA and the relevant chargeable period. Mr Ghosh KC supported his argument by reference to the reasoning and decision of this court in *R (Veolia ES Nottinghamshire Ltd) v Nottinghamshire County Council* [2010] EWCA Civ 1214, [2012] PTSR 185 ("*Veolia*"), where the issue was whether documents concerning a waste management contract between the claimant company and the defendant council could be inspected by an elector under section 15(1) of the Audit Commission Act 1998. That section allowed the elector, as an "interested person", to:

> "…(a) inspect the accounts to be audited and all books, deeds, contracts, bills, vouchers and receipts *relating to* them …"

Section 6(1) of the 1998 Act further provided that an auditor "has a right of access at all reasonable times to every document *relating to* a body subject to audit which appears to him necessary for the purposes of his functions under this Act."

51. In that context, this court held that the concept of "relating to" in section 15(1) was to be broadly interpreted and could not be given the narrow meaning of "expressed in" or "referred to in": see the judgment of Rix LJ (with whom Etherton and Jackson LJJ agreed on this issue) at [98] to [103]. The Upper Tribunal, however, thought that in the present case the claimants could derive "little assistance" from *Veolia*: see [73]. This was because the question in *Veolia* arose in the "very different" statutory context of elector inspection rights, and where the relation in question was, in the words of Rix LJ at [99], "between one document and another".

52. The Upper Tribunal continued, in a key passage at [74] and [75]:

> "74. Here, the statutory scheme is one whereby agreements entered into between the tax authority and the taxpayer are given statutory force as an exception to the statutory provisions that would otherwise apply. As a starting observation that might well suggest erring on the side of an interpretation that is less expansive rather than more. While the statutory scheme sets some parameters around the subject matter that the agreement can cover (i.e. the matters referred to in s218 TIOPA),

> and that it can apply to one or more chargeable periods, it leaves open the precise scope. That is entirely to be expected given that the point of having a framework which gives effect to agreements with individual taxpayers is to reflect the particular circumstances of the taxpayer.
>
> 75. Accordingly, in contrast to the way "related to" was used in the relevant legislation in *Veolia* there is no difficulty with understanding that term as meaning s220 will only apply to the chargeable periods to which the APA says it applies. That way the suspension of the statutory provisions that might otherwise apply will keep in step with what the parties have specified. The wider interpretation of the scope of "related to" that was apposite in the context of inspection rights of interested persons in *Veolia* does not seem appropriate for the purposes of Part 5; rather than respecting a bright line between what is covered by the agreement under Part 5 and what is not and therefore under Part 4, it would open up more scope for argument as to the reach of the APA. We acknowledge the legislation does not use the term "specified in" or "covered by" but the concept of "relating to" is capable of different degrees of breadth and we consider the context in which the words "… to which an [APA] relates" appears here is consistent with the more constrained interpretation we have suggested.".

53. Having rejected TR UK's argument that the necessary relationship under section 220(1) TIOPA was satisfied by any kind of connection between the relevant chargeable period and the APA, the Upper Tribunal then considered the question of what chargeable periods the APA does relate to under section 220(1): see [77]. The Upper Tribunal's discussion of this question runs from [78] to [91], where they concluded that there is no inconsistency between the DPT notices issued by HMRC in respect of 2018 and the APA, because the DPT notices "concerned an accounting period in relation to which the APA had no effect".

54. An important part of the Upper Tribunal's discussion concerned the effect and purpose of clause 3.2 of the APA, which provided that HMRC would be bound by the terms and conditions of the agreement, and prevented HMRC from imposing "during the currency of this agreement" any transfer pricing adjustments to the Covered Transactions which might otherwise have been made under Part 4 of TIOPA. HMRC's case was that the words "during the currency of this agreement" simply referred to the five year term described in clause 9, but TR UK relied on the fact that the relevant definition of "Covered Transactions" in clause 2.1.4 had no time limit, and only some of the further definitions in clause 1.1 of the services specified in clause 2.1.4 were time-limited: see for example the definitions of Advisory Services, which were expressly limited to the years ended 31 December 2010 and 2011 and the roll back period, and of Synergy and Integration Services, which were confined to the years 2008 to 2011 inclusive. So, the argument ran, the role of clause 3.2 was not to govern HMRC's conduct but rather to establish that the pricing methodology agreed in the APA would apply only to those Covered Transactions which were undertaken "during the currency of [*the*] agreement". Furthermore, the relevant services provided during the term of the agreement were priced by the APA at cost-plus on an exhaustive basis, which meant that in subsequent accounting periods it was not open

to HMRC to reopen the calculations as they related to the years covered by the APA, or to seek to recompute the profits of those historic periods. Specifically, it was not open to HMRC in 2018 to seek to recompute the profits of TR UK in relation to the pricing of the services supplied by TR UK to TRGR during the currency of the APA. The Upper Tribunal neatly encapsulated this point at the end of [80]:

> "The very referability of the 2008 to 2014 services to the calculation of profits in 2018 is enough to constitute the necessary relationship between the APA and the 2018 chargeable period for the purposes of s220, such that the APA "relates to" 2018."

55. The Upper Tribunal rejected this line of argument, for the reasons which they proceeded to give at [81] to [90]. In summary, their main reason was that the argument was circular: it assumed the very point in issue, by using the agreed pricing mechanisms in the APA as the means by which the necessary relationship with 2018 is established, whereas logically the true position was that the pricing of the services in the APA becomes relevant only if the necessary relationship between the APA and 2018 has already been established. The Upper Tribunal also emphasised the contextual point that the function of the basic transfer pricing rule in TIOPA section 147 is to calculate profits for the purposes of corporation tax, which (as we have seen) must be done by reference to accounting periods. They said at [87]:

> "87. That inextricable focus on the accounting period provides the backdrop for interpreting the terms of this particular APA. It explains why the claimants' submission that the APA priced the 2008-2014 service provision exhaustively is misconceived because it begs the question as to what it is exhaustive of. In the statutory context in which arm's length pricing is undertaken, that pricing could only be "exhaustive" as regards the pricing of services for the purposes of calculating the profits for the particular accounting periods which the APA covered."

56. The Upper Tribunal then stated their conclusion on the purpose and meaning of clause 3.2 of the APA, at [88]:

> "88. The straightforward reading of clause 3.2 is that it focusses on HMRC's conduct, as Mr Bremner [*KC, who was then appearing for HMRC*] suggested. Its role is to inhibit HRMC's ability to make alternative transfer pricing adjustments during that same 5 year term. If the intention had been for the 5 year term to circumscribe a period in which *Covered Transactions* were undertaken the clause would have been expressed differently and most likely located elsewhere. Clause 3.2 must also be read in conjunction with the rest of the clause and the recitals. Clause 3.1 states that the parties are bound "for the duration of the agreement". That must plainly refer to the 5 year term in Clause 9 ("Duration of Agreement")). Recital B also refers to a 5 year term defined by reference to specified accounting periods. The obvious effect, when all of clause 3 and the recitals are taken into account, is to apply the treatments set out in the APA only to the accounting periods for the stated 5 year term."

57. At [90], the Upper Tribunal further concluded that, in the light of their analysis, HMRC's acceptance that the 2018 profits were referable (in part) to the provision of services in 2008-2014 did not assist TR UK's case. The APA had terminated, and it had no effect in relation to the pricing of services for the purposes of calculating profits in 2018. As the Upper Tribunal said, "[t]he referability did not mean the services had to be priced under an APA that did not have effect".

58. In the remainder of the UT Decision, the Upper Tribunal reviewed various subsidiary arguments which covered similar ground, and which I do not need to rehearse. None of them affected the outcome, which was the dismissal of the claimants' judicial review claim: see [103].

The grounds of appeal

59. TR UK's grounds of appeal are admirably concise. They contend that the Upper Tribunal erred in law in holding that the DPT notices were lawful, because "it failed to recognise and give proper effect to the APA in its relevant statutory context". Specifically, (ground 1) the Upper Tribunal erred in its construction of the APA; (ground 2) it erred in its conclusion as to the application and effect of the APA; and (ground 3) it erred in its construction of TIOPA section 220.

60. Since the grounds of appeal overlap, and the issue which divides the parties is ultimately a very short one which does not admit of much elaboration, I will consider the grounds of appeal together.

Discussion

61. A convenient starting point is HMRC's Statement of Practice 2 (2010), as updated in July 2019. The 2010 Statement of Practice replaced an earlier version first published in 1999, when the APA legislation was introduced. The purpose of the 2019 update was "to incorporate best practice identified since SP 02/10 was published".

62. Under the heading "What APAs are and when businesses might consider one", the updated SP 02/10 said this:

> "1. An APA is a written agreement between a business and [*HMRC*] which determines a method for resolving transfer pricing issues in advance of a return being made. When the terms of the agreement are complied with, it provides assurance to the business that the treatment of those transfer pricing issues will be accepted by HMRC for the period covered by the agreement …
>
> 2. HMRC has found that where there is considerable difficulty or doubt in determining the method by which the arm's length principle should be applied, the transfer pricing issues can be more efficiently dealt with in real time rather than retrospectively years later when, for example, key personnel in the business may have moved on.
>
> …
>
> 4. The potential scope of an APA is flexible. It may relate to all the transfer pricing issues or be limited to one or more specific issues.

> There is no requirement that the commencement of an APA should coincide with the commencement of the arrangements which it addresses so it may apply to pre-existing issues.
>
> …
>
> 25. An APA will be operative for a specified period from the date of entry into force as set out in the agreement. The business should propose a term for the APA, taking into account the period over which it is reasonable to assume that the method for dealing with the relevant transfer pricing issues will remain appropriate. Typically, the term is from 3 to 5 years, and a longer term will only be considered in exceptional circumstances."

63. This guidance, which is the fruit of some 20 years' practical experience, brings out some of the key advantages of certainty, flexibility and timing which are inherent in the statutory scheme. By contrast, in the absence of the APA legislation, both taxpayer companies and HMRC would be obliged to deal with transfer pricing issues in the same way as they did before 1999, through the usual machinery of self-assessment followed by the opening of enquiries and resolution of the issues either by agreement, after negotiations which might well be long and complex, or by an appeal to the First-tier Tribunal, which might itself lead to further appeals to the Upper Tribunal, the Court of Appeal or even the Supreme Court.

64. A further important part of the wider statutory background, rightly emphasised by HMRC in their written and oral submissions, is that corporation tax is an annual tax, and in the absence of special provision either side is free to change its ground on matters of law or methodology from year to year. As I pointed out during the hearing, it is a long-established principle that the doctrines of res judicata and of issue estoppel cannot apply from one year to the next in the context of income tax, and the same must be true of corporation tax. As Lord Radcliffe explained on behalf of the Privy Council in *Caffoor v Income Tax Commissioner* [1961] AC 584 (PC) at 598:

> "The critical thing is that the dispute which alone can be determined by any decision given in the course of these proceedings is limited to one subject only, the amount of the assessable income for the year in which the assessment is challenged …
>
> It is in this sense that in matters of a recurring annual tax a decision on appeal with regard to one year's assessment is said not to deal with "eadem quaestio" [*the same question*] as that which arises in respect of an assessment for another year and, consequently, not to set up an estoppel."

(For those who are interested, a fuller discussion of this topic may be found in my judgment at first instance in *Littlewoods Retail and Others v Revenue and Customs Commissioners* [2014] EWHC 868 (Ch), [2014] STC 1761, at [169] to [181].)

65. A related point is that although HMRC have very wide powers of care and management, those powers do not extend to making binding agreements about the basis or amount of assessment in future years, or to making forward tax agreements of

the kind held to be invalid by the Inner House of the Court of Session in *Al Fayed v Advocate General for Scotland* [2004] STC 1703 at [73], citing the judgment of Astbury J in *Gresham Life Assurance Society v Attorney-General* [1916] 1 Ch 228.

66. Against this background, I start with a strong inclination to find the temporal scope of the APA in the present case within the four corners of the document itself, and not to expect it to exert an influence on the treatment of the tax affairs of TR UK in later years unless, of course, the APA was renewed. I also note that the five-year term of the APA specified in recital (B) and clause 9 is at the outer limit of duration which HMRC are normally willing to agree, quite apart from the additional roll back period from 1 October 2008 to 31 December 2009. The benefits to both parties of the convenience and certainty thus obtained were real and substantial, but once the APA had run its course and terminated at the end of TR UK's 2014 accounting period, I see no reason to suppose that its work was not then done, apart from completing the consequential implementation of the transfer pricing machinery agreed for the accounting periods covered by the APA.

67. Neither party, in my judgment, could reasonably have contemplated that, if (as happened) the APA was not renewed, the methodology used and applied for the years covered by the APA should have a continuing and constraining effect on HMRC's approach to transfer pricing in future accounting periods from 1 January 2015 onwards. Those future periods lay outside the temporal scope of the APA, so in the absence of further agreement each succeeding accounting period must be examined separately for corporation tax purposes unaffected by the APA. Still less, in my judgment, could the parties reasonably have contemplated that the time-limited methodology of the APA should somehow constrain the extent or nature of any charges to DPT that HMRC might later seek to impose on TR UK under legislation that did not yet exist, and had only very recently been announced, when the five-year term of the APA came to an end on 31 December 2014.

68. The question ultimately turns on the true construction of section 220(1) of TIOPA and of the APA itself. Is the 2018 accounting period of TR UK a chargeable period to which the APA "relates" within the meaning of section 220(1)? And if it is, does the APA on its true construction have the effect that the issue of the DPT notices by HMRC for the 2018 accounting period was unlawful in public law?

69. Taking first the question of statutory construction, it seems to me that the question whether an accounting period is one to which an APA relates is naturally to be answered by examining the terms of the APA in issue. In the context of corporation tax, which is an annual tax, the search must be for the chargeable periods for which the APA makes provision relating to one or more of the matters mentioned in section 218(2). The APA in our case makes provision for the matters mentioned in section 218(2)(e) during the specified five-year term and the roll back period. Those are therefore the chargeable periods to which the APA relates. The fact that this conclusion may seem both simple and obvious does not in my view mean that it is suspect or wrong. Sometimes the simple and obvious answer to a question is the right one.

70. The matter may perhaps be tested by asking whether Parliament could sensibly have intended that the APA should also "relate" to unspecified future chargeable periods, however remote in time, in which an issue settled by the APA for the chargeable

periods specified therein might again become relevant in some way to the determination of TR UK's future taxation liabilities. My answer to that question would be an unhesitating no, given the annual taxation framework in which the APA was concluded. I also find some support for this approach, if it is needed, in section 224, which explicitly refers to an APA as containing "provision relating to chargeable periods" ending before the agreement is made. As in section 220(1) and (2), the link between specified chargeable periods and the matters covered by the APA seems to me to be taken for granted.

71. I would add that in reaching this conclusion, I agree with the Upper Tribunal that no assistance can be gained from *Veolia*, where the context was entirely different and the issue was whether certain documents related to each other for local government audit and inspection purposes. In fairness to Mr Peacock KC, who appeared for TR UK in this court, he wisely placed no reliance on *Veolia* in his oral submissions to us.

72. Turning to the terms of the APA, I need to deal with the arguments advanced by TR UK based on clause 3, headed "Legal Effect". On my reading of the APA, the provisions of this clause fit into place without difficulty. Clause 3.1 says that the agreement will bind the parties "for the duration of the agreement". Clause 3.2 prevents HMRC "during the currency of the agreement" from imposing any transfer pricing adjustments to the "Covered Transactions" (defined in clause 1 as "the transactions described in Clause 2 of this agreement") which might otherwise have been made under Part 4 of TIOPA. Clause 3.3 provides, for the avoidance of doubt, that "in relation to years covered by this agreement" nothing shall prevent HMRC from raising a transfer pricing inquiry in respect of any transaction entered into by TR UK "which is not a Covered Transaction". The clause must of course be read and interpreted in the light of TIOPA section 220, which contains the basic rule on the legal effect of an APA, namely that in relation to any chargeable period to which the APA relates, the Tax Acts "have effect … as if, in the case of [*TR UK*], questions relating to the matters mentioned in section 218(2) are to be determined … (a) in accordance with the agreement, and (b) without reference to the provisions in accordance with which they would otherwise be determined."

73. Read in context, it seems clear to me that the various temporal expressions used in clause 3 are no more than different, but natural, ways of referring to the duration of the APA as specified in clause 9. I can detect no difference of substance between the "duration" and the "currency" of the agreement, or between either of those terms and the "years covered by this agreement". Mr Peacock KC submitted to us, however, that this case turns on the meaning of subclauses 3.1 and 3.2. He said it was "of real significance" that the agreement is expressed in terms of covered transactions, not covered years or covered periods of account. He argued that the subclauses are doing two things: first, they are providing a time limit to identify covered transactions where their time limit does not appear in the relevant definitions in clause 1; and second, they are making clear that HMRC are bound by the agreed methods for these services provided in these periods "*irrespective of when that question might arise*" (my emphasis). Mr Peacock KC pointed out that clause 3.3 is again expressed in terms of transactions, with the consequence that TR UK had "vested or accrued contractual rights" to have those transactions priced on a cost-plus basis, "whether the Revenue attempt to apply a different profit-split method in an accounting period in 2008 to 2014 *or later*" (again with my emphasis).

74. I am unable to accept these submissions. I am willing to accept that one of the functions of clause 3.1 is to stipulate the temporal limits of the Covered Transactions to the extent that the limits are not made clear in the relevant definitions, but that alone does not begin to explain how the agreed treatment of the transactions could continue to have effect and bind HMRC after the end of the term of the APA. There is, of course, no dispute that HMRC were bound by the APA throughout its term. They have never sought to argue otherwise, or to re-open the transfer pricing treatment agreed for those chargeable periods. But for the reasons I have already given, I can find nothing in the language of the APA to support the notion that the agreed treatment should enjoy a potentially indefinite afterlife in future accounting periods once the term of the APA had come to an end. In truth, the words which I have italicised in Mr Peacock's submissions on this point are no more than bare assertions, and they do nothing to advance the debate.

75. To conclude, therefore, I am satisfied that the 2018 accounting period of TR UK falls outside the temporal limits and the effective scope of the APA. It is not a period to which the APA relates within the meaning of section 220(1), and there is accordingly no objection in public law to the relevant assessments to DPT raised by HMRC.

76. In the light of this conclusion, it is unnecessary to consider a fall-back argument adumbrated by HMRC in paragraph 64 of their skeleton argument concerning their vires to enter into the APA, had we concluded that the 2018 accounting period was not one to which the APA related within the meaning of section 220(1), but nevertheless that the APA on its true construction still bound HMRC in respect of the calculation of TR UK's profits for that period. Although HMRC served no respondent's notice to raise this point, no objection was taken on that score by TR UK which filed a short skeleton argument to respond to it. Mr Grodzinski KC was ready to address us on the question on behalf of TR UK, should it become necessary to do so, but, in the event, we found it unnecessary to hear argument on the point after Mr Brinsmead-Stockham KC (who appeared in this court for HMRC) had completed his submissions for HMRC. It had become clear, by that stage, that it was vanishingly unlikely that we would reach a conclusion in the terms on which the further argument was predicated.

77. There is also one further matter I wish to mention. It was common ground before us, as it was before the Upper Tribunal, that in the circumstances of the present case TR UK's public law challenge to the DPT notices for 2018 would succeed if the notices were found to be inconsistent with the terms of the APA. This was in substance a concession by HMRC. While we have been content to proceed on that agreed basis in this case, in the interests of narrowing the issues and the saving of time and costs, we would emphasise that in different factual circumstances there may be further arguments that HMRC could legitimately deploy even where the issue of a DPT notice is found to be inconsistent in some material respect with the terms of a prior APA. We must therefore not be taken to endorse the proposition that any such inconsistency will always be enough to justify a public law challenge to the validity of the notice.

78. For the reasons which I have given, I would dismiss the appeal.

Lady Justice Whipple:

79. I agree.

Lord Justice Underhill:

80. I also agree.