Neutral Citation: [2026] UKFTT 00797 (TC)

Case Number: TC 09897

FIRST-TIER TRIBUNAL
TAX CHAMBER

[Taylor House]

Appeal reference: TC/2024/04874

CORPORATION TAX – transfer pricing enquiry – information notice issued pursuant to Schedule 36 to the Finance Act 2008 – cross border transactions between the Appellant and its US based parent company – transfer pricing methodology – ss 147 and 164 of the Taxation (International and Other Provisions) Act 2010 – the applicability of Article 9 of the OECD Model Tax Convention and the OECD Transfer Pricing Guidelines – the "arm's length" principle and the concept of a "comparability analysis" – the need to identify the "tested party" – request for parent company's group consolidated financial statements and entity level statements – whether the documents requested were "reasonably required" by HMRC to check the Appellant's tax position – no – whether the documents were in the "possession" or "power" of the Appellant – no – Appeal allowed

Heard on: 24 to 26 February 2026
Judgment date: 28 May 2026

Before

JUDGE NATSAI MANYARARA
IAN SHEARER

Between

LIFEPLUS EUROPE LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Keith Gordon and Mr Stephen Morse (both of Counsel), instructed by Forvis Mazars LLP

For the Respondents: Mr Shkar Kider and Mr Alex Barrett, Litigators of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal concerns HMRC's investigatory powers requiring disclosure of information and documents, in the context of a transfer pricing enquiry. The appeal also concerns the application of relevant transfer pricing principles, methodologies and processes as they relate to certain cross-border transactions between the Appellant ('Lifeplus Europe Limited') and Eurark LLC ("**the Parent Company**") (a company incorporated in Arkansas, USA). Transfer pricing applies to the Appellant's liability to corporation tax, as a matter of domestic legislation, through Chapter 1, Part 4 of the Taxation (International and Other Provisions) Act 2010 ("**TIOPA**").

2. Following the opening of an enquiry into the Appellant's tax position, HMRC identified a transfer pricing risk for the Accounting Periods Ended ("**APE**") 31 December 2014, 2015 and 2016, in respect of the Appellant. This was because whilst there had been significant growth in the Appellant's turnover, the net profit margin in its company accounts had reduced significantly for these, and subsequent, years.

3. The Appellant appeals against an information notice ("**the Information Notice**") issued by HMRC on 2 October 2023, pursuant to para. 1 of Schedule 36 to the Finance Act 2008 ("**Schedule 36**"). The Information Notice required the Appellant to provide the following documents:

> (1) All of the Parent Company's group ("**the Group**") consolidated financial statements that coincide with, or partly coincide with, the Appellant's APE 31 December 2014 to 31 December 2022 ("**Item 1**"); and
>
> (2) All of the Parent Company's entity level financial statements that coincide with, or partly coincide with, the Appellant's APE 31 December 2014 to 31 December 2022 ("**Item 2**").

4. Having carefully considered the evidence and the submissions made by both parties, we decided to allow this appeal. We are grateful to all of the advocates for their written and oral submissions in these proceedings. In this Decision, the legislation and case law are cited so far as is relevant to the issues in dispute.

ISSUES

5. The issues in the appeal are:

> (1) Whether the documents (i.e., 'Item 1' and 'Item 2') requested in the Information Notice are "**reasonably required**" by HMRC to check the Appellant's tax position ("the reasonably required test"); and
>
> (2) If so, whether the documents are in the "**possession**" or "**power**" of the Appellant.

6. These issues will, in turn, require consideration of the relevant transfer pricing principles as they apply to cross-border transactions.

BURDEN AND STANDARD OF PROOF

7. The burden of proof is on HMRC to show that the Information Notice was validly issued, and to establish a *prima facie* case that the documents are: (i) reasonably required; and (ii) in the Appellant's possession or power.

8. Once HMRC have established a *prime facie* case, it is then for the Appellant to disprove the above.

9. The standard of proof is the ordinary civil standard; that of a balance of probabilities.

THE AUTHORITIES AND THE DOCUMENTS

10. The authorities to which we were referred by the parties included:

(1) *Pergamon Press Limited v Maxwell* [1970] 1 WLR 1167 ('*Pergamon*');

(2) *Lonrho Ltd v Shell Petroleum Ltd* [1980] 1WLR 627 ('*Lonrho*');

(3) *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11 ('*North Shore*');

(4) *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62 ('*Charterbridge*');

(5) *Adams v Cape Industries Plc* [1990] 1 Ch 433; [1991] All ER 929 ('*Adams v Cape*');

(6) *Schlumberger Holdings Ltd v Electromagnetic Geoservices AS* [2008] EWHC 56 ('*Schlumberger*');

(7) *R (Derrin Brothers Properties Ltd) v HMRC* [2014] EWHC 1152 (Admin) ('*Derrin HC*');

(8) *R (Derrin Brothers Properties Ltd) v HMRC* [2016] EWCA Civ 15 ('*Derrin CoA*');

(9) *Ardila Investments NV v ENRC NV* [2015] EWHC 3761 (Comm) ('*Ardila*');

(10) *R (Kotton) v First-tier Tribunal (Tax Chamber)* [2019] EWHC 1327 (Admin) ('*Kotton*');

(11) *Pipia v BGEO Group Ltd* [2020] EWHC 402 (Comm) ('*Pipia*');

(12) *Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd* [2021] EWHC 849 (Ch) ('*Berkeley*');

(13) *Various Airfinance Leasing Companies v Saudi Arabian Airlines Corporation* [2021] EWHC 2904 (Comm) ('*Airfinance*');

(14) *The Public Institution for Social Security v Muna Al-Rajaan Al-Wazzan* [2024] EWHC 480 (Comm) ('*Al-Wazzan*');

(15) *Syngenta Holdings Limited v HMRC* [2021] UKFTT 236 (TC) ('*Syngenta*');

(16) *HMRC v Mattu* [2021] UKUT 245 (TCC) ('*Mattu*');

(17) *Steven Price v HMRC* [2011] UKFTT 624 ('*Price*');

(18) *HMRC v Parissis & Ors* [2011] UKFTT 218 (TC) ('*Parissis*');

(19) *H A Patel & K Patel (a partnership) v HMRC* [2014] UKFTT 167 (TC) ('*Patel & Patel*');

(20) *Andreas Michael v HMRC* [2015] UKFTT 577 (TC) ('*Michael*');

(21) *Allpay v HMRC* [2018] UKFTT 273 ('*Allpay*');

(22) *Avonside Roofing v HMRC* [2021] UKFTT 158 (TC) ('*Avonside*');

(23) *David Hackmey v HMRC* [2022] UKFTT 00160 (TC) ('*Hackmey*');

(24) *One Call Insurance Services Limited v HMRC* [2022] UKFTT 184 ('*One Call*');

(25) *Parker Hannifin (GB) Limited v HMRC* [2023] UKFTT 00971 (TC) ('*Parker*');

(26) *Turcan & Ors* [2024] UKFTT 869 (TC) ('*Turcan*');

(27) *Mungavin & Ors v HMRC* [2020] UKUT 0011 (TCC) ('*Mungavin*'); and

(28) *CF Booth Ltd v HMRC* [2016] UKFTT 261 (TC) ('*CF Booth*').

11. The documents before us included: (i) the Amended Hearing Bundle, consisting of 2,675 pages (within which were the Appellant's Grounds of Appeal and HMRC's Statement of Case); (ii) the Addendum to the Hearing Bundle, consisting of 102 pages; (iii) the Authorities Bundle, consisting of 1,994 pages; (iv) HMRC's Skeleton Argument dated 2 February 2026; (v) the Appellant's Skeleton Argument dated 2 February 2026; and (vi) Appendix 1[1] and 2[2] to the Appellant's Skeleton Argument.

12. Prior to the conclusion of the hearing, we also received: (i) corrections to a paragraph in Mr Malcolm Vincent's witness statement; and (ii) an email, dated 2 October 2023, from Officer David Lynas to Officer Daragh Taylor (the enquiry lead).

BACKGROUND FACTS

13. On 31 July 1996, the Appellant was incorporated. The Appellant is based in Cambridgeshire, UK, and is a wholly-owned subsidiary of the Parent Company. The Appellant is the Parent Company's appointed distributor for products sold into the UK, EU Member States and Switzerland. The Appellant also purchases some goods from various "**third parties**", in addition to those mainly purchased from the Parent Company, and sells nutritional supplements and personal care products through a multi-level marketing model, principally to customers in mainland Europe.

14. In February 2001, the Parent Company was established under the laws of the State of Illinois in the United States. The Parent Company is a privately owned limited liability company, which is based in Batesville, Arkansas. It specialises in vitamins, nutritional supplements and healthy body products, and researches, develops, formulates, manufactures and distributes those products from its manufacturing facility in Batesville. Over 90% of the products sold by the Group are formulated and manufactured at the Parent Company's manufacturing plant. The remainder of the Parent Company's commodity-type products are manufactured by third-party manufacturers, under its direction and formulation. The only exception, at the relevant time, is a water filter, which was acquired as a finished good from the manufacturer, then re-sold, and a fish oil with mussel extract, for which the Parent Company did not own the formulation.

15. The Parent Company has the following foreign, direct wholly owned "**Subsidiaries**":

(1) "LPI Marketing Ltd (NZ)": a limited liability company established in New Zealand;

(2) "Lifeplus Marketing EU GmbH (AT)": a limited liability company established in Austria;

(3) "Lifeplus Europe Limited" or "Lifeplus Europe" (i.e., the Appellant);

(4) "Lifeplus Netherlands BY (NL)"; and

(5) "Lifeplus Luxembourg Sari (LUX)".

16. The Parent Company is solely responsible for:

[1] Appendix 1 to the Appellant's Skeleton Argument is the Appellant's summary of the transfer pricing principles, which the Appellant submits are most relevant to this appeal.

[2] Appendix 2 to the Appellant's Skeleton argument sets out the dates of each substantive meeting, or call, between the Appellant and HMRC.

(1) Group corporate strategy, product formulation, manufacturing, strategic global marketing, global pricing and information technology;

(2) the design and operation of the business model through which the Group operates and sells its products: a network referral model of independent agents, called "**Associates**", through which the Parent Company's products are sold into local markets around the world; and

(3) designing the compensation / remuneration model by which all Associates are paid, recruited, retained and incentivised, and remains responsible for keeping that model up-to-date and commercially effective.

17. The Associates are the key driver of sales in the United Kingdom, through their network. Their remuneration model means that they do not make a loss. The Parent Company's relationship with the Associates is driven by the quality of the product that the Parent Company manufactures, and by the business model developed and executed by the Parent Company.

18. The role of the Subsidiaries (including the Appellant) is limited to fulfilling the orders from customers, distributing the product(s) and paying commission to Associates. The Parent Company's executive team takes all decisions on behalf of the Appellant, and other Subsidiaries. This is, typically, via telephone calls or Zoom/Teams meetings; with email communications being kept to a minimum.

Dramatis personae

19. Mr Robert Christian is the Appellant's Company Secretary, and is also the Chief Executive Officer ('CEO') of the Parent Company.

20. Mr David Stotelmyer joined the Parent Company as its Chief Financial Officer ('CFO') in May 2013, serving in that role until his recent retirement on 30 June 2025. Until Mr Stotelmyer's retirement, the Parent Company's accounting was performed in the United States under his direction and supervision.

21. Mr Malcolm Vincent started working for the Appellant in June 2000. He was the Managing Director ('MD') from October 2001 until September 2024, when he became Vice President ('VP') for Sales. His role until September 2024 was to:

(1) oversee the European operation to meet service levels for sales order processing;

(2) lead and develop the European team of employees to support customers and members;

(3) develop relationships with members to develop business; and

(4) meet short term objectives.

22. Mr Antoine Kemmere is the Appellant's 'Key Accounts Business Manager'.

23. Mr Alistair Beeden is the Appellant's 'Financial Controller'.

24. Ms Tracy McBride was the Appellant's 'International Marketing Director'.

25. Mr David Sayers is an International Tax Partner with Forvis Mazars LLP ("**Mazars**"). He was introduced to the Appellant in November 2017 by BKD LLP ("**BKD**"). BKD is a US accounting firm, which later merged with "DHG" to form "Forvis" in the US. BKD were members of the Praxity Alliance, together with Mazars, and had historically referred UK-related work to Mazars.

Transfer pricing

26. The Parent Company engaged BKD to prepare a transfer pricing analysis of the sale of its products to the Appellant. The first such analysis report was dated April 2014, and covered the year ending 31 December 2014.

27. In 2014, the Appellant then implemented a Transfer Pricing Policy ("**the TPP**"). The Appellant applied the "Transactional Net Margin Method" ("**the TNMM method**"). The use of this methodology was determined by BKD after undertaking a functional analysis review, which resulted in BKD characterising the Appellant as a 'routine distributor' with limited functions and risks, whilst noting that the Parent Company:

(1) performs entrepreneurial functions;

(2) owns the IP associated with the product formulations and the business model; and

(3) performs executive management functions for the Group.

28. The objective was to establish the transfer pricing "arm's length" price in accordance with US rules and the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("**the OECD Guidelines**"), and principles, so as to be suitable for use in both countries.

HMRC's enquiry

29. By a notice dated 8 December 2016, HMRC opened an enquiry into the Appellant's tax return for the APE 31 December 2014. The enquiry was opened by Officer Matthew O'Connor under para. 24(1) of Schedule 18 to the Finance Act 1998 ("**Schedule 18**"). Officer O'Connor was said by Officer Taylor (who gave evidence before us) to be a compliance case worker, with no specialist training. The opening letter was issued to the Appellant and its registered agents, UHY Hacker Young ("**UHY**"). On opening the enquiry, Officer O'Connor requested analysis of a number of figures in the Appellant's financial statements in relation to cost of sales and other costs, including marketing and promotional costs. Officer O'Connor also queried the amounts owed by the Appellant to the Parent Company.

30. HMRC issued further notices of enquiry into the Appellant's tax returns for the following years:

No.	**APE**	**Date of Enquiry**
2	31 December 2015	13 September 2017
3	31 December 2016	13 September 2017
4	31 December 2017	11 February 2019
5	31 December 2018	7 December 2020
6	31 December 2019	7 December 2020
7	31 December 2020	24 June 2022
8	31 December 2021	24 June 2022
9	31 December 2022	22 June 2023
10	31 December 2023	21 June 2024

31. On 27 March 2017, following a response to the opening letter by UHY and a request for further information relating to transactions between the Appellant and the Parent Company, UHY informed Officer O'Connor of the existence of a "**TPP Report**". The focus

of HMRC's enquiry then shifted to the TPP used to value goods and/or services transferred between the Parent Company and the Appellant.

32. On 7 April 2017, Officer O'Connor informed UHY that the case was being transferred to Officer Kenneth Mitchell. Officer Mitchell was of the same grade as Officer Taylor.

33. On 26 April 2017, UHY provided a copy of the TPP Report, after which HMRC concluded that the introduction of the TPP resulted in the Appellant's profit falling in the first three years following the implementation of the TPP.

34. During the enquiry, Officer Mitchell had taken advice from HMRC's "International Tax Specialist Team". His letter, dated 14 September 2017, to the Appellant was in the following terms:

> "***1. Cost of sales***
>
> *I am still taking specialist advice concerning the Transfer Pricing report. I have opened compliance checks for accounting periods ended 31 December 2015 and 31 December 2016, in case HMRC wishes to look into the company's transfer pricing methodology. I must stress, at this point, that these checks are merely to protect HMRC's right to enquire into these periods and I do not need any information from you at present. I will keep you advised on progress*."

[Emphasis added]

35. On 6 November 2017, Officer Mitchell sent a request for further information, including information and documents relating to the TPP. The letter included the following statement:

> "***1. Cost of sales (Transfer Pricing)***
>
> *I will now be conducting a transfer pricing enquiry due to the significant changes in the company's net profit margin, which appears to coincide with the production of the Transfer Pricing Planning Analysis prepared by BKD*."

36. Officer Mitchell further queried the reduction in the Appellant's Net Profit Margin ("**the NPM**") between 2012 and 2016. He also queried why the application of the Comparable Uncontrolled Price ("**the CUP**") method to transfer pricing analysis had been rejected within the TPP Report. Officer Mitchell identified a transfer pricing risk for the APE 31 December 2014, 2015 and 2016. This is because whilst there had been a significant growth in the Appellant's turnover, the net profit margin in the Appellant's accounts reduced from 13.6% in 2012 and 13.4% in 2013, to 5.4%, 4% and 2.99% in 2014, 2015 and 2016, respectively. Noting that the 2014 TPP Report stated that it needed to be updated annually, he also requested the updates for 2015 and 2016.

37. For the APE 31 December 2014, 2015 and 2016, the Appellant reported taxable profits and net margins as follows:

APE	**Taxable profit declared**	**Net margins**
2014	£5,928,228	5.39%
2015	£5,173,976	4.01%
2016	£4,612,744	3.00%

38. Officer Mitchell concluded that without the introduction of the TPP to correct the purported under reward to the Parent Company, based on an average margin of 13.5%, the Appellant would have reported taxable profits on turnover of:

APE	**Turnover**	**Taxable profit declared**	**Taxable profits at 13.5%**

2014	£110,031,794	£5,928,228	£14,854,292
2015	£129,000,519	£5,173,976	£17,415,070
2016	£153,795,065	£4,612,744	£20,762,333

39. Officer Mitchell concluded that over the three periods, there was a corresponding substantial loss of expected taxable profits.

40. In December 2017, HMRC were advised that Mazars would be taking over the transfer pricing aspects of the enquiry.

41. On 8 January 2018, Mazars responded to HMRC's information request dated 6 November 2017, and explained that the CUP method was rejected when products were acquired by the Appellant from the Parent Company, and sold at 'arms-length'. This was due to the Parent Company owning the product formulations for most such products. For the small number of remaining products for which the third parties themselves owned the designs/formulations, namely the water filters and the fish oil with mussel extract, these were stated to be sufficiently dissimilar to those sold by the Parent Company to the Appellant as to be not viable as CUPs.

42. In response to the query relating to the reduction in the NPM, Mazars explained that:

> "*LPE's reduction in NPM was due to corrective actions taken with the Company's transfer pricing policy in 2014. A new CFO joined Eurark in late 2013, who soon discovered that the original transfer pricing policy provided LPE with excess profits, while Eurark incurred losses*."

The response also attached the requested updated TPP Reports for 2015 and 2016

43. On 8 February 2018, Officer Mitchell issued an informal information request for further information and documents, including contracts with third-party suppliers.

44. On 23 March 2018, during a conference call with Mazars ("**the March 2018 telephone conference**"), HMRC's case team explained that the Appellant's third-party supplier contracts were required to understand:

(1) the supply chain;

(2) the business generally; and

(3) where value was added.

45. On 17 April 2018, Mazars provided information regarding the supply chain, and the roles of various teams within the business. Mazars further confirmed that third-party products are shipped direct to the United Kingdom.

46. On 3 September 2018, Officer Mitchell made a further request for the contracts with third-party suppliers. He also requested copies of the Parent Company's consolidated financial statements covering 2013 (the period before the TPP Report) and 2014, 2015 and 2016 (the periods covered by the enquiry), and requested the opportunity to interview the Appellant's "key individuals". These included, Mr Vincent, Ms McBride and Mr Beeden; all of whom were based in the United Kingdom.

47. On 25 September 2018, Mazars informed HMRC that the Appellant did not have contracts with third-party suppliers. They reiterated that the Parent Company used its intellectual property to design not only the majority of the third-party products supplied, but

also the sales system by which the products were sold; and on that basis third-party manufacturing activity was "*so manifestly different that it has been correctly discounted as comparable*". They further explained that they could not provide the Parent Company's financial statements as they were not a matter of public record in the US, and the Appellant did not have access to them.

48. On 4 December 2018, the case was transferred from Officer Mitchell to Officer Taylor. During his oral evidence (which we will refer to in our "Discussion" later), Officer Taylor explained that he was not an International Tax specialist and had to seek advice from the specialist International Tax Team within HMRC. Officer Taylor further explained that the role of the specialists is not merely to provide guidance, but also to ensure that transfer pricing governance is adhered to throughout the enquiry.

49. On 18 December 2018, Officer Taylor held a call with Mazars. During that call, Officer Taylor outlined his agreement with Officer Mitchell's email of 3 September 2018. It was then agreed that interviews could be held with Mr Vincent and Mr Beeden, with follow-up questions for the remaining individuals. On the same day, Officer Taylor sent a letter which began by stating that his responsibility as the case lead was "*to ensure that the information contained in the transfer pricing report accurately reflects the functions, responsibilities and risks of the UK entity*". It detailed the proposed site visit in pursuit of that end, but then reiterated that the Parent Company's financial statements, and the interviews with key personnel, were reasonably required to understand the facts of the case and evidence the Appellant's TPP. In addition, he asked for documentation to evidence agreements with third-party contractors. For any documents not provided, HMRC might make Exchange of Information ("**EOI**") requests with the relevant authorities in other countries.

50. On 31 January 2019, Mazars reiterated that the Appellant could not provide the Parent Company's financial statements. They stated that contracts with third-party suppliers did not exist, and offered some explanation of why such formal agreements, and the protection of the product formulas in the supplies from a contract standpoint, were not considered necessary by the Parent Company. In the context of those supplies, they stated that the formulas themselves were considered "*subordinate in importance to the Group business model*", which was instead mainly driven by its own customised Enterprise Resource Planning ("**ERP**") systems, and its reward and compensation framework.

51. By an email dated 31 January 2019, Officer Taylor scheduled a site visit to the Appellant's premises ("**the site visit**").

52. On 8 February 2019, Officer Taylor emailed Mazars explaining that on the basis that product formulations were not a key driver in the business, HMRC needed to understand other functions of the business, including how products are marketed. Office Taylor again requested the opportunity to interview Ms McBride, Mr Vincent and Mr Beeden, individually. Officer Taylor raised the potential need for a review of the Appellant's key personnel to test the functions and roles of the key people employed by the Appellant. In addition, Officer Taylor explained that HMRC were considering an EOI from the Inland Revenue Service ("**the IRS**") (which is the US tax authority) for the Parent Company's financial statements. The EOI request would be made under art. 27 of the UK/USA Double Taxation Convention. He asked if he could be given figures for the amount of tax the Parent Company had paid in the US on profits attributable to amounts transferred by the Appellant

53. On 26 February 2019, HMRC met with the Appellant ("**the February 2019 meeting/site visit**"). In attendance were Officer Taylor, Officer Shields, Mr Vincent, Mr Sayers, Mr Beeden, Asib Ali (Mazars) and Patrice Donnelly (HMRC notetaker).

54. On 8 March 2019, Mazars emailed HMRC seeking to provide more information about the respective roles of the Appellant and the Parent Company with respect to marketing, and the Associates network. On 14 March 2019, HMRC provided Mazars with a copy of the meeting notes.

55. On 8 April 2019, Mazars provided suggested amendments to the meeting notes, along with detailed additional comments.

56. On 30 May 2019, a conference call was held between Officer Taylor, Officer Shields, Officer Murray, Asib Ali, Mr Sayers and Patrice Donnelly ("**the May 2019 conference call**"). Officer Taylor considered that some of the suggested amendments and comments to the meeting notes contradicted what had actually been said during the site visit. He further suggested that, moving forward, he may require access to the US accounts and noted that in previous discussions, he was advised that Mr Sayers could not access these US accounts. Officer Taylor explained that he may consider an EOI request, which would prolong the enquiry. He added that an "**email review**" may also be necessary to test the functions and key people based in the United Kingdom (specifically, the Marketing team). Officer Taylor explained that this review would look at the day-to-day email traffic with the key people based in the United Kingdom to understand their functions and roles. Officer Shields later clarified that the purpose of the email review was to ascertain whether the Parent Company controls everything, including the Appellant.

57. Mr Sayers subsequently explained that he had checked the TPP Report and believed that the February 2019 meeting had clarified the key functions of the United Kingdom team. He highlighted that the TPP Report was very detailed, and that it was his understanding that there were no conflicts. Officer Shields explained that he still had further questions and had hoped to speak to Ms McBride to clarify her role and function within the business and the reporting lines. He explained that he required clarification regarding what value the highly paid individuals within the UK had. Mr Sayers stated that he would try to get any questions regarding the marketing team answered.

58. By a letter dated 5 June 2019, Officer Taylor set out HMRC's position on the meeting notes from the site visit, and reiterated that HMRC would consider proceeding with an EOI request from the IRS.

59. On 16 July 2019, Mazars responded, in detail, about the meeting notes to HMRC and confirmed that the Parent Company's financial statements would not be provided, for the reasons stated in their letter of 31 January 2019.

60. Following this response from Mazars, and based on the explanations provided, Officer Taylor came to the view that the Parent Company's financial statements were not within the Appellant's power or possession to provide. However, as it was considered that they were still reasonably required to evidence the facts of the case, on 14 August 2019, the EOI was submitted by HMRC requesting the Parent Company's consolidated group financial statements, as well as entity-level financial statements for the Parent Company and its US Subsidiaries. HMRC further requested information underpinning the TPP reports, such as copies of meeting notes from functional interviews. HMRC also emailed Mazars to ask for some missing employee data for the Appellant, including a list of top earners. Mazars responded to this request on 27 August 2019.

61. On 15 November 2019, Officer Taylor requested Key Performance Indicators ("**KPIs**") and job descriptions for key individuals based on the pay and bonus information that had been provided by the Appellant. He further made HMRC's email review request covering six of the Appellant's named employees, including Mr Vincent, Mr Beeden and Ms McBride, over specified periods.

62. On 5 December 2019, Mazars responded with some further comments, and declined to provide the information.

63. On 28 February 2020, Officer Taylor responded to Mazars, reiterating his concerns with regard to the significant reduction in the Appellant's NPM, and HMRC's concerns in relation to the functions and value attributed to the Appellant within the TPP Report. He attached an informal schedule of further information sought by HMRC, requesting a response by 30 March 2020.

64. On 3 April 2020, a Microsoft Teams meeting ("**the April 2020 Teams meeting**") was held between Officers Taylor, Murray and Sinéad McCrudden (for HMRC), and Mr Sayers, Tom Heath and Aude Delechat-Patel (for Mazars).

65. On 29 June 2020, Officer Taylor sent Mazars a draft Fact Paper ("**the draft Fact Paper**"), along with another information request. This again included the email review request. He also requested that HMRC should hold functional interviews with eight of the Appellant's named employees, and indicated that this might negate, or refine, the need for an email review.

66. On 11 September 2020, Mazars responded with detailed answers on the information request, along with an updated "**Statement of Facts**", and said that the email review was "incredibly time consuming" but ongoing. There were several more extremely detailed exchanges over a two-year period around the draft Fact Paper and email review.

67. On 7 December 2020, Officer Taylor received a response to the EOI from the IRS, as follows:

> "*We maintain that the financial statements of Eurark LLC comprise the activities and balances of foreign subsidiaries not relevant to your investigation… The role and contributions of Lifeplus Europe Limited to the consolidated group are explained and addressed in the transfer pricing study*".

68. Following further exchanges of correspondence, on 17 September 2021, Officer Taylor issued a letter to the Appellant stating, *inter alia*, that HMRC did not anticipate issuing any further large requests for information and documents. The letter was set out in the following terms:

> "***Next Steps***
>
> *…*
>
> *I am grateful for your client's efforts in providing information and documents throughout this enquiry and I am currently in the process of reviewing the emails provided in May and July 2021. I do not anticipate issuing any further large requests for information and documents, although I may request further information in relation to specific items identified within the emails provided, if necessary. I am sure you will appreciate that the email review is a significant and time-consuming piece of work, acknowledging that it took almost 11 months for the emails to be provided, and we are continuing to review the emails as quickly as possible.*
>
> *…*
>
> ***Action Plan***
>
> *To ensure momentum is maintained, I have enclosed an action plan for progressing the enquiry to closure. You will note that this plan includes a submission to HMRC's Internal governance immediately after the email review. This should give your client the reassurance that any further actions by the case team have support from HMRC's governance.*

The plan has been drafted based on indicative dates to reach a settled position as quickly as possible, however, the dates and actions in the plan are subject to change pending the outcome of the governance submission.

I would welcome your input / comments regarding the enclosed plan.

I hope that the information outlined above, and enclosed action plan, allay your client's concerns, however, I acknowledge your client's right to seek closure from the tribunal if they feel it's appropriate."

69. On 24 June 2022, Officer Taylor wrote to Mazars setting out HMRC's latest comments and proposed amendments on the draft Fact Paper, and stating their view on a 'without prejudice' basis, that the CUP method should be the most appropriate method to arrive at an arm's length price for the goods acquired by the Appellant from the Parent Company. He provided HMRC's analysis of the expected increase in the Appellant's gross profit for each of the years 2014 to 2019 (inclusive), which would have been calculated if the 'CUP method' were applied instead of the 'TNMM method'. Mazars responded, in detail, on 20 September 2022. The response included a formal complaint about HMRC's conduct of the investigation.

70. On 19 October 2022, Officer Taylor wrote to the Appellant as follows:

"*HMRC would state that by excluding items from the Statement of Facts, it does not believe that dishonest and/or inaccurate statements have been made... HMRC will consider all information it is provided with, to reach an appropriately evidenced conclusion to the enquiry. In this case, this information will include job adverts, because it is a way to define a particular role, and marketing videos, because they will provide evidence on the marketing function. The staff objectives and appraisals show the criteria that individuals are expected to do as part of their job, be judged against, and is evidence of the functions performed.*

…

Next Steps

HMRC would welcome your comments in relation to this letter and if further information is provided, it will be considered to reach a reliable, evidence-based conclusion. If you would like additional evidence to be considered, please provide it by 30 November 2022. If HMRC do not receive anything by this date, HMRC will consider the position final, using the CUP methodology put forward."

71. On 12 December 2022, a meeting was held between the Appellant and HMRC ("**the December 2022 Teams meeting**"). In attendance were Officer Taylor, Officer Murray, Michael Coughlan, Colin Gamble (for HMRC) and Mr Sayers and Vicky Sandford (from Mazars).

72. On 31 January 2023, Mazars sent another detailed letter to HMRC, with further comments on the Facts Paper and views on the selection of transfer pricing methodology. They did not agree with the use of the CUP method, explained the rejection of various other recognised methods, and stood by the Appellant's use of the TNMM method.

73. On 14 March 2023, a further meeting was held between HMRC and the Appellant ("**the March 2023 meeting**"). Whilst both parties stood by their preferred methods, it was agreed that the Appellant would provide its proposed adjustments to the CUP analysis and, as confirmed by HMRC in a letter on 24 March 2023, HMRC would review their analysis, to include relevant adjustments where appropriate. The CUP method was HMRC's preferred method.

74. On 3 August 2023, the Appellant provided financial data supporting an adjustment (reduction in gross profit) to the CUP analysis. The proposed adjustments were based on the total Management Charges incurred by the Parent Company, with some allocated on the basis

of turnover of the relevant entities, well as on royalties – to reflect the Parent Company designing the compensation and referral model and developing the supporting IT systems – in addition to adjustments for delivery costs and customs duties. The Appellant also provided a spreadsheet, which included detailed information and figures for the APE 2014 to 2019. The spreadsheet included a separate analysis of each charge, split by accounting period to show the amount calculated and the basis for the calculations. In the year ending 2019, for example, the Appellant proposed to include a 'Management Charge' of £4,896,637. The information surrounding the CUP adjustments was obtained from the Parent Company. This was for the sole purpose of settling the dispute that had been ongoing for a considerable period of time.

The Information Notice

75. On 2 October 2023, HMRC issued the Information Notice to the Appellant. In the covering letter to the Information Notice, they noted that significant adjustments to HMRC's CUP analysis were being proposed on the basis of some of the Parent Company's financial information, and stated that this strengthened their view that the Parent Company's documents were reasonably required to evidence the Appellant's transfer pricing position. The Schedule to the Information Notice was as follows:

> "*1. We need all Eurark LLC group consolidated financial statements that coincide with, or partly coincided with, account periods of Lifeplus Europe Limited (LPE) ended 31 December 2014 to 31 December 2022 inclusive.* [Item 1]
>
> *2. All Eurark LLC entity level financial statements that coincide with, or partly coincided with, account periods of LPE ended 31 December 2014 to 31 December 2022 inclusive.* [Item 2]
>
> *3. Global group structure diagrams at 31 December each year, from 2013 to 2022 inclusive, in standard notation if available, which should include […]* [Item 3]
>
> *4. The organisational structure diagrams at 31 December each year, from 2013 to 2022 inclusive, which should include […]* [Item 4]
>
> *5. All agreements or contracts Eurark LLC held with associated entities during the period 1 January 2014 to 31 December 2022 inclusive*. [Item 5]"

76. Upon receiving the Information Notice, Mazars asked Mr Stotelmyer to release the Consolidated Group Accounts and the Parent Company Accounts to HMRC. Having considered the request, the Parent Company declined as a result of the fact that:

(1) the owners of the privately-held company were entitled to their privacy and confidentiality, as afforded to them under US law;

(2) the annual transfer pricing studies provide all of the necessary analysis and information to verify the application of the 'arm's length' principle; and

(3) a significant amount of information had already been provided to HMRC over the course of the enquiry, then already into its eighth year.

77. By a letter dated 30 October 2023, together with a much more detailed supporting letter of the same date, the Appellant appealed against the Information Notice on the following grounds:

(1) Some of the items requested were not in the possession or power of the Appellant;

(2) Some of the items were not reasonably required for the purpose of checking the Appellant's tax position; and

(3) Some of the items had already been produced.

78. On 6 June 2024, HMRC wrote to the Appellant with their "View of the Matter". HMRC agreed that 'Item 3' and 'Item 4' of the Information Notice had been provided. HMRC further agreed to withdraw the request for 'Item 5'. However, HMRC maintained that 'Item 1' and 'Item 2' were required, and rejected the Appellant's appeal in relation to these two items. The Appellant was offered an "Independent Review".

79. On 5 July 2024, the Appellant accepted the offer of an Independent Review, and again made detailed points for consideration.

80. On 15 August 2024, HMRC issued the "Review Conclusion Letter". A decision was made to vary the Information Notice by removing Items 3,4, and 5 from the Information Notice, whilst retaining Items 1 and 2.

81. On 11 September 2024, the Appellant made an appeal to the First-tier Tribunal ("FtT").

RELEVANT LAW

82. In order to put the parties' respective contentions into context, we start with the relevant statutory provisions. The relevant law, so far as is material to the issues in this appeal, is as follows:

Taxation (International and Other Provisions) Act 2010

83. Section 147 TIOPA requires profits and losses subject to corporation tax to be determined by applying the transfer pricing "**arm's length' principle**", as follows:

> "**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…"

84. Section 164 provides that:

> "**164 Part to be interpreted in accordance with OECD principles**

(1) This Part is to be read in such manner as best secures consistency between—

(a) the effect given to sections 147(1)(a), (b) and (d) and (2) to (6), 148 and 151(2), and

(b) the effect which, in accordance with the transfer pricing guidelines, is to be given, in cases where double taxation arrangements incorporate the whole or any part of the OECD model, to so much of the arrangements as does so.

…

(3) In this section "the OECD model" means—

(a) the rules which, at the passing of ICTA (which occurred on 9 February 1988), were contained in Article 9 of the Model Tax Convention on Income and on Capital published by the Organisation for Economic Co-operation and Development, or

(b) any rules in the same or equivalent terms.

(4) In this section "the transfer pricing guidelines" means—

(a) the version of the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations approved by the Organisation for Economic Co-operation and Development (OECD) on 22 July 2010 as revised by the report, Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports, published by the OECD on 5 October 2015, or

(b) such other document approved and published by the OECD in place of that (or a later) version or in place of those Guidelines as is designated for the time being by order made by the Treasury, including, in either case, material which is published by the OECD as part of (or by way of update or supplement to) the version or other document concerned and which is designated for the time being by order made by the Treasury**.**

(5) In this section "double taxation arrangements" means arrangements that have effect under section 2(1) (double taxation relief by agreement with territories outside the United Kingdom)."

85. The Explanatory Notes to TIOPA provide, *inter alia*, that:

"*Part 4: Transfer pricing*

339. This section imports into the transfer pricing legislation not only the principles of

Article 9 of the OECD Model Tax Convention but also that organisation's transfer pricing guidelines. The Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration referred to in subsection (4)(a) were first issued in 1979 and extensively updated in 1995 with revisions and additions published periodically."

86. Section 164(1) TIOPA 2010 requires Part 4 TIOPA to be read in a manner that ensures consistency with art. 9 of the OECD Model Tax Convention on Income and Capital ("**the MTC**"), when it is included in a tax treaty.

The MTC

87. Article 9 of the MTC is included in the UK – USA treaty, and provides that:

"**ARTICLE 9**

ASSOCIATED ENTERPRISES

1. Where

a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State, and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

2. Where a Contracting State includes in the profits of an enterprise of that State — and taxes accordingly — profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other."

Finance Act 1998

88. Paragraph 24 of Schedule 18 provides for "**notices of enquiry**" into a company tax return, as follows:

"**Notice of enquiry**

(1) an officer of Revenue and Customs may enquire into a company tax return if they give notice to the company of their intention to do so ("notice of enquiry") within the time allowed.

(2) If the return was delivered on or before the filing date, notice of enquiry may be given at any time up to twelve months from the day on which the return was delivered (subject to sub-paragraph (6)).

(3) If the return was delivered after the filing date, notice of enquiry may be given at any time up to and including the 31st January, 30th April, 31st July or 31st October next following the first anniversary of the day on which the return was delivered.

(4) If the company amends its return, notice of enquiry may be given at any time up to and including the 31st January, 30th April, 31st July or 31st October next following the first anniversary of the day on which the amendment was made.

(5) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) by the company of its return.

(6) In the case of a company which is a member of a group other than a small group, the 12-month period in sub-paragraph (2) shall start not from the day on which the return was delivered but from the filing date.

(7) In sub-paragraph (6) "group" and "small group" have the same meaning as in sections 474(1) and 383 of the Companies Act 2006."

Finance Act 2008

89. Paragraph 1 of Schedule 36 concerns the power to obtain information and documents from a taxpayer. Pursuant to para. 1, HMRC may issue an information notice to a taxpayer (a "taxpayer notice") requiring the taxpayer to provide information and/or documentation which is "reasonably required" for the purpose of checking the taxpayer's tax position, as follows:

"**Power to obtain information and documents from taxpayer**

(1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer") –

(a) to provide information, or

(b) to produce a document, if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position

(2) In this Schedule, "taxpayer notice" means a notice under this paragraph."

90. Part 4 provides for the "**restrictions**" on HMRC's powers. A taxpayer is required to produce a document only if it is in their "possession or power", as follows:

"**PART 4 RESTRICTIONS ON POWERS**

Documents not in person's possession or power

18 An information notice only requires a person to produce a document if it is in the person's possession or power."

91. In relation to information requests for production of "**old documents**", documents originating more than six years before the date of issue are not disclosable, 'unless the notice is given by, or with the agreement of an "authorised officer", as follows:

"***Old documents***

20 An information notice may not require a person to produce a document if the whole of the document originates more than 6 years before the date of the notice, unless the notice is given by, or with the agreement of, an authorised officer."

92. Paragraph 21 provides the conditions for a "notice", as follows:

"(2) Where a person has made a tax return in respect of a chargeable period under paragraph 3 of Schedule 18 to FA 1998 (company tax returns), a taxpayer notice may not be given for the purpose of checking that person's corporation tax position in relation to the chargeable period.

(3) Sub-paragraphs (1) and (2) do not apply where, or to the extent that, any of conditions A to E is met

…

(8) Condition D is that the notice is given for the purpose of obtaining any information or document that is required (or also required) for the purpose of checking the person's position as regards any deductions or repayments referred to in paragraph 64(2) (PAYE etc)."

93. The term "**tax position**", for Schedule 36 purposes, is defined at para. 64, as follows:

"64 (1) In this Schedule, except as otherwise provided, "tax position", in relation to a person, means the person's position as regards any tax, including the person's position as regards –

(a) past, present and future liability to pay any tax,

(b) penalties and other amounts that have been paid, or are or may be payable, by or to the person in connection with any tax, and

(c) claims, elections, applications and notices that have been or may be made or given in connection with the person's liability to pay any tax, and references to a person's position as regards a particular tax (however expressed) are to be interpreted accordingly. […]"

94. The legislation governing "**appeals**" against information notices is provided for under Part 5 of Schedule 36, as follows:

"29 (1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal to the tribunal against the notice or any requirement in the notice.

(2) Sub-paragraph (1) does not apply to a requirement in a taxpayer notice to provide any information or produce any document, that forms part of the taxpayer's statutory records. …'

95. Under ss 32(3) to (5):

"32 (3) On an appeal that is notified to the tribunal, the tribunal may –

(a) confirm the information notice or a requirement in the information notice,

(b) vary the information notice or such a requirement, or

(c) set aside the information notice or such a requirement.

(4) Where the tribunal confirms or varies the information notice or a requirement, the person to whom the information notice was given must comply with the notice of requirement –

(a) within such period as is specified by the tribunal, or

(b) if the tribunal does not specify a period, within such period as is reasonably specified in writing by an officer of Revenue and Customs following the tribunal's decision

(5) Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 a decision of the tribunal on an appeal under this Part of this Schedule is final."

96. Reference should also be made to para. 58, which is headed 'General Interpretation'. The word "**checking**" includes carrying out an investigation or enquiry of any kind. The "**tribunal**" means the FtT or, where determined by or under tribunal procedure rules, the Upper Tribunal ('UT').

THE EVIDENCE AND THE KEY SUBMISSIONS

97. The documents for the hearing, set out at [11] and [12] above, comprised pleadings, correspondence relating to HMRC's enquiry, and appeal correspondence. The bundle also contained the statements of Officer Taylor, Mr Stotelmyer, Mr Vincent and Mr Sayers.

98. We considered the evidence given by all of the witnesses to be of assistance to us in understanding the background, and details, regarding the Appellant's business model, transfer pricing methodology, and the enquiry. We shall refer to the evidence given in our "Discussion", later.

Preliminary matters

99. At the commencement of the appeal hearing, we heard HMRC's application, dated 23 February 2026, for a direction to be given that the Appellant redact the witness statement of Mr Sayers. This was in relation to paragraphs within the statement that were said to constitute expert opinion/legal submissions, as opposed to statements of fact. In further amplification of the application, Mr Kider submitted that Mr Sayers had acknowledged, at para. 4 of his witness statement, that he was straying into opinion, Mr Kider ultimately submitted that it was not the purpose of a witness to raise points of law, or argue a party's case.

100. Mr Gordon opposed HMRC's application on the following grounds:

(1) Timing ("**the first ground of objection**"); and

(2) The fact that the application was made at all ("**the second ground of objection**").

101. Mr Gordon submitted that the Appellant was being ambushed following a renewed application which had previously been refused, and against which no appeal had been launched by HMRC. We refused Mr Kider's application and gave an *ex tempore* ruling, which we will return to in our "Discussion" later.

HMRC's submissions

102. Mr Kider's submissions on the substantive issues in this appeal can be summarised as follows:

(1) Paragraph 1(1) of Schedule 36 has been satisfied as the Information Notice was issued to the Appellant, in writing, on 2 October 2023. HMRC accept that the Information Notice requires the Appellant to produce documents which originate more than six years before the date of the Information Notice. However, this does not invalidate the Information Notice because it was given by and/or with the agreement of an authorised officer on 2 October 2023, in compliance with para. 20 of Schedule 36. Furthermore, whilst the Appellant had filed a company tax return in respect of a chargeable period under para. 3 of Schedule 18, the Information Notice remains valid because the Appellant had been given a notice of enquiry. Whilst para. 21(2) of Schedule 36 places restrictions on notices being given to parties who have filed taxable returns, paras. 21(3) and (4) enable HMRC to issue a notice in such circumstances where the taxpayer has been given a notice of enquiry under para. 24 of Schedule 18.

(2) The documents requested in the Information Notice are reasonably required for the purpose of checking the Appellant's corporation tax position in relation to the chargeable periods, and the documents are within the possession or power of the Appellant. Without these documents, the Appellant is unable to make an informed decision about the key facts that have had a significant impact on the Appellant's tax position. The information is also required to verify the Appellant's proposed adjustment to the CUP analysis. HMRC will otherwise be forced to make an assessment without full knowledge of the facts. More importantly, the statutory scheme entitles HMRC to full disclosure of the facts to check the Appellant's tax position.

(3) HMRC have consistently outlined concerns with the Appellant's TPP Report, particularly in relation to how the functions of Appellant are described in the TPP Report including in relation to 'Marketing'. At the very least, the provision of Items 1 and 2 will provide HMRC with primary evidence of the scale of the global business, and the Appellant's comparative contribution to it.

(4) The Appellant's TPP cannot sit in isolation, especially as HMRC were told that the TPP was instigated on the basis of the respective profits and losses of the Appellant and Parent Company. HMRC have not been provided with the appropriate evidence of the Parent Company's profits/losses to verify the Appellant's submissions, which should be evidenced in Items 1 and 2 of the Information Notice.

(5) HMRC cannot accept the Appellant's self-certification. The information provided, whilst detailed, lacks any supporting evidence and is of great relevance to the Appellant's tax position, both in terms of what has already been declared in the Appellant's returns, and its proposed adjustments to the CUP analysis.

(6) The fact that the IRS chose not to provide the Parent Company's financial statements has no relevance to whether information or documents are reasonably required for the purposes of Schedule 36. The request for the Parent Company's financial statements was made to the IRS long before HMRC were provided with significant amounts of unsubstantiated information in August 2023.

(7) The Appellant's leadership team/directors, who are the senior executives of the Parent Company, presumably used their influence to produce the spreadsheets in order to propose an adjustment to the CUP analysis, reducing their taxable profit by the corresponding amount. Therefore, the leadership team can use their influence on the Parent Company to obtain Items 1 and 2.

(8) Whilst it is acknowledged that HMRC had previously concluded that evidence relating to the Parent Company's detailed financial information, or accounts, was not in the Appellant's possession or power, this was prior to the Appellant's provision of the significant volume of information relating to the Parent Company on 3 August 2023.

(9) Without possession of the detailed financial information, the Appellant could not have produced the detailed spreadsheet proposing the adjustments to the CUP analysis. This disclosure led HMRC to reconsider their original view.

103. During his submissions, Mr Kider provided a copy of the email, dated 2 October 2023, from Officer Lynas to Officer Taylor. Neither Mr Gordon nor Mr Morse objected to the inclusion of this email, despite its late production. This may well have been a pragmatic approach in light of the fact that the Appellant was raising the issue of whether an 'authorised officer' had given authority for the Information Notice to be issued.

Appellant's submissions

104. Mr Gordon and Mr Morse's submissions can be summarised as follows:

105. Neither the Consolidated Group Accounts, nor the Parent Company Accounts are reasonably required. This is because:

(1) there is no 'rational connection' between the contents of those accounts and the question of whether the Appellant should have selected the CUP transfer pricing method, instead of the TNMM method. HMRC have not explained what the 'rational connection' is between the selection of the TNMM method, rather than the CUP method, and the contents of the accounts; and

(2) HMRC have not explained why the information is not contained in all of the information and documents they have received. In particular, HMRC have not explained what it is about the contents of those accounts that is relevant to the question of the selection of the TNMM method as the most appropriate transfer pricing method in the years under enquiry.

(3) It is noteworthy that HMRC had sought to obtain the very same accounts via their IRS counterparts, and the IRS refused to request this information from the Parent Company. It can reasonably be inferred that the IRS recognised that there was no good reason for the information (which the IRS were not entitled to themselves) to be obtained.

106. It is common ground that the Appellant does not, in fact, possess either the Consolidated Group Accounts or the Parent Company Accounts:

(1) Firstly, the Appellant does not have a present legal right to access them without the consent of the Parent Company. There is no dispute that the Parent Company has declined to volunteer them, or that the Parent Company itself is not otherwise subject to HMRC's jurisdiction. The evidence demonstrates that the Appellant does not have access to the accounts.

(2) Secondly, there is no 'general consent' by which the Appellant has the right to access the accounts and, thus, the necessary 'power'. There is no standing or continuing practical arrangement between the Appellant and the Parent Company, whereby the Parent Company has permitted the Appellant access to those accounts, irrespective of the absence of any legally enforceable right. The evidence demonstrates that the Appellant does not have a legally enforceable right to access the accounts.

(3) Thirdly, there is no *de facto* 'power', either in the sense asserted by HMRC, or in the very limited sense recognised by the Civil Procedure Rules ("**CPR**") cases.

(4) Fourthly, there is no jurisdiction for a court or a tribunal to order company directors (individually or collectively) to attempt to get hold of documents not already in their possession or power.

(5) Fifthly, the actions which HMRC necessarily say the Appellant's directors must take, in order to exercise any such *de facto* power, are not actions lawfully open to the Appellant's directors to take, in any event. This is because it would compel the Appellant's directors to act in breach of their statutory duties not to create a conflict of interest as between the Parent Company and the Appellant. The reason for the conflict is the dual roles that they perform for the Appellant and the Parent Company. It would also compel them not to exercise their own independent judgment.

107. The plain words of ss. 164(1)(a) and (b) TIOPA require consistency of process and effect between the domestic tax legislation, and the OECD principles, methodologies and processes as set out in the Guidelines. This is because Parliament has decided that the entirety of the OECD transfer pricing regime – including the requirements set out in the OECD Guidelines – must be applied. This is reflected in para. 339 of the Explanatory Notes to TIOPA. That includes applying processes and procedures set out in the OECD Guidelines to:

(1) identify and recognise transactions that should be remunerated for 'arm's length' purposes in the first place, and to do so on 'arm's length' terms;

(2) properly delineate transactions for transfer pricing purposes as that principle is set out; and

(3) perform a comparability analysis in the prescribed way, which includes the selection of the most appropriate transfer pricing methodology.

108. Once an appropriate transfer pricing methodology has been selected, through the application of the arm's length principle, and by applying the procedure and processes set out in the OECD Guidelines, any challenge to that by a tax authority must be brought through a proper application of the OECD Guidelines. HMRC have failed to do so. The core purpose of the arm's length principle is to adjust profits for tax purposes by reference to the conditions which would have obtained between independent enterprises in comparable transactions, and comparable circumstances.

109. Mr Gordon and Mr Morse's submissions during the hearing followed a more nuanced approach than those set out in the Skeleton Argument. Whilst we have not specifically referred to that approach in this 'Decision', we have nevertheless considered the approach in reaching our decision.

110. At the conclusion of the hearing, we reserved our decision, which we now give with reasons.

111. Our conclusions regarding the key submissions made by the parties are set out in our "Discussion", later.

FINDINGS OF FACT

112. The "Background Facts" are not in issue between the parties, save that the parties differ in view as to the conclusions that we should reach as a result. We, therefore, adopt the Background Facts, at [13] to [81] above, as our "Findings of Fact", and do not repeat these here.

DISCUSSION

113. The Appellant appeals against an Information Notice issued by HMRC on 2 October 2023. A formal notice (such as that issued in this appeal) is appropriate if there is a genuine dispute between the parties concerning any information or documents requested.

114. A formal notice will ordinarily be subject to the right of appeal, allowing any underlying disputes to be resolved. Paragraph 29 of Schedule 36 (supra) provides that a taxpayer has the right to appeal against "the notice". The taxpayer also as a right of appeal against "any requirement in the notice". In this respect, the role of the FtT is not 'supervisory'; rather it is a 'full appellate' hearing.

PRELIMINARY ISSUES: MR SAYERS' WITNESS STATEMENT AND OFFICER LYNAS' EMAIL

115. The preliminary issues raised in this appeal concerned the admissibility of Mr Sayers' witness statement, and the late evidence in the form of Officer Lynas' email to Officer Taylor. We therefore proceed with the preliminary issues before proceeding to determine the substantive issues surrounding the Information Notice.

Mr Sayers' witness statement

116. Mr Kider made an application for the us to give a direction that various aspects of Mr Sayers' witness statement be struck out, or redacted, due to the allegation that he was straying into professional opinion, and legal submissions, within that witness statement. Mr Gordon objected to the application. In respect of Mr Gordon's first ground of objection, it is correct that HMRC's application was made at the eleventh hour. Mr Kider's explanation for the timing of the application was that HMRC only received notification of the panel that was due to hear the appeal on the Friday before the hearing. This, we find, is not a good reason for waiting until shortly before the hearing to make the application. The hearing was listed a considerable time ago, and HMRC did not need to know the named panel members before submitting an application of this nature in a timely manner.

117. In respect of the second of Mr Gordon's grounds of objection, it is correct that Judge Bailey had previously refused HMRC's application to direct that the witness statement be amended. Judge Bailey's decision, issued on 23 September 2025, following HMRC's initial application on 5 September 2025, was set out in the following terms:

> "In respect of the Respondent's application to direct the Appellant to amend his evidence, I have decided that this part of the application should be refused. The Tribunal panel hearing this appeal will be able to see for itself whether certain paragraphs of the Appellant's evidence constitute evidence of fact or case submissions. The Respondent can seek directions from that panel as to the parts of Mr Sayers' witness statement that will be struck out as not constituting evidence of fact."

118. It is, therefore, correct that the application had already been determined. We nevertheless acknowledge Judge Bailey's reference to the ability of HMRC to seek a direction from us.

119. Having considered the submissions made by both parties in respect of the application, we decided not to give the direction sought by Mr Kider. In deciding not to give the direction sought by HMRC, we considered authorities which have dealt with the function of a witness of fact.

120. In *Mungavin*, Nugee J (sitting in the UT) considered the proper function of a witness of fact, and said this at [82]:

> "82. I should explain in more detail why I take this view. Without attempting to lay down any exhaustive rules, it seems to me that in general the proper function of factual witnesses, even of those involved in a case in a professional capacity…, is to give evidence of facts relevant

> to the issues in the case of which they can speak from their own knowledge (including in appropriate circumstances evidence of hearsay statements). Save insofar as they are able to give relevant evidence of their own, it is not the proper function of a witness's evidence to comment on documents, or on other witnesses' evidence, or to speculate on other persons' motives or intentions; far less is it the proper function of a witness's evidence to raise points of law, or to argue a party's case."

121. In *Kennedy (Appellant) v Concordia (Services) LLP (Respondent)(Scotland)* [2016] UKSC 6 ('*Kennedy v Concordia*'), at [44], the Supreme Court identified four factors which governed the admissibility of skilled evidence, noting that a skilled person can give expert factual evidence either by itself, or in combination with opinion evidence:

> "i) whether the proposed skilled evidence will assist the court in its task
>
> (ii) whether the witness has the necessary knowledge and experience
>
> iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and
>
> iv) whether there is a reliable body of knowledge and experience to underpin the expert's evidence."

122. At [46], the Supreme Court drew a distinction between skilled evidence of opinion which included, under i) above, a test of necessity rather than assistance; and skilled evidence of fact which did not require necessity, explaining that otherwise the court would be deprived of the benefit of a skilled witness who collates and presents to the court in an efficient manner the knowledge of others in his or her field of expertise – that would not strictly be necessary if instead the parties called many factual witnesses.

123. Mr Sayers has over 30 years of experience in International Tax, and for 15 years he was Head of Forvis Mazars' global Transfer Pricing practice. Furthermore, he was the partner responsible for the enquiry in this appeal. It follows that he has experience in the matters which arise in these proceedings. We should, therefore, be cautious about excluding evidence that assists the Appellant in rebutting HMRC's case.

124. In *CF Booth*, which is a decision of the FtT but which we find to be persuasive, Judge Berner said this, at [14]:

> "14. … Tribunals will be astute to the difference between the factual evidence contained in a witness statement and inferences and conclusions that may be contained within it. The latter are not properly part of the evidence of a witness of fact; to the extent they are contained in a witness statement they should be disregarded and it is not necessary for the witness to be cross-examined in those respects."

125. The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) 2009 SI 2009 No. 273 ("**the Procedure Rules**"): (i) draw a distinction between evidence and submissions; and (ii) refer to *expert evidence* and the flexibility to admit or exclude it. Rule 15(2) is in relation to admission or exclusion of *evidence*. The rules do not need to deal with the admission or exclusion of law because they do not envisage that evidence will be relevant to proving what the law is.

126. We are satisfied that we can determine the evidence that is admissible, without striking out Mr Sayers' witness statement. This is because we are in a position to determine the weight to be attached to Mr Sayers' witness statement, and can determine any aspects of his witness statement that do not constitute statement of fact. In any event, HMRC are not precluded from addressing any matters raised in the witness statement by submissions, if they so wish. It is clear that the purpose of cross-examination is:

(1) to seek to undermine, qualify or mitigate the effect of evidence (in relation to its credibility, reliability and accuracy); and

(2) to elicit further factual testimony that is helpful to the cross-examining party's case.

127. In *Mungavin,* at [82], Nugee J also said this:

> "... It is not the proper function of cross-examination to argue the case, or debate issues of law, or seek to get the witness to agree with factual propositions of which they cannot themselves give relevant evidence. In practice counsel is often allowed considerable latitude to stray into these areas, but strictly speaking evidence in cross-examination is no more admissible if it is not evidence of facts of which the witness can speak of his own knowledge than it is in chief."

128. Mr Kider can, therefore, put HMRC's case to Mr Sayers, and challenge those parts of his witness statement/testimony that HMRC seek to discredit. Furthermore, we are satisfied that the prejudice to Appellant is significant if the witness statement is struck out, or redacted. It would, indeed, be draconian to deprive the Appellant of important elements of how it wants to argue its case. There is, in summary, no compelling reason to exclude the evidence.

129. We, therefore, declined to give the direction sought by Mr Kider.

Officer Lynas' email

130. The second issue is in relation to Officer Lynas' email, which was only submitted during the appeal hearing. Whilst HMRC have information gathering powers set out in statute, these powers are tempered by the safeguards included at paras. 18 and 20 of Schedule 36. Paragraph 20 of Schedule 36 sets out that an information notice may not require a person to produce documents originating more than six years before the date of the notice, unless issued with the agreement of an "authorised officer". In *Derrin HC*, Simler J (as she then was) confirmed that the dictum in *R v Commissioners of Inland Revenue ex parte T.C., Coombs & Co* [1988] BTC 357 ('*Coombs*') (Parker, Bingham and Taylor LJJ) on the predecessor s 20 of the Taxes Management Act 1970 ('TMA') scheme 'applies with equal force to Schedule 36 notices', and a there is a presumption of regularity that the statutory authority has acted lawfully and in accordance in its duty.

131. Mr Kider has relied on Officer Lynas' email. This is because the Information Notice in these proceedings requested some documents which relate to a period extending beyond six years, and are properly classified as "old documents". Prior to serving Officer Lynas' email, Mr Kider had made reference to the Appellant's Notice of Appeal, and submitted that the Appellant had not previously raised any issues concerning the validity of the Information Notice despite its request for old documents. He did, however, seek to gainsay Mr Gordon's submission that the point about the need for the approval of an 'authorised officer' was considered in the Review Conclusion Letter, as follows:

> "*7.24 I can confirm that the inclusion of such documents in the notice under review was approved in advance by an Authorised Officer, and it is evident that that officer was provided with all the relevant facts and gave due consideration to them*."

132. In addition to this, the Statement of Case also addresses this issue, at para. 56, as follows:

> "56. *The Respondents accept that the Information Notice requires the Appellant to produce documents which originates more than six years before the date of the Notice. However, the Respondents assert that this does not invalidate the Notice, because it was given by and/or with the agreement of an authorised officer on 2 October 2023, in compliance with paragraph 20 of Schedule 36 to the Finance Act 2008*."

133. Mr Kider submitted that Officer Lynas was an authorised officer. The email from Officer Lynas to Officer Taylor is set out in the following terms:

> "*Daragh*
>
> *I have considered your request for approval to use the powers listed in your submission of 29/09/2023. I approve the proposed action.*
>
> *The attached document sets out my reasoning and confirms my decision. The document and this email should be saved in caseflow for audit trail purposes.*"

[Emphasis added]

134. The email was sent at 2.19pm, on 2 October 2023, which is the same day that the Information Notice was issued. The Information Notice was issued at 4.32pm. We note that Officer Lynas has not attached the document setting out his reasoning in support of his decision. No explanation for the absence of this document was provided by Mr Kider as he had no instructions as to why it was missing. We further note that Officer Lynas is described in the email as working for the "Employer Duties – Guidelines for Compliance ('GfC') Team", which is undefined. Contrary, to Mr Kider's submissions, the statute provides guidance as to what amounts to an 'authorised' officer. In the context of Schedule 56, an authorised officer refers to "an officer of the Board". Despite our observations, we accept, on balance, that Officer Lynas is an authorised officer, and that he gave authorisation for the Information Notice to be issued.

135. We decided to admit the email (in the absence of any real objection by the Appellant). As set out by Lightman J in *Mobile Export 365 Ltd v HMRC* [2007] EWHC 2664 (Admin) ('*Mobile Export*'), the key issue on applications for admissibility is 'relevance', and the presumption is that:

> "all relevant evidence should be admitted unless there were compelling reasons to the contrary."

136. We are satisfied that the email from Officer Lynas is relevant to the substantive issues surrounding the Information Notice, and therefore admit the email. We now turn to the substantive issues in the appeal.

SUBSTANTIVE ISSUES: THE INFORMATION NOTICE

137. Schedule 36 provides for the issuing of an information notice. Schedule 36 is headed 'Information and Inspection Powers'. Part 1 concerns 'Powers to Obtain Information and Documents'. Under Schedule 36, notices may be issued by HMRC which require a taxpayer to produce a document, or provide information. HMRC must prove that all of the requirements for issuing the Information Notice have been met: *Cliftonville Consultancy Ltd v HMRC* [2018] UKFTT 231 (TC) ('*Cliftonville*'), at [39]. In respect of para. 18 of Schedule 36, an information notice is valid if:

(1) it was issued by an officer of HMRC to the Appellant in writing;

(2) it asks the Appellant for the provision of specific documents;

(3) the documents are reasonably required for the purpose of checking the Appellant's tax position;

(4) it was given for tax periods under an enquiry; and

(5) it was given for documents in the Appellant's 'power' or 'possession'.

138. Where a corporation tax return has been filed for the relevant period (as in this appeal), a taxpayer notice may only be given for the purposes for checking that person's corporation

tax position in relation to the 'chargeable period' to the extent that at least one of Conditions A to D (supra) of para. 21, Schedule 36, is met.

139. There is a significant divergence between the parties' respective positions in this appeal. The Information Notice issued by HMRC requested the following documents:

(1) All of the Parent Company's group consolidated financial statements that coincide with, or partly coincide with, the Appellant's APE 31 December 2014 to 31 December 2022 ('Item 1'); and

(2) All of the Parent Company's entity level financial statements that coincide with, or partly coincide with, the Appellant's APE 31 December 2014 to 31 December 2022 ('Item 2').

140. In respect of 'Item 1', Mr Kider submits that the consolidated financial statements will:

(1) evidence the Group's overall turnover, costs and profit;

(2) enable HMRC to assess the proportion of the Appellant's contribution to Group profits/losses; and

(3) substantiate the accuracy of the evidence that the Appellant had provided to HMRC during the enquiry.

141. In respect of 'Item 2', Mr Kider submits that the entity level financial statements will:

(1) evidence the figures put forward as part of the Appellant's proposed adjustment to HMRC's CUP analysis;

(2) assist with verifying whether the Parent Company, as an entity, was making a loss in 2013; and

(3) enable HMRC to compare the Appellant's turnover and costs/profits with those of the Parent Company, to support the correctness of the CUP analysis.

142. Mr Kider, ultimately, submits that the documents requested are 'reasonably required' to check the Appellant's respective tax position, and that these documents are within the Appellant's 'power' or 'possession' to obtain. HMRC's position is that the Appellant should have selected the CUP method, as a transfer pricing method. HMRC do not, however, dispute that the Appellant is the 'tested party' in this respect, and that it is relevant to identify the transaction in question.

143. The Appellant's case (as argued by Mr Gordon and Mr Morse) is, essentially, that:

(1) the Consolidated Group Accounts and the Parent Company Accounts are not 'reasonably required' for the purpose of checking the Appellant's tax position, because there is no 'rational connection' between those accounts and the issue in the enquiry; and

(2) in any event, those accounts are not in the Appellant's 'possession' or 'power' because the Appellant does not have any enforceable legal right, 'general consent' or '*de facto*' right to access them.

144. As mentioned earlier, the case presented on behalf of the Appellant was more nuanced, and detailed than this. We will elaborate on the points made later. We are, however, in agreement with Mr Gordon and Mr Morse's submissions that the focus of HMRC's enquiry has been the methodology for the Appellant's purchase of products formulated, manufactured and sold to the Appellant by its Parent Company.

145. It is common ground that HMRC's enquiry concerns the application of relevant transfer pricing principles, methodologies and processes as they relate to cross-border transactions. The relevant statutory scheme will provide context to the Information Notice which is the subject of the decision under appeal, and the sustainability of HMRC's rejection of the information and documents already provided by the Appellant during the enquiry, and the transfer pricing method applied by the Appellant.

Transfer pricing principles and methodologies

146. A significant volume of global trade nowadays consists of international transfers of goods and services, "capital" (such as money) and "intangibles" (such as intellectual property) within a Multinational Enterprise ("**MNE**") group[3]. Such transfers are called "intra-group transactions". MNEs are global structures which may share common resources and overheads. MNEs are able to sell goods and provide services from one company to another, within the same group. To facilitate the provision of these goods and services among members of the same group, the companies set up transfer prices.

147. 'Transfer prices' are the prices at which an enterprise transfers physical goods and intangible property, or provides services to associated enterprises. They determine, in large part, the income, expenses and taxable profits of associated enterprises in different tax jurisdictions. Transfer prices serve to determine the income of both parties involved in a cross-border transaction. The transfer price influences the tax base of the countries involved in cross-border transactions.

148. "**Intangibles**" encompass something which is neither a physical, nor a financial, asset which is capable of being owned or controlled for commercial purposes, whose use or transfer would be compensated had it occurred between independent enterprises in comparable circumstances. For the purpose of transfer pricing issues, intangibles are typically divided into "trade intangibles" and "marketing intangibles":

(1) "**Trade intangibles**", such as "know-how", relate to the production of goods and the provision of services, and are typically developed through research and development.

(2) "**Marketing intangibles**" refer to intangibles, such as trade names, trademarks and client lists that aid in the commercial exploitation of a product or service. Whether a particular intangible is 'unique and valuable' is an important, separate concept and is measured by whether such intangible is not present in otherwise comparable uncontrolled transactions, and whether it leads to significant expected premium value in business operations.

149. The structure of transactions within an MNE group is determined by a combination of the market and group driven forces; which can differ from the open market conditions operating between independent entities. Parent companies of large MNE groups usually have intermediary, or sub-holdings, in several countries around the world. From a management perspective, the decision-making in MNE groups may range from highly centralised structures to highly decentralised structures, with profit responsibility allocated to individual group members. Such group structures typically include:

(1) Research and development ("**R&D**"), and services that may be concentrated in centres operating for the whole group or specific parts of the group;

[3] The component parts of an MNE group, such as companies, are called "associated enterprises" in the language of transfer pricing.

(2) Intangibles developed by entities of the MNE group (these may be concentrated around certain group members);

(3) Finance and "captive insurance companies", which may operate as insurers or internal finance companies; and

(4) Production units, where the production or assembly of final products may take place in many countries around the world.

150. In the context of transfer pricing, the Margin Level Method ("**MLM**") or Profit Level Indicator ("**PLI**") measures the net profit margin that a taxpayer earns from intercompany transactions relative to an appropriate base, such as total sales or operating.

151. The MLM operates in the following manner:

(1) "**Functionality**": which compares the net profit margin (i.e., the MLM) of a controlled intercompany transaction with the net profit margins realised by independent, unrelated companies engaged in similar transactions;

(2) "**Tested-party**": applied to the least complex entity in the supply-chain (i.e., a local distributor or a routine service provider) whose functions and risks can be benchmarked; and

(3) PLIs: to apply the MLM using specific financial ratios.

152. Multinational groups are required to ensure that their MLM calculations comply with international tax frameworks, such as those outlined by the OECD Guidelines, to prove that their intercompany prices accord with the "**arm's length principle**".

The OECD Guidelines

153. The OECD was organised to promote international trade and commerce due to concern about potential barriers to free trade among its member states. For this reason, the OECD issued a revised commentary in 1995 on the principles to be applied to related party transactions of tangible property. The OECD Guidelines recognise that, in the case of tax administrations, specific problems arise at both policy and practical levels. At the policy level, jurisdictions need to reconcile their legitimate right to tax the profits of a taxpayer based upon income and expenses that can reasonably be considered to arise within their territory with the need to avoid the taxation of the same item of income by more than one tax jurisdiction. Such double or multiple taxation can create an impediment to cross-border transactions in goods and services, and the movement of capital. At a practical level, a jurisdiction's determination of such income and expense allocation may be impeded by difficulties in obtaining pertinent data located outside its own jurisdiction.

154. The OECD Guidelines represent a consensus among OECD Members, and have largely been followed in domestic transfer pricing regulations of these countries. Paragraph 1.8 of the OECD Guidelines states that:

> "There are several reasons why OECD member countries and other jurisdictions have adopted the arm's length principle. A major reason is that the arm's length principle provides broad parity of tax treatment for members of MNE groups and independent enterprises. Because the arm's length principle puts associated and independent enterprises on a more equal footing for tax purposes, it avoids the creation of tax advantages or disadvantages that would otherwise distort the relative competitive positions of either type of entity. In so removing these tax considerations from economic decisions, the arm's length principle promotes the growth of international trade and investment."

155. The OECD Guidelines provide that the arm's length standard should be used to establish transfer prices between associated enterprises. The key question is how to apply the arm's length principle, in practice, to determine the arm's length price of a transaction.

156. The combined effect of s 164 TIOPA, and one subsequent statutory instrument[4], is that a particular version of the OECD Guidelines is applicable to each of the Appellant's accounting years in question[5]:

Year	OECD Guidelines version	Year	OECD Guidelines version
2014	2010	2019	10 July 2017
2015	2010	2020	10 July 2017
2016	2010	2021	10 July 2017
2017	2010	2022	10 July 2017
2018	2010		

157. Section 164(1) TIOPA 2010 requires Part 4 of TIOPA to be read "*in such manner as best secures consistency*" with art. 9 of the MTC (supra) when it is included in a tax treaty. This is to be done by interpreting, and applying, domestic legislation "*in accordance with the transfer pricing guidelines*": s. 164(1)(b). This means the OECD Guidelines[6]. This is the position adopted by Parliament.

158. As stated, the appropriate transfer price is based on the arm's length principle, which represents the internationally agreed methodology of how transfer prices for MNEs intra-group transactions should be applied.

The MTC and the arm's length principle

159. The authoritative statement of the 'arm's length' principle is found in para. 1 of art. 9 of the MTC, which is the "Associated Enterprises Article" of the MTC. The comparison implies examining two terms: the "**controlled transactions**" and the "**uncontrolled transactions**" that are regarded as potentially comparable. The search for comparables is only part of the "**comparability analysis**". In other words, the transactions between two related parties must be based on the arm's length principle. Under the arm's length principle, transactions within a group are compared to transactions between unrelated entities under comparable circumstances to determine acceptable transfer prices. Thus, the marketplace comprising independent entities is the measure, or benchmark, for verifying the transfer prices for intra-entity or intra-group transactions, and their acceptability for taxation purposes.

160. The MTC forms the basis of the extensive network of bilateral income tax treaties between OECD member countries, and between OECD member and non-member countries. The principles are incorporated in the Model United Nations Double Taxation Convention between 'Developed' and 'Developing' Nations. The UN, the MTC, the OECD Guidelines and domestic legislation of various countries have provided examples for introduction of transfer pricing legislation, worldwide, in response to the increasing globalisation of business,

[4] The Taxation (International and Other Provisions) Act 2010 Transfer Pricing Guidelines Designation Order 2018/266 (effective for accounting periods starting on or after 1 April 2018)

[5] The Appellant's accounting periods are for the 12 months starting on 1 January through to 31 December and for successive calendar years thereafter.

[6] For corporation tax accounting periods beginning on or after 1 April 2011 or income tax years 2011-12 or later, the Transfer Pricing Guidelines approved by the OECD on 22 July 2010.

and the concern that this may be abused to the detriment of countries without such legislation.

161. Article 9 of the MTC allows for profit adjustments if the actual price or the conditions of transactions between associated enterprises differ from the price or conditions that would be charged by independent enterprises under normal market commercial terms; i.e., an arm's length basis. It requires that an appropriate "corresponding adjustment" be made by the other Contracting State, in such cases, to avoid economic double taxation and taxation of essentially the same profit in the hands of two different legal entities, if justified in principle and in amount. In other words, if one country increases the profit attributed to one side of the transaction, the other country should reduce the profit attributed to the other side of the transaction. The competent authorities of the Contracting States are, if necessary, to consult with each other in determining the adjustment. The core purpose of the arm's length principle is to adjust profits, for tax purposes, by reference to:

> "the conditions which would have obtained between independent enterprises in comparable transactions and comparable circumstances." (OECD Guidelines at para. 1.6)

162. Thus, 'comparability' is:

> "at the heart of the arm's length principle." (OECD Guidelines at para. 1.9)

163. Furthermore, as correctly identified in the Appellant's case, at the heart of the comparability principle is the requirement to ensure that the "economically relevant characteristics" of the transactions being compared are "sufficiently comparable" to each other.

164. "Sufficient comparability" is achieved by one of two routes:

(1) Any differences in the "economically relevant factors" do not have a material effect on the relevant condition or feature of the transaction, so that they are truly comparable to each other; or

(2) The effect of these material differences can be eliminated through making adjustments to the conditions or features of the transactions being compared, so that they can be made to be comparable to each other.

165. If it is not possible to achieve sufficient comparability between the two transactions by following either route, then the transactions are not capable of being used to establish, or test, an 'arm's length' analysis. In short, all of this means that the Appellant's liability to corporation tax for each accounting year – and, for each year subject to an open enquiry – must be determined through the application of the 'arm's length' principle, as that core principle is to be understood, determined and applied as prescribed by the OECD model and as carried out in accordance with the OECD Guidelines. As explained in greater detail later, that includes applying the steps, processes and procedures set out in the OECD Guidelines to:

(1) identify and recognise transactions that should be remunerated for arm's length processes, and to do so on arm's length terms;

(2) properly delineate transactions for transfer pricing purposes; and

(3) perform a comparability analysis in the prescribed way, which includes the selection of the most appropriate transfer pricing methodology.

166. Where the pricing does not accord with internationally applicable norms, or with the arm's length principle under domestic law, the tax administration may consider this to be "mis-pricing", "incorrect pricing", "unjustified pricing" or non-arm's length pricing, and

issues of tax avoidance and evasion may potentially arise. There is, however, no suggestion by HMRC that there has been any tax avoidance in these proceedings.

Choosing and applying a transfer pricing method

167. The OECD Guidelines suggest a "**typical process**" that can be followed when performing a 'comparability analysis'. Paragraph 3.4 of the OECD Guidelines explains the typical process, as follows:

Step 1	Determination of the years to be covered.
Step 2	Broad-based analysis of the taxpayer's circumstances.
Step 3	Understanding the controlled transaction(s) under examination based in particular on a functional analysis, in order to choose the tested party (where needed), the most appropriate transfer pricing method to the circumstances of the case, the financial indicator that will be tested (in the case of transactional profit method), and to identify the significant comparability factors that should have been taken into account.
Step 4	Review of existing internal comparables, if any…
Step 5	Determination of available sources of information on external comparables, where such external comparables are needed, taking into account their relative reliability.
Step 6	Selection of the most appropriate transfer pricing method and… determination of the relevant financial indicator (e.g. determination of the relevant net profit indicator in case of the transactional net margin method).
Step 7	Identification of the potential comparables: determine the key characteristics to be met by any uncontrolled transactions in order to be regarded as potentially comparable, based on the relevant factors identified in Step 3 and in accordance with the comparability factors set forth at paragraphs 1.38-1.63 of the OECD Guidelines.
Step 8	Determination of and making comparability adjustments where appropriate.
Step 9	Interpretation and use of data collected, determination of the arm's length remuneration"

168. Prior to identifying the most appropriate transfer pricing method, a "**functional analysis**" needs to be performed to understand:

(1) the transaction;

(2) the functions which parties to the transaction perform with respect to the transaction;

(3) the economically significant risks that may arise on the transaction;

(4) which parties bear the risks and how the risks are managed; and

(5) the assets owned or used by the parties for the transaction.

169. The transfer pricing methods provide ways to set transfer prices that are arm's length, or test the transfer price already in place as to whether this is arm's length. In this respect, a transfer pricing method is identified as the most appropriate method; and that method is then the mechanism by which the prices, or results, of the transactions between related parties are compared to those of third parties in comparable situations.

Transfer pricing methods

170. Several acceptable transfer pricing methods exist, providing a conceptual framework for the determination of the arm's length price. No single method is considered suitable in every situation and the taxpayer must select the method that provides the best estimate of an arm's length price for the transaction in question. All of these transfer pricing methods rely, directly or indirectly, on the comparable profit, price or margin information of similar transactions. This information may be an "internal comparable" based on similar uncontrolled transactions between the entity and a third-party, or an "external comparable" involving independent enterprises in the same market or industry.

171. The OECD Guidelines explain that no rigid hierarchy is followed in the selection process. Instead, the method most appropriate to the facts, which provides the highest level of comparability and is capable of practical application, should be selected. Emphasis is, therefore, placed on the quality of the comparables and the reliability of the comparisons.

172. Two classes of transactional profit methods are recognised by the OECD Guidelines. The following three are commonly referred to as "**Traditional Methods**".

(1) The "**CUP method**" compares the price charged for goods or services in a related party transaction to that charged in a comparable third-party transaction in comparable circumstances (i.e., market price). This method uses property or service transactions between unrelated parties to determine arm's length consideration for similar transfers between related parties. This method evaluates whether the amount charged in a controlled transaction is arm's length, by reference to the amount charged in a comparable uncontrolled transaction. The CUP method was relied on by HMRC;

(2) The Resale Price method ("**the RPM**") (also referred to as 'resale minus') is used in sales and distribution transactions. This method is used to determine the arm's length consideration to be earned by the purchaser in an intercompany transaction when it resells to unrelated parties. This method evaluates whether the amount charged in a controlled transaction is 'arm's length' by reference to the gross profit margin realised in comparable uncontrolled transactions. The RPM measures the value of the function performed and is ordinarily used in cases where the reseller has not added any significant value to the product by physically altering it before resale; and

(3) The "**Cost Plus method**" (or "**the CPM**") determines the arm's length consideration that the seller should earn in an intercompany sale, based on the gross profit mark-up earned by sellers in comparable uncontrolled transactions. The appropriate mark-up is derived by referencing gross profit margins earned by comparable companies, operating under comparable circumstances, in uncontrolled transactions.

173. The Traditional Methods rely on actual transactions, and compare the terms and conditions in the related party transactions with those of third parties in comparable transactions.

174. The following two are commonly referred to as "**Transactional Profit Methods**":

(1) The "**Profit-Split method**" (or "**the PSM**") determines arm's length transfer pricing on the basis of the relative value of each controlled taxpayer's contribution to the combined profit or loss in a particular controlled transaction, or set of controlled transactions. These contributions should correspond to the division of profit or loss that would result from an arrangement between uncontrolled taxpayers, each performing functions similar to those of the various controlled taxpayers engaged in the relevant business activity. The OECD Guidelines identify two approaches in applying the PSM:

the 'residual analysis' and the 'contribution analysis'. Under the residual profit-split analysis, profit is first allocated to each of the related entities, in accordance with their routine functions, services and intangibles. The residual profit not accounted for by the routine contributions is then allocated to each entity based on each of the related parties' contributions of non-routine intangible property. Under the contribution analysis, uncontrolled taxpayers' proportions of the combined operating profit, or loss, in situations similar to the controlled transaction are used to allocate the related parties' combined operating profit or loss; and

(2) The **TNMM** determines arm's length transfer pricing by reference to a measure of net profitability of unrelated companies that engage in similar activities, under similar circumstances. The method measures the total return derived from the controlled taxpayer's most narrowly defined business activity, for which reliable data incorporating the controlled transactions under review are available. The TNMM examines the net profit relative to an appropriate base (e.g., costs, sales, assets) that a taxpayer realises from a controlled transaction. Thus, the TNMM operates in a manner similar to the CPM and the RPM. The TNMM method is that which was utilised by the Appellant (a 'one-sided' method).

175. The Transactional Profit Methods rely on the profit levels to determine arm's length prices, measuring the net operating profits of related party transactions, and comparing this to that of independent companies engaged in similar comparable transactions.

176. In addition to the five methods referred to above, the UN Manual includes a sixth method, or "Commodity Rule". This is similar to the CUP method, is used for commodities transactions and relies on the commodities market to price commodity transactions between related parties.

177. In determining which method provides the most reliable measure of an arm's length result, two factors are particularly important:

(1) First, the degree of comparability between the controlled transaction and the uncontrolled comparables influences the reliability of each method; and

(2) Second, the quality of the data and assumptions used in the analysis will influence the reliability of the method.

178. The CPM/TNMM compares the profitability of a 'tested-party' (one of the related parties involved in the tested transaction) to the profitability of comparable companies. Profitability is measured using a PLI/Net Profit Indicator **(**"**NPI**"). 'Comparability' under the CPM/TNMM depends on resources employed and risks assumed, as well as activities performed. Because resources and risks are often related to functions performed, 'functional comparability' is a significant factor under the CPM/TNMM.

179. Once an appropriate transfer pricing methodology has been selected, through the application of the arm's length principle and by applying the procedure and processes set out in the OECD Guidelines, any challenge to that by the tax authority must be brought through a proper application of the OECD Guidelines.

Whether the documents requested in the Information Notice are 'reasonably required'

180. One of the issues in this appeal relates to whether the documents requested by HMRC in the Information Notice are "**reasonably required**". In *Derrin CoA*, Sir Terence Etherton described the purpose of the statutory scheme as follows:

> "68. The purpose of the statutory scheme is to assist HMRC at the investigatory stage to obtain documents and information without providing an opportunity for those involved in

potentially fraudulent or otherwise unlawful arrangements to delay or frustrate the investigation by lengthy or complex adversarial proceedings or otherwise..."

181. In determining the issue of whether the documents are reasonably required, our consideration should be focussed on whether there is a "**rational connection**" between the information and documents sought, and the underlying investigation [or enquiry]': *Kotton*, at [62]. It is for HMRC to establish a rational connection with the request, and the underlying tax position being considered. Documents that are merely 'informative' and / or 'useful context' to an enquiry are not 'reasonably required'. We require to also have regard to the pronouncement in *Derrin CoA* that "at the investigatory stage it will be difficult to be definitive as to the precise way in which particular documents will establish tax liability", and bearing in mind that the statutory scheme of Schedule 36 is that HMRC are entitled to full disclosure of relevant facts relating to the tax position in issue before making a determination to close an enquiry.

182. It is common ground that a document which is not "**relevant**" to a purpose identified by the Information Notice would not be 'reasonably required'. A mere desire for background information is insufficient to justify the issuing of a notice. HMRC can only reasonably require information which relates to "**identified tax issues**". That principle recognises that HMRC cannot go on "**fishing expeditions**". Furthermore, it is consistent with the principles set out by Simler J in *Kotton*, at [59] to [62]. At [60], Simler J said this:

> "60. …It is not for the officer to investigate the merits of the underlying tax investigation, or whether the investigation is itself reasonably required or justified as a precondition for the giving of a notice. … Thus, provided there is a genuine and legitimate investigation or enquiry of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith, that is sufficient. The challenge is not the lawfulness of the investigation, but is limited to the rationality of the conclusion that the information / documents are reasonably required for checking the taxpayer's tax.

183. Simler J, therefore, held that:

(1) the test is not one on the 'merits' of the notice;

(2) the expressly limited question is whether the documents are 'reasonably required' for checking the tax position; and

(3) this is not conditional on the tax investigation itself being reasonably required.

184. Simler J's remark in *Kotton*, at [60], should be juxtaposed against, and read in conjunction with, her remark in *Derrin HC*, where she said this at [20]:

> "… given that the scheme is directed at an early investigatory stage and in any investigation some lines of enquiry may prove more fruitful than others but nevertheless may need to be pursued.
>
> …A broadly drafted request will not be valid if in reality HMRC are saying 'can we have all available documents because they form so large a class of documents that we are bound to find something useful'. What is required is that the request is genuinely directed to the purpose for which the notice may be given, namely to secure the production of documents reasonably required for carrying out an investigation or enquiry of any kind into another taxpayer's tax position."
>
> …
>
> Finally, HMRC may not use their Sch 36 powers for a fishing expedition – whether for their own or the purposes of another revenue authority..."

185. Simler J's observations in *Kotton* were approved by the Court of Appeal in *Kandore v HMRC* [2021] EWCA Civ 1082 ('*Kandore*') (Underhill LJ with whom Singh and Simler LJJ

agreed), at [73]. While Simler J and the Court of Appeal were considering third-party information notices, and the Court of Appeal was focused, particularly, on whether tribunal hearings dealing with third-party notice should be held *inter partes*, they were setting out the principles dealing with the application of the limitation to information or documents 'reasonably required' for the purposes of 'checking' the tax position of the taxpayer.

186. A document is 'reasonably required' – and, therefore, not sought as part of an impermissible fishing expedition – where the request is 'genuinely directed' to a "**genuine exercise**" of checking the taxpayer's tax position through the enquiry: *Hannifin*, at [154] to [158]. Whilst not binding on us, but highly persuasive, we have also considered a number of decisions of the FtT in relation to whether there is a genuine exercise in checking the tax position, as opposed to a fishing expedition:

187. In *Bemal Patel v HMRC* [2017] UKFTT 0323 ('*Patel*'), Judge Citron discussed Simler J's judgment in *Kotton*, and said this at [43]:

> "Simler J in the High Court came at this from the angle of requiring that there be a genuine exercise of checking the taxpayer's tax position through an investigation or enquiry of any kind – when she used the term 'fishing expedition', she meant a case where HMRC's request was not genuinely directed to that purpose."

188. In *Avonside*, at [68], Judge Nicholl referred to Simler J's judgment in *Derrin*, and said this:

> "68. … I have also taken account of the caselaw that provides that HMRC's request must be "genuinely directed to the purpose for which the notice may be given" (Simler J in *Derrin* at [20]). A request for information or documents "cannot be unreasonable, or entirely without foundation" and while "that does not rule out an element of uncertainty or speculation on HMRC's part" (…), it does not allow mere speculation or allow HMRC to use Schedule 36 "to "fish" for possible issues" (…)."

189. And, in *Hackmey*, Judge Aleksander said this at [45]:

> "45. …a mere desire for background information is insufficient to justify the issue of a notice – that would amount to "fishing".

190. As a matter of judicial comity, it is generally appropriate to follow the decision of another judge of first instance, unless we are convinced that the judgment is wrong: *Police Authority for Huddersfield v Watson* [1947] 1 KB 842, 848; *Willers v Joyce* [2016] UKSC 44, at [9]; and *Bilta (UK) Ltd (in liquidation) and others v Tradition Financial Services Ltd* [2023] EWCA Civ 112, at [106]. We find no reason to depart from the conclusions reached in the FtT decisions referred to above, which we find generally sit well with the decisions of the appellate courts (*Derrin* and *Kotton*). It is clear from the line of authorities that what constitutes 'fishing' must be considered in the light of the "reasonably required test".

191. Turning to the circumstances of this appeal:

192. Prior to issuing the Information Notice, HMRC's position was that they needed to understand other functions of the business, including how products are marketed by the Appellant. HMRC further requested the opportunity to interview Ms McBride, in addition to Mr Stotelmyer and Mr Beeden. This resulted in a request for information surrounding the Appellant's business model, and a request for interviews with key personnel. HMRC further put forward the CUP method as the most appropriate transfer pricing methodology. In this respect, HMRC considered that goods are acquired from 'third parties', and are then sold by the Appellant via 'Associates'. HMRC believed that:

(1) the third-party purchases are comparable on the basis of benefits provided and ingredients used;

(2) third-party purchases meet the quality standards imposed by the Appellant because they receive the Appellant's branding, and because of the statements made on the website regarding quality;

(3) these goods are comparable to the goods purchased internally;

(4) internally purchased goods are valued at a price that is not 'comparable' to the goods purchased from third parties.

193. HMRC concluded that the sales derived from products acquired from third parties represent c. 9% of the total sales, and considered this to be a viable comparable. As such, HMRC's position is that the CUP method should be used to assess the 'arm's length' position of the goods acquired from the Parent Company by the Appellant.

194. HMRC considered that the CUP method would substitute the internal price with the price used in the uncontrolled transaction. Mazars however observed, in their letter of 20 September 2022 (responding to HMRC's of 24 June 2022) that what HMRC had actually suggested was the RPM, rather than the CUP method. In this respect, they stated that:

> "*We would also like to reiterate here that in line with the Transfer Pricing Studies provided to HMRC, the most appropriate transfer pricing method was thoroughly considered, and it was deemed that the RPM was not appropriate in this situation as clearly set out in the reports. In contrast, we do not believe HMRC has provided any such support for their choice of method, and the rationale behind rejecting the other methods, and have chosen a method that is self-serving to HMRC*."

195. The Appellant's position is that the transactions between the third-party suppliers and the Appellant are not reliable comparables. This is because the third-party suppliers are primarily operating as contract manufacturers, producing products according to Parent Company-owned formulations. Also, whilst the products are purchased directly from the third-party suppliers by the Appellant, the overall NPM of the Appellant (inclusive of the products) is adjusted to achieve the targeted NPM per the transfer pricing policy. Otherwise, the unadjusted NPM earned by Appellant for these products would reflect excess profits attributable to the intangible property owned by the Parent Company. The Appellant further explained that the remaining products sourced from the third-party suppliers (with formulations/ designs owned by the third parties) are sufficiently dissimilar from those sold by the Parent Company to the Appellant, to be considered as viable CUPs (i.e., water filtration machines, fish oil with mussel extract).

196. In response to HMRC's CUP analysis surrounding application of the CUP method, the Appellant provided a detailed, and sophisticated, set of financial data supporting an adjustment to the proposed CUP. This disclosure led HMRC to conclude that the Parent Company's consolidated and entity level financial statements were within the Appellant's power or possession, and should therefore be disclosed to check the Appellant's tax position. This gave rise to the Information Notice to substantiate the Appellant's proposed adjustments to the CUP analysis. Mazars were, however, of the view that HMRC were suggesting that both the TPP Report, and the Appellant's responses to HMRC's information requests were either subjective or contentious, and that this was the reason that they had been excluded from the modified Statement of Facts as the vast majority of the amendments to the Statement of Facts were based upon these information sources. Following several exchanges around the Fact Paper to assist in assessing the validity of the TPP, HMRC were of the view that they had obtained all of the evidence that could be provided by the Appellant. We are satisfied that contrary to HMRC's belief that the Appellant had submitted to their CUP analysis, it is clear that the Appellant's engagement with the CUP analysis was with a view to

achieving settlement, and not because the Appellant was of the view that the CUP method was the appropriate method.

197. In support of the Information Notice, Mr Kider asserts that HMRC's repeated requests for the Parent Company's consolidated financial statements is strong evidence that these documents were reasonably required to assist with assessing the Appellant's tax position. He adds that HMRC are not carrying out a fishing expedition because whilst a total of five items had originally been included in the Information Notice, 'Item 2' and 'Item 3' had been withdrawn as the information had been received from the Appellant. He further added that 'Item 5' had also been withdrawn because it was felt that the request was too wide. This, he submits, is evidence of a focused approach by HMRC. In support of HMRC's position that the documents requested in the Information Notice are reasonably required, Mr Kider submits that the Appellant's TPP Report appeared to have had an impact on profits and that, therefore, HMRC's enquiries were "*genuine and legitimate*". In support of his submissions, Mr Kider relied on *Price*, where the FtT said this, at [10]:

> "10. …HMRC is entitled to know the full facts related to a person's tax position so that they can make an informed decision whether and what to assess. It is clearly inappropriate and a waste of everybody's time if HMRC are forced to make assessments without knowledge of the full facts. The statutory scheme is that HMRC are entitled to full disclosure of the relevant facts: this is why they have a right to issue (and seek the issue of) information notices seeking documents and information reasonably required for the purpose of checking a tax return (see Schedule 36 of Finance Act 2008)."

198. Whilst this judgment is not binding on us, given that it is also a decision of the FtT, it was cited with approval, most notably by Judge Sinfield in *Michael*, at [29].

199. The sole focus of this enquiry has been on the transfer pricing method selected, and applied, between the Parent Company and the Appellant. Furthermore, HMRC did not accept an adjustment to its CUP analysis by the Appellant, without evidence. Mr Kider submitted that the Appellant's reliance on its TPP Report amounts to "**self-certification**". In this respect, he relied on the decision in *Syngeta*. Syngenta had appealed HMRC's decision that certain group transactions had an "unallowable purpose", and HMRC subsequently applied for a direction that Syngenta disclose certain documents and information. Syngenta carried out its own exercise to identify relevant documents, but as Judge Popplewell put it at [33]:

> "HMRC did not trust the appellant's self- certification."

200. He went on to find, at [36], that:

> "Whilst self certification is not, per se, objectionable and indeed is commonplace in high value commercial litigation, its efficacy in any particular circumstance depends on the relevance of the material. The greater the relevance, the less satisfactory self certification becomes."

201. Mr Gordon and Mr Morse submit, on the contrary, that far from being reasonably required for the purpose of checking the Appellant's tax position, the challenged Information Notice requests are "*little more than a fishing expedition*" where, despite having received significant amounts of information over the course of a few years, HMRC continue to seek further documents "*in order to see if something might turn up*." This, they submit, is not a permissible way to proceed. We find that there is considerable force in Mr Gordon and Mr Morse's submissions that HMRC's reliance on *Price* and *One Call* is misplaced. This is because the case is authority for the proposition that HMRC are entitled to 'full disclosure of the facts', as measured against the need for them to show underlying 'relevance' and a 'rational connection' to the tax issues in that enquiry. Indeed, this is made plain in *Price* (at [10]), and also in *One Call*, at [64] and [70], as follows:

> "64. I agree that, as identified in those cases, HMRC can only reasonably require information which relates to identified tax issues. That principle recognises that, as stated, HMRC cannot go on fishing expeditions. Furthermore, it is consistent with the principles set out by Simler J in *R (Kotton) v First-tier Tribunal (Tax Chamber)* [2019] EWHC 1327 (Admin) (at [59-62]) and approved by the Court of Appeal in *Kandore* (at [73]).
>
> …
>
> 70. Accordingly, I consider that HMRC must identify a tax issue to which the information sought relates and I must be satisfied that HMRC's investigation is genuine and legitimate and not in bad faith. Beyond that it is not for me to reach any conclusion regarding the tax issues or issues identified by HMRC; and, in particular, it is not necessary for it to be shown that a liability to tax will arise on conclusion of the investigation as a valid investigation may lead to the conclusion there is no liability."

202. It is pertinent to note that HMRC have opened a total of nine enquiries into the Appellant's tax position. All years remain open. Having considered all of the information before us, we are satisfied that throughout the enquiry the Appellant has provided HMRC with a significant number of documents, over and above the TPP Report. This much was acknowledged by HMRC. Indeed, in 17 September 2021, Officer Taylor issued a letter to the Appellant in the following terms:

> "***Next Steps***
>
> ...
>
> *I am grateful for your client's efforts in providing information and documents throughout this enquiry and I am currently in the process of reviewing the emails provided in May and July 2021. I do not anticipate issuing any further large requests for information and documents...*"

[Emphasis added]

203. This letter was issued by Officer Taylor after Mazars had taken issue with the lack of progress in the enquiry. The Appellant's position is that HMRC has side-stepped all of the information that was provided during the course of the enquiry, and that there was a lack of progress being made.

204. Over the course of the enquiry, the Appellant sent a considerable number of emails (extending to tens of thousands) that had been requested by HMRC. Some, but not all, of these were selected for inclusion in the Hearing Bundle. In May and July 2021, HMRC were provided with over 29,000 emails, which were extracted from the sent email boxes of eight of the Appellant's employees; each covering three months of sent emails. The selection criteria were defined by HMRC, including nominating the custodians and setting the search terms. HMRC have not, however, provided the Appellant with any report of their findings, or notice of any conclusions that have been drawn from the review of the emails.

205. As can be seen from the "Background Facts", the parties have also engaged in the exchange of correspondence, telephone conferences, two face-to-face meetings, and a site visit. There have been at least ten substantive meetings between HMRC and Mazars. From the information before us, we are satisfied that HMRC have been provided with a considerable amount of information over the time that this enquiry has remained open. The correspondence received by HMRC from Mazars also included a "supply chain matrix", setting out the respective responsibilities of the Parent Company and the Appellant, in connection with "third-party products", sold into the European market. This was provided following exchange of the initial draft Fact Paper, and responses.

206. In respect of the information and documents already provided to HMRC by the Appellant, the 'Statement of Facts' submitted by Mazars on 11 September 2020 included, *inter alia*, the following description/explanation, in respect of the Appellant:

> *"**a. Business model***
>
> *...*
>
> *In general, the business model of LPE contains a number of aspects along with the compensation system that rewards business builders (i.e. the third party Associates) in keeping with the business model. This Business model has many components which were all designed by the founders and owners of Lifeplus...*
>
> *...*
>
> ***III. Conclusion***
>
> *As shown above, LPE does not bear the economically significant risks in relation to the business, nor any of the costs in relation to the ERP and MRP* [Material Requirements Planning] *systems, even though it benefits from both. All control and costs are borne by Eurark, along with those relating to any legal or product liability claims (although these risks have never materialised), In relation to returns and refunds, the Associates bear and manage this risk through LPE reclaiming commissions paid in relation to products returned by customers, as this forces the Associates to correctly build, manage and police their downline*."

207. In their letter dated 20 September 2022, Mazars wrote to HMRC in the following terms:

> "*..., our client's business and business model is an extremely simple one...*
>
> *For the avoidance of doubt, we reiterate the explanation provided by Mr Vincent at the start of the February 2019 meeting detailing the business model: (1) LPE receives orders from customers, (2) orders are shipped to the consumers and (3) in return our client pays commission to the Associates. The vast majority of the products being sold by our client are developed and manufactured by Eurark, with significant amounts of time and costs being incurred in the US relating to the development of unique product formulations. Eurark is also responsible for developing and maintaining the key intangibles within the Group; being the compensation and referral model; the ERP and MRP systems; and the product formulations themselves. As has been mentioned many times, overseas based third party Associates are responsible for generating sales orders from customers and referring them, not the call centre in the UK.*
>
> *We would also like to emphasise again that the UK marketing department is a support function only and it is not responsible for selling products or attracting customers*."

208. Mazars further explained that the Appellant's Marketing Team has no autonomy

209. In relation to identification of possible gaps in the market, or a new product, Mazars added that the Appellant carried this out in an extremely limited capacity, with only one instance where the Appellant identified a potential new third-party product; that being "Naturalli", which was an off-the-shelf product already on sale elsewhere and was simply repackaged for sale by the Appellant. The letter further added that this was not a successful product for the Appellant, and was outside of its normal product line. Apart from this one instance, there had been no other occasions where the Appellant had identified other potential new products for the European market.

210. In respect of the "increase in turnover" for the relevant period, Mazars' letter of 8 January 2018 had explained that:

> "*Much of the growth in this period may be explained by increased consumer demand and Eurark's ability to position the Company to meet this demand.*

...

Under the Eurark- designed referral marketing model, the associates were able to successfully establish and grow their direct sales networks, resulting in increased sales. The strategies, tools, and rewards provided through Eurark's business model encouraged associates to join and become successful sales people."

211. Mazars attached the following supporting information to the letter dated 20 September 2022:

(1) Transfer Pricing Reports for FY18 and FY19;

(2) 2017, 2018, and 2019 employee details (covering Key Accounts and Marketing team information);

(3) 2019 key accounts listing; and

(4) 2018 and 2019 analysis of third-party suppliers.

212. The Parent Company engaged BKD to prepare a transfer pricing analysis of the sale of the Parent Company's products to the Appellant. The objective was to establish the transfer pricing 'arm's length' price, in accordance with US rules and the OECD Guidelines, so as to be suitable for use in both countries. We have had the benefit of seeing BKD's "*Transfer Pricing Planning Analysis for the Tax Year Ending December 31, 2014*". The report states, *inter alia*, that:

"The following intercompany transaction is the focus of this transfer pricing planning analysis:

- The sale of finished goods (*i.e.*, nutritional supplements and healthy body products) by Eurark to Lifeplus UK for resale to third-party customers.

…

BKD has attempted to clearly define the subject intercompany transaction and to estimate a range of arm's-length prices for the subject intercompany transaction in accordance with the principles of Internal Revenue Code ("IRC") Section 482 ("Section 482 or §482"), the U.S. Department of the Treasury ("Treasury") Regulations promulgated thereunder ("§482 Regulations"), and the Organisation for Economic Co-operation and Development's ("OECD") *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* ("OECD Guidelines"), as the U.K. adheres to the OECD Guidelines. Described *infra*, Section 482 (U.S.), Schedule 28AA (U.K.), and the OECD Guidelines set forth rules and guidelines to be used in evaluating whether compensation paid with respect to related party transactions clearly reflects the income attributable to the transactions. The standard to be applied in every case is that of a taxpayer dealing at arm's-length with an uncontrolled taxpayer.

…

Based on the results of BKD's functional and risk analysis and a review of the various transfer pricing methods available, BKD employed a profit-based analysis consistent with the Comparable Profits Method ("CPM") set forth in §482 and the Transactional Net Margin Method ("TNMM") set forth in the OECD Guidelines to determine an arm's-length range of returns for the intercompany sale of finished goods by Eurark to Lifeplus UK for resale to third-party customers. Consistent with the principles of the CPM/TNMM, BKD selected Lifeplus UK as the party to be analyzed (*i.e.*, the tested party) and the Operating Margin ("OM")/Net Profit Margin ("NPM") as the appropriate Profit Level Indicator/Net Profit Indicator ("PLI/NPI") to derive an arm's-length range of prices in order to determine the appropriate remuneration for the subject intercompany transaction."

213. BKD applied the CPM/TNMM to determine the arm's length consideration, with respect to the intercompany sale of finished goods by the Parent Company and the Appellant for resale to third-party customers. The TNMM operates in a similar manner to the CPM and RPM, and BKD highlighted that the OECD further elaborates that one of its strengths is that:

> "Net profit indicators also may be more tolerant to some functional differences between the controlled and uncontrolled transactions than gross profit margins. Differences in the functions performed between enterprises are often reflected in variations in operating expenses. Consequently, this may lead to a wide range of gross profit margins but still broadly similar levels of net operating profit indicators.[7]

214. BKD was able to locate financial data for comparable public and private UK companies, which perform activities that are functionally comparable to those performed by the Appellant. It is clear, from our consideration of the TPP Report, that BKD applied an OECD-compliant approach, and had regard to OECD considerations (as well as the typical process to be followed in choosing a transfer pricing method. Whilst HMRC seek to verify the Appellant's TPP by issuing the Information Notice, it is not suggested by HMRC that BKD performed their work otherwise than in accordance with the OECD Guidelines. Moreover, para. 16 of the OECD Guidelines provides that:

> "…Tax administrations are encouraged to take into account the taxpayer's commercial judgement about the application of the arm's length principle in their examination practices and to undertake their analyses of transfer pricing from that perspective."

215. BKD prepared their first transfer pricing analysis for the year ended 31 December 2014. BKD have re-run their transfer pricing analysis annually thereafter. BKD's overall conclusions were that:

(1) using the terminology found in the transfer pricing reports, the Appellant was a 'routine distributor' and the Parent Company was the entrepreneur (reflecting the relationship between the entities);

(2) the most appropriate transfer pricing method to apply was the 'TNMM' method;

(3) the other OECD authorised methods ('CUP', 'Resale Minus', 'Cost Plus' and the 'Profit Split Method') were analysed and determined to be unavailable, or unsuitable, for reasons in line with the OECD principles and/or the OECD Guidelines; and

(4) a range of returns for the Appellant as being 'arm's length' was identified, based on comparable transactions between unconnected parties in comparable circumstances.

216. Materially, para. 3.22 of the OECD Guidelines provides that:

> "Where the most appropriate transfer pricing method in the circumstances of the case, determined following the guidance at paragraphs 2.1 to 2.11, is a one-sided method, financial information on the tested party is needed in addition to the information referred to in paragraph 3.20 – irrespective of whether the tested party is a domestic or foreign entity…On the other hand, once a particular one-sided method is chosen as the most appropriate method and the tested party is the domestic taxpayer, the tax administration generally has no reason to further ask for financial data of the foreign associated enterprise."

217. We have further derived considerable benefit from hearing Mr Sayers giving evidence before us. He was cross-examined, at some length, by Mr Kider. Whilst issue was taken by Mr Kider with the contents of Mr Sayers' witness statement, no issue was taken in respect of his experience or credibility as a witness. Moreover, it was not disputed that Mr Sayers had knowledge of transfer pricing issues. During his evidence, Mr Sayers described how HMRC had dismissed the Appellant's representations when a Statement of Facts was being agreed.

[7] OECD Guidelines 2010, para. 2.62

He added that the purpose of the March 2023 meeting had been to "draw a line" in respect of the fact-gathering.

218. We also heard from Mr Stotelmyer and Mr Vincent. Their credibility as witnesses was, similarly, not called into question on behalf of HMRC by Mr Kider.

219. Mr Vincent is responsible for the Appellant's European customer relations. In his oral evidence, Mr Vincent stated that any decisions relating to the Appellant came down to one to two people. In respect of the meetings that took place within the company, decisions were taken by telephone and often amounted to discussions about adherence to short-term strategic plans. He added that the managers in the Parent Company determine the answers to any disputes that arise, and that the 'Marketing Team' did not have "free rein", and were not vital to the increase in the Appellant's revenue. Mr Vincent also added that the increase in the Appellant's turnover was due to the "Metabolic Rest/Diet Programme".

220. Mr Stotelmyer has audited accounts for various companies, and is an experienced individual. Mr Stotelmyer had identified that, contrary to the requirements of tax laws in the USA and the UK, there was no transfer pricing analysis in place by which the price of the products sold by the Parent Company to the Appellant to fulfil orders from customers was tested against the arm's length principle. He further noted that almost all of the profit was in the subsidiary companies, and that the Parent Company was loss-making. Mr Stotelmyer adjusted the prices of the products sold by the Parent Company to the Appellant to bring them in line with the arm's length outcome. Materially, Mr Stotelmyer has knowledge of the Appellant's business. He explained that as the TNMM method had been used by the Appellant, there was no need for the other entity's financial statements. This accords with the OECD Guidelines, which we have considered earlier, and HMRC have not sought to gainsay this.

221. Upon receipt of the Information Notice, Mazars asked Mr Stotelmyer to obtain the documents. The Parent Company declined because of:

(1) the annual transfer pricing studies providing all of the necessary analysis and information to verify the application of the arm's length principle; and materially

(2) the sheer volume of information that had been provided to HMRC over the course of the enquiry, then already into its eighth year.

222. At every stage of the transfer pricing process, varying degrees of documentation are necessary, such as information on contemporaneous transactions. One pressing concern regarding transfer pricing documentation is the risk of overburdening the taxpayer with disproportionately high costs in obtaining relevant documentation, or in an exhaustive search for comparables that may not exist. Ideally, a taxpayer should not be expected to provide more documentation than is objectively required for a reasonable determination by the tax authorities of whether or not the taxpayer has complied with the arm's length principle.

223. We had the benefit of hearing Officer Taylor giving evidence. In relation to HMRC's approach to selecting the appropriate transfer pricing method, we considered Officer Taylor's evidence that all of the officers who were involved in this enquiry (including Officer Taylor) had to take advice from an "International Tax Specialist Team". The enquiry was opened by Officer O'Connor. Officer O'Connor was said by Officer Taylor to be a compliance case worker, with no specialist training. Officer Mitchell took over the case from Officer O'Connor (and he was of the same grade as Officer Taylor). During the enquiry, Officer Mitchell took advice from HMRC's International Tax Specialist Team. Officer Taylor then took over the case from Officer Mitchell. Officer Taylor was the enquiry lead when the Information Notice was issued to the Appellant.

224. Whilst we are grateful to Officer Taylor for the candid and helpful evidence that he gave, we observe that he accepted a number of potentially adverse matters to HMRC's position during his evidence. Materially, the matters that he accepted during his evidence included that:

(1) he is not an international tax specialist and has no legal background;

(2) his question in the letter dated 8 February 2019 about tax on US profits was not his own words, and was not within what he said was the responsibility of his enquiry, but had come from the specialists;

(3) he did not say that he had followed the OECD Guidelines in his witness statement;

(4) it was the specialists who were meant to ensure compliance with 'governance' requirements;

(5) he was unable to test if Guidance had been adhered to by HMRC;

(6) he did not know if the 'tested party' in the TNMM method is the Appellant;

(7) there was no statement of agreed facts; and

(8) there had been no 'action plan' until 17 September 2021.

225. As mentioned earlier, the role of the specialist team within HMRC is to ensure that transfer pricing governance is adhered to, throughout the enquiry. Officer Taylor admitted in evidence that this is an important role. In this respect, reference was made to the operational guidance issued by HMRC "*INTM481040 – Transfer pricing: operational guidance: governance: the selection stage*", which provides that:

> "As soon as a case team identifies a transfer pricing issue that may necessitate an enquiry, it should contact the Transfer Pricing Unit…A Transfer Pricing Specialist will then be assigned to the case… A transfer pricing enquiry must not be opened (or any approach made to a customer that might be construed as the opening of a transfer pricing enquiry) without the approval of the Transfer Pricing Panel or Board"

226. The guidance "*INTM481080 – Transfer pricing: operational guidance: governance: case teams and the wider transfer pricing community*" then specifies that the degree of involvement of teams varies. The guidance, "*INTM485010 – Transfer pricing operational guidance: Evidence gathering: overview*" recognises that practical issues may be encountered in calculating the arm's length price, and highlights that the exercise is "*not straightforward*".

227. In terms of the process that then follows, the guidance "*INTM483010 – Transfer pricing: operational guidance: working a transfer pricing case: opening the case*" says this:

> "**Conducting an effective case**
>
> A clear strategy from the outset is essential. Case teams should bear in mind at all times that the purpose of a transfer pricing enquiry is to test controlled transactions against the arm's length principle."

228. The guidance "*INTM483020 – Transfer pricing: operational guidance: working a transfer pricing case*" goes on to state that:

> "**Make a plan - and agree it with the business**
>
> …Creating the plan should be a collaborative process involving where possible the business and its advisers.
>
> **Gather information**

Frequently, the most effective ways of understanding the business and placing its approach to transfer pricing in context can be to have a meeting with the business's officers.

Assess the evidence

Case teams should examine the evidence."

229. It is clear, therefore, that it is not for HMRC to unilaterally impose a selection of the transfer pricing method without any input from the tested-party. HMRC have put forward suggested adjustments to the Appellant's taxable profits by applying the CUP method. HMRC had, up until that point, accepted that they did not require the document requested in the Information Notice. It is also clear from the information before us that the transfer pricing method employed by the Appellant does not rely upon the Parent Company accounts. We are satisfied that the Parent Company's financial statements will not provide further detail on the functional analysis of the entities, nor will they assist HMRC in understanding the functional profile of the businesses.

230. We find that there is considerable force in the Appellant's submission that HMRC are focused on whether the CUP method should have been selected, instead of the TNMM method, as the most appropriate transfer pricing methodology for the sale of products by the Parent Company to the Appellant. This much is clear from the enquiry correspondence sent by HMRC. We are fortified in our view by HMRC's letter (by way of example) dated 24 March 2023:

"***Next Steps***

As discussed at the meeting, HMRC will review their CUP analysis, to include relevant adjustments where appropriate.

Mazars / Lifeplus have offered to refer back to Forvis to review the TNMM analysis / comparables used, which HMRC have also agreed to consider in the hope of reaching an agreed settlement.

It has been agreed that when the appropriate work has been completed by all parties, a call will be arranged to discuss any updates or adjustments that have been made, which is currently expected to be late April or Early May 2023 based on the time Forvis expect the work to take."

231. This is also evident from HMRC's letter to Mazars, dated 24 June 2022:

"***Transfer Pricing Methodology***

...

I believe the adoption of the internal CUP provides a more reliable comparable than applying a sales based TNMM methodology. I do not believe that TNMM sufficiently rewards the value of the marketing function, which appears to be a key value driver within the business. The OECD guidelines also provides a preference for the application of the CUP Methodology at Para 2.3, "Moreover, where, taking account of the criteria described in paragraph 2.2, the comparable uncontrolled price method (CUP) and another transfer pricing method can be applied in an equally reliable manner, the CUP method is to be preferred."

232. This is also clear from HMRC's pleaded case within the Statement of Case, at paras. 11, 15 and 59:

"*11. The focus of the Respondents enquiries shifted to the Transfer Pricing Policy ("TPP") used to value goods and/or services transferred between the Parent Company in the USA and the Appellant. The new TPP was adopted in 2014, following which the Appellant's taxable profit margins shrunk significantly.*

...

15. At the meeting held between the Respondents and Appellant, on 14 March 2023, it was agreed the Appellant would provide their proposed adjustments to the Respondents CUP.

...

Reasonably Required:

59. The Respondents reject the Appellants submission on this point and submit that the documents are reasonably required. The Respondents assert that without these documents they are unable to make an informed decision about the key facts that have had a significant impact on the Appellant's tax position, as well as verify the Appellant's £89,000,000 of proposed adjustment to the Respondents' CUP. The Respondents will therefore be forced to make an assessment without full knowledge of the facts. More importantly, the Statutory scheme entitles the Respondents to full disclosure of the facts, to check the Appellant's tax position."

233. We further find that there is considerable force in Mr Gordon and Mr Morse's submissions that HMRC have also been focused on the narrow point of the Appellant having made trading losses in the years up to, and including, 2013 (as shown by the Statement of Case):

> "*12. Throughout the enquiry, the Respondents have repeatedly asked for copies of the Parent Company's consolidated accounts to verify that it was loss making pre-2013. However, the Appellant repeatedly claimed that they could not provide these documents*."

234. We find that the documents being requested by HMRC in the Information Notice were not utilised when HMRC were proposing the appropriate transfer pricing methodology, and the rejection of the Appellant's TPP Report. It is noteworthy that HMRC sought to obtain the documents covered by the Information Notice by approaching the IRS, and the IRS refused to accede to HMRC's request, as follows:

> "*RESPONSE: We maintain that the financial statements of Eurark LLC comprise the activities and balances of foreign subsidiaries not relevant to your investigation.*
>
> *The role and contributions of Lifeplus Europe Limited to the consolidated group are explained and addressed in the transfer pricing study.*"

235. It is further clear that the specialist team within HMRC would have a more significant role to play, which was not amplified by any oral evidence by any member of that team during the hearing before us. One or two individuals from HMRC's specialist team were said to be in the hearing room throughout these proceedings. HMRC did not, however, call these witnesses. Mr Gordon and Mr Morse invite us to draw adverse inferences from HMRC's failure to call any evidence from the international tax specialists involved during the enquiry, or who have the ability to speak to HMRC's decision, in line with the ordinary principles for so doing. In support of this argument, reliance is placed on the Supreme Court decision in *Royal Mail Group Ltd v Efobi* [2021] UKSC 33 ('*Efobi*'). Lord Leggatt (with whom Lord Hodge, Lord Briggs, Lady Arden and Lord Hamblen agreed) said this, at [41]:

> "41. The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority... Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-

related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

236. In *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324; LI Rep Med 223 ('*Wisniewski*'), Brooke LJ set out a number of principles on the issue of when it is appropriate (in the civil context) to draw adverse inferences from a party's absence or silence. These principles are not to be confused with the situation where a party who bears the legal burden of proving something adduces sufficient evidence, so as to place an evidential burden on the other party. The invocation of the principles depends upon there being a *prima facie* case; but what this means will depend on the nature of the case that the party in question has to meet. Morgan J summarised the principles from Brooke LJ's judgment in *Wisniewski* in *British Airways PLC v Airways Pension Scheme Trustee Ltd* [2017] EWHC 1191 (Ch) ('*British Airways*'), at [141]. The issue is whether the party calls a 'relevant' witness. The authorities canvassed in *Wisniewski* make this abundantly clear.

237. It is not for the Appellant to summon the relevant witnesses. It is a basic principle that a party cannot call a witness simply to impugn their evidence. An illustration of this principle was provided in *Kazahstan Kagazy PLC & Ors v Zhunus & Ors* [2017] EWHC 3374 (Comm) (per Picken J), at [57]:

> "57. … it is not open to a party to call a witness to give evidence which that party will say is not only wrong but deliberately so. In this respect, the following passage in the judgment of Mustill LJ (as he then was) in *The 'Filiatra Legacy'* [1991] 2 Lloyd's Rep. 337 at page 361 explains the position:
>
> > "In one category are the situations where a party says that his own witness is giving mistaken albeit honest evidence and where he seeks to establish this either by calling direct evidence to contradict what his witness has said or by arguing that, when the evidence is regarded as a whole, a mistake is to be inferred. We believe that this is a common occurrence in civil litigation and unobjectionable in principle, provided that care is taken to avoid surprise and hence injustice. We adopt the reasoning of the British Columbia Court of Appeal in *Cariboo v Carson Truck Lines* 32 D.L.R. (2d) 36 (1961), and in the English cases there cited.
> >
> > From this must be distinguished the situations where a party wishes to assert that the evidence given in chief by a witness whom he has called is not only wrong, but is wrong on purpose. The most obvious instance is one where the witness has turned coat and has deliberately failed to come up to proof. Here the position seems clear. The party cannot cross-examine his own witness by reference to his proof of evidence or other previous statement unless and until the court has ruled that he is hostile. Nor may he call evidence to establish the general bad character of his witness. (See *Ewer v Ambrose* (1825) 3 B. & C. 246; The Criminal Procedure Act, 1865, s.3, applied by the Civil Evidence Act, 1968) ..."

238. We are satisfied that the arguments on behalf of the Appellant are cogent and draw adverse inferences from the failure to call any further evidence by HMRC. HMRC have the burden of proving that that documents are reasonably required. Whilst Mr Kider urged us to focus on the issue of whether the documents were reasonably required, without looking too closely at the underlying enquiry, the nature of the underlying enquiry was 'Transfer Pricing'. The approach adopted by HMRC during the enquiry, together with the relevant transfer pricing methodologies and processes, is the lens through which any rational connection between the tax dispute and the documents requested in the Information Notice is to be viewed. Having considered the information before us, cumulatively, we hold that the documents requested in the Information Notice are not 'reasonably required'.

239. For completeness, we have considered the alternative question of whether the documents were within the Appellant's possession or power.

Whether the documents were within the Appellant's 'possession' or 'power'

240. The requirement that items must be in the "**possession**" or "**power**" of the recipient of the information notice strictly applies only to documents, and not to information. HMRC must raise a *prima facie* case that the documents are in the Appellant's 'possession', or 'power'. It is then for the Appellant to show that they are not.

241. The statutory wording of para. 18 of Schedule 18 is in the affirmative:

> "An information notice only requires a person to produce a document if it is in the person's possession or power."

242. In respect of 'possession', it is common ground that the Appellant does not, in fact, possess either, or both, of the Consolidated Group Accounts or the Parent Company Accounts. In respect of 'power', the term means both legal and *de facto* power to obtain documents: *Mattu*, at [101]. In *Mattu,* the matter before the UT was HMRC's application for imposing a tax-related penalty under para. 50 of Schedule 36, for an alleged failure to comply with an information notice. In relation to burden of proof, the UT held, at [100], that:

> "HMRC accepted that, whilst they strictly have the burden of proof, in an issue of this type it is sufficient for HMRC to raise a *prima facie* case that the documents and information are in the Respondent's possession or knowledge and then it is for the Respondent to show that they are not. As the FTT said in *HMRC v Parissis* [2011] SFTD 757 ("*Parissis*") at [19] in relation to the predecessor legislation to Sch 36, which is in identical terms on this point:
>
> > 'It seems to us that it is HMRC's application for a penalty and it is for them to satisfy us that the documents are in the respondents' possession or power. We bear in mind it is hard to prove a negative. But, we think, although HMRC must raise a *prima facie* case that the documents are in the respondents' possession or power then it is for the respondents to show that they are not."

243. HMRC's case is predicated upon the assertion that the Appellant has the 'power' to obtain the documents. A document which is not in the "**physical possession**" of a party is not within his or her control unless s/he has a currently "**enforceable legal right**" to its possession (or to take copies of it). The starting point for the relevant principles in respect of this issue is the judgment of Lord Diplock in *Lonrho*.

244. In *Lonrho*, the issue was whether documents in the possession of a company's foreign subsidiary were within the 'power' of the parent company, for the purposes of Order 24, Rule 2(1), of the Rules of the Supreme Court. Rule 2(1) of the Rules of the Supreme Court provided that each party to an action must:

> "…make and serve on [the] other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question between them in the action."

245. Disclosure of documents was sought for the purposes of an arbitration in which Lonrho alleged that Shell and BP had conspired with others to cause loss to Lonrho by supplying oil to Zimbabwe (then Southern Rhodesia) in breach of the Southern Rhodesian (Petroleum) Order 1965. The documents in question were in the possession of companies in which Shell and BP each had a 50% interest through intermediate subsidiaries. The articles of association of all the subsidiaries vested the management of the company in its board of directors. Those subsidiaries that were resident in South Africa or Zimbabwe would have required, under local law, to obtain a ministerial licence before being lawfully permitted to disclose the documents to Shell or BP.

246. Lord Diplock dealt with an argument that the consent of subsidiaries could be obtained, at pp 635-6:

> "…in the context of the phrase 'possession, custody or power' the expression 'power' must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the person entitled to it to obtain immediate inspection would not prevent the document from being within his power; but in the absence of a presently enforceable right there is, in my view, nothing in Order 24 to compel a party to a cause or matter to take steps that will enable him to acquire one in the future...
>
> For the reasons already indicated Shell Mocambique's documents are not in my opinion within the 'power' of either of Shell or BP within the meaning of RSC Ord 24. They could only be brought within their power either (1) by their taking steps to alter the articles of association of Consolidated and procuring Consolidated through its own board of directors to take steps to alter the articles of association of Shell Mocambique, which Order 24 does not require them to do; or (2) by obtaining the voluntary consent of the board of Shell Mocambique to let them take copies of the documents. It may well be that such consent could be obtained; but Shell and BP are not required by Order 24 to seek it, any more than a natural person is obliged to ask a close relative or anyone else who is a stranger to the suit to provide him with copies of documents in the ownership and possession of that other person, however likely he might be to comply voluntarily with the request if it were made."

247. A large number of recent cases have considered arguments where a party has sought disclosure of documents which are in the hands of "third parties", and which are alleged to be disclosable by the opposing party because they are under its "**control**". The relevant principles were summarised by Mr MacDonald Eggers, at [21] of the decision in *Airfinance*:

> "Insofar as a document is in the physical possession of a third party, meaning a person who is not a party to the action, that document is in the control of a party to the action not only where the party has a legally enforceable right to obtain access to such a document, but also where there is a standing or continuing practical arrangement between the party and the third party whereby the third party allows the party access to the document, even if the party has no legally enforceable right of such access… However, in order to establish that there is such a standing or continuing arrangement or even a specific, time-limited arrangement, whereby a third party allows a party to the action access to the document which the third party has in its possession, it is not generally sufficient to demonstrate that there is a close legal or commercial relationship between the party and third party, such as parent and subsidiary companies or employer and employee relationships; something more is required; there must be more specific and compelling evidence of such an arrangement…"

248. One issue in *Airfinance* was whether, in circumstances where a party did not have control over third-party documents, the court could order the party nevertheless to make a request to the third-party for the production of such documents by way of an order that it should exercise "best endeavours" to obtain the documents. Mr MacDonald Eggers decided, after a full review of the authorities, that the court could not do so, at [47] to [59], concluding that the court had no jurisdiction to make an order requiring a party to exercise best endeavours to obtain, or request a third-party to produce, documents for disclosure which are not already in the party's control. Where the documents were within the litigating party's control, there is no difficulty in making an order that the party should ask for the documents. *Airfinance* establishes that this cannot be translated into an order where there is no such control.

249. In respect of the submission that the Appellant has the right to the documents through its leadership, the part of Rule 31.8 of the CPR relevant to HMRC's case is r. 31.8(b):

> "(b) he has or has had a right to possession of it."

250. The Appellant accepts that Rule 31.8 of the CPR deploys the concept of 'control', with the Schedule 36 regime using 'power'. However, the High Court has held that 'control' and 'power' mean the same thing in the context of disclosure: *Schlumberger*, at [16]; *Berkeley*, at [28]. Furthermore, it was common ground in *Syngenta*, and indeed the Tribunal decided, that Rule 31.8 and *Schlumberger* were all relevant to the question of whether the taxpayer had 'possession' or 'control' over documents on an application for disclosure under Rule 5(3)(d) of the Procedure Rules: see *Syngenta*, at [53] to [59] and [89].

251. Establishing 'control' or 'power' on any basis is a matter of evidence in every case: *Berkeley*, at [50] to [51]. This requires the court (or tribunal) to have regard to the true nature of the relationship between the person and the third-party: *North Shore*, at [40]. The burden is on the party seeking disclosure to prove the existence of practical control over the documents sought, and not for the other party to disprove it. The burden of proof is, therefore, on HMRC.

252. The starting point is that a person will not normally have 'control' (as synonymous with 'power') over documents held by a third-party unless that person has a presently enforceable legal right to access those documents, without the need for consent by the third-party, or any other person: *Lonrho*, at p 635 (per Lord Diplock). The leading practitioners' textbook on disclosure "Disclosure, 6th edition, Matthews and Malek KC" ("**Disclosure**") explains, at para. 5-92 and in the cases footnoted, that:

> "*[i]t would* appear, however, that the "power" concerned had to be one vested in the person concerned in his personal capacity, and not for example as a company director or other fiduciary."

253. These principles apply, equally, to corporate groups and to parent / subsidiary company relationships. Parent companies do not automatically have 'control' over documents held by a subsidiary, by virtue of the corporate relationship: *Berkeley*, at [46]. *A fortiori*, the same applies to a subsidiary and its parent. This is also the view of the authors of 'Disclosure', at para. 5-96. The Appellant accepts that 'power' or 'control' may be established where there is a standing, or continuing, practical arrangement between the person and the third-party, whereby the third-party allows access to the document irrespective of any legally enforceable right to do so: see, for example, *Schlumberger*, at [21] and *Pipia*, at [11], [14] to [21]. This is commonly referred to as a situation of "**general consent**": *Schlumberger*, at [21]. In seeking to prove that such an arrangement exists, it is not sufficient simply to demonstrate there is a close legal or commercial relationship between the parties, such as parent / subsidiary or (as in *Pipia*) employer / employee. Instead, there must be specific and compelling evidence that such an arrangement exists: *Ardila*, at [10], [13] to [14]; *Airfinance*, at [21].

254. The case of *Schlumberger* has often been relied on as authority for the proposition that common corporate structure is less important than general consent having been given to a party to search for documents properly disclosable in litigation. In *Schlumberger*, the claimant was a holding company. The company had carried out searches of files at facilities in Texas which housed Schlumberger's corporate patent files, and also the personal files of four individuals who were employees of non-UK Schlumberger group companies. Floyd J said that it was clear that the search of these facilities and files had been done without reference to the specific group company. At [21], Floyd J said this:

> "21. I accept that the mere fact that a party to a litigation may be able to obtain documents by seeking the consent of a third party will not on its own be sufficient to make that third party's documents disclosable by the party to the litigation. They are not within his present or past control precisely because it is conceivable that the third party may refuse to give consent. But what happens where the evidence reveals that the party has already enjoyed, and continues to enjoy, the co-operation and consent of the third party to inspect his documents and take

> copies and has already produced a list of documents based on the consent that has been given and where there is no reason to suppose that that position may change? Because that is the factual situation with which I am confronted here. In my judgment, the evidence in this case sufficiently establishes that relevant documents are and have been within the control of the claimant. I should emphasise that my decision does not turn in any way on the existence of a common corporate structure. My decision depends on the fact that it appears from the evidence that a general consent has in fact been given to the claimant to search for documents properly disclosable in this litigation, subject only to the caveats contained in paragraph 4 of Mr. Griffin's witness statement concerning corporate acquisition documents and unreasonably onerous requests."

255. In *Ardila*, Males J said that caution was needed, and the issue was not to be elided with practical control in the sense of there being an expectation of complying with a request. At [10], Males J said this:

> "10. It is apparent that what is required is an existing arrangement or understanding, the effect of which is that the party to the litigation from whom disclosure is sought has in practice free access to the documents of the third party, in that case the trustees. It appears that that does not need to be an arrangement which is legally binding. If it did, then there would be a legal right to possession of the documents, but it must nevertheless be an existing arrangement which, in practice, has the effect of conferring such access
>
> …
>
> 13. The position can, therefore, be summarised for present purposes in this way. First, it remains the position that a parent company does not merely by virtue of being a 100 parent have control over the documents of its subsidiaries. Second, an expectation that the subsidiary will in practice comply with requests made by the parent is not enough to amount to control. Third, in such circumstances, as Lord Diplock said in *Lonrho*, there is no obligation even to make the request, although it may, in some circumstances, be legitimate to draw inferences if the party to the litigation declines to make sensible requests. But that is a separate point.
>
> 14. Fourth, however, a party may have sufficient practical control in the sense which the *Schlumberger* and *North Shore* cases [*North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11] indicate, if there is evidence of the parent already having had unfettered access to the subsidiary's documents or if there is material from which the court can conclude that there is some understanding or arrangement by which the parent has the right to achieve such access."

256. Males J further said, at [21], that evidence that a subsidiary would, in practice, comply with a request from a parent for documents, and evidence of compliance in the past in response to specific requests, did not amount to evidence of 'control':

> "21. …It is merely the evidence of the normal relationship that one would expect between a parent and subsidiary without the particular features of the *Schlumberger* or *North Shore* cases. Such co-operation as there may have been in the past as to compliance with specific requests, for example production of certain of the licences in issue, does not, in my judgment, amount to evidence that ENRC has the necessary control in the sense which the cases show is necessary over Bamin's documents. It does not indicate that ENRC would be entitled to send its solicitors into Bamin's premises and to insist on searching Bamin's computers, applying the kind of word search terms and insisting on production of the computers of various individuals which would be necessary in order to enable that to be done. There is no evidence as far as I can see that that has happened so far, as distinct from specific documents being provided in response to a specific request."

257. Compliance with any previous request is not, of itself, sufficient to establish the existence of a general consent, nor is any expectation (valid or otherwise) that a subsidiary will comply with a parent's request: *Berkeley*, at [45]. It follows that the same is also true of a subsidiary's request to its parent. Indeed, the requirements of disclosure in litigation do not

require a parent to seek voluntary consent from its subsidiary: *Berkeley*, at [27] to [30]. Once again, the same is true of a subsidiary and its parent. The court does not have any jurisdiction to make any such order, in any event: *Airfinance*, at [54]. There is no scope to make any adverse inference, including within corporate group or parent / subsidiary relationships: *Al-Wazzan*, at [31].

258. HMRC's position is that the Appellant's attempted requests, quoted below, fall significantly short of the requirement to make a "**serious attempt**" to obtain the documents from the Parent Company. In this respect, reference is made to the Appellant's letter to HMRC of 5 July 2024, as follows:

> "*we have undertaken discussions, as recently as 25 June 2024 with representatives of our client's USA parent whom we understand do have power of the documents that are subject to the request.*
>
> *...*
>
> *a) Eurark is a privately held Company, and under the laws of the US, its accounts are not required to be publicly available. Indeed, the documents subject to the request are considered extremely confidential, and no one outside of the owners of Eurark, except a select few Eurark executives on a limited basis, are permitted access to these.*
>
> *...*
>
> *d) they have no intention of providing those documents to our client*."

259. Reference is also made to Mr Stotelmyer's witness statement, dated 19 June 2025:

> "*42. ...I discussed the matter with the Eurark Manager/CEO, and we agreed that the combined and consolidated financial statements of the group controlled by Eurark should not be shared.*
>
> *...*
>
> *44. The decision was made by our Manager/CEO and me not to provide the financials of Eurark or the combined and consolidated financials of the group controlled by Eurark...*"

260. In *Parissis*, which was relied on by Mr Kider, HMRC had requested various documents (including trust accounts) from the taxpayers in an information notice. The FtT held that since the taxpayers were the settlors and beneficiaries of the trust, the trustee was a professional trustee, and there had been co-operation and direct transactions (loans) between the trustee and the taxpayers, it was likely that the trustee would choose to provide the documents sought. The FtT, therefore, held that HMRC had raised a *prima facie* case that the documents were in the 'power' of the taxpayers.

261. At [78] to [82] the FtT said this:

> "78. De facto or practical power did not arise in *Lonrho* as the defendants in that case had asked the owners of the documents sought for their production and been refused. The documents were not in Shell's de facto power. In any event, the Lords in *Lonrho* did not consider that being able in practice to obtain a document, perhaps by influence, was enough for it to be within the person's 'power'. Not only did the Lords require a presently enforceable legal right to the documents to exist but they said it must be exercisable without another person's consent. HMRC are asking us to find that a document may be within a person's power for s 20 purposes even if they do need the consent of another person...
>
> 79. …We consider, in the context of information notices where the emphasis is on the present and future, and contrary to the conclusion reached in *Lonrho* in the context of disclosure for litigation where the emphasis was on the present and past, that documents are within a person's power if they can obtain them, by influence or otherwise, and without great expense, from another person even where that person has the legal right to refuse to produce them.

> 80. So the question is then is it for HMRC to show that the trustees certainly would hand over the documents if asked or for the respondents to demonstrate they have asked the trustees and been refused?
>
> 81. HMRC have raised a *prima facie* case that the respondents would be given the documents by the trustees: they are both settlors and beneficiaries. The respondents, we find, transferred some of their wealth to the trustee on trust for themselves. We find they were unlikely to do this if they did not believe that the trustee would act on their instructions. The trustee is a professional trust company and will have a reputation to maintain…Even if not obliged in the absence of a court order to provide documents …, we find it is likely a trustee would choose, in the spirit of trusteeship, to provide copies of them to the settlors and beneficiaries.
>
> 82. HMRC have raised a *prima facie* case that the documents are within the power of the respondents and we therefore think it is for the respondents to show that they have asked the trustee for the documents and been refused. They have not done this. They are therefore liable to a penalty."

262. Mr Kider submits that the voluntary submission of sophisticated financial data, on 3 August 2023, supporting an adjustment to the CUP analysis establishes HMRC's *prima facie* case. This is because the nature and complexity of the data provided was said to evidence the Appellant's power to obtain the Parent Company's internal accounts and comprehensive financial records, when it suits the Appellant. This, Mr Kider asserts, confirms the Appellants' practical ability to obtain Items 1 and 2 in the Information Notice. The key point was that documents had been provided in the past, and the court could readily conclude, as a working assumption, that the arrangement continued.

263. Mr Kider further relies on *Patel* in support of the proposition that the Appellant has the ability to influence the Parent Company to obtain the documents. In *Patel*, the taxpayers claimed that the documents requested in an information notice were not in their possession or power, but were within the possession of the professional offshore trustee. Judge Sinfield held, at [14] to [16], that:

> "14. It appears to me that, as Founders and Protectors, the Appellants must have power to influence the behaviour of the Trustee in relation to such things as the provision of documents or information... The fact that the Appellants were able to ask for and obtain substantial loans from the Trustee in March 2010 shows that the Trustee does accede to the Appellants' requests... I conclude that the Appellants can influence and, in practice, require the Trustees to comply with their lawful and reasonable requests. Nothing that I have seen in the Trust Deed or the letter from the Trustees shows that the provision of the documents and information would be unlawful or that it would be unreasonable to expect the Trustee to comply with the request.
>
> 15. On the basis of the evidence provided, I find that the Appellants' only asked the Trustee to provide the information and documents specified in the information notice in the letter dated 11 October 2012 which, if it was received, the Trustee ignored. The Appellants made no attempt to obtain a reply to their letter until the email of 16 October 2013. Having received the Trustee's reply, the Appellants do not appear to have made any effort to persuade the Trustee to reconsider its refusal to provide the documents and information. From the language of the letter and the fact that no attempt was made to follow it up for more than a year (and then only in response to my earlier decision) and the passive acceptance of the Trustee's refusal to provide the documents and information, I conclude that the Appellants have not made any serious attempt to obtain the relevant information and documents from the Trustee.
>
> 16. In conclusion, I am not satisfied, on the balance of probabilities, that the information and documents specified in the information notice are not in the Appellants' possession or power."

264. We are satisfied that the Appellant made serious attempts to obtain the documents requested in the Information Notice. This is because, upon receipt of the Information Notice, Mazars asked Mr Stotelmyer to obtain the documents, and the Parent Company declined. We have already considered the reasons why the request was denied. The Parent Company expressly stated that the owners of the privately-held company were entitled to their privacy and confidentiality, as afforded to them under US law. When the limited amount of information was previously provided, the information was not provided to the Appellant, and was provided for a limited purpose. This much is evident from Mr Stotelmyer's witness statement, at para. 40:

> "*The departmental expenses of Eurark were provided through our advisors Mazars without involvement of our personnel in the UK in order to allow a conversation to move forward towards a settlement and solely for that purpose.*"

265. Mr Kider further submitted that because some of the Appellant's officers are officers of the Parent Company, all that the Appellant is doing in making requests for the documents sought in the Information Notice is asking its own manager(s) for the documents. We are satisfied that Mr Kider's submission in respect of what lies within the power of the Appellant to do is misconceived. This is because the authorities on which Mr Kider relies related to Trusts. More importantly, a company is a species of corporation which is a distinct kind of organisation. This means that it is a 'body of bodies'; technically, an artificial person composed of natural persons. It should be noted, however, that sometimes the members are themselves companies, but ultimately there will be natural persons at the end of the chain. A company ranks as a legal person, along with natural persons (unless the context otherwise requires). Furthermore, there is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that "each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and responsibilities" *The Albazero* [1977] AC 774, 807 per Roskill LJ: *Adams v Cape*, at 532D-E.

266. The separate legal personality of a limited liability company was firmly established by the House of Lords in the leading case of *Salomon v Salomon & Co Ltd* [1897] AC 22 ('*Salomon*'). In his speech, at p 51, Lord Macnaghten states quite firmly that:

> "The company is at law a different person altogether from the subscribers to the Memorandum and, although it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment."

267. The principle in *Salomon* was re-affirmed by the House of Lords in *JH Rayner (Mincing Lane) Ltd v Department of Trade & Industry* [1990] 2 AC 418. The principle of separate corporate personality (as confirmed by *Salomon* and reaffirmed in later cases) forms a cornerstone of company law. It is a central feature of company law (and of the law of corporation generally) that incorporation creates a new and separate legal entity – a being capable of enjoying rights, exercising powers, and incurring duties and obligations. Judicial inroads into the principle of separate personality are numerous.

268. In *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 WLR 427, at 435 B-G, Lord Diplock said this:

> "My Lords, the reason why English statutory law, and that of all other trading countries, has long permitted the creation of corporations as artificial persons distinct from their individual shareholders and from that of any other corporation even though the shareholders of both corporations are identical, is to enable business to be undertaken with limited financial

> liability in the event of the business proving to be a failure. The 'corporate veil' in the case of companies incorporated under the Companies Act is drawn by statute and it can be pierced by some other statute if such other statute so provides: but in view of its raison d'être and its consistent recognition by the courts since *Salomon v Salomon & Co Ltd* [1897] AC 22, HL, one would expect that any parliamentary intention to pierce the corporate veil would be expressed in clear and unequivocal language…"

269. As a species of corporation, the company has perpetual succession. Until dissolved, a company continues to exist and survives the death of its directors and shareholders. The company owns its own property. It is only if the company is being wound up, and there is some evidence of fraud, that creditors may have recourse against the shareholders. As the price of separate legal personality, the company must comply with the formalities of the Companies Acts. These are the costs of transacting business. Many of the statutory directions to "lift the corporate veil" occur in Revenue law. The Companies Act 2006 ("**CA 2006**") and the Insolvency Act 1986 contain provisions which pierce the corporate veil. The general principle seems to be that *Salomon* will be applied until some strong reason to the contrary applies; for instance, in the case of fraud (which is not alleged in this appeal).

270. In *Adams v Cape* (Slade, Mustill and Ralph Gibson LJJ), an English company headed a group which included many wholly-owned subsidiaries. Some of these mined asbestos in South Africa, and others marketed the asbestos in various countries, including the US. The judgment of the court was given by Slade LJ, who said this, at 532 D-F:

> "*The 'single economic unit' argument*
>
> There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that "each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities:" *The Albazero* [1977] A.C. 774, *Ml, per* Roskill L.J.
>
> …Mr. Morison did not go so far as to submit that the very fact of the parent-subsidiary relationship existing between Cape and N.A.A.C. rendered Cape or Capasco present in Illinois. Nevertheless, he submitted that the court will, in appropriate circumstances, ignore the distinction in law between members of a group of companies treating them as one, and that broadly speaking, it will do so whenever it considers that justice so demands. In support of this submission, he referred us to a number of authorities."

271. Cases show that the central management and control of a company may be divided. A company's residence is where it really keeps house and does its real business. Its real business is carried on where the central management and control actually abides.

272. HMRC's case relies on the proposition that the Appellant's directors both can, and should, take individual positive action using their supposed 'influence' over the US Parent Company – which HMRC assert exists. In considering the proposition that a subsidiary can ever control its parent, it is necessary to consider whether it is open to the Appellant's directors to do so lawfully under domestic law. Company directors owe their statutory and other common law duties only to the company to which they are appointed as director: s 170(1) CA 2006. There is no suggestion that US law provides otherwise. Foreign law will be taken to be the same as English law (*FS Cairo (Nile Plaza) LLC v Lady Brownlie (as Dependant & Executrix of Professor Sir Ian Brownlie CBE QC*) [2021] UKSC 45). Company directors must act in accordance with a company's constitution, and only for the purposes for which their powers as its director were conferred: s 171 CA 2006. They cannot be compelled to exercise their powers in accordance with another company's wishes: *Pergamon Press Limited v Maxwell* [1970] 1 WLR 1167, 1172; *Lonrho*, at 634. They must also exercise their independent judgment, in the exercise of their powers: s 173(1) CA 2006, and have a statutory duty to avoid conflicts of interest: s 175 CA 2006.

273. All of the Parent Company's Consolidated Group Accounts and Company Accounts are kept secure, and confidential, on US-based servers, with tightly restricted access. No-one, other than the Parent Company's CEO, COO and CFO is permitted access. This is well-understood across the Group. Similar confidentiality principles are applied to local subsidiaries' accounting/accounts from an internal Group perspective. The corporate and tax laws applicable to the Parent Company in the USA do not require it to make public disclosure, or public filing, of either its Company Accounts, or the Consolidated Group Accounts, and do not require the Parent Company to file those accounts with the IRS as part of its compliance with annual tax obligations. The Parent Company is not under enquiry, not least because it is a US-incorporated entity trading only in the USA and not subject to UK taxation. Indeed, the IRS are not entitled to the information themselves. For all of the foregoing reasons, we are satisfied that the documents are not within the Appellant's possession or power.

CONCLUSIONS

274. Having considered all of the information before us, we are in agreement with Mr Gordon and Mr Morse's submissions that:

(1) HMRC have not explained what the 'rational connection' is between the selection of the TNMM method rather than the CUP method and the contents of the accounts, in the sense of giving an objectively reasonable explanation of why HMRC should be permitted to have them;

(2) HMRC have not explained why the information they need is not contained in all of the information and documents they have received so far;

(3) the OECD Guidelines clearly set out the detailed process to be followed to select a transfer pricing method; and

(4) the OECD Guidelines specifically state that once a particular 'one-sided' method is properly selected, there is generally no reason for the tax authority to ask for the accounts.

275. We are further satisfied that:

(1) the Appellant does not have a present legal right to access the documents requested in the Information Notice, without the consent of the Parent Company. The Parent Company has declined to volunteer them and is not, in any event, subject to HMRC's jurisdiction;

(2) there is no standing or continuing practical arrangement between the Appellant and Parent Company whereby the Parent Company has permitted the Appellant access to those Accounts irrespective of the absence of any legally enforceable right for the Appellant to do so. The evidence demonstrates that the Appellant does not have a legally enforceable right to access the accounts;

(3) there is no *de facto* 'power', either in the sense asserted by HMRC, or in the very limited sense recognised by the CPR cases;

(4) there is no jurisdiction for a court or a tribunal to order company directors (individually or collectively) to attempt to get hold of documents not already in their possession or power; and

(5) the actions which HMRC necessarily say the Appellant's directors must take in order to exercise any such *de facto* power, are not actions lawfully open to the Appellant's directors to take in any event. This is because it would compel the

Appellant's directors to act in breach of their statutory duties not to create a conflict of interest as between the Parent Company and the Appellant.

276. Accordingly, therefore, the appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

Release date:
28 May 2026